

# Decision Notice

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## Decision 014/2015: Mr N and the Scottish Prison Service

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### Delivery of newspapers

Reference No: 201402359 and 201402589

Decision Date: 28 January 2015



Scottish Information  
Commissioner

## Summary

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On 12 July 2014 and 6 September 2014, Mr N asked the Scottish Prison Service (the SPS) for information relating to the delivery of newspapers which had been ordered externally and delivered on those dates. The SPS told Mr N that it did not hold the information requested.

Following an investigation the Commissioner accepted this.

## Relevant statutory provisions

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Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1), (4) and (5) (General entitlement); 17(1) (Notice that information is not held)

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

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### Request 1

1. On 12 July 2014, in relation to the arrangements for delivery of newspapers which had been ordered externally pursuant to Rule 52 of the Prison and Young Offenders Institutions (Scotland) Rules 2011 (the Prison Rules), Mr N wrote to the SPS and requested specific information relating to the delivery of papers on that date. This request was contained in a Prisoner Complaint Form (PCF1), which he handed to a Residential Officer within the prison.
2. On 11 August 2014, the SPS provided Mr N with a response. It informed him that it did not hold the requested information, as it had been routinely destroyed in accordance with the SPS's standard records management practice, before the date of his request.
3. On 23 August 2014, Mr N wrote to the SPS, requesting a review on the basis that he did not accept the information was not held. He drew the SPS's attention to an SPS email of 22 April 2013, which stated the newspapers should be delivered with a checklist and that the information contained in that checklist should be retained by the SPS for audit purposes.
4. The SPS notified Mr N of the outcome of its review on 17 September 2014. The SPS confirmed that the information was not held, explaining that while the papers were delivered with a checklist identifying the intended recipients, the checklist was not retained and therefore was routinely destroyed.
5. On 30 September 2014, Mr N wrote to the Commissioner. He applied to the Commissioner for a decision in terms of section 47(1) of FOISA. In summary, he disputed that the SPS did not hold the information, given that the process for delivery (as outlined in the SPS email of 22 April 2013) dictated that a checklist sheet be retained for audit purposes.

## Request 2

6. On 6 September 2014, Mr N wrote to the SPS and requested specific information relative to the delivery of papers on that date. These had also been ordered pursuant to Rule 52 of the Prison Rules. This request was also contained in a PCF1, which related to the delivery of papers that day.
7. On 10 September 2014, the SPS wrote to Mr N regarding his complaint. This letter explained that the information request had been passed to the relevant area for consideration.
8. On 26 September 2014, the SPS provided Mr N with a response. It acknowledged that his request had been received on 6 September 2014 and informed him that it did not hold the requested information. It had been routinely destroyed in accordance with the SPS's standard records management practice, before the date of his request.
9. On 11 October 2014, Mr N wrote to the SPS, requesting a review. He again drew the SPS's attention to the SPS email of 22 April 2013, regarding the retention of the checklist for audit purposes. He further commented that the information requested on 6 September 2014 would be contained in the checklist of papers delivered on the date of his request: as a matter of logic, it could not have been routinely destroyed before the date of his request.
10. Mr N further commented that if the list had been destroyed, the destruction would have taken place following the receipt of his request, thereby raising issues of a failure to secure information contrary to section 1(5) of FOISA. Based on the SPS email of 22 April 2013, the checklist should be held within a designated folder: following these procedures, its retention would have been entirely practicable in the circumstances.
11. The SPS notified Mr N of the outcome of its review on 5 November 2014. It confirmed that his request for information had been received by the Business Team at the prison on the first working day, which was Monday 8 September 2014. It confirmed that a search on that date did not find the information requested: it could not say whether the information was still available at the time of delivery of his request. The SPS further explained that the email of 22 April 2013 had been superseded on 23 September 2014, the new procedure being that the information would only be retained for one day.
12. On 6 November 2014, Mr N wrote to the Commissioner. He applied to the Commissioner for a decision in terms of section 47(1) of FOISA. Following further correspondence, Mr N confirmed his application to the Commissioner was to establish whether the SPS breached its duty to retain the information requested where it was reasonably practical to do so, as required by section 1(5) of FOISA.

