



Scottish Information
Commissioner

**Decision 176/2006 Ms Carolyn Leckie MSP and the
Scottish Executive**

*Communications concerning treatments on offer to Haemophiliacs
in the 1980s*

Applicant: Ms Carolyn Leckie MSP

Authority: the Scottish Executive

Case No: 200600451

Decision Date: 21 September 2006

**Kevin Dunion
Scottish Information Commissioner**

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Decision 176/2006 Ms Carolyn Leckie MSP and the Scottish Executive

Communications concerning treatments on offer to Haemophiliacs in the 1980s – section 12 – excessive cost of compliance – section 16 – content of refusal notice – section 21(1) – timescales for conducting a review

Facts

Ms Leckie asked the Scottish Executive (the Executive) to provide information relating to treatments on offer to haemophiliacs from 1983 to 1986. In response, the Executive provided a CD that had been prepared for public release containing documents relating to Hepatitis C and the issue of NHS treatment with blood and blood products. The Executive advised Ms Leckie that some information on this subject had been withheld from inclusion on this CD under the terms of sections 28, 29 and 30 of the Freedom of Information (Scotland) Act 2002 (FOISA). Ms Leckie then sought a review of the Executive's decision to withhold this information. In its response, the Executive informed her that the cost of compliance with her request would exceed the £600 prescribed limit, and so, under the terms of section 12 of FOISA, the Executive was not required to comply with this request. Ms Leckie then made an application for a decision by the Commissioner in relation to this case.

Outcome

The Commissioner found that the cost of compliance with Ms Leckie's information request would exceed the prescribed limit of £600, and so the Executive had acted in accordance with Part 1 of FOISA by refusing to comply with the request under the terms of section 12.

However, the Commissioner found that the Executive had failed to comply with the technical requirements of sections 16 and 21(1) of FOISA respectively in its responses to Ms Leckie's request for information and subsequent request for review. The Commissioner did not require any remedial steps to be taken in response to this decision.



Appeal

Should either Ms Leckie or the Scottish Executive 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 of receipt of this notice.

Facts

1. Carolyn Leckie MSP wrote to the Health Minister on 4 November 2005 to request information relating to hepatitis C and heat treatment of blood products for haemophiliacs. Her letter included four distinct requests, the first three of which are not under consideration in this decision. The fourth request asked:

Could the Minister provide me with all documents/communication between SNBTS, Government and or Haemophilia Directors around treatments on offer to haemophiliacs from 1983 to 1986?

2. Information would be relevant to this request if it related to treatments on offer between 1983 and 1986 and it had been transmitted between two or more of SNBTS, Haemophilia Directors and Government. "Government" could refer to either or both of the UK Government or the Scottish Executive.
3. Ms Leckie was consulted on the intended scope of this request in the course of the investigation into this case. As a result, I understand the request above to be seeking communications or documents communicated at any time, where they relate to treatments available to Haemophiliacs within the period 1983 to 1986. Information relevant to this request would therefore include that dating from the period 1983 to 1986, but also that from both before and after this period, where it was communicated between relevant parties and related to the subject of treatments that were available from 1983 to 1986.
4. The Executive provided a response to the first three of Ms Leckie's requests in a letter dated 7 December 2005. With respect to the final request detailed in paragraph 1 above, it stated that "all information that the Executive holds on Hep C, excluding FOI exemptions" was to be published on 12 December. The Executive informed Ms Leckie that she would receive a copy of the CDs containing relevant information.



