

# Decision Notice



Decision 143/2010 Mr Gordon Aikman and the Scottish Government

Breakdown of and costs of correspondence

Reference No: 201000547

Decision Date: 23 August 2010

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**Kevin Dunion**

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## Summary

Mr Aikman requested from the Scottish Ministers (the Ministers) information relating to numbers of pieces of correspondence disagreeing with the decision to release Mr Megrahi, numbers and copies of responses to that correspondence, and the cost of processing and responding to that correspondence, all broken down in various specified ways. The Ministers responded by refusing the request in terms of section 12(1) of FOISA, on the basis that the cost of compliance with each request would exceed the sum of £600 prescribed for the purposes of that section, while also stating that they did not hold the information. Following a review, Mr Aikman remained dissatisfied and applied to the Commissioner for a decision.

Following an investigation, Commissioner concluded he was dealing with a single request for information, the cost of complying with which would exceed the prescribed amount. Consequently, he was satisfied that the Ministers were therefore not obliged to comply with the request. He did, however, require them to provide Mr Aikman with advice and assistance as to what relevant information might be available within the cost limit.

## Relevant statutory provisions and other sources

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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); 17(1) (Notice that information is not held).

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 30 September 2009, Mr Aikman submitted a number of information requests to the Ministers, including the following:



- i) Full details of the number of pieces of correspondence (including emails, letters and any other form of official communication) the Scottish Government received from (1) individuals and (2) organisations (including the name, details of purpose and membership of each organisation where known), (a) prior to and (b) following the Scottish Government's decision to release Mr Abelbaset Ali Mohmed Al Megrahi, that disagreed with the decision to do so, broken down by (i) country of origin of communication and (ii) date received.
  - ii) Full details of (a) the number of responses the Scottish Government issued to all such correspondence and (b) a copy of the responses issued.
  - iii) The total overall cost to the Scottish Government of processing and responding to all such correspondence, including a breakdown of all associated costs showing staff time, postage, stationery and any other associated costs (including details of the nature of that expenditure).
2. The Ministers responded on 13 November 2009, stating that they did not hold the requested information, but also that the cost of complying with the requests would exceed the upper cost limit of £600 specified for the purposes of section 12 of FOISA.
3. On 17 December 2010, Mr Aikman wrote to the Ministers requesting a review of their decision. He believed that the information in question would have been compiled already, or would be stored in a form suitable for its collation and release without exceeding the £600 limit, either collectively or in respect of each request.
4. The Ministers notified Mr Aikman of the outcome of their review on 22 January 2010, upholding their original decision in respect of excessive cost of compliance and in particular confirming that in their view the cost of complying with each of the three requests would have exceeded £600. They provided reasons why they considered this to be so.
5. On 11 March 2010 Mr Aikman 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 Aikman had made a request 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 that request. The case was then allocated to an investigating officer

## Investigation

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7. On 21 April 2010 the investigating officer 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, they were asked for more detailed submissions on the application of section 12(1) of FOISA.



8. The Ministers responded on 20 May 2010, with detailed submissions including calculations. Further clarification was obtained in the course of the investigation. All relevant submissions received will be considered 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 the submissions made to him by both Mr Aikman 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 cost of doing so (on a reasonable estimate) would exceed the relevant amount prescribed in the Fees Regulations. This amount is currently set at £600 in regulation 5 of the Fees Regulations. Consequently, the Commissioner has no power to require the release of information should he find that the cost of responding to the relevant request exceeds this amount.
11. The costs that the public authority can take into account in relation to compliance with a request for information are the projected costs defined in regulation 3 of the Fees Regulations. These are the total costs, whether direct or indirect, which the public 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 set at £15 per hour per member of staff.
12. In their responses to the investigating officer, the Ministers contended that section 12(1) applied to requests i) and ii), while also claiming that they held no information falling within the scope of request iii). Having considered the requests and the degree to which they are interdependent, however, the Commissioner's view is that they are more appropriately dealt with as a single request and the rest of this decision will proceed on that basis.
13. The Ministers explained that thousands of pieces of correspondence of varying types had been received in relation to the release of Mr Megrahi. These had been sent to a broad variety of Government departments and officials: there was no way of knowing where the letters would be sent within Government and no central point of receipt. At the time, the possibility of dealing with all of the incoming correspondence centrally had been considered, but this had been discounted given the sensitive nature of the case and the fact that a central team would only be in a position to issue standard responses.



