

Briefing on key concepts



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Guidance on validity of requests following Court of Session Opinion on 30 September 2009

1 Introduction

- 1.1 On 30 September 2009, the Court of Session issued its Opinion in the case of *Glasgow City Council v Scottish Information Commissioner* [2009] CSIH 73¹. The Opinion addresses some important aspects of the Freedom of Information (Scotland) Act 2002 (FOISA), particularly in relation to how information requests should be framed and whether an information request made on behalf of another (unnamed) person is valid.
- 1.2 The Commissioner has a duty, under section 43 of FOISA, to give advice on the operation of FOISA and on good practice. The aim of this guidance is to explain the practical effects which the Opinion has for applicants who wish to make information requests and for public authorities dealing with such requests.
- 1.3 Over the next few months, the Commissioner will update other guidance on his website to take account of the Opinion.
- 1.4 It should be noted that the Opinion was based on the provisions of FOISA. As a result, this guidance does not cover requests made under the Environmental Information (Scotland) Regulations 2004. The Commissioner will, however, issue additional guidance in due course on whether the Opinion has a bearing on requests for environmental information.

2 Background

- 2.1 In 2005, MacRoberts, a firm of solicitors, wrote to Glasgow City Council (the Council) asking for copies of specific statutory notices. The requests made it clear that MacRoberts were acting on behalf of an unnamed client.
- 2.2 The Council refused to disclose the information, on the basis that it was exempt from disclosure under Part 2 of FOISA. Following an investigation, the Commissioner came to the conclusion that the information was not exempt and ordered the Council to provide MacRoberts with copies of the notices.
- 2.3 The Council subsequently appealed the Commissioner's decision to the Court of Session.

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



- 2.4 The Court of Session came to the conclusion that the information requests were not valid in terms of section 8(1) of FOISA because the requests were not requests for “information” within the meaning of FOISA; (the applicant insisted upon receiving copies of notices, as opposed to the information contained in the notices) and because the requests were made on behalf of an unnamed person.

3 Making or receiving requests for documents or copies of documents

Summary

- 3.1 FOISA provides a right to obtain information and not a right to obtain copies of specific documents. However, this does not mean that a request for a copy of a document is automatically invalid, as long as it is reasonably clear from the request that it is the information recorded in the document that the applicant wants. If it is not reasonably clear, the public authority can contact the applicant to obtain clarification.

Guidance for public authorities

- 3.2 Many information requests made to public authorities refer to specific documents. Section 8 of FOISA provides that an applicant must describe the information requested. The purpose of this description, as section 1(3) makes clear, is to allow a public authority to identify and locate the information. However, FOISA does not prescribe how the information sought must be described.
- 3.3 It is obvious that it is possible to describe information by reference to documents; the Court of Session recognised this in the *Glasgow City Council* case. In some cases it may be necessary to do so. In the case of *Sugar v BBC*², the House of Lords made it clear that a request framed by reference to a copy of a document, in that case “a copy of the report by Mr Michael Balen regarding the BBC’s news coverage of the Middle East”, was within the ambit of the Freedom of Information Act 2000 (FOIA). The House of Lords endorsed the view of the Information Tribunal that such a request “was a request for information that was properly made” under section 1 of the FOIA. The relevant provisions of FOIA are almost identical to those of FOISA.
- 3.4 Therefore, where an applicant has asked for a copy of a document and it is reasonably clear in the circumstances that it is the information recorded in the document which the applicant wants, the public authority should respond to the request as a request properly made under FOISA. A reference to a specific document is a commonplace way of describing the information sought and can be of assistance to an authority in identifying and locating the information. Such a reference can also benefit the authority by limiting the scope of the information request, e.g. to that contained in a minute of a certain date.

² <http://www.publications.parliament.uk/pa/ld200809/ldjudgmt/jd090211/sugar-2.htm>



- 3.5 If it is not reasonably clear to a public authority what information the applicant wants, and the public authority reasonably needs further detail to identify and locate the information, the public authority must tell the applicant what other information it needs.
- 3.6 The public authority must also remember that it has a duty to provide reasonable advice and assistance to the applicant. Public authorities may find it useful to refer to the Scottish Ministers' Code of Practice on the Discharge of Functions by Public Authorities under FOISA (commonly known as the "Section 60 Code"), which provides guidance on this point; paragraph 20 of the Section 60 Code states that it is important that the applicant is contacted as soon as possible, preferably by telephone, fax or email.
- 3.7 Where a public authority refuses to deal with an information request on the basis that it is a request for a copy of a document and/or does not adequately describe the information requested, the authority should advise the applicant of their right to seek a review and to make an application to the Commissioner. The Commissioner has the power to determine whether the request was in fact a request made in compliance with FOISA. The Commissioner will take account of matters such as:
- the wording of the request and the context in which the request was made;
 - whether the public authority sought clarification of the request (and the response from the applicant); and
 - any advice and assistance given to the applicant by the authority.

