

# Decision Notice

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## Decision 059/2016: Mr Tommy Kane and the Scottish Ministers

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### Meetings with Marketing Edinburgh

Reference No: 201502222

Decision Date: 9 March 2016



Scottish Information  
Commissioner

## Summary

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On 2 September 2015, Mr Kane asked the Scottish Ministers (the Ministers) for a list of all meetings between any Scottish Government Minister or official and any representative of Marketing Edinburgh, including details of participants and reason for meeting, from 10 May 2011 until 1 September 2015. The Ministers responded that the cost of replying to the request would exceed £600 and they were therefore not obliged to comply. Mr Kane amended his request to cover a shorter period. Following a review, Mr Kane remained dissatisfied and applied to the Commissioner for a decision.

The Commissioner investigated and found that the Ministers had properly responded to Mr Kane's request for information in accordance with Part 1 of FOISA.

## Relevant statutory provisions

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Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1), (4) 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 Appendix 1 to this decision. The Appendix forms part of this decision.

## Background

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1. On 2 September 2015, Mr Kane made a request for information to the Ministers. The information requested was a list of all meetings between any Scottish Government Minister and/or any Scottish Government official and any representative of Marketing Edinburgh, including details of participants and reason for meeting, from 10 May 2011 until 1 September 2015. Mr Kane asked for the information in digital format.
2. Mr Kane submitted five other requests, asking for similar information in relation to five other companies or organisations. He asked the Ministers to treat these as separate requests. These requests are not the subject of this decision.
3. The Ministers responded on 11 September 2015. They informed Mr Kane that it would cost in excess of £600 to respond to his request and so, by virtue of section 12 of FOISA, they were not required to comply with it. The Ministers provided Mr Kane with a link to their website where details of all events hosted by Ministers and engagements carried out by Ministers were available.
4. The Ministers suggested that Mr Kane might wish to reduce the scope of his request to bring the cost below £600 by specifying the subject matter(s) of the meetings or the specific business area of the Scottish Government.
5. On 16 September 2015, Mr Kane wrote to the Ministers requesting a review of their decision on the basis that the Ministers had provided "identical information" to him earlier that year for a similar request about a similar company. In light of this, he could not understand why the Ministers were now citing section 12 of FOISA. Mr Kane also suggested that there was a public interest in terms of open government and, in light of the Lobbying Transparency Bill about to go through Parliament, that it would be good practice and a good example to

disclose the information. Mr Kane reduced the timeframe of his request to the period 10 May 2013 until 1 September 2015.

6. The Ministers notified Mr Kane of the outcome of their review on 30 September 2015. They noted that Mr Kane was willing to reduce the timeframe of his request, but stated that this would not bring the cost of complying with the request below £600. The Ministers upheld their decision that the cost of complying with the request would exceed £600 and therefore they were not required to comply, in terms of section 12(1) of FOISA. Again, the Ministers suggested that Mr Kane specify the subject or business area in which he was interested.
7. On 24 November 2015, Mr Kane wrote to the Commissioner. Mr Kane applied to the Commissioner for a decision in terms of section 47(1) of FOISA. He was dissatisfied with the outcome of the Ministers' review because he had received similar information before; had modified his request; and believed in the importance of transparency in lobbying. Mr Kane queried whether the data collection systems used by the Ministers were being conveniently used as justification not to provide information under FOISA.

## Investigation

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8. The application was accepted as valid. The Commissioner confirmed that Mr Kane made a request for information to a Scottish public authority and asked the authority to review its response to that request before applying to her for a decision.
9. Section 49(3)(a) of FOISA requires the Commissioner to give public authorities an opportunity to provide comments on an application. The Ministers were invited to comment on this application and answer specific questions including justifying their reliance on any provisions of FOISA they considered applicable to the information requested.

## Commissioner's analysis and findings

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10. In coming to a decision on this matter, the Commissioner considered all the relevant submissions, or parts of submissions, made to her by both Mr Kane and the Ministers. She is satisfied that no matter of relevance has been overlooked.

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

11. 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 (regulation 5 of the Fees Regulations). Consequently, the Commissioner has no power to require the disclosure of information should she find that the cost of responding to a request for that information would exceed this sum.
12. 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.
13. The Ministers submitted that it would cost more than £600 to comply with Mr Kane's request, even if modified as he suggested at review.

