

Decision Notice



Decision 064/2012 Mr Tom Gordon and the Scottish Ministers

Information relating to Brian Souter's nomination for a knighthood

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Summary

Mr Tom Gordon of the Sunday Herald (Mr Gordon) asked the Scottish Ministers (the Ministers) for the name of the Scottish Government department that nominated Brian Souter for a knighthood and the reasons why. The Ministers responded by advising him that they considered the source of honours nominations to be confidential. Mr Gordon subsequently asked the Ministers to review their original response to him, and in doing so he narrowed the scope of his request to exclude the reason for the nomination being made. Following a review, in which the Ministers applied the exemption in section 41(b) of the Freedom of Information (Scotland) Act 2002 (FOISA) to the requested information (whilst still not confirming that they held the requested information), Mr Gordon remained dissatisfied and applied to the Commissioner for a decision.

During the investigation, the Ministers advised the Commissioner that they did not want to reveal whether or not they held the requested information, in terms of section 18(1) of FOISA.

Following an investigation, the Commissioner found that the Ministers were entitled to rely upon section 18(1) of FOISA.

Relevant statutory provisions

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) and (6) (General entitlement); 2(1)(b) (Effect of exemptions); 18(1) (Further provisions as respects responses to request); 41(b) (Communications with Her Majesty etc. and Honours)

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.

All references in this decision to “the Commissioner” are to Margaret Keyse, who has been appointed by the Scottish Parliamentary Corporate Body to discharge the functions of the Commissioner under section 42(8) of FOISA.



Background

1. On 10 August 2011, Mr Gordon wrote to the Ministers. He said he understood that Brian Souter was nominated for a knighthood by a Scottish Government department. He asked which department had made the nomination and for the reasons given for making the nomination.
2. The Ministers responded on 11 August 2011. In their response, the Ministers simply advised Mr Gordon that confidentiality was integral to the honours system. The Ministers did not apply any exemption(s) to the requested information, nor did they confirm whether they held any information falling within the scope of Mr Gordon's request.
3. On 11 August 2011, Mr Gordon wrote to the Scottish Ministers requesting a review of their decision. Mr Gordon drew the Ministers' attention to the public interest arguments regarding his request, noting that, although section 41(b) of FOISA provides a class-based exemption for information relating to "the exercise by Her Majesty of her prerogative of honour," this is not an absolute exemption and the public interest must be taken into account. In his request for review, Mr Gordon also narrowed the scope of his request, indicating that he was not seeking the reasons behind the nomination, but was simply requesting information as to whether a Scottish Government department nominated Brian Souter for an honour and, if so, which department.
4. The Ministers notified Mr Gordon of the outcome of their review on 8 September 2011. The Ministers apologised for the way in which they had responded to his initial request for information, in particular that they failed to confirm whether or not they held the information he had requested and whether they were applying an exemption under FOISA. The Ministers advised Mr Gordon that they considered that the exemption in section 41(b) of FOISA applied, but still did not confirm whether or not they held the requested information.
5. On 14 September 2011, Mr Gordon 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 Gordon 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.



Investigation

7. On 3 October 2011, the Ministers were notified in writing that an application had been received from Mr Gordon. The investigating officer subsequently 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, the Ministers were asked to justify their reliance on any provisions of FOISA they considered applicable to the information requested.
8. In response, the Ministers advised that they were refusing to reveal whether they held the information requested by Mr Gordon in terms of section 18(1) of FOISA.
9. The relevant submissions received from both the Ministers and Mr Gordon will be considered fully in the Commissioner's analysis and findings below.

Commissioner's analysis and findings

10. In coming to a decision on this matter, the Commissioner has considered all of the submissions made to her by both Mr Gordon and the Ministers and is satisfied that no matter of relevance has been overlooked.

