

Decision Notice



Decision 099/2013 Ms Laura Francis and the Scottish Ministers

Legal advice on tuition fees

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Summary

On 7 November 2012, Ms Francis asked the Scottish Ministers (the Ministers) for all legal advice the Scottish Government had received regarding policies on tuition fees. The Ministers responded by withholding the information on the basis that it was subject to legal professional privilege. During the investigation, the Ministers submitted that it would cost more than the £600 to provide the information and, therefore, they were not required to comply with the request. The Commissioner agreed with this conclusion, but also found that the Ministers had failed to provide Ms Francis with reasonable advice and assistance on how she might reduce the scope of her request.

Relevant statutory provisions

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) and (6) (General entitlement); 12(1) (Excessive cost of compliance); 15 (Duty to provide advice and assistance)

The Freedom of Information (Fees for Required Disclosure) (Scotland) Regulations 2004 (the Fees Regulations) regulations 3 (Projected costs) and 5 (Excessive cost prescribed amount)

The full text of each of the statutory provisions cited above is reproduced in the Appendix to this decision. The Appendix forms part of this decision.

Background

1. On 7 November 2012, Ms Francis wrote to the Ministers, requesting copies of all legal advice the Scottish Government had received regarding all policies on tuition fees.
2. On 10 December 2012, the Ministers responded to the request. They stated that they were withholding the information under section 36(1) of FOISA, on the basis that it was legal advice and its disclosure would breach legal professional privilege. On balance, the Ministers decided that the public interest favoured withholding the information.
3. Ms Francis wrote to the Ministers on 10 December 2012, requesting a review of their decision. Ms Francis believed the Ministers' decision failed to take full account of the benefits of disclosure, to promote openness, transparency and accountability.



4. The Ministers notified Ms Francis of the outcome of their review on 21 January 2013: they continued to withhold the information under section 36(1) of FOISA and confirmed that the public interest favoured withholding this information.
5. On 23 January 2013, Ms Francis wrote to the Commissioner, stating that she was dissatisfied with the outcome of the Ministers' review and applying to the Commissioner for a decision in terms of section 47(1) of FOISA.
6. The application was validated by establishing that Ms Francis made a request for information to a Scottish public authority and applied to the Commissioner for a decision only after asking the authority to review its response to that request.

Investigation

7. The investigating officer subsequently contacted the Ministers, giving them an opportunity to provide comments on the application (as required by section 49(3)(a) of FOISA) and asking them to respond to specific questions. In particular, the Ministers were asked to justify their reliance on any provisions of FOISA they considered applicable to the information requested.
8. The relevant submissions received from the Ministers and Ms Francis will be considered fully in the Commissioner's analysis and findings below.

Commissioner's analysis and findings

9. In coming to a decision, the Commissioner has considered all the submissions made to her by Ms Francis and the Ministers. She is satisfied that no matter of relevance has been overlooked.

Section 12(1) – excessive cost of compliance

10. Due to the volume of information held and falling within the scope of the request, the Ministers determined that they should apply section 12 to the request. The Ministers stated that although they were of the view their use of the exemption at section 36(1) was strong and supported by FOISA, they considered that provision of the information – if the exemption at section 36(1) did not apply – would significantly breach the cost limit under section 12.
11. The Ministers estimated the cost of complying with the request to be £1,201.70. This exceeds £600, which is the sum prescribed for the purposes of section 12 in the Fees Regulations.
12. Were the Commissioner to accept that section 12(1) applied, she could not require the Ministers to comply with the request. The Commissioner will therefore firstly consider the Ministers' submission on the applicability of section 12(1) to the request.