14. The Ministers explained that information about meetings involving Scottish Ministers is routinely published on the Scottish Government's website. The Ministers had provided Mr Kane with the link<sup>1</sup> to the published information on Ministerial engagements to assist him by showing where Ministers may have had contact with Marketing Edinburgh. They commented that they had hoped that Mr Kane might then seek information with regard to particular meetings he was interested in rather than asking for records of all meetings.
15. The Ministers said that while a central record is maintained for Ministerial engagements, no central record is maintained for meetings with officials. Given the numbers of civil servants in the Scottish Government, it would be much harder (the Ministers submitted) to locate all information regarding their meetings. While the information might in some cases be identified relatively easily by asking all staff, or by someone in each team carrying out a search of all team calendars, the time it would take to do this would significantly exceed the cost limit imposed by the Fees Regulations.
16. Mr Kane had drawn attention to a similar request for which the Ministers had provided information. Mr Kane thought the Ministers were inconsistent in citing section 12 in relation to the current request, after providing information for the previous request. This was put to the Ministers.
17. The Ministers responded that, in dealing with the previous request, it had become apparent that it would significantly exceed the cost limit to provide the information. In that case, the Ministers had decided to provide a full response, as the work had been started and in order to be as helpful as possible to Mr Kane.
18. Mr Kane questioned how the Scottish Government could demonstrate transparency in relation to lobbyists, if the Ministers could not show how often they had met with them. The Ministers commented that Mr Kane had received links to online information about Ministers' meetings and engagements.
19. For the present request, the Ministers were asked if they were able to identify the department most likely to hold relevant information and focus the search there. The Ministers replied that there is no such Department in the Scottish Government; marketing and communications companies can approach or be approached by any part of the Scottish Government to advise or assist in the promotion of a policy. Similarly, such companies do PR or consultancy work on a wide range of policies, so they do not specialise in any particular policy area or topic. Therefore, almost anyone in the Scottish Government could have met with these companies. The Ministers explained that there is a Marketing and Communications team to whom they could have limited any searches, but this would not have identified any meetings with other policy officials and therefore the Ministers considered that it would not provide a correct or full response to Mr Kane. The Ministers noted that the information provided to Mr Kane in relation to his previous request would not have been retrieved if the search had been limited to the Marketing and Communications team.
20. The Ministers explained that they had searched their electronic records management system (eRDM) system. They had used the name of the company as a keyword. The Ministers cautioned that such a keyword search will not necessarily identify meetings that the company has attended with Ministers or officials. It will only identify information about such meetings if the person saving the file has included the name of the company in the title of the record

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<sup>1</sup> <http://www.gov.scot/About/People/14944/Events-Engagements/MinisterialEngagements>

(which may not always happen). In some cases, the company may not have been the key player or instigator of the meeting, just a participant.

21. The Ministers also cautioned that in many cases, there may not have been any agenda or notes of the meetings kept for the record, so their eRDM would not locate details of such meetings. Such meetings could only be identified either by asking officials or teams individually or by conducting a search of calendars (while noting that Marketing Edinburgh may not be mentioned in the calendar entry).
22. The Ministers provided a breakdown of the likely costs of responding to Mr Kane's request. They explained that there are approximately 5,000 staff in the Scottish Government (excluding agencies, which, if included, took the total staff to around 14,000). The Ministers assumed that Mr Kane was not intending the Ministers to consider Agency staff, although if he was, the cost of locating information would be higher. Assuming an average team size of five, the Ministers estimated that there are approximately 500-600 teams in the Scottish Government.
23. The cost per hour of staff time for a Band A3 member of staff would be approximately £11.71. However, not all teams have access to administrative staff and the most junior member in a team may be at Band B1 level, with an hourly rate of £15. Also, if a person at Band A3 was asked to carry out the searches, their work would need to be reviewed and checked by their line manager and this would inevitably lead to further costs. The Ministers commented that it was likely that the hourly rate for all the staff attending any meetings with the organisations named in Mr Kane's requests would be at least £15.
24. Therefore, the Ministers estimated that if one official from each team took approximately 5-10 minutes to ask each team member if they had held meetings involving the company, the minimum cost would significantly exceed the £600 threshold.
25. The Ministers considered that to identify participants at meetings, and the topic discussed at meetings, would require further searches. Any teams who identified relevant meetings would need to check calendars and eRDM/inboxes to locate the dates, reasons for meetings, etc. requested by Mr Kane. The Ministers commented that a significant number of officials may have moved jobs or left the government and therefore it would take considerably more time to identify those officials and seek a response to answer the requests.
26. The Ministers said that the fact that Mr Kane asked for the information in digital format would not affect the cost estimate at all.
27. The Ministers were asked to comment on Mr Kane's criticism of the Scottish Government's records management systems. The Ministers referred to their Code of Practice on Records Management by Scottish Public Authorities under the Freedom of Information (Scotland) Act 2002 ("the Section 61 Code"<sup>2</sup>), which states that "records systems should be designed to meet the authority's operational needs and using them should be an integral part of business operations and processes".
28. The Ministers also quoted section 3 of Part 1 of the Section 61 Code, which states that "Authorities should ensure they keep the records they will need for business, regulatory, legal and accountability purposes" and (at paragraph 3.1) "Authorities should consider what records they are likely to need to document their activities..."

