

# Decision Notice



Decision 162/2012 Mr K and the Scottish Ministers

Contact with the Americans for an Independent Scotland group

Reference No: 201201429  
Decision Date: 8 October 2012

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**Rosemary Agnew**  
Scottish Information Commissioner

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## Summary

Mr K asked the Scottish Ministers (the Ministers) for information relating to contact between the Scottish Government and the Americans for an Independent Scotland group. The Ministers responded by advising that they considered the cost of complying with the requests would exceed £600 and therefore they were not obliged to comply. Following an investigation, the Commissioner accepted this argument.

## Relevant statutory provisions

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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

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1. On 3 July 2012, Mr K wrote to the Ministers requesting the following information:
  - Whether any individuals from the Scottish Government (including all Ministers, special advisers and officials) had (a) met or (b) made contact with the Americans for an Independent Scotland group or any of the people involved in that group and named on its website since 1 January 2012. If so, who, where, when, for what purpose, who was present at the meeting and what matters were discussed.
  - All information contained in correspondence between the Scottish Government and the Americans for an Independent Scotland group or any of the people involved in the group and named on its website sent or received since 1 January 2012.

Mr K also made clear that he wished his request to be interpreted as widely as possible.



2. The Ministers responded on 13 July 2012. They considered the estimated cost of locating, retrieving and providing this information to exceed £600. Consequently, they gave Mr K notice that, by virtue of section 12 of FOISA, they were not obliged to comply with his request. The Ministers explained that they filed information according to subject matter, not by reference to the names of individuals with whom they had corresponded. They invited Mr K to reduce the scope of his request and offered him suggestions as to how to do so.
3. On the same day, Mr K wrote to the Ministers requesting a review of their decision. He did not accept that the cost of dealing with his request would exceed £600, and also expressed dissatisfaction that he had not been provided with details of how these costs had been arrived at.
4. The Ministers notified Mr K of the outcome of their review on 23 July 2012. They maintained that the cost of dealing with his request would exceed the prescribed amount, and provided information about the work it considered would be involved. Again, they invited Mr K to reduce the scope of his request, providing him with further guidance on doing so.
5. On 23 July 2012, Mr K wrote to the Commissioner, stating that he 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 Mr K had made requests for information to a Scottish public authority and had applied to the Commissioner for a decision only after asking the authority to review its response to those requests. The case was then allocated to an investigating officer.

## Investigation

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7. On 9 August 2012, the Ministers were notified in writing that an application had been received from Mr K and given an opportunity to provide comments on that application (as required by section 49(3)(a) of FOISA). They were asked to respond to specific questions, with a view to justifying their reliance on section 12(1) of FOISA.
8. The Ministers responded on 3 September 2012. Their submissions, along with relevant submissions received from Mr K, will be considered fully in the Commissioner's analysis and findings below.



## Commissioner's analysis and findings

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9. In coming to a decision on this matter, the Commissioner has considered all of the submissions made to her by both Mr K and the Ministers and is satisfied that no matter of relevance has been overlooked.

### Section 12(1) – excessive cost of compliance

10. Section 12(1) provides that a Scottish public authority is not obliged to comply with a request for information where the estimated cost of doing so would exceed the relevant amount prescribed in the Fees Regulations. This amount is currently set at £600 in terms of regulation 5 of the Fees Regulations. Consequently, the Commissioner has no power to require the release of information should she find that the cost of responding to a request for that information would exceed this sum.
11. The projected costs the authority can take into account in relation to 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 is likely to incur in locating, retrieving and providing the information requested in accordance with Part 1 of FOISA. The authority may not charge for the cost of determining (i) whether it actually holds the information requested or (ii) whether or not it should provide the information. The maximum rate a Scottish public authority can charge for staff time is £15 per hour.
12. In their submissions, the Ministers highlighted that Mr K stated that he wanted his requests to be interpreted “as widely as possible” and did not specify a particular subject or department he was interested in. In order to interpret the requests as widely as he had requested, the Ministers determined that a government-wide trawl would be required to ensure that all and any information and communications with the group or the named individuals could be identified.
13. The Ministers did not consider Mr K’s provision of a timeframe for his requests to diminish the need for a government-wide trawl. In their view, it merely limited the parameters under which the government-wide trawl would be undertaken.
14. The Ministers submitted that to respond to both or either of Mr K’s requests independently would breach the cost limit, as the scope of each individual request was to be interpreted very broadly. A government-wide trawl would be required for each, in both cases involving the same searches.



15. Given the size of the Scottish Government, the Ministers found it difficult to estimate the total costs involved. However, the Ministers estimated that there were approximately 250 teams across the Government, with an average team size of 20. Calculations had been made on the basis of one official at A3 grade (£9.50 per hour) searching on average for an hour on Objective (the Government's electronic records and document management system) and any locally held records, e.g. personal mailboxes. The Ministers acknowledged that some teams would establish very quickly that they did not hold any relevant information, while others would be required to search considerably longer. At an average hourly rate of £9.50, the Ministers estimated that it would cost a total of £2,375, with an additional cost being incurred to check any potentially relevant information by a member of staff at B2 grade.
16. Having taken into account the submissions made by the Ministers, and having particular regard in this case to the wording of Mr K's request, the Commissioner is satisfied that it has provided a reasonable estimate of the cost of compliance with Mr K's requests. While a government-wide trawl may not be required in the case of every request which fails to specify particular subject matter or department(s), the Commissioner acknowledges that these requests were particularly broad in their scope, encompassing communications both to and from the Government, and contact which might not necessarily have been planned: in the circumstances, there would appear to be no reasonable means of limiting the potential repositories of such information within the Government. She considers this would have been the case regardless of any specific instruction to interpret the requests widely.
17. The Commissioner also accepts that the Ministers' arguments apply to each of Mr K's requests equally.
18. Consequently, the Commissioner accepts that the Ministers were entitled to refuse to comply with Mr K's request by virtue of section 12(1) of FOISA.

### **Section 15 of FOISA – Duty to provide advice and assistance**

19. 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.
20. Examples of such advice and assistance given in the Scottish Ministers' Code of Practice on the discharge of functions by Scottish public authorities under FOISA and the Environmental Information (Scotland) Regulations 2004 include, in cases where section 12(1) applies, "consider[ing] what information could be provided below the cost limit, and suggest[ing] how the applicant may wish to narrow the scope of their request accordingly" (see paragraph 1.9).
21. The Commissioner notes from both the Ministers initial response to Mr K's request and in response to his request for review, that they offered Mr K an opportunity to narrow the scope of his request and, in particular within the review response, provided Mr K with a number of options on how to do so.
22. The Commissioner is also aware that Mr K has since submitted a new, narrowed request to which the Ministers responded, providing Mr K with information on 20 August 2012.



23. Given the above, the Commissioner is satisfied that the Ministers fulfilled the requirements of section 15 of FOISA.

## **DECISION**

The Commissioner finds that the Ministers complied with Part 1 of the Freedom of Information (Scotland) Act 2002 in responding to the information request made by Mr K.

## **Appeal**

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Should either Mr K 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.

**Margaret Keyse**  
**Head of Enforcement**  
**8 October 2012**



## Appendix

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### 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.

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- (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.