13. The projected costs a Scottish public authority can take into account for a request for information are, according to regulation 3 of the Fees Regulations, the total costs (whether direct or indirect) which the authority reasonably estimates it will incur in:
 - locating
 - retrieving, and
 - providingthe information requested in accordance with Part 1 of FOISA. The maximum hourly rate the authority can charge for staff time is £15 an hour.
14. The authority may not charge for the cost of determining:
 - whether it actually holds the information, or
 - whether or not it should provide the information.
15. The Ministers commented that “policies on tuition fees” was a very broad topic. They interpreted the request as covering issues around both tuition fee levels and student support (i.e. financial support for students paid by the Scottish Government, specifically student support for tuition fees). They explained that their “policies on tuition fees” were part of broader policy around the public funding of higher (and further) education in Scotland, and so any legal advice given in relation to such matters would be likely to involve consideration of tuition fee policies.
16. In addition, the Ministers emphasised that the request was for “all legal advice the Scottish Government has received” on this broad topic, rather than advice on any particular aspect or aspects of the topic. Similarly, the request was unlimited with reference to time: it was for all legal advice received by the Scottish Government on the topic since the Scottish Government (previously the Scottish Executive) was established in 1999. Therefore, locating and retrieving information held by the Scottish Government and falling within the request was likely to be “time consuming and labour-intensive.”
17. The Ministers explained the information identified as falling within the request as follows.
18. The Scottish Government Legal Directorate (SGLD) identified 13 eRDM files which contained advice provided on the Scottish Government’s tuition fee policies. These contained in excess of 3,400 items. Eleven of the files were opened and maintained by SGLD and contained client requests for advice, internal SGLD discussions and advice provided to clients. The remaining two were opened by the Scottish Government’s Employability, Skills and Lifelong Learning Directorate (ESLLD) in connection with the Post-16 Education (Scotland) Bill – currently in the Scottish Parliament – and into which SGLD had saved relevant legal advice.
19. Of the 11 “SGLD eRDM files” (the Ministers explained) -
 - seven were relatively general files opened to store advice given to policy teams in the ESLLD (or, in one case, to the Student Awards Agency for Scotland) or advice on particular broad topics. These contained over 1900 items.



- four were files opened in connection with particular legislative changes, three in relation to changes to regulations relating to tuition fee levels (only) and one in relation to changes to instruments of student support (including those relevant to tuition fee support) and regulations relating to tuition fee levels. These files contained over 1,200 items.
20. Of the two “ESLLD eRDM files” in connection with the Post 16 Education Bill (one element of which relates to tuition fees), the Ministers explained that one was a “Bill drafting” file and included instructions from SGLD to the Office of Scottish Parliamentary Counsel in connection with the Bill and related exchanges, all generally copied to policy colleagues in ESLLD. The other related to the Bill’s accompanying documents. These files contained over 250 items (at 7 February 2012).
21. The Ministers submitted that a significant number of the approximately 3,400 items in these files were likely to be “potentially relevant” (estimate based on 75% of 3,400 being potentially relevant - i.e. 2,550 items) in the sense that they would need to open the item to check whether it was relevant. It would therefore be necessary to open up a significant number of the documents to ascertain whether they were in fact relevant to the request (in that they (a) related to the Scottish Government’s tuition fee policies and (b) comprised advice given by SGLD). Those identified as relevant (estimated at 25% of 2,550 - 637) would then need to be printed.
22. In addition, the Ministers submitted, there were eRDM files held by ESLLD. Searches of their files indicated that 516 documents were potentially relevant to the request. They estimated that (following consideration of the titles) it would be necessary to open at least 50% of these (258) to check whether they would be relevant. It was estimated that about 25% of those checked (65) would be relevant and would require to be printed.
23. The Ministers also explained that the views of the Scottish Law Officers had been sought on matters involving the Scottish Government’s policies on tuition fees. A review of an index of those opinions had identified 12 which related to issues involving fees, support and wider public funding of higher education in Scotland. The Ministers considered all of these would be likely to contain legal advice to the Scottish Government in relation to its “tuition fee policies.”
24. The Ministers also indicated that two searches of the Scottish Government’s electronic database of paper files were carried out:
- a search for files with title containing the words “tuition” and “fees” (114 results – i.e. 114 file volumes), and
 - a search for files containing the words “student” and “support” (189 results – i.e. 189 file volumes).
25. From these results, the SGLD identified a total of 35 file volumes, of which seven had been destroyed, leaving a total of 28 file volumes which would require to be recalled from storage and reviewed to locate information relevant to the request. It was considered that the legal advice still held in paper files would be in SGLD files, and that any documents containing legal advice still held in ESLLD paper files would simply be duplicates of legal advice held in SGLD paper files.