Scope of the request

11. In his initial request dated 10 August 2011, Mr Gordon used the following wording:
"In the case of Brian Souter's knighthood, I understand he was nominated by a Scottish Government department. Can you tell me which one and why?"
12. The Ministers responded to this request by simply advising Mr Gordon that confidentiality was integral to the Honours System. Following the Ministers' response, Mr Gordon submitted a request for review on 11 August 2011, in which he asked the Ministers to review their earlier response to him and rephrased his request to ask:
"Did a Scottish Government department recommend Mr Souter for his honour, and, if so, which department?"
13. In their review outcome of 8 September 2011, the Ministers referred to the questions raised in Mr Gordon's request for review (not those raised in his initial request) and they provided him with a response based on those questions.



14. The Commissioner notes that Mr Gordon's request for review effectively narrowed the scope of his initial request, by no longer seeking an explanation as to why the nomination was made. Instead, the narrowed request was only seeking confirmation as to whether a Scottish Government department did make the nomination and, if it did, the name of that department. Mr Gordon also referred to the narrowed request in his application to the Commissioner.
15. In the circumstances, it is the Commissioner's view that the questions to be considered in this case are those raised by Mr Gordon in his request for review dated 11 August 2011 and not the wider questions stated in his initial request.

Section 18 of FOISA

16. Section 18 allows public authorities to refuse to confirm or deny whether they hold information in the following limited circumstances:
 - a request has been made to the authority for information which may or may not be held by it;
 - if the information were held by the authority (and it need not be), the information would be exempt under one of the exemptions contained in sections 28 to 35, 39(1) or 41 of FOISA; and
 - the authority considers that to reveal whether the information exists or is held by it would be contrary to the public interest.
17. The Ministers submitted that the information requested by Mr Gordon, if held, would reveal whether a nomination came from the Scottish Government or an external group or individual and that this would be contrary to the public interest. The Ministers submitted that, if the information were held, it would be exempt from disclosure in terms of section 41(b) and 28(1) of FOISA.
18. The Ministers provided a number of arguments as to why they believed it would be contrary to the public interest to confirm or deny whether the relevant information existed or was held. They submitted that, in general terms, confirming or denying the existence of this type of information could undermine the process by which people are nominated for honours.
19. Mr Gordon challenged the Ministers' application of section 18(1) of FOISA, claiming that it has already been established that the Scottish Government nominated Mr Souter for his knighthood.
20. Where a public authority has chosen to rely on section 18(1) of FOISA, the Commissioner must establish whether the authority is justified in stating that to reveal whether the information exists or is held would be contrary to the public interest. She must also establish whether, if the information exists and is held by the public authority, the authority would be justified in refusing to disclose the information by virtue of any of the exemptions provided for by sections 28 to 35, 39(1) or 41 of FOISA.



21. In so doing, the Commissioner must ensure that in her decision she does not confirm one way or the other whether the information requested actually exists or is held by the public authority. This means, for example, that she is unable to comment in any depth on the reliance by the public authority on any of the exemptions listed in section 18(1), as to do so could have the effect of indicating whether the information exists or is held by the public authority.
22. While the Commissioner is unable to summarise all of the comments made to her in this case, she has considered them fully. Having considered these, she is satisfied, in the circumstances, that it would be contrary to the public interest for the Ministers to reveal whether the relevant information requested by Mr Gordon exists or is held by them, as this could undermine the process by which people are nominated for honours. Requiring the Ministers to confirm whether or not they held the information requested by Mr Gordon would allow requesters to determine who did or did not make an honours nomination. Requesters would be able to frame their questions in such a way that, if Ministers were forced to admit that they did not hold the requested information, that, in itself, could disclose that a nomination was not made by a specific group/individual, thus providing information about who did or did not make a nomination.
23. The Commissioner then considered the exemptions put forward by the Ministers in conjunction with their use of section 18. The Ministers submitted that, if the information sought by Mr Gordon existed and was held by them, it could be withheld under the exemptions in sections 28(1) and 41(b) of FOISA.

