



# Decision Notice 106/2023

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## Suspension of prisoners' recreational activity

**Authority: Scottish Prison Service**

**Case Ref: 202200804**

### Summary

The Applicant asked the Authority for information on the governor's decision-making in relation to suspension of prisoners' recreational activity at HMP Glenochil as a result of COVID-19. The Authority provided the Applicant with a copy of a COVID-19 route map and informed them that it did not hold the remainder of the information requested. The Commissioner investigated and was satisfied that the Authority did not hold any more information than it had already provided.

### Relevant statutory provisions

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1), (2) and (6) (General entitlement); 15(1) (Duty to provide advice and assistance); 17(1) (Notice that information is not held); 20(1) (Requirement for review of refusal etc.); 47(1) and (2) (Application for decision by Commissioner).

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

### Background

1. On 7 May 2022, the Applicant made the following request for information to the Authority:
  - (i) the reasons the Governor considered it necessary and proportionate to suspend all recreational activity in HMP Glenochil

- (ii) a copy of all review(s) carried out by the Governor in relation to the suspension of recreational activity ordered under paragraph Rule 88A (4) of the Prisons and Young Offenders Institutions (Scotland) Amendment Rules
  - (iii) the route map in place to reintroduce recreational activity to prevent further damage to prisoners' mental health and wellbeing.
2. The Authority responded on 8 June 2022 and told the Applicant that it did not hold any information set out in parts (i) and (ii) of the request. For request (ii), the Authority provided further context, confirming its Local Coronavirus Recovery Group met to discuss measures in line with Scottish Government guidance. For request (iii), the Authority provided a copy of its COVID-19 route map, which included an executive summary.
  3. On 17 June 2022, the Applicant wrote to the Authority requesting a review of its decision. The Applicant stated that they were dissatisfied with the decision because they did not find it credible that information was not held in relation to requests (i) and (ii). For request (iii), the Applicant considered their request had not been answered as the provided route map did not explain *how* the Authority planned to reintroduce prisoners' recreational activity.
  4. The Authority notified the Applicant of the outcome of its review on 4 July 2022, upholding its original decision after having carried out a further review of its records.
  5. On 20 July 2022, the Applicant wrote to the Commissioner, applying for a decision in terms of section 47(1) of FOISA. The Applicant stated they were dissatisfied with the outcome of the Authority's review because:
    - they did not accept (or find it credible) that the Authority did not hold the information in parts (i) and (ii) of their request
    - they did not consider part (iii) of their request had been answered as the route map provided did not explain how recreational activity was to be reintroduced
    - of the lack of independence and neutrality of the staff involved in the review response.

## **Investigation**

6. The Commissioner determined that the application complied with section 47(2) of FOISA and that he had the power to carry out an investigation.
7. On 21 September 2022, and in line with section 49(3)(a) of FOISA, the Commissioner gave the Authority notice in writing of the application and invited its comments.
8. The case was subsequently allocated to an investigating officer.
9. The investigating officer invited the Authority to answer specific questions. These related to the searches and enquiries undertaken by the Authority to establish what information it held falling within the scope of the Applicant's request.

## **Commissioner's analysis and findings**

10. The Commissioner has considered all of the submissions made to him by the Applicant and the Authority.

## **Section 17(1) – Notice that information is not held**

11. Section 1(1) of FOISA provides that a person who requests information from a Scottish public authority which holds it is entitled to be given that information by the authority, subject to qualifications which, by virtue of section 1(6) of FOISA, allow Scottish public authorities to withhold information or charge a fee for it. The qualifications contained in section 1(6) are not applicable in this case.
12. The information to be given is that held by the authority at the time the request is received, as defined in section 1(4). This is not necessarily to be equated with information an applicant believes the authority should hold. If no such information is held by the authority, section 17(1) of FOISA requires it to give the applicant notice in writing to that effect.
13. The standard of proof to determine whether a Scottish public authority holds information is the civil standard of the balance of probabilities. In determining where the balance of probabilities lies, the Commissioner considers the scope, quality, thoroughness and results of the searches carried out by the public authority. The Commissioner also considers, where appropriate, any reason offered by the public authority to explain why it does not hold the information.
14. The Commissioner's remit here, however, extends only to the consideration of whether the Authority actually held the relevant information requested and whether it complied with Part 1 of FOISA in responding to the request. The Commissioner cannot comment on whether a public authority should have recorded any, or more, information about a particular event or process.

