

Decision Notice



Decision 034/2012 Mr Ross Gilligan and the Scottish Ministers

Correspondence with and related to Sir Brian Souter

Reference No: 201101939

Decision Date: 17 February 2012

www.itspublicknowledge.info

Kevin Dunion

Scottish Information Commissioner

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Summary

Mr Gilligan requested from the Scottish Ministers (the Ministers) correspondence with or mentioning Sir Brian Souter since May 2007. The Ministers responded by advising Mr Gilligan that the information he sought was exempt under section 41(b) of FOISA, which relates to the exercise by Her Majesty of Her prerogative of honour. Following a review, as a result of which the Ministers responded by stating that Mr Gilligan's requests were invalid, Mr Gilligan remained dissatisfied and applied to the Commissioner for a decision.

Following an investigation, the Commissioner found that the Ministers had failed to deal with Mr Gilligan's requests for information in accordance with Part 1 of FOISA, by incorrectly concluding that the requests did not fulfil the requirements of section 8(1) of FOISA. He was satisfied that the requests met those requirements and were therefore valid. Consequently, he required the Ministers to review their handling of Mr Gilligan's information requests, and notify him of the outcome of that review.

Relevant statutory provisions

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) (General entitlement); 8(1) (Requesting information)

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 8 August 2011, Mr Gilligan wrote to the Ministers requesting the following:
 - Information contained in any correspondence between the Scottish Government and (Sir) Brian Souter or anyone acting on his behalf since May 2007, and
 - Information contained in Scottish Government correspondence (letters, e-mails, memos, minutes and electronic or handwritten notes of telephone or other conversations from, to or between Ministers, their officials and/or Special Advisers) mentioning (Sir) Brian Souter since May 2007 along with information contained in any accompanying enclosures or attachments.



2. The Ministers responded on 31 August 2011. They withheld the information requested on the basis that it was exempt from disclosure under section 41(b) of FOISA (Communications with Her Majesty etc. and honours). The Ministers explained that this exemption applied because the information related to the exercise by Her Majesty of Her prerogative of honour.
3. On 1 September 2011, Mr Gilligan wrote to the Ministers requesting a review of their decision. In particular, Mr Gilligan advised the Ministers that his requests were not restricted to the issue of Brian Souter's nomination for an Honour.
4. The Ministers notified Mr Gilligan of the outcome of their review on 10 October 2011. The Ministers explained to Mr Gilligan that they had, on receipt of his initial request, considered it invalid on the grounds that it did not identify the information sought. However, in the light of the (then) current media interest, it was concluded that his request should be interpreted to refer to Brian Souter and the honours process and it was responded to accordingly. On review, and in light of Mr Gilligan's clarification, advising that his request was not restricted to the nomination of honours, the Ministers advised Mr Gilligan that they considered his request to be invalid.
5. In deeming the requests invalid, the Ministers referred to the Court of Session judgment in the case of *Glasgow City Council and Dundee City Council v Scottish Information Commissioner* [2009] CSIH 73¹ (the *Glasgow City Council* decision) which clarified, *inter alia*, that information requests must identify the information sought. The Ministers stated that a request was not valid if it did not, in accordance with section 8(1)(c) of FOISA, describe the information requested.
6. On 14 October 2011, 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.

Investigation

7. On 19 October 2011, the Ministers were notified in writing that an application had been received from Mr Gilligan and were invited to comment on the application, as required by section 49(3)(a) of FOISA. In particular, they were asked to comment on why they did not consider Mr Gilligan's requests to be valid for the purposes of FOISA.
8. The Ministers responded with comments on 2 November 2011 and again on 28 November 2011, explaining why they regarded the requests as invalid. In the second submission, they made it clear that they were arguing only that the requests were invalid, rather than seeking to apply any other provisions of FOISA.

