

Decision Notice



Decision 001/2014 Ross Gilligan and the Scottish Ministers

Information contained in correspondence

Reference No: 201300788

Decision Date: 9 January 2014

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Rosemary Agnew

Scottish Information Commissioner

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Summary

On 21 September 2012, Mr Gilligan asked the Scottish Ministers (the Ministers) for correspondence held by the Ministers with or about Sir Brian Souter. The Ministers failed to respond to the request. Mr Gilligan asked the Ministers to conduct a review. This resulted in the Ministers disclosing information for only parts of his request. Mr Gilligan was dissatisfied with this response and applied to the Commissioner for a decision.

Following an investigation, further information was identified and disclosed by the Ministers to Mr Gilligan. The Commissioner found that the Ministers held no further information. She also found the Ministers had failed to respond to Mr Gilligan's request within the statutory timescales.

Relevant statutory provisions

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) and (3) (General entitlement); 10(1) (Time for compliance); 17(1) (Notice that information is not held); 21(1) Review by Scottish public authority

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

1. On 21 September 2012, Mr Gilligan wrote to the Ministers requesting a range of information. His request was in three parts:

Part 1 "Information contained in correspondence (letters, e-mails, memos, minutes and electronic or handwritten notes of telephone or other conversation) between (Sir) Brian Souter and the First Minister's Office (including the First Minister himself and special advisers) since May 2007."

Part 2 "Information contained in correspondence as defined above held by the Scottish Government between or regarding (Sir) Brian Souter on the following subjects since May 2007:"



- a) Transport policy
- b) Proposals for equal (same-sex) marriage
- c) Constitutional policy including the proposed referendum
- d) (Sir) Brian Souter's knighthood which is not exempt under FOISA"

Part 3 "Recorded details of meetings or telephone calls between (Sir) Brian Souter and/or anyone acting on his direct behalf in a public relations or secretarial capacity and Ministers (including the First Minister) and/or special advisers, DGs (Directors General), private offices or the Permanent Secretary and his office since May 2007".

2. On 22 November 2012, Mr Gilligan wrote to the Ministers requesting a review as he had not yet a response to his request.
3. The Ministers notified Mr Gilligan of the outcome of their review on 12 December 2012, releasing some information for Part 1. The Ministers indicated, in line with section 17(1) of FOISA, that they held no information for Parts 2b, 2c and for elements of Part 3. For Part 3, the Ministers asked Mr Gilligan to clarify some of the wording whilst also applying section 25(1) of FOISA to some of the information which was already in the public domain. The Ministers also indicated there would be a delay in addressing Parts 2a and 2d of the request.
4. On 25 March 2013, Mr Gilligan 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.
5. The application was validated by establishing that Mr Gilligan made a request for information to a Scottish public authority and applied to the Commissioner for a decision only after asking the authority to review its response to that request.

Investigation

6. On 12 April 2012, the Ministers were notified in writing that an application had been received from Mr Gilligan and given an opportunity to provide comments on the application (as required by section 49(3)(a) of FOISA). They were asked to respond to specific questions, with a view to clarifying what searches had been carried out and whether they held further information relevant to Mr Gilligan's request.
7. The Ministers addressed the outstanding parts of Mr Gilligan's request (Parts 2a, 2d and the remainder of Part 3 of the request). This resulted in further information being disclosed to Mr Gilligan by the Ministers on 22 May 2013. The investigating officer then sought clarification on the searches carried out and as to whether all information had been identified. On 1 July 2013, the Ministers provided their response to the investigating officer.