### *The Authority's submissions*

15. The Authority noted that the scope of part (i) of the information request had been confined to the governor's considerations. The Authority explained that, with regard to request (i), the governor of HMP Glenochil did not decide to apply restrictions to the prison as implementing a restricted regime was instead a national decision in light of the COVID-19 pandemic. The Authority provided documentary evidence of a Scottish Prison Service (SPS) directive circulated to prison governors in April 2020 to support this.
16. The Authority stated that the governor confirmed they held no record of a decision on this matter and explained that the above document provided by SPS set out the rationale to implement the restricted regime. The Authority further submitted that there was no requirement for the governor's considerations to be recorded.
17. With regard to request (ii) and the searches undertaken by the Authority, it confirmed that it held no records of review(s) carried out by the governor of the decision to suspend recreational activity, stating the governor had confirmed they held no record of such a review.
18. In respect of the Local Coronavirus Recovery Group referred to in its response to part (ii) of the request, the Authority submitted that this group did discuss the prison regime at HMP Glenochil but did not discuss detail of prisoners' activity.

### *The Applicant's submissions*

19. The Applicant submitted that the governor's decision to suspend all recreational activities outwith normal working hours was of such significance that it was not credible it had not been recorded. The Applicant further commented that this, in turn, would suggest significantly poor record keeping on behalf of the Authority in terms of maintaining clear, transparent and accessible records of its decision-making.

20. The Applicant considered that Rule 88A (5) of the Prisons and Young Offenders Institutions (Scotland) Amendment Rules 2020 compelled the governor to carry out a review of the suspension of recreational activity and that it was not credible the Authority could carry out such a review if the original decision had not been recorded. The Applicant considered that any failure by the Authority to carry out such a review would be a breach of its statutory duties.
21. The Applicant also submitted that the Authority's reference to the Local Coronavirus Recovery Group in part (ii) of the request was not relevant.

#### *The Commissioner's view*

22. The Commissioner notes the narrow framing of the information request in parts (i) and (ii), in that they relate to the governor; specifically, the governor's reasons for suspending recreational activity and reviews of that suspension by the governor.
23. Having considered all of the relevant submissions and the terms of parts (i) and (ii) of the request, the Commissioner is satisfied that the Authority took adequate, proportionate steps to establish what information it held that fell within the scope of the request.
24. The Commissioner also notes that whether a public authority *should* hold information which it does not is not a matter for him to decide.
25. The Commissioner is therefore satisfied that the Authority does not (and did not, on receipt of the request) hold the information to which parts (i) and (ii) of the request relate and so was correct to give the Applicant notice, in terms of section 17(1) of FOISA, that it held no information falling within the scope of those parts of the request.

#### **Section 15(1) – Advice and assistance**

26. Section 15(1) of FOISA provides that 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.
27. In its submissions to the Commissioner, the Authority provided further context (set out above in paragraph 15) around the restriction of prisoners' recreational activity, explaining that this was a national decision.
28. Noting the Authority's duty to provide advice and assistance under section 15(1) of FOISA, the Commissioner sought further submissions from the Authority as to why this context had not been provided to the Applicant, in relation to part (i) of the request, in either its initial or review response.
29. The Authority stated it had provided the Applicant, in person, on a number of occasions of several months with the explanation and rationale it provided to the Commissioner and that, consequently, this contextual information was well known to them.
30. While acknowledging the Authority's submissions in relation to the prior provision of relevant context to the Applicant, the Commissioner considers it was incumbent on the Authority to have provided this in its response to their request, in order to satisfy its duty under section 15(1) of FOISA. This was not raised in the application and is therefore simply noted here for the Authority's reference.

## **COVID-19 route map**

31. The Applicant stated that they were dissatisfied with the COVID-19 route map document provided by the Authority as they considered it did not provide the information requested in that it failed to detail how prisoners' recreation was to be reintroduced at HMP Glenochil.
32. The Commissioner notes that the COVID-19 route map states it "presents a Routemap for the whole SPS to move forward..." (at section 3.0) and that the following paragraph falls under the heading "Recreation Review" (at section 6.1.1.6):

"The suspension of recreation was a necessary element of reducing the potential spread of the virus within the custodial setting. All recreation in association was stopped effective from 23 March 2020 and in transitioning to Phase 3, people can begin to meet in extended groups subject to physical distancing and hygiene safeguards. Details of the policy change are contained in the Compendium."
33. The Commissioner therefore sought further submissions from the Authority, namely seeking clarification on whether there was any other documentation (however named) addressing the reintroduction of prisoners' recreation.