5. The Executive then wrote again to Ms Leckie on 12 December 2005 enclosing a copy of a CD containing the documents that the Executive had released on the subject. This letter noted that some information had been withheld, in particular under the terms of sections 28, 29 and 30 of FOISA.
6. Ms Leckie asked the Executive to conduct a review of its response to her request on 16 December 2005. She asked the Executive to explain the rationale behind withholding certain information, and in what way the material qualified for exemption from release under sections 28, 29 and 30 of FOISA. Ms Leckie stated that she believed it was possible to present information in a way that did not compromise these clauses, and that the public interest was paramount on these issues.
7. The Executive advised Ms Leckie of the outcome of its review in a letter dated 20 February 2006. This stated that the request under consideration should have been refused under the terms of section 12(1) of FOISA, because the estimated costs of compliance would exceed the prescribed limit of £600.
8. This letter noted that the proactive release of documents included on the CD supplied to Ms Leckie had been in the spirit of FOISA, but had gone beyond FOISA's requirements in recognition of the public interest in the issue of Hepatitis C and HIV infections from blood and blood products. The Executive believed that information that was directly relevant to Ms Leckie's request was included within the information released. However, it asserted that the Executive was not required by FOISA to comply with her specific request.
9. In response to Ms Leckie's questions concerning the application of exemptions to information not released on the CD, the reviewer went on to explain the rationale for the application of the exemptions when deciding what information would be published.
10. Ms Leckie then made an application for a decision from me in relation to her request for information. Her application, dated 27 February 2006, was received by my Office on 28 February 2006. In particular, she asked me to consider the Executive's judgement in relation to information that had been judged to be exempt from release when preparing to proactively release information on this subject.



Investigation

11. Ms Leckie's application was allocated to an investigating officer and then validated by establishing that she had made a valid information request to a Scottish public authority (i.e. the Executive) under FOISA and had appealed to me only after asking the Executive to review its response to the request.
12. The investigating officer wrote to the Executive on 7 April 2006 informing it that an appeal had been received and that an investigation into the matter had begun. The Executive was invited to comment on the case in terms of section 49(3)(a) of FOISA. The Executive was also asked to provide a range of background information to aid my consideration of this case.
13. The Executive's response was received on 5 May 2006. This provided details of the Executive's reasoning when judging that the cost of complying with Ms Leckie's request would exceed the £600 prescribed limit. It also provided background information on the proactive process that led to the release of the CD of documents supplied to Ms Leckie on the subject of Hepatitis C and HIV infection through treatment with blood and blood products. The Executive confirmed that its calculation of the costs of this proactive process had formed the basis of its assessment of the projected costs of responding to Ms Leckie's request.
14. The investigating officer met with officials from the Executive on 7 June 2006 to discuss this case, and to view relevant files and records in order to gain a greater understanding of the steps that would be required were the Executive to comply with Ms Leckie's request for information.
15. During this meeting, the investigating officer raised concerns about the Executive's submission that the costs associated with its proactive release of information would also apply in relation to Ms Leckie's request for related information. The work on this proactive process took place over a number of months and was almost complete by the time Ms Leckie's request was received. The costs associated with this process therefore did not appear to be directly relevant to this new request, or relevant to the calculation of projected costs.
16. Following this meeting, the Executive was invited to make a further submission about the projected costs that would be incurred solely in responding to Ms Leckie's request. The Executive's further submission was received on 27 July 2006.



The Commissioner's analysis and findings

17. In her application for decision, Ms Leckie asked me to consider in particular the Executive's decision to withhold certain information when publicly releasing the CD of documents provided to her in December 2005. This CD contained a range of documents relating to Hepatitis C and NHS treatment with blood products, and was sent to Ms Leckie following her request for information on a closely related topic. However, this CD was not prepared or released publicly as a direct response to Ms Leckie's request.
18. Before going onto consider whether the Executive responded appropriately to Ms Leckie's specific request, I will briefly outline the wider background that is relevant to this case.

Background on haemophilia and infection with Hepatitis C

19. Hepatitis C is a blood borne virus that was first identified in the 1970s, but was not isolated until 1989. It is primarily transmitted when the infected blood or body fluids of an individual come into contact with the blood of an uninfected person.
20. Haemophilia A is a genetically inherited bleeding disorder caused by a lack of the coagulation Factor VIII. This disorder is treated with Factor VIII concentrate, which until recently was produced solely from human plasma. Although donations can now be tested for the presence of Hepatitis C infection, this was not possible before the isolation of the virus in 1989.
21. It is now generally accepted that a number of haemophiliacs and other patients were infected with Hepatitis C and HIV as a result of treatment with infected blood products in the 1980s.
22. Over the course of the 1980s, methods of heat treating blood products were developed to inactivate HIV and Hepatitis C and prevent the spread of these infections. No standard technique was used and there was a variation in practice between England and Scotland. For some time, a technique used in England eradicated Hepatitis C as well as HIV whereas the technique employed in Scotland inactivated HIV but not the Hepatitis C virus. A method of heat treatment that also eradicated Hepatitis C was not introduced in Scotland until 1987, some eighteen months later than in England.