Commissioner's analysis and findings

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

Parts 1 and 2 of Mr Gilligan's request

9. As noted above, additional information was disclosed during the investigation. However, Mr Gilligan did not believe that the Ministers had disclosed all of the information they held.
10. The Ministers told the investigating officer that they had disclosed all information which they held in respect of Part 1 of Mr Gilligan's request. Searches had been conducted for the whole period "since May 2007". Also, the Ministers commented that Part 1 of the request, as worded by Mr Gilligan, did not extend to internal correspondence or information arising from the content of any conversation or correspondence between individuals other than those stipulated (Brian Souter and the First Minister's Office, including the First Ministers himself and special advisers). They confirmed that all information had now been provided, based upon this interpretation of the request.
11. Part 1 of Mr Gilligan's request is explicit in stipulating information from correspondence in which Sir Brian Souter was a party. There is no mention of any other parties in Part 1 of the request, other than the First Minister's Office. Part 2 of Mr Gilligan's request stipulates "information in correspondence as defined above", i.e. defined in reference to Part 1 of the request. The Commissioner is satisfied with the Ministers' interpretation of the scope of the request.
12. Mr Gilligan was also dissatisfied with the information disclosed in response to Part 2 of his request, as he believed the Ministers held more information than they had disclosed. For example, he drew attention to a letter which the Ministers had disclosed in response to Part 2c of his request, noting that the response to this letter had not been provided, or any information showing whether the event it referred to had taken place.
13. The investigating officer asked the Ministers to verify the searches for this letter. The Ministers confirmed no response to the letter is held. The Ministers confirmed searches had been carried out across the applicable policy areas and the Ministerial office on this basis, and that no response to the letter is held.
14. The Commissioner notes that her remit in carrying out this investigation extends to the consideration of what the Ministers held at the time of Mr Gilligan's request, not whether the Ministers should have recorded any, or more, information about a particular event or process or subject, nor whether it should have retained particular records. She cannot comment on whether information should have been kept from a certain date nor can she comment on what should be kept. Her decision in this case is based upon evidence about the adequacy, or otherwise, of the searches carried out by the Ministers to establish what information they held in relation to Mr Gilligan's request.



15. As noted above, during the investigation, the Ministers had been asked to verify the searches carried out in relation to Parts 1 and 2 of Mr Gilligan's request. The Ministers confirmed that the searches covered the entire time period stipulated in Part 1 of his request. With regard to Part 2 of Mr Gilligan's request, the Ministers verified which data sources had been searched and the approaches taken by officials and Ministers. The Ministers confirmed that subsequent searches (during the investigation) showed no further information is held which falls within the scope of Mr Gilligan's request. The Commissioner accepts that for Parts 1 and 2 of Mr Gilligan's request, adequate searches have now been carried out.
16. Having considered all the relevant submissions, the Commissioner accepts that the Ministers' searches were sufficient to identify information for the named parties and that no further information has been identified falling within Parts 1 and 2 of Mr Gilligan's request.
17. Consequently, the Commissioner concludes that Mr Gilligan has now been provided with all the information held by the Ministers in respect of Parts 1 and 2 of his request.

Part 3

18. This part of the request related to details of meetings or telephone calls between a number of parties, not just Sir Brian Souter and the First Minister's office. In this part of his request, Mr Gilligan stipulated those people acting on behalf of Sir Brian as well as a range of Ministers and advisers and government officials.
19. In their review letter of 12 December 2012, the Ministers asked Mr Gilligan to explain what he meant by "anyone acting on his [Sir Brian's] direct behalf in a public relations or secretarial capacity" and put this part of the request "on hold" until clarification was provided by Mr Gilligan. (This action is considered later in the decision.)
20. Mr Gilligan clarified (on 7 January 2013) that his wording referred to anyone representing Sir Brian or arranging meetings or discussions on his behalf. The Ministers then issued a response on 22 May 2013, addressing this element of Part 3 together with any remaining elements of the request. They indicated that having searched their paper and electronic systems, no information was held regarding details of meetings or telephone calls between the named individual and special advisers, directors general, private officers or the Permanent Secretary and his office since May 2007.
21. During the investigation, the Ministers were asked to describe how officials record phone calls when someone telephones them on behalf of an employer.
22. The Ministers explained that telephone calls received by officials at the Scottish Government are not routinely recorded. Following a telephone call, there may be a face to face conversation if the person receiving the call is unable to progress any requests or issues, or to pass on contact details as necessary, but there is no expectation that this would be written down or kept on record. If a telephone call yielded information considered necessary for a permanent record, the caller would be asked to submit the information by email thereafter so that a record could be made. The Ministers stated they did not have any such record in relation to the conversations Mr Gilligan referred to in his request.