## Investigation

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13. The applications were accepted as valid. The Commissioner confirmed that Mr N made requests for information to a Scottish public authority and asked the authority to review its responses to those requests before applying to her for a decision. The cases were subsequently allocated to an investigating officer.
14. Section 49(3)(a) of FOISA requires the Commissioner to give public authorities an opportunity to provide comments on an application.

## **Request 1**

15. On 16 October 2014, the investigating officer notified the SPS in writing that Mr N had made a valid application regarding request 1, and was invited to comment on this application. It was asked to explain the steps it had taken to identify and locate the information requested, and to comment on whether it would have been reasonably practicable to prevent the destruction of that information, in accordance with section 1(5) of FOISA.
16. The SPS provided a full response on 29 October 2014.
17. The SPS further submitted that during the investigation in relation to request 1, it obtained a copy of the checklist from the provider and provided Mr N with a redacted copy. Mr N confirmed receipt of this, but stated that it did not meet his request. In any event, the Commissioner's role here is to ascertain whether the information was held by the SPS at the time it received Mr N's request, not to comment on information subsequently obtained by the SPS.

## **Request 2**

18. On 12 December 2014, the investigating officer notified the SPS in writing that Mr N had made a valid application regarding request 2, and was invited to comment on this application. Again, it was asked to explain the steps it had taken to identify and locate the information requested, and to comment on whether it would have been reasonably practicable to prevent the destruction of that information.
19. The SPS responded and relied upon its submissions of 29 October 2014, relative to request 1, as it considered the circumstances to be the same. It explained, and provided evidence in relation to, the searches it had conducted in relation to this particular request
20. The two cases were conjoined, with a view to a single decision being issued.

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

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21. In coming to a decision on this matter, the Commissioner considered all the relevant submissions, or parts of submissions, made to her by both Mr N and the SPS. She is satisfied that no matter of relevance has been overlooked.

### **Information held by the SPS**

22. 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 relevant in this case.
23. The information to be given is that held by the authority at the time the request is received, subject to any amendment or deletion which would have been made, regardless of the receipt of the request, between the time the request is received and the time the information is given (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.

24. Section 1(5) of FOISA states the information is not to be destroyed before it can be given, unless it is not reasonably practicable to prevent the destruction from occurring. The Commissioner must therefore consider whether the SPS could have taken reasonable steps to prevent the destruction of the information requested.
25. The Commissioner notes the submissions provided by Mr N, in which he provides reasons why he believes the SPS should have held the information on receipt of his requests (and retained it thereafter). He has referred to the SPS email of 22 April 2013 (see above), noting that this states: *“Vestibule Staff will arrange delivery at the weekends (contact the areas informing that papers have arrived), cover sheet will be kept within folder to allow audit.”*
26. In relation to request 1, Mr N also explained that he handed his request for information, contained in a PCF1, to a Residential Officer on Saturday 12 July 2014 at approximately 09:45. He stated that as he was requesting information relating to deliveries on that date, the information would have been held by the SPS at the time it had received his request and should have been retained in the audit folder in line with the procedures set out above. He made a similar point in relation to request 2, pointing out that the request (also relating to deliveries on the date it was made) was handed to a Residential Officer at approximately 08:45 hours on Saturday 6 September 2014.
27. In its submissions to the Commissioner, the SPS explained the process for the delivery of newspapers ordered and paid for by friends and family members of those in custody. It explained that such newspapers are normally delivered to the prison vestibule around 06:30 each day and included with the delivery is a checklist showing where and to whom the papers are to be delivered. The checklist would contain the information requested by Mr N in this case.
28. The SPS also explained the process for delivery on Saturday mornings. Once the papers are delivered to the prison, vestibule staff use the checklist to confirm the delivery is accurate. At the time the SPS received both of the requests under consideration here, local procedures (as outlined in the SPS email of 22 April 2013) dictated that the checklist should be placed in a folder within the vestibule area, with the “current week only” being retained (as marked on the folder). Once the delivery is confirmed as correct, the SPS continued, the newspapers are collected by staff from the relevant accommodation areas, after taking up duty at 07:30 hours.
29. Having outlined the specified procedure for retention, the SPS stated that it had identified inconsistencies in the practice of retaining the checklist. For example, a check carried out after the change in procedures in September 2014 revealed a number of checklists which had been retained, all for longer than the new retention period of the current day.
30. The SPS acknowledged that Mr N would have been entitled to be given any relevant information still held at the time it received his requests, in accordance with section 1(4) of FOISA. The Commissioner agrees: the actual time of receipt is the relevant time for the purposes of section 1(4), even if it is not on a working day.

