

Decision Notice



Decision 055/2013 Mr Rami Okasha and the Scottish Ministers

Information relating to the honours system

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Summary

On 11 August 2011, Mr Okasha asked the Ministers for a range of information regarding the operation of the honours system in Scotland and specifically in relation to the nomination of Brian Souter for a knighthood.

The Ministers initially withheld the information under the exemptions in sections 25(1) and 41(b) of FOISA. The Ministers subsequently amended their position, disclosing some information to Mr Okasha; stating that they would neither confirm nor deny whether some of the information existed or was held; stating that they did not hold some of the information; and stating that some information was exempt from disclosure under various exemptions in FOISA. The Ministers also told Mr Okasha that the cost of complying with some of his requests would exceed the upper cost limit of £600.

Following an investigation, the Commissioner found that the Ministers were entitled neither to confirm nor deny whether they held certain information falling within the scope of the request. The Commissioner accepted that some of the information sought by Mr Okasha was exempt from disclosure under sections 28(1) and 41(b) of FOISA. The Commissioner also accepted that the Ministers did not hold certain information requested by Mr Okasha. The Commissioner agreed that the cost of complying with certain requests would exceed £600. However, the Commissioner did not agree that some of the information was exempt from disclosure under section 25(1) of FOISA or that the Ministers had provided adequate advice and assistance to Mr Okasha under section 15 of FOISA. The Commissioner also found that the Ministers had failed to respond to certain of Mr Okasha's requests.

Relevant statutory provisions

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1), (4) and (6) (General entitlement); 2(1)(b) and (2)(a) (Effect of exemptions); 12(1) (Excessive cost of compliance); 15(1) (Duty to provide advice and assistance); 17(1) (Notice that information is not held); 18(1) (Further provision as respects responses to request); 25(1) (Information otherwise accessible); 28(1) and (2) (Relations within the United Kingdom); 41(b) Communications with Her Majesty etc. and Honours)

The Freedom of Information (Fees for Required Disclosure) (Scotland) Regulations 2004 (the Fees Regulations) regulations 3 (Projected costs) and 5 (Excessive cost - prescribed amount)

The full text of each of the statutory provisions cited above is reproduced in Appendix 1 to this decision. Both Appendices form part of this decision.



Scottish Ministers' Code of Practice on the discharge of functions by Scottish public authorities under FOISA and the Environmental Information (Scotland) Regulations 2004 (the Section 60 Code)

Background

1. On 11 August 2011, Mr Okasha sent ten separate letters to the Ministers requesting information regarding the knighthood awarded to Brian Souter and the Ministers' involvement in the honours system. The ten letters contained 35 separate information requests, which are reproduced in Appendix 2 below.
2. The Ministers responded on 31 August 2011. In relation to the majority of the requests, the Ministers advised Mr Okasha that the information was exempt from disclosure in terms of section 41(b) of FOISA on the basis that it related to the exercise by Her Majesty of Her prerogative of honour. In relation to requests 12, 13 and 14, the Ministers advised Mr Okasha that the information was exempt from disclosure in terms of section 25(1) of FOISA on the basis that the information was reasonably obtainable by him via the internet. The Ministers provided a weblink to information which they indicated would answer these requests.
3. On 31 August 2011, Mr Okasha wrote to the Ministers requesting reviews of their decisions. In relation to the Ministers' application of section 41(b) of FOISA, Mr Okasha did not consider that all of the information fell within the scope of the exemption and, even where it did, took the view that the public interest favoured its disclosure. In relation to the Ministers' application of section 25(1) of FOISA, Mr Okasha stated that the link provided by the Ministers did not take him to the information he was seeking.
4. The Ministers notified Mr Okasha of the outcome of their reviews on 10 October 2011, upholding their original decisions without modification.
5. On 14 October 2012, Mr Okasha wrote to the Commissioner, stating that he was dissatisfied with the outcome of the Ministers' reviews 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 Okasha 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 9 November 2011, the Ministers were notified in writing that an application had been received from Mr Okasha and were asked to provide the Commissioner with any information withheld from him. Once the Ministers had responded, the case was allocated to an investigating officer.
8. On 9 January 2012, the investigating officer 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. The Ministers were asked to justify their reliance on any provisions of FOISA they considered applicable to the information requested.
9. On 13 February 2012, the Ministers wrote to Mr Okasha to inform him that they had reviewed their position and had decided that some information could now be disclosed to him. This provided an answer to some of his requests. The Ministers also told Mr Okasha that they now considered some of the information to be exempt from disclosure under sections 28(1), 38(1)(b) and 41(b) of FOISA. The Ministers informed Mr Okasha that some of the information being sought was not held by them. Additionally, in relation to requests 19 and 20, the Ministers told Mr Okasha that they did not consider the requests to be valid in terms of section 8(1)(c) of FOISA on the basis that they did not reasonably clearly identify the information he sought.
10. On 16 February 2012, the Ministers informed the investigating officer that they had conducted a further review into Mr Okasha's application and supplied a copy of their letter of 13 February 2012. At this stage, the Ministers asked the investigating officer to contact Mr Okasha to ascertain whether he was prepared to withdraw his application for a decision by the Commissioner.
11. The investigating officer subsequently contacted Mr Okasha asking him if he was content with the information supplied by the Ministers and whether he was now prepared to withdraw his application for a decision by the Commissioner.
12. Mr Okasha remained dissatisfied with the limited information supplied by the Ministers and did not wish to withdraw his application to the Commissioner.
13. As the Ministers had failed to provide the investigating officer with any submissions in response to his letter of 9 January 2012, a further letter was sent on 3 April 2012 asking the Ministers to provide submissions based on their amended position.



