

# Decision Notice

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## **Decision 066/2016: Mr Mark Mitchell and the Scottish Social Services Council**

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### **Timekeeping records**

Reference No: 201502124

Decision Date: 18 March 2016



Scottish Information  
Commissioner

## Summary

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On 30 September 2015, Mr Mitchell asked the Scottish Social Services Council (the SSSC) for specified timekeeping records.

The SSSC told Mr Mitchell that complying with his request would cost in excess of the £600 limit (and so they were not obliged to comply) and upheld this position on review. Following an investigation, the Commissioner accepted this, but found that the SSSC had failed to provide reasonable advice and assistance to help Mr Mitchell narrow the request.

The Commissioner required the SSSC to go back to Mr Mitchell and provide him with adequate advice and assistance.

## 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); 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 30 September 2015, Mr Mitchell made a request to the SSSC for information on staff timekeeping records. The information requested was: “... *copies of all the swipe in times for all staff from 1 August 2014 to the end of March 2015 [and] a redaction key to allow me to compare and contrast ... flexi records and ... swipe in times...*”
2. The SSSC responded on 22 October 2015 and notified Mr Mitchell that it was unable to comply with his request because the estimated cost of doing so was more than the sum of £600 prescribed for the purposes of section 12(1) of FOISA. It provided calculations in support of its position.
3. On 22 October 2015, Mr Mitchell wrote to the SSSC, requiring a review of its decision on the basis that he believed the SSSC should be able to provide him with the information for under the cost limit.
4. The SSSC notified Mr Mitchell of the outcome of its review on 5 November 2015 and upheld its reliance on section 12(1) of FOISA.
5. On 11 January 2016, Mr Mitchell wrote to the Commissioner. He applied to the Commissioner for a decision in terms of section 47(1) of FOISA. Mr Mitchell stated he was dissatisfied with the outcome of the SSSC’s review because he disagreed with the application of section 12(1) of FOISA and believed the information should have been provided to him.

## Investigation

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6. The application was accepted as valid. The Commissioner confirmed that Mr Mitchell 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.
7. On 15 January 2016, the SSSC was notified in writing that Mr Mitchell had made a valid application and the case was allocated to an investigating officer.
8. Section 49(3)(a) of FOISA requires the Commissioner to give public authorities an opportunity to provide comments on an application. The SSSC was invited to comment on this application, with particular reference to the requirements of section 12(1) of FOISA.
9. The SSSC responded to the investigating officer with its comments and continued to rely on section 12(1) of FOISA.

## Commissioner's analysis and findings

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10. In coming to a decision on this matter, the Commissioner considered the relevant submissions, or parts of submissions, made to her by both Mr Mitchell and the SSSC. 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). Consequently, the Commissioner has no power to require the disclosure of information should she find that the cost of responding to a request for information exceeds this sum.
12. The projected costs the public 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 public authority may not charge for the cost of determining whether it actually holds the information requested, or 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. Mr Mitchell submitted he had already been provided with the stand-alone flexi-sheet records for the period in question: the SSSC acknowledged this, but explained that in order to respond to his current request, it would still have to:
  - collate the flexi-sheets again for the period in question
  - collate the swipe card information
  - redact all identifying personal data from the flexi-sheets and swipe card records
  - mark up all the flexi-sheets and swipe cards with an identifier (i.e. "person A")
14. The SSSC submitted that there were approximately 2000 flexi-records, relating to 250 members of staff. These needed to be printed out, then redacted, then scanned back into the computer in redacted form.

15. The swipe card records (containing approximately 11,250 pages of information) needed to be obtained from the external firm responsible for the door control access system. The SSSC provided the Commissioner with a quote obtained from the firm for the retrieval and provision of the records for the period in question (cost £439.45 + VAT).
16. Once retrieved, the SSSC stated, the swipe card records would need to be matched against the flexi-sheets and an identifier added to each record make a “key”. The grade of staff required to carry out the work would be a business support assistant, at a rate of £9.15 per hour. The SSSC stated that the collation and printing of the 2,000 flexi sheets would take an estimated 13.5 hours and the redaction of these sheets would take approximately 36.5 hours.
17. The SSSC calculated that redacting the swipe card information (approximately 11,250 records) would take approximately 5 hours, and marrying up the flexi data with the swipe-card data would take an estimated 30 minutes for each of the 250 records, giving a total of 125 hours.
18. Having taken account of the scope of the request and the nature of the information requested, and having considered the SSSC’s calculations, the Commissioner is satisfied that the request could not have been dealt with within the £600 cost limit, so the SSSC was entitled to apply section 12(1) of FOISA and was under no obligation to comply with the request.
19. The Commissioner has reached her conclusion taking into account that obtaining the swipe card records alone would cost the SSSC £527.34, which leaves little room within the £600 limit for the cost of the remainder of the administrative work required to complete the task. The remaining calculations appear reasonable given the amount of information involved, but even with a considerably reduced number of hours allocated to undertake the work, the overall cost would still exceed the £600 cost limit.