31. Section 1(4) is qualified, to the effect that the authority may amend or delete information held on receipt of the request, if that amendment or deletion would have been made (regardless of receipt of the request) between the time of receipt and the time the information is given. This does not, however, permit the destruction of such information, unless it is not reasonably practicable to prevent that destruction (section 1(5)). The question, therefore, is whether it would have been reasonably practicable for the SPS to prevent the destruction of any information held on receipt of the relevant request but no longer held by the time it took steps to respond to the request.
32. The SPS has been unable to confirm what relevant information it held at the time it received each request. It has explained that the checklists, being ephemeral in nature and of short-term value only, are not covered by its Records Management Policy. The Commissioner acknowledges this. From the submissions she has received, however, she considers it likely that the checklist containing the information sought by Mr N was held when the corresponding request was received.
33. The SPS explained the processes whereby Mr N's requests were dealt with separately from the associated complaints. In each case, the request was passed to the local FOI lead, in accordance with established procedures, to be actioned on the next available working day (for the officer concerned). This led to searches being carried out for the information on 14 July and 8 September 2014 respectively: records of both searches were produced. The relevant checklists could not be identified and were presumed to have been destroyed: having considered all the relevant submissions, this appears to the Commissioner to be a reasonable conclusion in the circumstances. In other words, the SPS was correct to give Mr N notice that it did not hold the information, in line with section 17(1) of FOISA
34. The Commissioner considers it important that a request for information is considered promptly on receipt, in order to ensure full compliance with FOISA. Depending on the circumstances, it may be appropriate to take prompt action to prevent avoidable destruction of the information requested.
35. In this particular case, the Commissioner notes that the SPS's policy at the time of receiving both requests was to retain checklists of this kind for a period of one week from the date of receipt. The date on which each request was made was, of course, the date on which the relevant checklist would have been received. In other words, there would have been no reason to expect that the checklist would not have been held on the Monday immediately following receipt of the request, when the request would have been actioned in the ordinary course of events. There is nothing to suggest otherwise in the submissions received from either Mr N or the SPS.
36. The SPS also submitted that the Residential Officers receiving the requests would have no knowledge of the checklist or its management. Given the processes in place for handling information requests and managing the checklist, there would appear to be no reason why they should have been. Equally, the SPS submitted, staff in the vestibule area responsible for the checklist would have had no idea that an information request had been received – again, had all the relevant processes been operating as they should have been, this should have had no effect on the proper handling of the request.

37. The SPS went on to comment that the staff receiving the request would, at that time, have been engaged in supervising prisoners and managing the operation of the accommodation area. This is clearly a key function of the SPS. Obviously, competing priorities have to be balanced and it is important that time is found to ensure that other statutory functions (such as those under FOISA) are complied with timeously. In the case of FOISA, this does not mean complying with every single request for information on the day when it is received – recognising that public authorities have other important things to do, section 10 of FOISA allows up to 20 working days for a response. In particular, where establishments such as prisons and hospitals are providing vital public services overnight, at weekends and on public holidays, an immediate response to an information request may be neither practicable nor appropriate.
38. In all the circumstances of this particular case, there would appear to have been no reason why immediate action should have been considered necessary to address either of Mr N's requests. Specifically, there would appear to have been no reason why immediate action should have been considered necessary to prevent the destruction of information held by the SPS and falling within the scope of the requests. The Commissioner cannot identify a breach of section 1(5) in failing to prevent that destruction.
39. The SPS has acknowledged that it did not follow its own process for retaining the information in question, at the time both requests were received. In itself, that is not a failure to comply with Part 1 of FOISA, or a failure to follow good practice in discharging the SPS's functions under Part 1.

## Decision

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The Commissioner finds that the Scottish Prison Service complied with Part 1 of the Freedom of Information (Scotland) Act 2002 in responding to the information requests made by Mr N.

## Appeal

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Should either Mr N or the Scottish Prison Service 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.

**Margaret Keyse**  
**Head of Enforcement**

**28 January 2014**

### 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.

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- (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.

- (5) The requested information is not, by virtue of subsection (4), to be destroyed before it can be given (unless the circumstances are such that it is not reasonably practicable to prevent such destruction from occurring).

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#### 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.

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