14. The Ministers responded on 22 May 2012. The Ministers informed the investigating officer that they had reconsidered their position and now wished to apply the provisions of section 18(1) of FOISA to some of Mr Okasha's requests. Section 18(1) allows Scottish public authorities to refuse to reveal whether information exists or is held by them, where, if the information did exist and was held by the authority, the authority could give a refusal notice under section 16(1) of FOISA on the basis that the information was exempt information under any of a number of specified exemptions *and* if the authority considers that to reveal whether the information exists or is held would be contrary to the public interest.
15. In relation to requests 19 and 20, the Ministers stated that they no longer considered these requests to be invalid in terms of FOISA. The Ministers now considered that the cost of responding to these two requests would exceed the upper limit set in the Fees Regulations and therefore they were not obliged to comply with the request.
16. In ongoing correspondence, the investigating officer sought and received clarification and additional information from the Ministers regarding their application of sections 12 and 18 of FOISA.
17. Following further correspondence with the investigating officer, the Ministers disclosed some additional information to Mr Okasha on 20 December 2012, which satisfied some of his requests. The Commissioner has discounted these, and the other requests that have been answered by the Ministers, from consideration within this decision.

Commissioner's analysis and findings

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

Requests under consideration in this decision

19. As noted above, during the investigation, the Ministers provided responses to some of Mr Okasha's 35 requests. These have been discounted from consideration within this decision. The requests that remain under consideration are requests 2, 3, 4, 5, 7, 8, 12, 13, 14, 15, 16, 17, 18, 19, 20, 22, 23, 24 (where it relates to individuals other than the Permanent Secretary), 25 (where it relates to individuals other than the Permanent Secretary), 26, 27, 28, 29, 30, 31, 32 and 33.

Section 18 of FOISA

20. Section 18(1) of FOISA gives public authorities the right to refuse to reveal whether information exists or is held by them in certain limited circumstances. These circumstances are as follows:



- a request has been made to the authority for information which may or may not be held by it;
 - if the information existed and was held by the authority, the authority could give a refusal notice under section 16(1) of FOISA on the basis that the information was exempt information by virtue of any of the exemptions 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.

21. In this case, the Ministers applied this provision to requests 2, 3, 4 and 8. The Ministers submitted that, if the information existed and was held by them, it would be exempt from disclosure under sections 28(1) and 41(b) of FOISA.
22. It is not sufficient, however, to claim that one or more of the relevant exemptions applies. Section 18(1) makes it clear that a public authority must be able to give a refusal notice under section 16(1) on the basis that the information is exempt information. Given that none of the exemptions listed in section 18(1) are absolute exemptions for the purposes of section 2(2) of FOISA, it is only by satisfying a dual test that information can be considered to be *exempt* information. The test is:
- that a relevant exemption applies and
 - having carried out the public interest test required by section 2(1)(b) of FOISA, the public interest is found to lie in maintaining that exemption.
23. As such, the Commissioner will first go on to consider whether the Ministers could have given a refusal notice under section 16(1) in relation to information sought in requests 2, 3, 4 and 8, if it existed and was held.

Section 41(b) of FOISA (in relation to requests 2, 3, 4 and 8)

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 Okasha 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. This 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 stated 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 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.
27. Mr Okasha argued that the public interest in this case was demonstrated by the unusual prominence and controversial political interventions of the individual to which the request related. He also referred to the significant news coverage of the matter and Mr Souter's status as the largest political donor to the party of government in Scotland. Mr Okasha considered all of these factors pointed towards a requirement to release the information.
28. In considering the public interest arguments in this case, the Commissioner 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."*
29. 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, for the following reasons.
30. The Commissioner considers that the disclosure of information which could reveal who did or did not make the nomination in this case 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, in case 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.
31. Given that the Commissioner has concluded that, if the information existed and was held by the Ministers, the Ministers could give a refusal notice under section 16(1) of FOISA on the basis that the information would be exempt information by virtue of section 41(b) of FOISA, she is not required to go on to consider whether the Ministers would also be entitled to give a refusal notice on the basis that the exemption in section 28(1) applied.