Section 41(b) of FOISA

24. Under section 41(b) of FOISA, information is exempt if it relates to the exercise by Her Majesty of Her prerogative of honour. The exemption contained in section 41(b) is “class-based”, meaning that it can be applied to information of a certain type without considering the specific content of that information in detail. The information Mr Gordon has asked for, if held, would clearly be exempt from disclosure under section 41(b) of FOISA, as it relates to the exercise by Her Majesty of Her prerogative of honour.
25. However, the exemption is subject to the public interest test laid down in section 2(1)(b). The Commissioner considers that the specific circumstances of each case must be taken into account.
26. The Ministers provided a number of arguments as to why they believed it would be contrary to the public interest to confirm or deny whether the relevant information existed or was held. They submitted that, in the circumstances, confirming or denying the existence of the type of information Mr Gordon described could have a negative impact on the integrity of the process by which people are nominated for honours. The Ministers advised that there is an expectation of confidentiality in the Honours System, and that the process relies upon those involved being able to fully express their views, confident that their involvement and views will not be made public. The Ministers have argued that the protection of confidence is of equal importance for those considered for, but not awarded, an honour. The Ministers have submitted that, if this confidentiality is breached, people will be less likely to give frank views and this could weaken the integrity of the honours system.

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27. Mr Gordon commented that, at the time of his nomination, Brian Souter was the largest donor to the party of government, having given more than £1.1 million to the SNP in recent years. Consequently, Mr Gordon believes that the process by which Brian Souter came to be knighted is in the public interest.
28. Mr Gordon has referred to the various steps involved in the approval of an honours recommendation and has argued that it is the Prime Minister's submission to the Queen which is critical, not the type of information that he has sought in this case. Mr Gordon has queried whether knowing if an initial recommendation was made by an unnamed person or group outside the Scottish Government, or generated by a specific Scottish Government department, really constitutes a trespass on the Honours System.
29. The Commissioner acknowledges the strong public interest arguments put forward by Mr Gordon, and she accepts that the recipient of the honour in this case has a high public profile and has made significant donations to the serving party in Government.
30. However, the Commissioner also notes that the forms used for nominating individuals for honours state:
- “The information contained in this nomination is strictly confidential and will not be communicated to any person other than those involved in the administration of the Honours System with the exception of background information ... which may be used in association with the announcement of any honour granted.”*
31. The Commissioner considers that this statement adds weight to the arguments put forward by the Ministers in this case. Those who nominate an individual for an honour do so in the expectation that their identity will not be made public. The Commissioner considers that there is both explicit and implicit confidentiality applied to the process of nominating and considering someone for an honour, and that the public benefits from having such confidentiality instilled in this process.
32. The Commissioner considers that the disclosure of information that may reveal who did or did not nominate Brian Souter for a knighthood may cause concern amongst those many individuals who have submitted nomination forms in the past, and may dissuade people in the future from making a nomination, less the public (or indeed the person nominated) discovers their identity. The Commissioner acknowledges that this may undermine the Honours process and she considers that this would not be in the public interest. On balance, therefore, she considers that, if the information existed and were held, the public interest in maintaining the exemption in section 41(b) would outweigh the public interest in the disclosure of the information.
33. Having considered the submissions of both parties, she is satisfied in the circumstances of this case that it would be contrary to the public interest for the Ministers to reveal whether the relevant information requested by Mr Gordon existed or was held by them.

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DECISION

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

Appeal

Should either Mr Gordon 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
Acting Scottish Information Commissioner
4 April 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.

...

- (6) This section is subject to sections 2, 9, 12 and 14.

2 Effect of exemptions

- (1) To information which is exempt information by virtue of any provision of Part 2, section 1 applies only to the extent that –

...

- (b) in all the circumstances of the case, the public interest in disclosing the information is not outweighed by that in maintaining the exemption.

...

18 Further provision as respects responses to request

- (1) Where, if information existed and was held by a Scottish public authority, the authority could give a refusal notice under section 16(1) on the basis that the information was exempt information by virtue of any of sections 28 to 35, 39(1) or 41 but the authority considers that to reveal whether the information exists or is so held would be contrary to the public interest, it may (whether or not the information does exist and is held by it) give the applicant a refusal notice by virtue of this section.

...

41 Communications with Her Majesty etc. and honours

Information is exempt information if it relates to-

...

- (b) the exercise by Her Majesty of Her prerogative of honour.

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