26. Having considered the Ministers' submissions on these points, the Commissioner is satisfied that the Ministers applied a reasonable interpretation to the request and that the searches and related measures described above were appropriate in the circumstances.
27. Applying the measures described above, the Ministers identified a total projected cost of £1,201.70 for dealing with the request. This was broken down as follows, all at an hourly rate for staff time (where applicable) of £15:
- i. reviewing information in the 13 eRDM files identified by SGLD as potentially relevant and retrieving that identified as relevant (estimated at 637 items) –
 - staff time – 1 minute per document – 42.5 hours (£637.50)
 - cost of paper etc. to print 637 items at estimate of 5 pages (3 sheets, double sided) per item. 1911 sheets at 10p per sheet (£191.10).
 - ii. identifying the relevant information likely to be contained in 516 eRDM documents held in ESLLD files and reviewing to retrieve relevant items (estimated 258 items to be checked and 65 to be printed as relevant) –
 - staff time – 1 minute per document – 4.3 hours (£64.50)
 - cost of paper etc. to print 65 items at estimate of 5 pages (3 sheets, double sided) per item. 195 sheets at 10p per sheet (£19.50).
 - iii. reviewing SGLD Index of Law Officer opinions and retrieving approximately 12 relevant referrals/opinions from SGLD database (estimated 25 pages (13 sheets, double sided) per referral/opinion) –
 - staff time – 30 minutes (£7.50)
 - cost of paper etc. to print 156 sheets at 10p per sheet (£15.60).
 - iv. searching and reviewing (older) paper files and retrieving relevant items –
 - staff time at 30 minutes each for 28 files (estimated number of sheets per file to be copied: 20)
 - 14 hours (£210).
28. The sub-total for locating and retrieving information (including printing relevant information from eRDM) was therefore identified as £1,045.70.
29. The cost of copying the information was explained as:
- eRDM – no additional copying cost (as items printed when retrieved)
 - Law Officer opinions – no additional copying cost
 - IMPRES/old paper files – cost of paper etc. to print 560 sheets (28 files, 20 sheets per file) at 10p per sheet: £56
- which gave a sub-total for copying of £56.



30. The Commissioner considers these projections to be reasonable in the circumstances. In particular, she is satisfied (given the nature of the information requested) that where an hourly rate is applied for staff time, it is appropriate for that rate to be the maximum of £15.
31. On the basis of the submissions she has received, set out in detail above, the Commissioner accepts that compliance with Ms Francis's request, on a reasonable interpretation of the request and a reasonable estimate of the cost of compliance, would cost in excess of the £600 limit prescribed for the purposes of section 12(1) of FOISA.
32. The Commissioner does not consider that the request, as framed, could have been responded to within the £600 limit. Consequently, she is satisfied that the Ministers were entitled to rely on section 12(1) of FOISA in relation to the request.

Section 15 – the duty to advise and assist

33. Having concluded that section 12 applies to the request, the Commissioner has considered whether the public authority provided adequate and appropriate advice and assistance in relation to the request. In this case, particularly with a view to reducing the scope of the request to bring it within the £600 limit.
34. Section 15(1) of FOISA requires a Scottish public authority, so far as it is reasonable to expect it do so, to provide advice and assistance to a person who has made, or proposes to make, a request for information to it. The *Scottish Ministers' Code of Practice on the Discharge of Functions by Scottish Public Authorities under FOISA and the Environmental Information Scotland Regulations 2004* includes guidance that, where section 12(1) applies, public authorities may "consider what information could be provided below the cost limit, and suggest how the applicant may wish to narrow the scope of their request accordingly."¹
35. In this case, the Ministers did not cite section 12 of FOISA until they presented their submissions to the Commissioner. The Ministers have never attempted to contact Ms Francis with a view to offering any advice and assistance which might assist in reducing the cost of complying with the request, for example by asking what topic(s) she was particularly interested in.
36. The Ministers submitted that it was not considered appropriate to ask Ms Francis to reduce the scope of her request as she had sought "all legal advice" and they therefore considered that (no matter the time or subject restriction) this information would still be exempt under section 36(1) of FOISA. In all the circumstances of the case, they believed public interest in disclosing legal advice received by the Scottish Government regarding all policies on tuition fees would be outweighed by the public interest in maintaining the exemption.
37. The Ministers considered that it would be of most assistance to Ms Francis if the refusal of the request was issued on the basis that the section 36(1) exemption was being relied on, rather than stating that the information could not be provided on the grounds of excessive cost.