Conclusion on section 18

32. Having concluded that, if the information existed and was held by them, the Ministers would have been entitled to give a refusal notice under section 16(1) of FOISA, the Commissioner is required also to consider whether the Ministers were entitled to conclude that to reveal whether the information sought by Mr Okasha existed or was held by them would be contrary to the public interest.
33. 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 requested by Mr Okasha could have a negative impact on the integrity of the process by which people are nominated for honours. They also 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.
34. The Ministers submitted that the information requested by Mr Okasha, 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.
35. Mr Okasha submitted that the Ministers had already confirmed, in the earlier stages of dealing with his request, that the information existed. He considered that invoking section 18 at this late stage was incompatible with the Ministers' earlier responses.
36. Mr Okasha noted that the Commissioner's previous decisions on section 18 had generally involved matters relating to national security or active policing operations which clearly did not apply in this case. He did not accept that the test for section 18 could be met, as he did not believe that the information was exempt under section 41(b) of FOISA. In relation to the public interest, he referred to the arguments he had already put forward to show that disclosure of the information would be in the public interest.
37. The Commissioner notes that the Ministers only applied the provisions of section 18 of FOISA at a relatively late stage during the investigation, having earlier indicated that the information was held by them, but was exempt from disclosure. The Commissioner understands Mr Okasha's puzzlement at the stance adopted by the Ministers. However, she must consider the case on the basis of the arguments presented by the Ministers as at the date of the decision. In this case, as the Ministers' final submission in relation to requests 2, 3, 4 and 8 was to apply section 18, the Commissioner will proceed on that basis.
38. 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.



39. In so doing, the Commissioner must ensure that in her decision she does not confirm one way or the other whether the information 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.
40. 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 that the Ministers were entitled to conclude that revealing whether the information sought by Mr Okasha exists or is held would be contrary to the public interest, given that 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 Okasha could allow requesters to determine who had or had not made 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, this in itself could disclose that a nomination was not made by a specific group or individual. This would provide information about who had, or had not, made a nomination.
41. 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 Okasha in requests 2, 3, 4 and 8 existed or was held by them.
42. As a result, the Commissioner is satisfied that the Ministers were entitled to refuse to confirm or deny, in line with section 18(1) of FOISA, whether the information requested by Mr Okasha in requests 2, 3, 4 and 8 existed or was held by them.

Section 41(b) of FOISA (in relation to requests 24 and 25)

43. The Ministers also submitted that the information sought in requests 24 and 25 regarding the identities of individuals was exempt from disclosure under section 41(b) of FOISA. As this exemption was not applied in conjunction with section 18 in relation to these requests, the Commissioner will consider the application of the exemption in section 41(b) separately in relation to requests 24 and 25.
44. During the investigation, the Ministers disclosed to Mr Okasha that the Permanent Secretary was one of the individuals who was aware of the outcome of deliberations and the names submitted to the Cabinet Office. The Ministers stated that the only other individuals who were aware of the outcome of the nominations and the names submitted to the Cabinet Office were the Honours Secretariat. The Commissioner is satisfied that the Honours Secretariat were the only individuals (other than the Permanent Secretary) with such awareness within the Scottish Government and therefore will consider the exemption in section 41(b) only in relation to the Honours Secretariat.
45. Having considered the information being withheld in these requests, the Commissioner is satisfied that it falls within the ambit of the exemption.



46. As noted above, the exemption in section 41(b) is subject to the public interest test contained in section 2(1)(b) of FOISA. Having accepted that the information sought in requests 24 and 25 is exempt under section 41(b), the main issue for the Commissioner to consider is whether, in all the circumstances of the case, the public interest in disclosing the information is outweighed by the public interest in maintaining the exemption.
47. The Ministers stated that there are only two individuals in the Honours Secretariat, at relatively junior levels within the civil service. The Ministers submitted that these individuals are likely to be involved in future deliberations concerning awards and they wished to protect the identities of the individuals involved.
48. Whilst accepting that there is a degree of public interest in knowing the identity of the individuals concerned, the Commissioner considers this has to be balanced against the public interest in ensuring the integrity of the honours system is maintained. The Commissioner has considered the short space of time that has passed since the nomination was made in this case and the likelihood that the civil servants present during the deliberations are still in post and are likely to be in attendance during such deliberations in future. In this case, the Commissioner accepts that it is in the interest of maintaining the integrity of the honours system that the information withheld should not be disclosed after such a short time has passed following the relevant deliberations.
49. On balance, therefore, having taken account of all relevant information available to her, the Commissioner is satisfied in the circumstances that the Ministers were correct to apply the exemption in section 41(b) of FOISA to the information withheld in requests 24 and 25 (where this relates to the identities of individuals), the public interest in disclosure of this information being outweighed by the public interest in maintaining the exemption.

Section 25(1) of FOISA

50. Under section 25(1) of FOISA, information which an applicant can reasonably obtain other than by requesting it under section 1(1) of FOISA is exempt information. The exemption in section 25(1) is absolute, in that it is not subject to the public interest test set out in section 2(1)(b) of FOISA. In this case, the Ministers applied this exemption to requests 12, 13 and 14.
51. The Ministers provided Mr Okasha with a link to certain web pages¹ and told him that they considered the information he had asked for was reasonably accessible on the internet. The Ministers also informed Mr Okasha that, since 2007, the First Minister had chosen to have no role in any part of the honours process.