23. Since the 1990s, individuals and groups representing haemophiliacs who were infected with Hepatitis C in the 1980s have campaigned for compensation and for an independent inquiry into the circumstances surrounding this issue. In particular, campaigners have sought to establish whether haemophiliacs in Scotland were exposed to the risk of infection with Hepatitis C for longer than they should have given the state of knowledge in the 1980s.
24. Both the Scottish Executive and the Scottish Parliament's Health and Community Care Committee have conducted investigations into the circumstances surrounding Hepatitis C and infection with blood products in the 1980s. In both cases, these found that there was no evidence of negligence on the part of the Scottish National Blood Transfusion Service. Calls for a public inquiry have also been rejected.

The Executive's proactive release of documents relating to hepatitis and treatment with blood products

25. In the context of continued public interest in the issue of infections with Hepatitis C in the 1980s, the Health Minister made a commitment to the Haemophilia Society in February 2005 to release documents relating to Hepatitis C and NHS treatment with blood products into the public domain.
26. This commitment was made in the spirit of freedom of information law, and recognised the significant public interest in this information. The task of locating, reviewing and preparing a considerable amount of relevant information for release took place over 10 months, leading to the public release of documents (made available on request on a CD rom) in December 2005.
27. In producing this CD, officials in the Executive's Health Department reviewed more than 140 files or part files to identify relevant documents, and then considered whether these should be made available or if they were exempt from release under any exemptions under Part 2 of FOISA. Certain information was not released because the Executive judged that it fell under the exemptions in sections 28, 29 and 30 of FOISA.
28. The Executive has estimated that the process of identifying, reviewing and then preparing information for release took around 1300 hours of staff time, at considerable cost. I commend the Executive for undertaking this process in the spirit of freedom of information and in response to the considerable public interest in the information it holds on this topic.



29. However, I should also point out that this proactive process went far beyond what would be required in response to a request for information under the terms of FOISA. Under section 12 of FOISA, a public authority is not required to comply with any request for information where doing so would exceed the £600 prescribed limit.

The Executive's responses to Ms Leckie's request – technical matters

30. With this context in mind, I turn now to consider the Executive's response to the specific request under consideration here. This request was made by Ms Leckie as the Executive neared the completion of the work to prepare the CD of documents for proactive release. The Executive's initial response addressed three parts of her request. In response to the final request (which is the subject of this decision), the Executive confirmed that all information that it held on Hepatitis C, excluding exempt information, was to be published on 12 December, the following week.
31. No full response was therefore supplied in relation to the request under consideration at that point. Where a request for information is received under the terms of FOISA, a public authority must respond either by providing the information that has been requested or by issuing a formal notice explaining why it has not been supplied. If information is withheld, either because an exemption in Part 2 of FOISA is judged to apply, or because the authority believes that the cost of compliance would be excessive in terms of section 12 of FOISA, a refusal notice under the terms of section 16 of FOISA must be given to the applicant. The notice must specify the relevant exemption (or, as appropriate, that the authority is relying on section 12(1)) and the authority's reasons for relying on it.
32. I have found that the Executive failed to comply with the requirements of section 16 of FOISA in its initial response to Ms Leckie, by failing to properly explain its reasons under FOISA for refusing (at that point) to supply information in response to the request under consideration.
33. The Executive wrote again to Ms Leckie on 12 December 2005, providing a copy of the CD of documents that had been released as a result of the process described in paragraphs 25 to 29 above. This letter provided information on the preparation of the CD, and noted that some information had been withheld under the terms of sections 28, 29, and 30 of FOISA.
34. The Executive's letter also advised (for the second time) that Ms Leckie had the right to ask the Executive to review its handling of her request and, if dissatisfied with the response to this, to make an application to me. Ms Leckie then asked the Executive to review its decision to withhold information under sections 28, 29 and 30 of FOISA.



