

Decision Notice



Decision 008/2010 Mr Tommy Kane and Scottish Futures Trust

Correspondence on water industry

Reference No: 201001484

Decision Date: 12 January 2010

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Kevin Dunion

Scottish Information Commissioner

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Summary

Mr Tommy Kane requested from Scottish Futures Trust (SFT) certain correspondence on the water industry between specified dates. SFT responded by stating that it did not consider the requests in question to be valid. Following a request for review, SFT accepted that the requests were valid and withheld the requested information under sections 30(b) and 33(1)(b) of FOISA. Mr Kane remained dissatisfied and applied to the Commissioner for a decision.

Following an investigation, the Commissioner found that SFT had partially failed to deal with Mr Kane's request for information in accordance with Part 1 of FOISA, by not identifying, locating and providing all the relevant information held at the time his request was received. As he was satisfied that all relevant information held by SFT had since been provided to Mr Kane, he did not require SFT to take any action.

Relevant statutory provisions and other sources

The Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1), (4) and (6) (General entitlement) and 73 (Interpretation) (definition of "information").

Background

1. SFT is a publicly owned company, responsible for improving value for money in public infrastructure investment projects such as schools, transport, health and regeneration. On 1 February 2010, Mr Kane wrote to the SFT requesting information in nine numbered requests, three of which are considered in this decision as follows:
 - a) All correspondence between SFT and Scottish Water between September 2008 and 1 February 2010.
 - b) All correspondence discussing Scottish Water between SFT and the Scottish Government between September 2008 and 1 February 2010.
 - c) All correspondence between the Scottish Futures Trust and the Water Industry Commission for Scotland between September 2008 and 1 February 2010.

Each request stipulated that the correspondence in question should include e-mail, letters, text messages, voice mail and video messages.



2. SFT responded on 12 March 2010, informing Mr Kane that it considered all three of the above requests to be invalid, as it did not consider them to be requests for “information” within the meaning of FOISA.
3. On 19 April 2010, Mr Kane wrote to SFT requesting a review of its decision. Referring to the relevant guidance published by the Commissioner, he argued that the requests were valid.
4. SFT notified Mr Kane of the outcome of its review on 21 May 2010. While it now accepted that the requests were valid, it withheld the information requested under sections 30(b) and 33(1)(b) of FOISA.
5. On 21 July 2010 Mr Kane wrote to the Commissioner, stating that he was dissatisfied with the outcome of SFT’s 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 Kane had made requests 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 those requests.

Investigation

7. On 5 August 2010, SFT was notified in writing that an application had been received from Mr Kane and was asked to provide the Commissioner with any information withheld from him. However, SFT telephoned the Commissioner’s office on 19 August 2010 to advise that it had changed its position and now intended to release the withheld information to Mr Kane with redactions.
8. On 23 August 2010, SFT released information to Mr Kane with some redactions, mostly of personal data. Having considered the information, Mr Kane wrote to the Commissioner’s Office on 26 August 2010, indicating that he wished to continue with his application as he believed more information within the scope of his request should be held by the SFT. The case was then allocated to an investigating officer.
9. The investigating officer subsequently contacted SFT, giving it an opportunity to provide comments on the application (as required by section 49(3)(a) of FOISA) and asking it to respond to specific questions as to the steps it had taken to establish what relevant information it held. Its response dealt with these questions and advised that it had located further information falling within the scope of Mr Kane’s requests. This additional information was provided to Mr Kane, who advised that he wished the investigation to continue.
10. The relevant submissions received from both Mr Kane and SFT will be considered further in the Commissioner’s analysis and findings below.



Commissioner's analysis and findings

11. In coming to a decision on this matter, the Commissioner has considered all of the withheld information and the submissions made to him by both Mr Kane and SFT and is satisfied that no matter of relevance has been overlooked.