¹ <https://www.gov.uk/honours>



52. In his submissions to the Commissioner, Mr Okasha stated that the web pages did not provide the information that he was seeking. In his view, the information to which he had been directed explained how the UK Cabinet Office deals with nominations, but not how the Scottish Government considers suggestions and makes nominations. Mr Okasha noted that the Scottish Government had maintained publicly that changes were made to the role of Ministers in the honours process in 2007 and he was seeking information about how this was communicated, for example press releases, advice to civil servants and instructions from Ministers. Mr Okasha contended that, if this was the case, paperwork would exist showing the procedures followed before and after 2007.
53. The Ministers submitted that honours are a matter reserved to the UK Government and the Civil Service in Scotland deals with honours under the guidance of the UK Government Cabinet Office. They submitted that, for the purposes of honours, the Scottish Government and all the other devolved administrations are considered to be a UK Department. They explained that the UK Cabinet Office produces all of the forms and guidance used by all UK Departments and devolved administrations, and produces and has responsibility for the “Direct Gov” website available to the public at the web pages to which Mr Okasha was referred. The Ministers stated that they had no separate guidance.
54. The Ministers also referred to an investigation conducted by Lord Fraser of Carmyllie² concerning a complaint that the First Minister had directly or indirectly intervened to secure a knighthood for Brian Souter. The Ministers noted that the outcome of the investigation was that Scottish Ministers had no involvement in the nomination and that the First Minister should be wholly exonerated of any breach of the Ministerial Code. Lord Fraser concluded that the Scottish Government had not deviated from the First Minister’s policy announcement, when he took office in 2007, that he and all other Scottish Government Ministers had chosen to have no role in any part of the honours process.
55. The key question, for the Commissioner is whether the information requested by Mr Okasha was reasonably accessible to him within the web pages to which the Ministers directed him.
56. The Commissioner has considered Mr Okasha’s requests and the nature and content of the information contained within the web pages. The Commissioner notes that it provides a general overview of the honours system, including advice on how to nominate someone for an honour, types of honour, information on where to find lists of honours and the membership of various honours committees.
57. It seems clear to the Commissioner that this general information regarding the honours process is not the information that Mr Okasha is seeking within requests 12, 13 and 14. His requests focus on procedures relating to the nomination of honours emanating from the Scottish Government and the change, which has been acknowledged by the Ministers, regarding the role of the First Minister and other Ministers, since 2007.

² <http://www.scotland.gov.uk/Resource/Doc/1124/0123480.pdf>



58. The Commissioner notes that, in their responses to Mr Okasha, the Ministers referred to the work of the Scottish Government Honours Secretariat and an informal honours group, and to their internal procedures. Whilst the Commissioner understands that the relevant forms and guidance are produced by the UK Cabinet Office, she has difficulty accepting that the Ministers hold no recorded information concerning, for example, procedures for attendance at the honours group. The Commissioner also notes that the Ministers have made reference to a policy announcement regarding the First Minister's involvement in the honours process. The Commissioner considers information relating to this announcement would fall within the scope of request 14.
59. The Commissioner has therefore concluded that the information requested by Mr Okasha in requests 12, 13 and 14 could not reasonably be obtained by him other than by making a request in terms of FOISA. She is not persuaded that the web pages to which he was directed by the Ministers contain the information sought by Mr Okasha. Consequently she finds that this information was not exempt from disclosure under section 25(1) of FOISA.
60. The Commissioner now requires the Ministers to respond to requests 12, 13 and 14 otherwise than in terms of section 25(1) of FOISA.

Section 12 of FOISA

61. As noted above, in their submissions of 22 May 2012, the Ministers stated that they now considered the cost of complying with requests 19 and 20 would exceed the £600 limit set out in the Fees Regulations and, therefore, that they were not obliged to comply with these requests.
62. Section 12(1) of FOISA provides that a Scottish public authority is not obliged to comply with a request for information where the estimated cost of doing so would exceed the relevant amount prescribed in the Fees Regulations. This amount is currently set at £600 in terms of regulation 5 of the Fee Regulations. Consequently, the Commissioner has no power to require the release of information should she find that the cost of responding to a request for that information would exceed this sum.
63. The projected costs the authority can take into account in relation to a request for information are, according to regulation 3 of the Fee Regulations, the total costs, whether direct or indirect, which the authority reasonably estimates it is likely to incur in locating, retrieving and providing the information in accordance with Part 1 of FOISA. The authority may not charge for the cost of determining (i) whether it actually holds the information requested or (ii) whether or not it should provide the information. The maximum rate a Scottish public authority can charge for staff time is £15 per hour.
64. In their submissions of 22 May 2012, when the Ministers first indicated that they considered the cost of compliance would exceed £600, they stated that no timescale had been specified in request 19 and no topic specified in either of the requests under consideration. The Ministers submitted that they could not search their electronic records and document management system for information "about" Brian Souter without first being able to identify the subject in which Mr Souter might have an interest or have had an interest in the past.