Guidance for applicants

- 3.8 If you want to see information which is held in the form of documents, you should try to make your information request as clear and precise as possible so that the public authority can identify and locate the information you want.
- 3.9 You are not entitled to be given copies of specific documents under FOISA (see 4.8), but this does not mean that any requests you make for documents or copies of documents are automatically invalid. Indeed, you may need to refer to documents in describing the information you want. However, to reduce the possibility of any doubt, your request may be dealt with more quickly if you ask for the information *contained* in the documents rather than for the documents or records themselves.

So, instead of writing:

"Please let me have copies of correspondence between the Council and Company A ..."

you could write:

"Please let me have the information contained in the correspondence between the Council and Company A ..."

Instead of writing:

"I would like the contract between the Health Board and Company X..."

you could write:

"I would like the information contained in the contract between the Health Board and Company X ..."



- 3.10 If you want to, you can ask the public authority for advice and assistance in drafting your request to make sure that it is clear to the public authority what information you want. Public authorities have a duty to give you reasonable help.
- 3.11 If an authority decides to treat your request as invalid you can follow the review procedures set out in FOISA, and ultimately ask the Commissioner to investigate. Advice on making information requests, on the review procedures and on making an application to the Commissioner is also available from the Commissioner and his staff (see contact details at the end of this Guidance). If the Commissioner comes to the view that the request was in fact valid, the Commissioner will overturn the authority's decision and, in some cases, may simply order the release of the information.

4 Providing information in response to a request for documents or for copies of documents

Summary

- 4.1 Applicants cannot insist on receiving copies of specific documents, but only on receiving information. However, unless the applicant has asked for the information to be provided in a digest or summary, the information provided must be a complete and accurate version of the information contained in the specified documents. This means that it may be easier for public authorities just to provide copies.

Guidance for public authorities

- 4.2 While the right to receive information under FOISA is not the same thing as a right to receive copies of documents, there is nothing to stop public authorities providing copies of documents in response to a request. In many cases, it will be easier for a public authority to provide copies of a document rather than to try to describe the information, copy the information into another document, or transfer it into another format.
- 4.3 Where a public authority chooses not to provide copies of the original documentation (as it has the right to do), it must ensure that any information which falls within the scope of the request and which is contained in the document is disclosed completely and accurately. So, a public authority will need to consider how it will convey information regarding annotations, highlighting in a document, manually underlined or deleted text, etc. It may be difficult to provide information in a complete and accurate form if it is visual material relevant to a request, e.g. charts and graphs, other than by providing a copy.
- 4.4 When dealing with requests for photographs, plans, CCTV recordings, etc, that do not fall within the meaning of a "document", it is difficult to see how the information contained in these could be provided completely and accurately without providing copies of the actual print, plan or recording. It is noted also that requests for these forms of media were not the subject of the *Glasgow City Council* appeal. Subject to the application of relevant exemptions under FOISA, requested information held in such forms must be provided to applicants in a complete and accurate way.



- 4.5 One advantage of simply providing copies of documents in response to information requests is that applicants are more likely to rely on the completeness and accuracy of the information if they receive a copy, and so may be less inclined to seek a review or make an application to the Commissioner to check whether they have been given all of the information they asked for.
- 4.6 Public authorities should also remember that it is a criminal offence to alter, block or conceal etc. a record held by the authority with the intention of preventing the disclosure of information. The provision of copies of documents is likely to lessen concerns as to whether an offence has been committed.
- 4.7 Although applicants do not have the right to insist on being given copies of documents, the Commissioner does have the power to require a public authority to provide him with copies of documents for the purposes of his investigations. The Commissioner can also require the provision of unrecorded information for the purposes of his investigations.