Information requested by Mr Kane

12. Mr Kane is dissatisfied with SFT's disclosures in response to his requests, believing further relevant information to be held in addition to that disclosed in the course of the investigation. Given that this (rather than any aspect of the information which has been provided to him) forms the basis of his dissatisfaction, the Commissioner does not consider it necessary to consider the redactions which were made to the information released in the course of the investigation.
13. The Commissioner does, however, consider it necessary (and within the scope of Mr Kane's application) to comment on SFT's failure to provide earlier information which was identified, located and provided in the course of the investigation: clearly (it being acknowledged that the information would have been held at the time the requests were received), its failure to do so in response to Mr Kane's request for information or his requirement for review was a failure to deal with the request in accordance with section 1(1) of FOISA. In this connection, the Commissioner notes SFT's apology (both to him and to Mr Kane) that this information was not identified, located and provided earlier.
14. In relation to Mr Kane's continuing concern that additional relevant information should be held by SFT, the Commissioner must satisfy himself as to whether SFT held any further information falling within the scope of Mr Kane's requests at the time it received those requests.
15. During the investigation, a detailed explanation was sought from SFT on the searches undertaken by it for any information falling within the scope of the request. Details were provided by SFT of the locations searched, the search terms used (where relevant) and the reasons for using these parameters. Explanations were provided of the information held and the processes relating to it.
16. Mr Kane expected more information to be held which fell within the scope of his requests, given the significance of work undertaken by SFT on the Scottish water industry. He understood this had considered the current and future ownership status of Scottish Water, entailing research to consider options for future ownership and involving meetings with various stakeholders within the industry.
17. SFT maintained that it would not be expected to hold further correspondence falling within the terms of Mr Kane's requests, in addition to that which it had identified. It explained that it had no specific or other legal duty to do so, nor did any external guidance create such an expectation. SFT indicated that in general it kept records which provide evidence of;
- a. Top-level decision making and policy formulation within SFT



- b. Policy making within SFT
 - c. Important or high profile aspects of the interactions between SFT and stakeholders
 - d. Principal administrative processes of SFT
 - e. Structure and remit of SFT, and any major changes to these.
18. SFT went on to advise that its Board had taken a decision to review the financing of Scottish Water in public ownership and that this had been set out in its 2009/10 business plan and also in its 5 year corporate plan, both of which were public documents published on the SFT website. SFT further explained that in preparing the evaluation of the options for Scottish Water in public ownership, all the thinking within the report was generated *within* SFT with the exception of work commissioned from KPMG to consider particular financial ratios (this was the subject of another request made by Mr Kane, which is not under consideration here). Specifically, while there had been occasional meetings with Scottish Water and the Water Industry Commissioner, the SFT indicated that the analysis and findings in the report on this work had been solely its own views, and consequently it had not identified a need to log minutes or other records of the consultation meetings.
19. In addition to the submissions provided by SFT (which also included a full explanation of its records retention policies), the Commissioner has considered carefully the terms of Mr Kane's requests (set out in paragraph 1 above), which specified "communications" between SFT and others (detailing the various forms these might take) as distinct from working or other internal documents, minutes or reports. He has also considered carefully the searches conducted and SFT's explanations of what is recorded and retained. Whilst the Commissioner can investigate what is actually held by a Scottish public authority, there is no provision in FOISA specifying how much information should be recorded or the quality of any information which should be held: section 73 of FOISA simply defines *information* as "information recorded in any form". In the circumstances, therefore, the Commissioner can only satisfy himself as to what the SFT actually held, as opposed to whether discussions or other deliberations should have been recorded more comprehensively given the subject matter in hand.
20. Having considered all the submissions he has received, therefore, the Commissioner is satisfied that SFT had, by the close of the investigation, carried out all searches reasonably required to identify and locate the information covered by the terms of Mr Kane's requests.
21. This being so, and because Mr Kane has now received the information to which he is entitled, the Commissioner does not require SFT to take any further action in relation to this matter.



DECISION

The Commissioner finds that Scottish Futures Trust (SFT) partially complied with Part 1 of the Freedom of Information (Scotland) Act 2002 (FOISA) in responding to the information request made by Mr Kane. However, in failing to identify, locate and provide all the information it held and which fell within the scope of Mr Kane's requests, SFT breached section 1(1) of FOISA.

Given that SFT has since provided all information it held and which was covered by the terms of Mr Kane's requests, the Commissioner does not require it to take any further action.

Appeal

Should either Mr Kane or SFT 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.

Margaret Keyse
Heads of Enforcement
12 January 2010



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.
- ...
- (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.

73 Interpretation

In this Act, unless the context requires a different interpretation –

...

"information" (subject to section 50(9) and 64(2)) means information recorded in any form;

...