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<sup>2</sup> <http://www.gov.scot/Resource/Doc/933/0124124.pdf> (Part 4, paragraph 4.3)

29. The Ministers emphasised that there is nothing in the Section 61 Code or in FOISA which requires an authority to keep records specifically to answer information requests, or requires authorities to anticipate requests and create new records or systems just to answer those requests. For the purposes of the Scottish Government's business, operational and accountability needs, the Ministers said that:
- "...it is simply not necessary for us to be able to identify centrally all meetings that have been held with any particular company or individual. Our current system meets our business needs and is sufficient for us to answer the vast majority of FOISA/EIRs (Environmental Information (Scotland) Regulations 2004) requests."
30. While the Commissioner accepts that in this case the nature and range of the information requested would have been challenging to any records management system, she does not accept the Ministers' general point. She would point out to the Ministers that responding to FOI requests (along with other provisions in FOISA) *is* part of their business in that FOISA imposes on them statutory duties which they are obliged to carry out. The Commissioner understands that records management (including eRDM) systems cannot foresee every eventuality, but that is true of the need to find information for a range of business needs, not just FOI, and she would expect the Ministers to take reasonable steps to ensure that systems are designed recognising the need to search for, locate and retrieve information efficiently.
31. Taking account of all the circumstances, the Commissioner is satisfied that the Ministers have provided a reasonable estimate of the cost of complying with Mr Kane's request for information. Given the nature of the work required, the Commissioner accepts that it would cost more than £600 to comply with the request. While the Commissioner has considered the cost of responding to the request as originally worded on 2 September 2015, she is satisfied that cost of complying with the narrowed request submitted by Mr Kane in his request for review would not be significantly less: it is the scale of the searches required (in terms of the number of people who would have to be involved) which is the main cost factor, not the timescale covered by the request. The only way to reduce costs seems to be for Mr Kane to make a subject-specific request to the Ministers which would enable them to exclude some parts of the Government from their searches.
32. The Commissioner is satisfied that the Ministers were entitled to rely on section 12(1) of FOISA in relation to Mr Kane's information request, and were not obliged to comply with the request because the cost would exceed £600.

### **Section 15 - duty to provide advice and assistance**

33. Section 15 of FOISA requires a public authority to provide reasonable advice and assistance to someone making an information request. Where the cost of complying with a request is likely to exceed the £600 limit, the public authority should consider what information could be disclosed free of charge or within the cost limit, in order to comply with the duty to provide advice and assistance.
34. The Ministers considered that their responses to Mr Kane at request and review stage explained why his request would breach the cost limit and suggested ways of limiting that cost (e.g. by focusing on meetings about particular subjects or policy areas). The Ministers had also drawn his attention to published information about Ministerial engagements.
35. The Commissioner accepts that the Ministers provided Mr Kane with reasonable advice and assistance on how he could make an information request which would not be refused on

grounds of excessive cost. Consequently, the Commissioner is satisfied that the Ministers complied with their duties under section 15(1) of FOISA.

## **Decision**

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

## **Appeal**

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Should either Mr Kane or the Ministers wish to appeal against this decision, they have the right to 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**

**9 March 2016**

## Appendix 1: Relevant statutory provisions

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### 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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- (4) The information to be given by the authority is that held by it at the time the request is received, except that, subject to subsection (5), any amendment or deletion which would have been made, regardless of the receipt of the request, between that time and the time it gives the information may be made before the information is given.

...

- (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.

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