Guidance for applicants

- 4.8 Although you may have asked for a copy of a specific document, the Court of Session has made it clear that applicants don't have a right to receive copies of specific documents, only information contained within them (subject to the statutory exemptions etc. in FOISA). You may wish to take this into account when deciding whether to ask the public authority to review the way it dealt with your information request, or whether to refer the matter to the Commissioner – especially if you believe that you have received all of the information you have asked for.

5 The “true applicant”

Summary

- 5.1 An information request must state the name of the applicant. There is nothing to stop someone making a request on behalf of another person. However, the person the request is being made on behalf of must be named. A public authority which receives a request on behalf of another, unnamed, person has a duty to provide reasonable advice and assistance to the person who submitted the request to provide an explanation of what needs to be done in order for a valid request to be made.

Guidance for public authorities

- 5.2 Where a public authority receives an information request from a person who states that he/she is acting on behalf of another person, but the request does not name that person, the information request is invalid.
- 5.3 However, the public authority still has a duty to provide reasonable advice and assistance to the person making the request, including providing advice to the person acting on behalf of the unnamed applicant that the request is invalid, and explaining why. Advice should also be given as to what needs to be done to make the request valid.



- 5.4 Alternatively, if the public authority intends to provide the information in full, it can opt to simply provide the information (and, if it thinks it is necessary, explain why the request was invalid). This may prove to be less cumbersome for the public authority in some circumstances.
- 5.5 Matters are more complex where a public authority receives information which suggests that an information request has been made on behalf of another person, but does not know for certain that this is the case.
- 5.6 If the request is straightforward and the public authority would disclose the information in full, it may be simpler to provide the information (the authority could also explain why the request may have been invalid if it thinks it is necessary to do so). However, where a public authority wishes to confirm the true identity of the applicant before responding to a request, it should ascertain whether the request is being made on behalf of another person. This should be done as quickly as possible – if the original request proves to be valid, the public authority will have 20 working days following receipt of the request (and not from the date of confirmation that the applicant is the true applicant) to respond.
- 5.7 The Commissioner will expect public authorities to ask whether a request is being made on behalf of another person only where there are reasonable grounds for believing that this is the case. Otherwise, the Commissioner will expect the authority to simply deal with the request.
- 5.8 Authorities should bear in mind that there is no obligation on applicants to answer any query about whether requests have been made on behalf of another person, and the authority should draw no inferences from an applicant refusing to do so. Where the applicant has refused to respond and the matter is subsequently referred to the Commissioner, the authority must be able to demonstrate that there are reasonable grounds for believing that the request was made on behalf of another person.
- 5.9 Where a public authority refuses to deal with an information request on the basis that the request has been made on behalf of another, unnamed, person, the authority should advise the applicant of their right to seek a review and to make an application to the Commissioner.

Guidance for applicants (and for people acting on behalf of applicants)

- 5.10 If you are making an information request on behalf of another person, it is important that you name that person. If you do not, the public authority has the right to refuse to deal with the request on the basis that it is invalid. The authority will still have a duty to provide you with reasonable advice and assistance; this will usually include advice on what needs to be done to make the request valid.
- 5.11 Information requests must include an address for correspondence (this can be an email address). It can be the address of the person making the request on behalf of the applicant. The home or business address of the true applicant, however, is not essential, although it may be supplied.



- 5.12 Where a public authority thinks that you have made a request on behalf of another person, it may ask you whether that is the case. You are under no obligation to answer that query, although if your request was not in fact made on behalf of another person then it will usually be a good idea to tell the authority so, as it may avoid any unnecessary delay or disruption to the request process. If you do not respond to the authority, the authority must have reasonable grounds for believing that your request was made on behalf of another person before it can decide that your request is invalid.
- 5.13 If an authority decides to treat your request as invalid you can follow the review procedures set out in FOISA, and ultimately ask the Commissioner to investigate. Advice on making information requests, on the review procedures and on making an application to the Commissioner is also available from the Commissioner and his staff (see contact details at the end of this Guidance). If the authority cannot show the Commissioner that the request was in fact made on behalf of another person, the Commissioner will overturn the authority's decision and, in some cases, may simply order the release of the information.
- 5.14 The Commissioner recognises that there may be organisations that wish to make information requests in relation to cases they are working on, but without naming an actual client. Clearly, FOISA does not prohibit such organisations from making requests on their own behalf rather than on behalf of a client or someone whom that organisation may represent in some way.

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