23. Given the Ministers' explanation, the Commissioner accepts that the Ministers do not hold any information covered by Part 3 of Mr Gilligan's request, and finds that the Ministers complied with section 17(1) of FOISA by giving him notice of this.

Technical Issues

24. In his application, Mr Gilligan complained that his request "had been frustrated at every turn" by the Ministers due to their failure to respond in time, respond fully, or respond at all.
25. Section 10(1) of FOISA gives Scottish public authorities a maximum of 20 working days after receipt of the request to comply with a request for information. The Ministers failed to respond to the initial request within 20 working days. Consequently, the Commissioner finds that the Ministers failed to comply with section 10(1) of FOISA.
26. Mr Gilligan asked for a review on 22 November 2012. Section 21(1) of FOISA states that Scottish public authorities must comply promptly with a requirement for review and in any event not later than the twentieth working day after its receipt. The Ministers responded on 12 December 2012, which was within the 20 working day timescale. However, in their review response, the Ministers advised Mr Gilligan that in order to identify and locate the information covered by part of his request, they needed some further information from him.
27. Section 1(3) of FOISA provides that, where the public authority requires further information in order to identify and locate the requested information, and has asked the applicant to provide this, it is not obliged to provide the requested information until it has the further information. However, this only applies where the authority is first responding to a request - i.e. within 20 working days of receiving the request. The Ministers were not entitled to put part of Mr Gilligan's request "on hold" for the purposes of clarification at the time it came to conduct their review.
28. The Commissioner therefore finds that the Ministers failed to comply with section 21(1) in responding to Mr Gilligan's request for review.



DECISION

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

By the end of the investigation, the Commissioner was satisfied that the Ministers had disclosed all of the information they held regarding Mr Gilligan's request. However, in failing to identify and locate all of the information they held in respect of Parts 2(a) and 2(d), the Ministers failed to comply with section 1(1) of FOISA.

The Commissioner also finds that the Ministers failed to comply with sections 10(1) and 21(1) of FOISA in failing to respond to the initial request and request for review.

The Commissioner does not require the Scottish Ministers to take any action in respect of these failures.

Appeal

Should either Mr Gilligan or the Scottish 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
09 January 2014



Appendix

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.

...

- (3) If the authority –

- (a) requires further information in order to identify and locate the requested information; and
- (b) has told the applicant so (specifying what the requirement for further information is),

then provided that the requirement is reasonable, the authority is not obliged to give the requested information until it has the further information.

...

10 Time for compliance

- (1) Subject to subsections (2) and (3), a Scottish public authority receiving a request which requires it to comply with section 1(1) must comply promptly; and in any event by not later than the twentieth working day after-

- (a) in a case other than that mentioned in paragraph (b), the receipt by the authority of the request; or
- (b) in a case where section 1(3) applies, the receipt by it of the further information.

...



17 Notice that information is not held

(1) Where –

(a) a Scottish public authority receives a request which would require it either –

(i) to comply with section 1(1); or

(ii) to determine any question arising by virtue of paragraph (a) or (b) of section 2(1),

if it held the information to which the question relates; but

(b) the authority does not hold that information,

it must, within the time allowed by or by virtue of section 10 for complying with the request, give the applicant notice in writing that it does not hold it.

21 Review by Scottish public authority

(1) Subject to subsection (2), a Scottish public authority receiving a requirement for review must (unless that requirement is withdrawn or is as mentioned in subsection (8)) comply promptly; and in any event by not later than the twentieth working day after receipt by it of the requirement.

...