65. In further submissions, the Ministers stated that the remit of request 19 was very wide and in effect would require a complete trawl of all Scottish Government records to locate any relevant information. The Ministers indicated that, given the size of the Scottish Government, it was difficult to estimate the cost involved. However, the Ministers estimated that there were approximately 5000 staff in the Scottish Government, comprising approximately 250 teams. They calculated on the basis of one official at A3 grade from each team searching on average for an hour on Objective (the Government's electronic records and document management system) and any locally held records e.g. personal mail boxes and concluded that an hour average at A3 grade (£9.50 per hour) results in a total of £2375. The Ministers indicated that an additional cost would be incurred if an officer at this grade was unavailable to undertake the work within any given team.
66. The Ministers also noted that electronic records would not be the only source where the information may be held: this would also include account desks, inboxes and outboxes, personal computers and files, temporary storage facilities, paper files or Freedom of Information case files.
67. The Ministers also stated that Ministerial offices maintain a correspondence log and hold hard copies of correspondence. However, due to the vast amount of information and correspondence that passes through these offices, these logs are deleted after three months. At that time, all information for the permanent record should be saved by officials in the relevant policy areas dependant on the subject matter of the correspondence. The Ministers noted that the Scottish Government does not utilise a standard naming convention for information saved in its electronic records management system and it is unlikely that information would be saved with a title which would identify any individual.
68. In his submissions, Mr Okasha submitted that information and correspondence in the Scottish Government is carefully archived. He understood that electronic searches were simple and quick and noted the limited timescale involved in request 20. Accordingly, he considered it counterintuitive that the cost of providing the information would exceed £600.
69. Having taken into account the submissions made by the Ministers, and having regard to the wording of Mr Okasha's requests, the Commissioner is satisfied that the Ministers have provided a reasonable estimate of the cost of compliance with these requests. The Commissioner acknowledges that these requests were particularly broad in their scope, potentially encompassing communications both within and outwith the Scottish Government. In this instance, the Commissioner is satisfied that, in order to fully comply with each of requests 19 and 20, the cost would exceed the cost threshold of £600.
70. The Commissioner is satisfied that the Ministers' submissions in this case provided a reasonable estimate of costs. Given the breadth of scope of these requests, the Commissioner accepts that there would appear to be no reasonable means of limiting the potential repositories of such information within the Government. She notes that an estimate of one hour searching per team of 20 staff is untested, but even if the task could be undertaken in one third of the time assumed by the Ministers, the cost of complying with each request would remain in excess of £600. Consequently, the Commissioner is satisfied that the Ministers were entitled to rely on section 12(1) of FOISA in relation to requests 19 and 20.



71. Consequently, the Commissioner accepts that the Ministers were entitled to refuse to comply with Mr Okasha's request by virtue of section 12(1) of FOISA.

Section 15 of FOISA

72. Section 15(1) of FOISA requires a Scottish public authority, so far as it is reasonable to expect it do so, to provide advice and assistance to a person who has made, or proposes to make, a request for information to it.
73. Examples of such advice and assistance given in the Section 60 Code³ include, in cases where section 12(1) applies, "consider[ing] what information could be provided below the cost limit, and suggest[ing] how the applicant may wish to narrow the scope of their request accordingly".
74. The Ministers stated that, as Mr Souter has various interests and businesses on which he may have been in communication with Ministers or officials, they would not be able to narrow down the scope of the request in any meaningful way in order to ensure that relevant information was provided to Mr Okasha. They submitted that Mr Okasha had not stated a subject matter that he was specifically interested in and therefore they considered that with the scope of the request being so wide, there was no way they could produce any information within the cost limit.
75. In this case, in relation to requests 19 and 20, the Ministers did not cite section 12 of FOISA until they presented their submissions to the Commissioner on 22 May 2012. This was the third different position adopted by the Ministers in relation to these requests, having previously stated that the information was exempt under section 41(b) of FOISA, and then, that the requests were invalid in terms of section 8(1)(c) of FOISA. The Ministers have never attempted to contact Mr Okasha with a view to offering any advice and assistance which may assist in reducing the cost of complying with the request, for example by asking him what topic(s) he was particularly interested in.
76. Consequently, the Commissioner has concluded that the Ministers failed to comply fully with the duty in section 15(1) of FOISA to provide reasonable advice and assistance to Mr Okasha in relation to requests 19 and 20. The Commissioner now requires the Ministers to remedy this failure by providing Mr Okasha with such advice and assistance.

Section 28(1) of FOISA

77. Section 28(1) of FOISA exempts information if its disclosure would, or would be likely to, prejudice substantially relations between any administration in the United Kingdom and any other such administration. The Scottish Administration and the Government of the United Kingdom fall within the definition of "administration in the United Kingdom" in section 28(2) of FOISA.

