

Decision Notice



Decision 108/2012 Mr G and the Scottish Prison Service

DVDs held by prisoners

Reference No: 201200806
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Rosemary Agnew
Scottish Information Commissioner

Kinburn Castle
Doubledykes Road
St Andrews KY16 9DS
Tel: 01334 464610



Summary

Mr G requested from the Scottish Prison Service (SPS) information relating to DVD films held by prisoners in a specific hall on a specific date. The SPS responded in terms of section 12(1) of FOISA, by giving Mr G notice that the cost of complying with the request would exceed £600 and therefore that it was not obliged to comply with the request. Following a review, Mr G remained dissatisfied and applied to the Commissioner for a decision.

Following an investigation, the Commissioner was satisfied that cost of complying with the request would exceed £600, and so the SPS was entitled to refuse to comply in terms of section 12(1) of FOISA.

The Commissioner further found that the SPS was not in breach of section 1(5) of FOISA by allowing information to be deleted or otherwise destroyed.

Relevant statutory provisions and other sources

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1), (4), (5) and (6) (General entitlement); 12(1) (Excessive cost of compliance).

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 the Appendix to this decision. The Appendix forms part of this decision.

Background

1. On 16 November 2011, Mr G wrote to the SPS, requesting certain information as to local policy on the availability of DVD films to prisoners, and also the following:
 - a) The number of prisoners within Abercrombie Hall as of evening lock-up on 13 November 2011 who had DVD films in their possession;
 - b) A list of all DVD titles of films in possession of prisoners within Abercrombie as of evening lock-up on 13 November 2011.



2. The SPS responded on 14 December 2011. In relation to points a) and b) above, it explained that the cost of providing the information would exceed £600. Consequently, by virtue of section 12 of FOISA, it was not obliged to do so.
3. On 20 December 2011, Mr G wrote to the SPS by way of a fax transmission, requesting a review of its decision in relation to points a) and b). He did not believe the SPS had justified its conclusion that the cost of providing the information would exceed £600.
4. Mr G did not receive a response to his requirement for review and, on 9 February 2012, wrote to the Commissioner, stating that he was dissatisfied with that failure and applying to the Commissioner for a decision in terms of section 47(1) of FOISA.
5. The application was validated by establishing that Mr G had made a request for information to a Scottish public authority and had applied to the Commissioner for a decision only after asking the authority to review its decision.
6. As a result of this, the SPS responded to Mr G's requirement for review on 28 March 2012. The SPS confirmed that, by virtue of section 12 of FOISA, it was not required to comply with points a) and b) as to do so would exceed the prescribed cost limit of £600. It provided some calculations in support of this conclusion. Mr G still required a decision from the Commissioner relating the SPS's failure to respond to his requirement for review and *Decision 073/2012* was issued on 19 April 2012.
7. On 25 April 2012, Mr G wrote to the Commissioner, stating that he was dissatisfied with the outcome of the SPS's review and applying to the Commissioner for a decision in terms of section 47(1) of FOISA.
8. The application was validated by establishing that Mr G had made a request 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 that request. The case was then allocated to an investigating officer.

Investigation

9. The SPS is an agency of the Scottish Ministers (the Ministers) and, on 7 May 2012, in line with agreed procedures, the Ministers were notified in writing that an application had been received from Mr G and invited to comment on the application, as required by section 49(3)(a) of FOISA. Specifically, they were asked to comment on the SPS's reliance on section 12(1) of FOISA.
10. Subsequent references to contact with or submissions from the SPS are references to contact with or submissions from the Ministers on behalf of the SPS.



11. The SPS responded on 18 May 2012, with calculations of the costs taken into account for the purposes of section 12(1) of FOISA. Further explanation was sought in the course of the investigation, taking into account comments received from Mr G.
12. During the investigation, Mr G brought to the Commissioner's attention a further information request he had made on 20 April 2012. This sought further information on the 365 prisoners covered by points a) and b) and their property cards. It appeared from the SPS's response to this further request that only 314 of the relevant property cards remained within the control of the SPS on the date of the later request (20 April 2012) and on 28 March 2012. Mr G asked the Commissioner to consider whether the apparent loss of the remaining 51 cards represented a failure to comply with section 1(5) of FOISA. Further comments were sought and obtained from the SPS.
13. The relevant submissions received from both the SPS and Mr G will be considered fully in the Commissioner's analysis and findings below.

Commissioner's analysis and findings

14. In coming to a decision on this matter, the Commissioner has considered all of the submissions made to her by both Mr G and the SPS and is satisfied that no matter of relevance has been overlooked.

Section 12(1) – Excessive cost of compliance

15. Section 12(1) 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 Fees 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 exceeds this sum.
16. The projected costs the public authority can take into account in relation to a request for information are, according to regulation 3 of the Fees 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 requested in accordance with Part 1 of FOISA. The public 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.
17. Mr G submitted that the SPS should have costed compliance with points a) and b) separately. The SPS did not consider this appropriate, given that the source of the information required in each case was the same (property cards for the prisoners concerned). It also considered Mr G's understanding of how the property cards were filed to be inaccurate: they were filed alphabetically and not by prisoner location within the prison.



18. FOISA does not currently allow Scottish public authorities to aggregate one or more requests for information made by the same person. In a small number of cases, the Commissioner has found that multiple requests made in the same letter or email are so interconnected that the requests should be treated as one for the purpose of determining whether the cost of complying with the request exceeds £600.
19. In his request, Mr G states that he is looking for information as to local policy and availability of DVD disks within the prison. Having considered the terms of the request in that context, the Commissioner is satisfied that separating the information required to address points a) and b) would be a wholly artificial exercise: essentially, on any reasonable interpretation, the same tasks of interrogation would be required in each case. In the circumstances, she accepts that points a) and b) are so interconnected that the SPS was entitled to conclude that they should be treated as a single request for the purpose of determining whether the cost of complying with the request exceeds £600.