¹ <http://www.scotcourts.gov.uk/opinions/2009CSIH73.html>



9. The investigating officer sought further submissions from the Ministers, specifically in the light of decisions which considered substantially similar arguments in relation to the validity of requests, issued by the Commissioner in the intervening period (*Decision 009/2012 Mr David Rule and the Scottish Ministers*² and *Decision 245/2011 Mr David Rule and the Scottish Ministers*³). The Ministers confirmed on 17 January 2012 that they wished to continue to rely on their earlier submissions, without any amendment in relation to this application.
10. Insofar as relevant, these submissions will be considered fully 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 submissions made to him by both Mr Gilligan and the Ministers and is satisfied that no matter of relevance has been overlooked.
12. The Ministers, in their submission of 2 November 2011, argued that Mr Gilligan appeared to have submitted two requests seeking the same information, with the second request just a more descriptive version of what correspondence (and with whom within the Scottish Government) he sought to be included.
13. For the purposes of clarity, the Commissioner is satisfied that it would be appropriate to treat Mr Gilligan's email of 8 August 2011 as containing two separate requests for information. His first request is defined by reference to the parties to correspondence within a specified time frame, with no parameters set in relation to the substantive content of the correspondence. The second request, on the other hand, is defined by the subject matter contained *within* the correspondence, i.e. references to Sir Brian Souter, rather than by reference to who was involved in sending or receiving the correspondence. It is quite clear to the Commissioner that each request has distinct parameters and each request could independently capture a variety of information. To conclude, the Commissioner is satisfied that each of these requests, if valid, is quite capable of standing alone and would not be dependent on the other.

Validity of requests

14. Section 8(1) of FOISA sets down the basic requirements for a valid request for information in terms of section 1(1). Section 8(1)(c) specifies that a request must describe the information requested. The Ministers have not sought to argue that the requests failed to meet any of the other requirements contained in section 8(1), focusing entirely on those of section 8(1)(c) in their submissions: this, therefore, is the requirement the Commissioner will consider in what follows.

² <http://www.itspublicknowledge.info/applicationsanddecisions/Decisions/2012/201101932.asp>

³ <http://www.itspublicknowledge.info/applicationsanddecisions/Decisions/2011/201101773.asp>



15. In their submissions to the Commissioner, the Ministers re-iterated their review finding: that the requests, in not specifying a subject matter or topic of discussion, were not valid requests for information. They did not describe the information requested and therefore did not meet the requirements of section 8(1)(c), as interpreted in the *Glasgow City Council* decision.
16. The Ministers submitted that the insertion of the term "information" was insufficient to qualify as a description of the information sought, providing no assistance in identifying, locating and retrieving information falling within the scope of the requests.
17. Furthermore, the Ministers argued that the information held could cover a very broad range of information across the whole Government and the term "any of his representatives" could encompass any number of Sir Brian Souter's employees. They provided additional comments on the scope of the request and the perceived difficulties in dealing with it: on a reasonable interpretation, the Commissioner does not consider these to have any bearing on determining whether Mr Gilligan's request described the information he was seeking adequately.
18. The Commissioner has dealt with questions of interpreting section 8(1)(c) before (see, for example *Decision 096/2010 Mr Rami Okasha and the Scottish Ministers*⁴ and the decisions referred to in paragraph 9 above). These take into consideration the Commissioner's guidance on the validity of requests, produced in the light of the Court of Session decision in the *Glasgow City Council* case. He has taken the view that the purpose of requiring a description of the information is to allow the public authority to identify and locate the information requested. While (as the Court of Session found) FOISA provides a right to information and not documents, a request which describes information by reference to a document will still be valid when it is reasonably clear from the request that the applicant is seeking the information recorded in that document.
19. In this case, Mr Gilligan, in both requests, sought all information contained in a specific type of document (correspondence). The Commissioner finds it reasonably clear that the applicant is seeking the information recorded in that type of document. The word "correspondence" provides specification about the type of communication. Clearly, it is not sufficient by itself to describe the information Mr Gilligan is looking for – the question is whether the remaining information in the requests achieves this.
20. In this connection, the Commissioner does not accept that a request must specify what information is sought by reference to the subject matter of that information. He is of the view that this is inconsistent with the plain words of section 8(1)(c). He also considers such an interpretation to be inconsistent with the overall aim of FOISA, which is to achieve openness with a minimum of formal requirements.
21. It is quite clear from the terms of Mr Gilligan's first request that he sought correspondence between a prominent, named public person (Sir Brian Souter) or anyone acting on his behalf and the Ministers, and that this was further qualified with a specified time period, that being from May 2007 until the date of the request (8 August 2011).