³ <http://www.scotland.gov.uk/Resource/Doc/933/0109425.pdf>



78. For section 28(1) to apply, the harm resulting from disclosure must be at the level of substantial prejudice. There is no definition of substantial prejudice in FOISA, but the Commissioner's view is that in order to claim this exemption an authority must be able to satisfy him that the damage caused, or likely to be caused, by disclosing the information would be both real and significant, as opposed to hypothetical or marginal. For the harm to be likely, there would require to be at least a significant probability of it occurring, in the near or foreseeable future and not at some distant time.
79. The Ministers submitted that the exemption applied to an email falling within the scope of request 25.
80. The Ministers submitted that, for the purposes of honours, the Scottish Government and all the other devolved administrations are considered to be a UK department and, as such, each has to have confidence in the integrity of how each operates to ensure a consistency of approach and to ensure cordial relations are maintained. The Ministers stated that there is no memorandum of understanding as each department and devolved administration follows the guidance issued by the UK Cabinet Office.
81. The Ministers submitted that, as honours are a reserved matter, the disclosure of the information in the email would prejudice considerably their relationship with the UK Government.
82. Mr Okasha provided general submissions regarding the Ministers' application of this exemption. He found it difficult to see how the disclosure of the information could prejudice substantially relationships between the UK Government and any other administration. He noted that the Cabinet Office had already stated publicly that the source of the nomination was the Scottish Government itself; in his view, the UK Government had already conceded that some of the information it holds should be in the public domain.
83. The Commissioner has considered the submissions made by both Mr Okasha and the Ministers regarding this exemption. The withheld information in this case comprises correspondence from the Cabinet Office to the Honours Secretariat. Given the circumstances in which the information was sent, the Commissioner is satisfied that, if this document were to be released, then the disclosure would, or would be likely to, prejudice substantially the relationship between the Ministers and the UK Government. In this instance, the Commissioner is especially persuaded by the Ministers' arguments regarding the need to ensure that the administrations of the United Kingdom have confidence in each other's integrity.
84. The exemption in section 28(1) of FOISA is subject to the public interest test required by section 2(1)(b) of FOISA. This means that, even where the exemption is judged to apply, the information must be disclosed unless, in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information.



85. The Ministers acknowledged that there is a legitimate public interest in information relating to honours, but considered this was outweighed by the significant and greater public interest in preserving the integrity of the process by which people are nominated for honours. Additionally, the Ministers argued that the honours system would not operate if the relationship of trust between the administrations was not effective and built on trust, operating within an understanding of propriety and absolute confidentiality. In the Ministers' view, if that relationship was damaged, then the process of vital exchanges of information and discussions between administrations would be irrevocably damaged, as would the honours process.
86. The Commissioner accepts that it is important that the Ministers maintain a good relationship with the UK Government and other administrations, and that this facilitates the effective operation of the honours system throughout the whole of the UK. It is important that devolved administrations can represent their interests freely to the UK Government and, equally, that the UK Government is not inhibited in informing these administrations of relevant developments as they occur. The Commissioner also appreciates that this will, from time to time, involve the exchange of information and views of a confidential and sensitive nature.
87. The Commissioner accepts that, where the subject of the information is a matter which invokes public discussion and debate, there is a public interest in ensuring that such matters are open to scrutiny. However, the Commissioner considers that there is a strong public interest in ensuring that lines of communication and the exchange of confidential information between the administrations can continue effectively, so that the interests of both administrations can be taken into account, particularly where the information relates to ongoing discussion. In weighing up these competing interests, the Commissioner is of the view that the public interest in disclosing the information in this case is outweighed by the public interest in maintaining the exemption in section 28 of FOISA.

Section 17 of FOISA

88. Under section 17(1) of FOISA, where an authority receives a request for information that it does not hold, it must give the applicant notice in writing to that effect.
89. In this case, the Ministers submitted that they did not hold information falling within the scope of requests 5, 7, 15, 16, 17, 18, 22, 23, 26, 27, 28, 29(a) and (c), 30(a) and (c), 31(a) and (c), 32 and 33.
90. In their submissions, the Ministers stated that the Honours Secretariat within the Scottish Government administers the whole of the honours process and reiterated that, since 2007, Ministers had chosen to have no role in the honours process. The Ministers again referred to the investigation conducted by Lord Fraser of Carmyllie which concluded that Ministers had no role in any part of the honours process.



91. Specifically in relation to request 7, the Ministers submitted that they did not hold information confirming which civil servant had forwarded the nomination to the Cabinet Office. The Ministers stated that it is usually an A3 grade administrator within the Honours Secretariat who emails the download to the UK Cabinet Office. The Ministers submitted that, once confirmation is received from the Cabinet Office that it has received the download, there is no need for the email to be retained as it poses issues with the mailbox due to its size.
92. In relation to request 22, the Ministers stated that there is no set quota of nominations discussed at any one honours group meeting and the numbers can vary, as can the nominations for a particular level. The Ministers stated that, as this process relies upon those involved being able to fully express their views, confident that their involvement and views will not be made public, no records of the meetings are retained once any action has been completed by the Honours Secretariat. The Ministers stated that there is no procedure document covering honours group meetings and no formal agendas are created. As it is an informal meeting, there are no procedural records made of the destruction of any notes made by the Honours Secretariat. For the same reasons, the Ministers stated that they held no information which would answer request 23.
93. Mr Okasha provided wide ranging submissions, disagreeing with the Ministers' position that no information was held in relation to these matters. In summary, Mr Okasha considered it "implausible" and "extraordinary" that the Ministers held no information showing how important decisions such as this were taken.
94. Having considered the Ministers' submissions, the Commissioner has concluded that the information under consideration is not held by the Ministers. The Commissioner accepts the Ministers' assertion that Ministers play no part in the honours process in Scotland and notes that this was accepted also by Lord Fraser of Carmyllie in the investigation referenced above. As such, the Commissioner is not surprised that no information is held relating to the involvement of Ministers in the honours process in relation to Brian Souter. Accordingly, the Commissioner is satisfied that the Ministers do not hold any information concerning Ministerial involvement in the nomination and award of a knighthood to Brian Souter i.e. requests 5, 15, 16, 17, 18, 26, 27, 28, 29(a) and (c), 30(a) and (c), 31(a) and (c), 32 and 33 (the majority of the requests under consideration in relation to section 17).
95. In relation to requests 7, 22 and 23, the Commissioner accepts the Ministers' explanation of why they do not hold the requested information. The Commissioner acknowledges that the nature of the information that would be covered by these requests is such that there is no requirement for the information to be created (requests 22 and 23) or retained (request 7).
96. The Commissioner accepts that it was reasonable in all the circumstances for the Ministers to conclude that they did not hold any information sought in the requests listed in paragraph 94. However, when responding to Mr Okasha's request and requirement for review, the Ministers failed to give notice, in terms of section 17(1) of FOISA, that they held no information falling within the scope of these requests. In failing to do this, the Ministers failed to comply with Part 1 of FOISA.