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

20. 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.
21. The Scottish Ministers' Code of Practice on the Discharge of Functions by Scottish Public authorities under FOISA and the EIRs<sup>1</sup> provides (at paragraph 9.3.3 in Part 2):

*“When refusing a request on cost grounds, it is good practice for the authority’s response to provide clear advice on how the applicant could submit a new, narrower request within the cost limit. In giving advice, you may wish to take account of how much the cost limit has been exceeded. Any narrowed request would be a separate new request and should be responded to accordingly.”*
22. The Commissioner considers this important if the public authority is to fulfil its duty to provide advice and assistance under section 15 of FOISA. Frequently a dialogue between the authority and the applicant will be desirable, if the applicant is to understand fully what can be provided within the cost limit. The SSSC was invited to explain how it had discharged this duty in relation to Mr Mitchell’s request.

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<sup>1</sup> <http://www.gov.scot/Resource/0046/00465757.pdf>

23. The SSSC submitted that Mr Mitchell had made it very clear that he was requesting the records for a particular timeframe and purpose, so it did not consider it necessary to explore whether the request could be narrowed. The SSSC also suggested that marrying up the flexi sheet information and the swipe-card records might amount to the creation of new information, although it is clear from the authority's submissions that it is applying section 12(1) of FOISA rather than arguing that the information is not held.
24. The Commissioner does not accept that it was appropriate to make an assumption of this kind in relation to a requester's wishes, in this particular case. She does not believe it follows automatically from the SSC's submissions that information for, say, a reduced timeframe would be of no use to Mr Mitchell. Certainly, he has given no reason to believe that he would not be open to reducing the scope of his request.
25. In this case, the Commissioner can see no reason why it should have been unreasonable to expect the SSSC to engage with Mr Mitchell, with a view to explaining what information might be provided within the cost limit and thus assisting him to make a request (should he wish to do so) which might result in the provision of some information. She acknowledges that this might not meet Mr Mitchell's requirements, but she is of the view that it would still have been reasonable to put the option to him and give him the opportunity to narrow the timeframe or the information sought.
26. For these reasons, the Commissioner has concluded that the SSSC failed to comply fully with its duty under section 15(1) of FOISA. She requires the SSSC to contact Mr Mitchell, to discuss how his request might be narrowed in order that some information could be provided within the cost limit.

## Decision

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The Commissioner finds that the Scottish Social services Council (the SSSC) partially failed to comply with Part 1 of the Freedom of Information (Scotland) Act 2002 (FOISA) in responding to the information request made by Mr Mitchell.

The Commissioner accepts that the SSSC was not obliged to comply with Mr Mitchell's information request, given that section 12(1) of FOISA applied.

However, the Commissioner must also find that the SSSC failed to provide reasonable advice and assistance to Mr Mitchell, by way of explaining what information could be provided within the cost limit. In this respect, the SSSC failed to comply with section 15(1) of FOISA.

The Commissioner requires the SSSC to go back to Mr Mitchell and discuss with him how his request could be narrowed in scope to bring it within the cost limit. She requires the SSSC to do this by **3 May 2016**.

## **Appeal**

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Should either Mr Mitchell or the SSSC 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.

## **Enforcement**

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If the SSSC fails to comply with this decision, the Commissioner has the right to certify to the Court of Session that the SSSC has failed to comply. The Court has the right to inquire into the matter and may deal with the SSSC as if it had committed a contempt of court.

**Margaret Keyse**  
**Head of Enforcement**

**18 March 2016**

### 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.

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#### **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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