### *The Authority's submissions*

34. The Authority stated it had released its COVID-19 route map in full, without redaction, and considered it could not be responsible for what the Applicant had expected to be in the document.
35. The Authority explained that the document had been drafted at the onset of a pandemic where the primary concern was to minimise risk to prisoners in custody.
36. The Authority also confirmed that references within the COVID-19 route map to "agreed changes [being] contained within an Operational Policy Guidance Compendium" (at section 5.1.1.1) related to the route map itself (that it provided in full to the Applicant) and not to the existence of other documentation that may have fallen within the scope of part (iii) of the request.

### *The Commissioner's view*

37. While he recognises that it contains limited information in relation to the restoration of prisoners' activities, the Commissioner, having considered all of the information provided, accepts that this document is the extent of the Authority's "route map" in relation to COVID-19 and the restoration of prisoners' recreation.

## **Independence of request for review response**

38. Under section 20(1) of FOISA, an applicant who is dissatisfied with the way a public authority has dealt with a request for information may require the authority to review its actions and decisions in relation to that request.
39. In their application, the Applicant raised a concern about the integrity of the review process. The Applicant noted that they had submitted their request for review to the Chief Executive of the Authority and that it had subsequently been passed to the office at HMP Glenochil, which had provided the Authority's original response.
40. The Applicant further noted that the individual who carried out the review was subordinate to the individual who had issued the initial response.

### *The Authority's submissions*

41. The Authority noted that it has a small team, in each establishment, with responsibility for responding to information requests and requests for reviews under FOISA. The Authority explained that these teams liaise with subject matter specialists in each establishment or the Authority's headquarters, as required.
42. The Authority considered that it was a matter for individual authorities to decide who should provide a response to a request (including requests for review), and it provided evidence to support that review decisions have, where appropriate, overturned original decisions.

### *The Commissioner's view*

43. [The Scottish Ministers' Code of Practice on the Discharge of Functions by Scottish Public Authorities](#)<sup>1</sup> (the "Section 60 Code") sets out good practice for Scottish public authorities to follow in connection with the discharge of their functions under FOISA.
44. In relation to the review procedures of Scottish public authorities, the Section 60 Code provides that:
  - "The aim of a review is to allow the authority to take a fresh look at its response to an information request, to confirm the decision (with or without modifications) or, if appropriate, to substitute a different decision. The review procedure must therefore be fair and impartial and allow decision makers to look at the request refresh." (at 10.3.3)
  - "It is good practice for the reviewer to be a person who did not respond to or advise on the original request (where possible or practicable)". (at 10.3.4)
45. Taking all of the above into consideration, the Commissioner's view is that, particularly given the size of the team responsible for handling FOISA requests, the Authority's review process was, in the circumstances, appropriate.

## **Decision**

The Commissioner finds that, in respect of the matters specified in the application, the Authority complied with Part 1 of the Freedom of Information (Scotland) Act 2002 in responding to the information request made by the Applicant.

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<sup>1</sup> [Code of Practice under section 60 of FOISA \(www.gov.scot\)](http://www.gov.scot)

## **Appeal**

Should either the Applicant or the Authority wish to appeal against this decision, they have the right to 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.

**Euan McCulloch**  
**Head of Enforcement**

**25 October 2023**

## **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.
- (2) The person who makes such a request is in this Part and in Parts 2 and 7 referred to as the “applicant.”
- ...
- (6) This section is subject to sections 2, 9, 12 and 14.

#### **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.
- ...

#### **20 Requirement for review of refusal etc.**

- (1) An applicant who is dissatisfied with the way in which a Scottish public authority has dealt with a request for information made under this Part of this Act may require the authority to review its actions and decisions in relation to that request.
- ...

## 47 Application for decision by Commissioner

- (1) A person who is dissatisfied with -
- (a) a notice under section 21(5) or (9); or
  - (b) the failure of a Scottish public authority to which a requirement for review was made to give such a notice.

may make application to the Commissioner for a decision whether, in any respect specified in that application, the request for information to which the requirement relates has been dealt with in accordance with Part 1 of this Act.

- (2) An application under subsection (1) must -
- (a) be in writing or in another form which, by reason of its having some permanency, is capable of being used for subsequent reference (as, for example, a recording made on audio or video tape);
  - (b) state the name of the applicant and an address for correspondence; and
  - (c) specify –
    - (i) the request for information to which the requirement for review relates;
    - (ii) the matter which was specified under sub-paragraph (ii) of section 20(3)(c); and
    - (iii) the matter which gives rise to the dissatisfaction mentioned in subsection (1).