Calculation of costs

20. Mr G suggested that it would take no longer than two minutes to check an individual property card to ascertain whether it contained any record of DVDs in the prisoners' possession. He further submitted that, even if 300 prisoners had DVDs listed on their property cards, the information could be collated from each card within 10 minutes, giving a total of 50 hours. He also suggested that an hourly cost of £10.00 would be appropriate.
21. The SPS explained that there were 365 prisoners held with Abercrombie Hall at the time specified in the request. All were long term prisoners serving terms between four years and life imprisonment, with the result that the majority of them had large amounts of property and therefore large records.
22. The SPS also described the location of the records and the arrangements for their storage. This determined which officers could be assigned the work of location and retrieval, with the result that the maximum hourly rate of £15 would be applicable. The officer concerned would be required have a list of the relevant prisoners and recover the file for each of them, returning it after it had been interrogated. These tasks alone would take approximately one minute per record.
23. During the investigation, the SPS carried out a sampling exercise with a view to providing a reasonable estimate of how long it would take to respond to the request. To minimise disruption to the operation of the prison and ensure the records were managed securely, it sampled on the basis that 12 records would be removed at a time. At an average of seven pages per record, this would involve the removal of an average of 94 pages. The task would need to be repeated on at least 30 occasions to complete the work.
24. The SPS explained that, having retrieved the records, it took an average of six minutes to interrogate each property card. On this basis, it would take approximately 46.58 hours to deal with the request (i.e. to identify the prisoners, retrieve and replace the records, and interrogate those records and record the information). The total cost, at £15 per hour, would be £698.74



25. Having taken due account of the submissions made by the SPS, together with the terms of section 12(1) and the Fees Regulations, the Commissioner is satisfied that the costs identified in this case represent a reasonable estimate of the cost of complying with Mr G's request for information. Given the nature of the work required (and the Commissioner acknowledges that this will, of necessity, involve measures which may not be necessary in a less secure environment), the Commissioner does not consider that the request could have been responded to within the £600 limit. Consequently, the Commissioner is satisfied that the SPS was entitled to rely on section 12(1) of FOISA in relation to Mr G's information request, and therefore was under no obligation to comply with the request.

Steps taken to secure the information

26. As mentioned above, on 20 April 2012, Mr G wrote to the SPS on a related matter. In this request, he asked for the numbers of property cards pertaining to the 365 prisoners within Abercrombie Hall on 13 November 2011 which remained within the SPS's control on 28 March 2012 and 20 April 2012. For both dates, the number provided by the SPS was 314.
27. As a result of the above, on 22 May 2012, Mr G wrote to the Commissioner's office, referring to the apparent loss of 51 of the property records falling within the scope of his 16 November 2011 request. On the basis that it was reasonably foreseeable that these records would be required for the purposes of a response to that earlier request, he asked the Commissioner to consider whether there had been a breach of section 1(5) of FOISA.
28. Section 1(1) of FOISA states that a person who requests information from a Scottish public authority which holds it is entitled to be given that information, subject to certain qualifications which, by virtue of section 1(6) of FOISA, allow the authority to refuse to comply with the request. Section 1(4) provides that 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 receipt of the request) between the time of receipt and the time the information is given. However, this is subject to section 1(5), which states that the information is not to be destroyed before it can be given, unless it is not reasonably practicable in the circumstances to prevent the destruction from occurring.
29. The investigating officer therefore sought an explanation from the SPS of the circumstances in which the 51 property cards ceased to be within its control.
30. On 22 June 2012, the SPS advised the investigating officer that it had further responded to Mr G, informing him that its original response to his request of 20 April 2012 was inaccurate. It explained to the investigating officer that a further search found that all 365 property cards were still held, as they were not destroyed (in line with the SPS's records management policy) until three years after the liberation of the prisoner.
31. The Commissioner has considered these further submissions. In all the circumstances, the Commissioner accepts that there was a failure to understand the relevant SPS policies in dealing with Mr G's request of 20 April 2012, rather than any failure to secure information falling within the scope of his request of 16 November 2011. Therefore, the Commissioner does not find that the SPS failed to comply with section 1(5) of FOISA in this particular case.



32. In the absence of such a breach, and given the actual timescale for destruction of these records, it is not necessary for the Commissioner to consider whether it would have been reasonably practicable for the SPS to prevent routine destruction of property cards in the circumstances of Mr G's request of 16 November 2011. In practical terms, the question does not arise. More generally, from the work done by the SPS in response to the assessment of its FOI practice in 2011, the Commissioner is aware that SPS staff were reminded (as recently as September 2011) of the need to secure information which is the subject of a current request.
33. To deal with a request properly under section 1 of FOISA, a Scottish public authority needs to understand the way in which the requested information is held, including the relevant records management arrangements. There is no evidence that the SPS failed to do this in dealing with the request under consideration in this decision. On the other hand, there was clearly such a failure in dealing with the request of 20 April 2012. The SPS's response to that later request proceeded on a basic misunderstanding of the authority's arrangements for destruction of the records in question, with the result that the response was fundamentally inaccurate. While noting that the SPS's current records management policy is under review, in line with the duty to prepare a records management plan under the Public Records (Scotland) Act 2011, the Commissioner would urge the SPS to ensure that the outcomes of that review (and in particular the relevant destruction periods) are adequately understood by all staff dealing with information requests.

DECISION

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 request made by Mr G.



Appeal

Should either Mr G or the Scottish Prison Service 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
4 July 2012



Appendix

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.
- (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).
- (6) This section is subject to sections 2, 9, 12 and 14.

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.
...



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.