14. The Ministers went on to advise that the correspondence had not been filed centrally, and that given its volume it had not been possible to dedicate resources to ensuring that all of it was stored centrally on their Electronic Records Management System (ERDM). Therefore, to locate all of the relevant correspondence would require a Government-wide trawl, which they submitted would significantly breach the cost limit. They would, they argued, require to locate all Megrabi-related correspondence before going on to identify those incoming items which disagreed with the decision, whether it had been received from individuals or organisations, the number of responses etc. Redactions would then be required, at least of personal information.
15. The Ministers indicated there were five main areas which it could be certain would hold relevant information, these being the Private Offices of the Cabinet Secretary for Justice and the Minister for Community Safety, the Scottish Government Criminal Law and Licensing team, the Scottish Government Justice Directorate and the Justice Communications team. They estimated that to locate and retrieve the information alone would involve at least 100 hours of work, comprising searches of personal computers and filing systems, storage cabinets and desks, as well as finding paper files in work areas and stores. A member of the Ministerial Correspondence Unit would be required to gather certain information. The Ministers estimated the cost of this work at approximately £1,500.
16. The maximum hourly rate was cited by Ministers in their calculations, on the basis that the work would require to be undertaken by staff at senior levels due to the sensitivity of the information. Noting that the information was unlikely to have been saved so specifically as to identify it as a letter disagreeing with the decision or responding to such a letter (and also the other breakdowns Mr Aikman had requested), the Ministers also identified additional costs of collation, which it estimated at in the region of £1,100. In this connection, the Commissioner has noted that a key word search of the Ministers' ERDM system against the word "Megrabi", carried out in the course of the investigation, identified in excess of 1500 records, excluding certain departments which would need increased file access permissions.
17. The Commissioner has considered the submissions made by both parties in this case and overall is satisfied with the Ministers' arguments as to the tasks which would have been required to locate, retrieve and provide the information requested by Mr Aikman. Having considered their submissions, acknowledging that both manual and electronic searches would be required to locate any potentially relevant information (before going on to consider whether it actually fell within the scope of the request), he is satisfied that the Ministers have provided a reasonable estimate of the cost of complying with the request, which would exceed the prescribed sum of £600.
18. The Commissioner is therefore satisfied that the Ministers were correct in their application of section 12(1) of FOISA and were under no obligation to comply with the information request made by Mr Aikman.



## Section 15 – duty to provide advice and assistance

19. Section 15 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. Examples of such advice and assistance given in the Scottish Ministers' Code of Practice on the discharge of functions by public authorities under FOISA include, in cases where section 12(1) applies, "an indication of what information could be provided within the cost ceiling".
20. In this case, the Commissioner has noted Mr Aikman's assertion (in his application) that the Ministers should have provided him with such information as could be supplied within the cost limit. While this is not strictly the case, they should (in compliance with section 15) have provided him with an indication of what relevant information they could provide within that limit. The Ministers acknowledged this in the course of the investigation, confirming that they could have suggested ways in which Mr Aikman might have narrowed the scope of his request. While acknowledging that this might not have provided the applicant with an entirely satisfactory solution, bearing in mind that it is unlikely to have led to the identification of correspondence disagreeing with the decision to release Mr Megrahi and responses to that correspondence, the Commissioner must agree that the Ministers could have taken some steps towards clarifying what might be made available. In particular, he notes that some relevant correspondence can be traced through the ERDM system, although all that would necessarily disclose would be some connection to Mr Megrahi.
21. In the circumstances, the Commissioner would require the Ministers to go back to Mr Aikman and advise him what correspondence on the decision to release Mr Megrahi could be located, retrieved and provided (subject to such exemptions under FOISA as might be applicable) within the cost limit of £600 prescribed for the purposes of section 12(1) of FOISA.



## DECISION

The Commissioner finds that the Scottish Ministers partially complied with Part 1 of the Freedom of Information (Scotland) Act 2002 (FOISA) in responding to the information request made by Mr Aikman, to the extent that they claimed that they were not obliged to comply with the request by virtue of section 12(1) of FOISA.

However, the Commissioner also finds that the Ministers failed to deal with Mr Aikman's request in accordance with Part 1 of FOISA, in failing to provide him with reasonable advice and assistance under section 15 of FOISA as to what information falling within the scope of his request could be provided within the cost limit prescribed for the purposes of section 12(1). Therefore, the Commissioner requires the Ministers to advise Mr Aikman as to what correspondence on the decision to release Mr Megrahi could be located, retrieved and provided (subject to such exemptions under FOISA as might be applicable) within the cost limit, by 7 October 2010.

## Appeal

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Should either Mr Aikman 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 notice.

**Kevin Dunion**  
**Scottish Information Commissioner**  
**23 August 2010**





## 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.