97. Given that this decision makes the position clear, the Commissioner does not require the Ministers to issue a notice to Mr Okasha in terms of section 17(1).

Comments on Requests 29, 30 and 31

98. In relation to requests 29(b) and 30(b), the Ministers explained that the Permanent Secretary agrees to nominations being transmitted to the Cabinet Office, and explained the process by which this is carried out. In relation to request 31(b), the Ministers referred to their response to request 11 (which is not considered within this decision notice) where they explained the process by which the UK Cabinet Office informs the Honours Secretariat of any awards prior to the official public announcement. The Ministers' position is understood to be that they have answered requests 29, 30 and 31 in relation to the Permanent Secretary (part (b) of these three requests).
99. Having viewed the various responses provided by the Ministers to Mr Okasha, the Commissioner is unable to conclude that they have provided a satisfactory response to requests 29(b), 30(b) and 31(b). The Commissioner cannot see where the Ministers have provided a direct response to these requests, either by providing the information, advising Mr Okasha that it is exempt under any exemption in Part 2 of FOISA or informing him that the information is not held by them.
100. The Commissioner therefore requires the Ministers to respond to requests 29(b), 30(b) and 31(b) in terms of FOISA.



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 requests made by Mr Okasha.

The Commissioner was satisfied that the Ministers were entitled to rely on the provisions of section 18(1) of FOISA in responding to certain parts of Mr Okasha's requests.

The Commissioner accepts that the cost of complying with certain requests would exceed £600 and that the Ministers were not obliged to comply with these requests. However, in failing to provide adequate advice and assistance to Mr Okasha, the Minister failed to comply with section 15(1) of FOISA. The Commissioner now requires the Ministers to provide such advice and assistance in relation to requests 19 and 20.

The Commissioner also accepts that the Ministers were entitled to withhold certain information under the exemptions in sections 28(1) and 41(b) of FOISA and in doing so, complied with Part 1 of FOISA.

The Commissioner accepted that the Ministers did not hold some of the information requested by Mr Okasha. However, by failing to give Mr Okasha notice in terms of section 17(1) of FOISA that they did not hold certain information, the Ministers failed to comply with Part 1 of FOISA.

The Commissioner finds that the Ministers incorrectly withheld certain information under section 25(1) of FOISA and by doing so failed to comply with Part 1 of FOISA. The Commissioner now requires the Ministers to respond to requests 12, 13 and 14 otherwise than under section 25(1) of FOISA.

The Commissioner also finds that the Ministers failed to respond to some of Mr Okasha's requests, as specified in the decision notice. She now requires the Ministers to respond to requests 29(b), 30(b) and 31(b).

The Commissioner requires the Ministers to take the steps outlined above by **Friday 10 May 2013**.



Appeal

Should either Mr Okasha 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
26 March 2013



Appendix 1

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.

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 –
 - (a) the provision does not confer absolute exemption; and
 - (b) in all the circumstances of the case, the public interest in disclosing the information is not outweighed by that in maintaining the exemption.
- (2) For the purposes of paragraph (a) of subsection 1, the following provisions of Part 2 (and no others) are to be regarded as conferring absolute exemption –
 - (a) section 25;
 - ...

12 Excessive cost of compliance

- (1) Section 1(1) does not oblige a Scottish public authority to comply with a request for information if the authority estimates that the cost of complying with the request would exceed such amount as may be prescribed in regulations made by the Scottish Ministers; and different amounts may be so prescribed in relation to different cases.



...

15 Duty to provide advice and assistance

- (1) A Scottish public authority must, so far as it is reasonable to expect it to do so, provide advice and assistance to a person who proposes to make, or has made, a request for information to it.

...

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 request 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.

...

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.

...

25 Information otherwise accessible

- (1) Information which the applicant can reasonably obtain other than by requesting it under section 1(1) is exempt information.

...



28 Relations within the United Kingdom

- (1) Information is exempt information if its disclosure under this Act would, or would be likely to, prejudice substantially relations between any administration in the United Kingdom and any other such administration.
- (2) In subsection (1), "administration in the United Kingdom" means-
 - (a) the Government of the United Kingdom;
 - (b) the Scottish Administration;
 - (c) the Executive Committee of the Northern Ireland Assembly; or
 - (d) the National Assembly for Wales.