35. In writing to Ms Leckie in the terms of its letter of 12 December, the Executive created a degree of confusion between its response to her specific information request, and its own proactive process of releasing information on a related topic.
36. It is clear to me that the Executive neither released nor withheld any information in direct response to Ms Leckie's request. Rather, the decisions to release and withhold information were taken in the course of the preparation of the CD of documents for publication. Although this CD contained certain information that was relevant to Ms Leckie's request, it had not been prepared in response to this request.
37. This distinction is important because it means that the Executive was not in a position to confirm what information that fell under the scope of Ms Leckie's request for information had been released or withheld as part of the proactive process without undertaking a further review of the relevant files. When it supplied the CD to Ms Leckie, the Executive gave the impression that she was entitled to request a review of decisions that were taken outwith the context of the Executive's response to her information request.
38. In reviewing Ms Leckie's request, the Executive did not consider fully the application of exemptions to the documents that were not included within the published CD, although it did supply some information on the rationale for the decisions that were taken in relation to the application of these. Instead, the Executive notified Ms Leckie that compliance with the request under consideration would exceed the £600 prescribed limit, and so, under the terms of section 12(1) of FOISA, it was not required to comply. I will consider the application of section 12 to Ms Leckie's request in detail below.
39. Before considering the application of section 12, I wish to briefly note that the Executive's response to Ms Leckie's request for review was not supplied within the timescale required by section 21(1) of FOISA. This section states that when a request for review is received, an authority must comply promptly, and in any event no later than the 20th working day after receipt. I find that the Executive failed to comply with the requirements of section 21(1) of FOISA in this case.

Section 12 – excessive cost of compliance

40. The Executive's initial submission to my Office provided a breakdown of the projected costs that it estimated were associated with Ms Leckie's request. This suggested that compliance with this request would incur costs that were relevant for the purposes of FOISA of £9868.50.



41. However, the projected costs calculated by the Executive were based on the costs associated with preparing for the proactive release of the CD of documents in December 2005. As I noted above, this process was not prompted by any specific request for information under FOISA, and it had been ongoing for 8 months prior to the receipt of Ms Leckie's request.
42. In discussions and correspondence with the investigating officer, the Executive was advised of my understanding that only costs relating to locating, retrieving and providing information in response to the request under consideration are applicable when considering the costs associated with that request. Given this understanding, the Executive was advised that the basis upon which it had initially evidenced the application of section 12 to the request under consideration was not appropriate.
43. The Executive was invited to make a revised submission on the projected costs that would be involved in responding the specific information request made by Ms Leckie, had this been complied with when this request was received. In preparing this new submission, the Executive was asked to take into consideration a number of observations about the process that might be followed if the Executive were to comply with the request.
44. It was noted, for example, that Ms Leckie's request was received as the Executive neared the completion of the preparation for the proactive release of information on Hepatitis C and treatment with blood products. An appropriate starting point for considering a new request on a related topic would therefore be the list of files that had been identified in the course of that process as potentially containing relevant information and the schedules that had been prepared describing the documents contained within each file. The process of identifying these files and preparing schedules had already been completed by the time Ms Leckie's request was received, and so would not need to be repeated.
45. In preparing its revised submission on costs, the Executive was asked to consider whether all files or part files that were reviewed in the course of the preparation of the CD of documents for release would still require consideration in the context of the narrower request made by Ms Leckie. The investigating officer reviewed a sample of files and the schedules for these in June 2006. One of the three files reviewed contained no relevant information, and a second file appeared to be of questionable relevance given the age of the contents.



46. This review established that when considering the contents of a relevant file for the purposes of identifying information requested by Ms Leckie, the pre-existing schedules did not provide sufficient information to definitively identify relevant documents. I agree with the Executive's submission that relevant files would need to be reviewed again in their entirety to provide a full response to Ms Leckie's request. However, this process could be aided through reference to the existing schedules.