⁴ <http://www.itspublicknowledge.info/applicationsanddecisions/Decisions/2010/200902059.asp>



22. Taking specifically the term “anyone acting on his behalf”, it would appear reasonable to interpret this phrase as meaning anyone identified as acting on Sir Brian Souter’s behalf as an individual, rather than expecting the authority to speculate as to whether an employee (or anyone else, for that matter) was doing so. It does not, on the other hand, appear reasonable, to interpret the phrase as meaning any employee within a company associated with Sir Brian: companies do not operate simply “on behalf of” individuals associated with them, however prominent. In any event, the Commissioner cannot see why the phrase should have the effect of rendering invalid an otherwise valid request.
23. The Commissioner has noted the Ministers’ argument that Mr Gilligan’s failure to specify a subject matter or topic as a key factor in the argument that the request lacked specification. The Commissioner has made it clear in previous decisions (and has reiterated above) that this is not a prerequisite of a valid description. With specific reference to Mr Gilligan’s second request, the Commissioner would also question whether it was reasonable to conclude that no subject matter or topic had been identified. Mr Gilligan’s request specified information “mentioning (Sir) Brian Souter”, acknowledging that this could capture a variety of information: and although this description may not align directly with the manner in which information is stored by the Ministers, it cannot be argued that a specific subject matter has not been provided.
24. In this case, for the reasons set out above, the Commissioner considers Mr Gilligan’s description of the requested information to have been sufficiently clear to enable its identification.
25. The Commissioner is therefore satisfied that the description provided in Mr Gilligan’s requests fulfilled the requirements of section 8(1)(c) of FOISA. Consequently, he is satisfied that the requests were valid for the purposes of section 1(1) of FOISA (and the Ministers were therefore obliged to respond to them in terms of Part 1 of FOISA).
26. In light of his finding that Mr Gilligan’s requests were valid, the Commissioner requires the Ministers to review their handling of those requests and notify him of the outcome of that review.



DECISION

The Commissioner finds that the Scottish Ministers (the Ministers) failed to comply with Part 1 (and in particular section 1(1)) of the Freedom of Information (Scotland) Act (FOISA) in responding to the requests made by Mr Gilligan.

In the circumstances, the Commissioner has concluded that Mr Gilligan's requests to the Ministers adequately described the information he was seeking and, fulfilling all other requirements of section 8(1) of FOISA, were valid information requests for the purposes of section 1(1).

Accordingly, the Commissioner concludes that the Ministers were under an obligation to respond to Mr Gilligan's information requests, on the basis that they were valid requests for information.

The Commissioner therefore requires the Ministers to conduct a review in relation to Mr Gilligan's requests in accordance with section 21(4), and to notify him of the outcome of that review in accordance with section 21(5), all on the basis that the requests were valid, by 2 April 2012

Appeal

Should either Mr Gilligan 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.

Margaret Keyse
Head of Enforcement
17 February 2012



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.

...

8 Requesting information

- (1) Any reference in this Act to "requesting" information is a reference to making a request which-
- (a) is in writing or in another form which, by reason of its having some permanency, is capable of being used for subsequent reference (as, for example, a recording made on audio or video tape);
 - (b) states the name of the applicant and an address for correspondence; and
 - (c) describes the information requested.

...