¹ See paragraph 1.9 in Part 2 of the Code at <http://www.scotland.gov.uk/Resource/Doc/933/0109425.pdf>



38. The question is whether it was reasonable to expect the Ministers to provide advice and assistance to Ms Francis on reducing the scope of her request. This Commissioner is of the view that it was. She has noted the alternative approach to the provision of assistance put forward by the Ministers, but considers this to have been misguided in the circumstances of this case. The Commissioner cannot see how Scottish Ministers could have concluded precisely what the outcome may have been as they could not have known precisely what Ms Francis' views and comments would have been.
39. In this case, it is difficult to see how the Ministers could be said to have considered anything on a case-specific basis. Quite properly, given the application of section 12(1), they have identified potentially relevant material, but do not appear to have gone on to extract what is actually relevant to the request and consider its content, which is what they would need to do to consider whether any exemptions applied. The request may be for information which, by definition, falls within the section 36(1) exemption, but the Commissioner struggles to understand how the Ministers could have concluded, that the exemption (and only the cited exemption) applied, based on the submissions received from Ministers.
40. In the Commissioner's view, there was a definite point in the Ministers assisting the applicant to reduce the scope of her request. She notes that this should not have been a difficult task for them, given their clear understanding of the types of potentially relevant information held.
41. In all the circumstances, the Commissioner has concluded that the Ministers failed to comply fully with the duty under section 15(1) of FOISA to provide Ms Francis with advice and assistance in relation to her request. As the Commissioner has accepted that section 12(1) of FOISA applies to Ms Francis's request, she now requires the Ministers to provide Ms Francis with advice on how she might frame a reduced information request, with a view to avoiding the application of section 12(1).

DECISION

The Commissioner finds that the Scottish Ministers (the Ministers) were not obliged to comply with Ms Francis's information request, given that section 12(1) of FOISA applied.

However, the Commissioner also finds that in failing to provide adequate advice and assistance to Ms Francis on how her request might be reduced in scope, the Ministers failed to comply with section 15(1) of FOISA. The Commissioner now requires the Ministers to provide such advice and assistance in relation to the request, by 13 July 2013.



Appeal

Should either Ms Francis or the Scottish Ministers wish to appeal against this decision, there is an appeal to the Court of Session on a point of law only. Any such appeal must be made within 42 days after the date of intimation of this decision.

Rosemary Agnew
Scottish Information Commissioner
29 May 2013



Appendix

Relevant statutory provisions

Freedom of Information (Scotland) Act 2002

1 General entitlement

- (1) A person who requests information from a Scottish public authority which holds it is entitled to be given it by the authority.

...

- (6) This section is subject to sections 2, 9, 12 and 14.

12 Excessive cost of compliance

- (1) Section 1(1) does not oblige a Scottish public authority to comply with a request for information if the authority estimates that the cost of complying with the request would exceed such amount as may be prescribed in regulations made by the Scottish Ministers; and different amounts may be so prescribed in relation to different cases.

...

15 Duty to provide advice and assistance

- (1) A Scottish public authority must, so far as it is reasonable to expect it to do so, provide advice and assistance to a person who proposes to make, or has made, a request for information to it.
- (2) A Scottish public authority which, in relation to the provision of advice or assistance in any case, conforms with the code of practice issued under section 60 is, as respects that case, to be taken to comply with the duty imposed by subsection (1).



Freedom of Information (Fees for Required Disclosure) (Scotland) Regulations 2004

3 Projected costs

- (1) In these Regulations, "projected costs" in relation to a request for information means the total costs, whether direct or indirect, which a Scottish public authority reasonably estimates in accordance with this regulation that it is likely to incur in locating, retrieving and providing such information in accordance with the Act.
- (2) In estimating projected costs-
 - (a) no account shall be taken of costs incurred in determining-
 - (i) whether the authority holds the information specified in the request; or
 - (ii) whether the person seeking the information is entitled to receive the requested information or, if not so entitled, should nevertheless be provided with it or should be refused it; and
 - (b) any estimate of the cost of staff time in locating, retrieving or providing the information shall not exceed £15 per hour per member of staff.

5 Excessive cost - prescribed amount

The amount prescribed for the purposes of section 12(1) of the Act (excessive cost of compliance) is £600.