

OUR REF DCH.NCM.SCO268.9

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Dear Margaret

PSEUDONYMS AND ADDRESSES

I have now had the opportunity of looking at this matter and Christine and I have discussed at some length the issues arising and how we should advise you.

As you know Section 8(1) of FOISA sets out that a request under the Act should state the name of the applicant and an address for correspondence. My view would be that the use of a pseudonym means that the applicant is not stating his or her name and that technically, therefore, this would not be a proper request in terms of the Act.

Likewise in situations where a pseudonym has been used and the purported applicant has not provided you with an address for correspondence, again I would take the view that this is not a proper request in terms of Section 8(1). I assume that in relation to addresses you have encountered difficulty where the applicant has provided only an e-mail address. I do not think that an e-mail address can properly be viewed as an address for correspondence. By contrast, I do think that the use of a Post Office Box would constitute an address for correspondence. There are other difficulties which may arise with PO Boxes which are discussed below.

Pseudonyms

In relation to the applicant's name, It is of course easier to identify a problem where the pseudonym is a very obvious one, but it may of course be difficult in practice to always be certain that a pseudonym has been used and there also be situations where an obvious pseudonym is used with a genuine postal address.

I can also see that there is great strength in the approach that the Commissioner has been taking namely that there is nothing to stop people using pseudonyms because everyone is entitled to receive information under FOISA. It is similarly attractive to allow the use of pseudonyms where for example a potential whistle blower is trying to obtain information

perhaps about their own organisation but of course does not want to run the risk of being identified as being the applicant in case there are any detrimental repercussions.

There may be substantive reasons, though, why the identity of the applicant may be directly relevant to the determination of the request by the receiving authority. I am thinking here specifically of requests which involve personal data. The use of a pseudonym would make it impossible for an authority to know whether a request could be refused because it had been made by the data subject him or herself and should be dealt with instead under the Data Protection Act. Perhaps more significantly, compliance with a request for third party personal data may depend in part upon the identity of the applicant. For example, disclosure of third party personal data may be considered to be compatible with the data protection principles because it is necessary for the legitimate interests pursued by the applicant (DPA, Schedule 2, Condition 6). It would be extremely difficult to assess the legitimacy of the request without information about the identity of the applicant.

I think difficulties such as these support my view that Section 8 requires the provision of an accurate name and address.

However, I would consider that it would be overly legalistic in the overall context of the Act for either the Commissioner or indeed a public authority to refuse to deal with applications simply because a pseudonym has been used. There may be an exception to this if it is clear that a vexatious applicant is behind a pseudonym but I do not think that the mere use of a pseudonym would make an applicant vexatious.

My practical suggestion would be for the guidance on the website to be altered to confirm that strictly speaking an application by someone using a pseudonym and without a proper correspondence address is technically not a proper application in terms of Section 8 but that the Commissioner takes the view that such applications should be dealt with by public authorities as a request unless there are substantive reasons, such as those relating to personal data, which require proper identification of the applicant.

Correspondence Addresses

As I mentioned above, in relation to correspondence addresses I think it is reasonable to advise that the use of a Post Office Box address by the applicant would be sufficient to bring the request within the ambit of section 8.

I know that you have concerns about the service of notices by the Commissioner and I would agree that, where a request is refused and is brought to the attention of the Commissioner, the Commissioner will require an address for correspondence for service of decision notices and the like.

I do not see how the Commissioner can proceed to comply with the terms of Section 49 and in particular sub sections 2 and 5 without having a proper correspondence address on which to service notices. Certainly in other areas of legislation for example involving

planning or licensing it is always necessary for either the applicant or the Local Authority to be in a position to demonstrate that notices have been properly served and given that time limits for appeal may depend on the service of the notice I think it is essential that the applicant provides some proper correspondence address so that notices can be served properly.

The only area of doubt, to my mind, relates to PO Boxes. I am not convinced that in the planning or licensing context service on a PO Box would be sufficient. However Royal Mail have advised that it is possible for recorded delivery letters to be delivered to a PO Box address and were the Commissioner to have on file a recorded delivery slip demonstrating that service was attempted within the requisite timescale I think it would be extremely difficult for an applicant to argue that the Commissioner had failed to discharge his duties in relation to notices. For the sake of completeness, where a PO Box address is given in the first instance, you may wish to write at the earliest opportunity to the applicant advising them that it would be preferable if they would release another address. If they fail to do so then, again, I think they cannot complain if notices are sent to their PO Box.

Finally, you may wish your guidance to make clear that without a proper correspondence address, the Court of Session is unlikely to entertain an appeal against a decision of the Commissioner.

Anonymous Requests

Arguably, the guidance should also make clear that it would be best if applications made by persons who did not wish to disclose their true identity would be better made via some third party such as a friend or legal representative. I appreciate that we have just received instructions from you in connection with applications made in that form and that we are now looking at that very issue.

General

It should also be remembered that sometimes individuals in Scotland use in their everyday life names which appear to be pseudonyms but in fact have become their name for daily usage. For example you will be aware of the well known Skye bridge campaigner Robbie the Pict who has engaged in litigation and indeed has been prosecuted under that name. It may therefore be difficult to be absolutely certain that a pseudonym is being used and that neither public authorities nor the Commissioner should take an overly formalistic approach to this issue.

I hope all of the above is helpful. Christine has seen this advice and I have discussed it with her and she will be able to deal with any queries you have.

Thank you for your instructions on this and the other matters that I have dealt with.

Kind regards.

Yours sincerely

Dominic C Harrison
Partner
On behalf of Brodies LLP