The Executive's revised estimate of projected costs

47. The Executive provided a revised estimate of the costs that would be incurred, this time in responding to Ms Leckie's specific request for information. It estimated that the cost of compliance with the request would be £5450.84.
48. In line with the Freedom of Information (Fees for Required Disclosure) (Scotland) Regulations 2004 (the Fees Regulations), this estimate was based on the costs that would be incurred in locating, retrieving and providing information in response to the request. Also in line with the Fees Regulations, costs associated with the considering the application of exemptions were not included in the Executive's projected costs and the maximum estimated staff cost used when calculating the projected costs was £15 per hour.
49. The projected cost of £5450.84 was calculated on the basis that 148 files or part files would require to be reviewed in order to identify any relevant information, and the cost associated with locating, retrieving and providing information in each file would be, on average, £36.83. This average was calculated following an exercise that followed the steps that would be required in order to comply with Ms Leckie's request in relation to two files.
50. The Executive has submitted that this revised estimate is reasonable for the purposes of section 12(1) of FOISA, and that as a result, it is not required to comply with Ms Leckie's request.

Conclusions on section 12

51. In its revised submission, the Executive provided a detailed estimate of the costs associated with responding to Ms Leckie's specific request. This estimate clearly exceeds significantly the £600 prescribed limit, beyond which a public authority is not required to comply with a request for information.
52. I am satisfied that the cost of compliance with Ms Leckie's request would exceed £600, although I want to note that there are aspects of the Executive's calculation of projected costs that I find I am unable to accept fully.



53. For example, I note that the Executive based its calculation of projected costs on the assumption that more files would need to be considered in responding to Ms Leckie's request than were considered when reviewing files for the purposes of releasing all non-exempt information on the topic of Hepatitis C and treatment with blood products. 141 files were reviewed in the preparation of the CD of documents for public release. The Executive's revised projected costs in relation to Ms Leckie's request were based on the assumption that 148 files would be reviewed.
54. With its recent experience of reviewing relevant files, I would have anticipated that the Executive would be able to exclude files that been considered in preparation for the CD's release that would be irrelevant to Ms Leckie's particular request. The Executive's assessment of the costs appears to be based on the different assumptions.
55. With this concern in mind, I have considered the effect on the Executive's projected costs had these been based on the consideration of just 50 files or part files. If the Executive's cost estimate of £36.83 to identify, retrieve and provide information from each file is multiplied by 50, the projected cost is £1841.50, still far in excess of the £600 prescribed limit.
56. Despite my reservations about the details of the Executive's estimate of the projected costs associated with Ms Leckie's request, and the total cost calculated through this, I accept that it is reasonable in the circumstances to conclude that the cost of responding to this request would exceed £600.
57. Therefore, I have found that the Executive acted in accordance with Part 1 of FOISA, and in particular with section 12(1), in its response to Ms Leckie's request.

Exempt information

58. Where I have concluded that the cost of complying with a request for information would exceed £600, I may not require the public authority to comply with that request or disclose the information that was requested. In this case, FOISA therefore does not allow me to go onto consider whether exemptions apply to the information requested by Ms Leckie or, if they did, whether the public interest would favour the disclosure of the information.



59. I noted in paragraphs 36 and 37 above that, although the Executive created the impression that Ms Leckie was entitled to seek a review of its decision to withhold certain information when releasing documents relating to Hepatitis C and treatment of blood products, these decisions were not actually taken in response to her own request for information. In the light of this, had I concluded differently that the cost of compliance with Ms Leckie's request would *not* exceed £600, I would have been unable to consider in this decision whether the Executive correctly applied exemptions in Part 2 of FOISA to any information that was considered in the context of the separate process of proactive disclosure.

Decision

I have found that the Scottish Executive (the Executive) acted in accordance with Part 1 of the Freedom of Information (Scotland) Act 2002 (FOISA) in advising Ms Leckie under the terms of section 12(1) that it was not obliged to comply with her request for information.

However, I have found that the Executive failed to comply with the requirements of sections 16 of FOISA in its response to Ms Leckie's initial request for information, and with section 21(1) of FOISA in its response to her subsequent request for review.

I do not require any remedial steps to be taken in response to this decision.

Kevin Dunion

Scottish Information Commissioner

21 September 2006