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.

Freedom of Information (Fees for Required Disclosure) (Scotland) Regulations 2004

3 Projected costs

- (1) In these Regulations, "projected costs" in relation to a request for information means the total costs, whether direct or indirect, which a Scottish public authority reasonably estimates in accordance with this regulation that it is likely to incur in locating, retrieving and providing such information in accordance with the Act.
- (2) In estimating projected costs-
 - (a) no account shall be taken of costs incurred in determining-
 - (i) whether the authority holds the information specified in the request; or
 - (ii) whether the person seeking the information is entitled to receive the requested information or, if not so entitled, should nevertheless be provided with it or should be refused it; and
 - (b) any estimate of the cost of staff time in locating, retrieving or providing the information shall not exceed £15 per hour per member of staff.



5 Excessive cost - prescribed amount

The amount prescribed for the purposes of section 12(1) of the Act (excessive cost of compliance) is £600.



Appendix 2

Mr Okasha's information requests

1. The number of letters, emails and phone calls received by the Scottish Government from parliamentarians, organisations and members of the public regarding Mr Souter's knighthood from 11 June 2011 to today (31 August 2011).
2. What person suggested the nomination of Brian Souter for a knighthood to the Scottish Government and on what date.
3. The occupation and gender of that person.
4. The number, names and occupations of persons providing letters of support in respect of Mr Souter's nomination.
5. The date Scottish Ministers became aware of this.
6. Dates on which the Scottish Government corresponded with the Cabinet Office regarding the decision to nominate Brian Souter for a knighthood.
7. The rank and division of the civil servant who forwarded the nomination to the Cabinet Office.
8. Copies of all paperwork, redacted where necessary, regarding and related to the nomination.
9. The date the Cabinet Office informed the Scottish Government that it had received the nomination.
10. The date that the Cabinet Office informed the Scottish Government that a knighthood would be awarded.
11. The date that Scottish Ministers were informed of this.
12. Paperwork relating to the procedure followed for the nomination of honours from the Scottish Executive prior to 2007.
13. Paperwork relating to the procedure followed for the nomination of honours from the Scottish Executive following changes made in 2007.
14. Information about where such changes were communicated in 2007.
15. Communications between Special Advisers, ministers and civil servants and civil servants in the Cabinet Office about the drafting, composition and wording of the letter from Denis Brennan to Cathy Jamieson MP dated 28 July 2011.



16. Communications between Special Advisers, ministers and civil servants about the nomination for and award to Brian Souter of a knighthood, between the dates November 2010 – February 2011, including but not limited to the media handling of the matter.
17. Communications between Special Advisers, ministers and civil servants about the nomination for and award to Brian Souter of a knighthood, between the dates March 2011 – May 2011, including but not limited to the media handling of the matter.
18. Communications between Special Advisers, ministers and civil servants about the nomination for and award to Brian Souter of a knighthood, between the dates June 2011 – today, including but not limited to the media handling of the matter.
19. Communications between Special Advisers, ministers and civil servants about Mr Brian Souter at any time.
20. Communications to or from Special Advisers about Brian Souter between 1 June 2011 – 14 June 2011 and 6 June 2011 – today.
21. Who sits on the honours committee of the Scottish Government, who appoints the members and how often does it meet, including the dates of meetings for 2010-2011.
22. How many recommendations for honours are considered at meetings of the honours committee broken down by meeting and how many of those were recommendations for knighthoods.
23. The date that the nomination for Mr Brian Souter for knighthood was discussed by the honours committee.
24. The persons in the Scottish government who were aware of the outcome of the deliberations about the 2010-11 Honours nominations from the Scottish government.
25. The persons in the Scottish Government aware of the names of the persons that the Scottish Government submitted for an honour in 2010/11, both before and after those nominations were submitted to the Cabinet Office, including all emails, letters and memos relating to this matter.
26. The dates that ministerial approval for Mr Brian Souter's nomination for a knighthood was sought by officials.
27. The dates that ministerial approval for Mr Brian Souter's nomination for a knighthood was received by officials.
28. Which Scottish government minister(s) signed off the approval of Mr Brian Souter for an honour.
29. The date that (a) the First Minister and (b) the Permanent Secretary and (c) special advisers became aware Mr Brian Souter had been nominated for a knighthood.



30. The date that (a) the First Minister and (b) the Permanent Secretary and (c) special advisers became aware that Mr Brian Souter had been recommended for a knighthood by the Cabinet Office honours committee.
31. The date that (a) the First Minister and (b) the Permanent Secretary and (c) special advisers became aware that Mr Brian Souter would be awarded a knighthood.
32. The date that the First Minister's private office and his Special Advisers became aware (a) that Mr Brian Souter had been nominated for a knighthood, (b) that he had been recommended for a knighthood by the Cabinet Office honours committee, and (c) he would be awarded with a knighthood.
33. What date Scottish Government ministers received the list of approved names for honours to go to the Cabinet Office.
34. The number of persons nominated by the Scottish Government each year in each category of honour, for each of the last four years.
35. The number of persons such person, by category, who were awarded and accepted such an honour.