

Decision Notice



Decision 002/2014 Mr X and the Scottish Prison Service

Property permitted in use within prison residential units

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www.itspublicknowledge.info

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Summary

On 22 March 2013, Mr X asked the Scottish Prison Service (the SPS) for information regarding items of property “permitted in use” within residential units of HMP Edinburgh, including guidance. The SPS provided Mr X with some information in its initial response. Further information was located and provided during the Commissioner’s investigation.

The Commissioner found that the SPS had not taken adequate steps to interpret the request fully and to identify and locate all relevant information in dealing with the request. This had consequences for the way in which the SPS subsequently responded.

The Commissioner also found that the SPS was entitled to apply the excessive cost provision in section 12 of FOISA, and that it had failed to provide adequate advice and assistance on what could be provided within the cost limit in line with its duties under section 15.

The Commissioner went on to find that no further action to search for and provide additional information in relation to part (b) of the request was required because adequate additional steps were taken by the SPS during the investigation. However, she would encourage the SPS to reflect on its approach to searching for information, in the light of its failures in this case.

Relevant statutory provisions

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1), (4) and (6) (General entitlement); 12(1) (Excessive cost of compliance); 15 (Duty to provide advice and assistance)

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 22 March 2013, Mr X wrote to the SPS asking for the following information:



- (a) the number and description of (i) acoustic, and (ii) electronic musical instruments permitted in use within each residential unit at HMP Edinburgh housing sentenced prisoners (as of 22 March 2013)
 - (b) all and any information contained within any form of written guidance as to items of property allowed in use within any residential unit at HMP Edinburgh.
2. The SPS responded on 24 April 2013. It provided Mr X with copies of a prison *pro forma* request sheet (for items allowed in use in the various residential units at HMP Edinburgh) and an Argos order form for prisoners at HMP Edinburgh. It explained that these were used to inform staff and prisoners of the items allowed in use at the prison. The SPS commented that there was no mention of acoustic or electronic musical instruments on either list, from which it concluded that neither were permitted items.
3. On 27 April 2013, Mr X wrote to the SPS requesting a review of its decision. He did not accept that the material provided to him amounted to all the information held by the SPS falling within the scope of his request. He referred to guidance in the form of Governors and Managers Action Notices (GMAs) and to guitars in use at the prison.
4. The SPS notified Mr X of the outcome of its review on 14 May 2013. The SPS upheld its initial response without modification, noting that it had been unable to locate any relevant guidance and that any guitars accessible to prisoners at HMP Edinburgh would have been loaned by an education provider for self-tuition and practice.
5. On 18 June 2013, Mr X 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.
6. The application was validated by establishing that Mr X made a request for information to a Scottish public authority and 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

7. The investigating officer contacted the SPS, giving it an opportunity to provide comments on the application (as required by section 49(3)(a) of FOISA) and asking it to respond to specific questions. These focused on the searches carried out to identify and locate information falling within the scope of the request, and on aspects of the SPS's interpretation of the request.
8. During the investigation, the SPS was asked to carry out further searches, as a result of which it provided Mr X with additional information.
9. The SPS also informed the Commissioner during the investigation that it could not identify musical instruments allowed in use by prisoners without checking each prisoner's property



card. To do this, it claimed, would cost in excess of £600, with the result that it was entitled to refuse part (a) of the request under section 12 of FOISA. In responding to the Commissioner in this way, it was effectively treating part (a) as a separate request, having already responded to part (b). Mr X was given, and took up, the opportunity to comment on the application of section 12.

Overview of the SPS's handling of the information request

10. To understand the Commissioner's analysis and findings, it is necessary to understand the context of how the SPS handled Mr X's information request.
11. Mr X made a request for information about property permitted in use. The SPS did not interpret the request appropriately (see the section on Information held, below). As a result of this, the SPS responded differently to the request than it should have, particularly in the provision of advice and assistance and the way in which it responded.
12. The request contained two parts. As a result of its narrow interpretation of part (a), the SPS did not identify and hence locate all the information within the scope of that part of the request. Had the SPS interpreted part (a) differently, it would have realised earlier that section 12 applied and it could then have offered advice and assistance about what information could be provided within the cost limits. As it did not reach this conclusion during its handling of the request, the SPS proceeded on the basis of responding to both points as a single request, as they were related and within cost limits (as it thought), and there would have been no reason to consider disaggregating them. It was the outcome of this process that was appealed to the Commissioner.
13. During the Commissioner's investigation, the SPS appeared, from its submissions, to have accepted a wider interpretation of part (a) than it had initially. Its submissions demonstrated that it was at this point treating the two parts of the request quite separately, effectively disaggregating them, as it applied section 12 to part (a) and disclosed further information in respect of part (b).

Commissioner's analysis and findings

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



Information held

15. The SPS explained that there was a predetermined list of articles “allowed in use”, which set out articles a prisoner could buy or have brought into the prison without further authorisation. Part (a) was interpreted initially by the SPS as relating to items on this list.
16. During the investigation, the SPS confirmed that prisoners could seek authorisation to have other items in their possession. Once authorisation was given, the item would be “permitted in use”. On an ordinary interpretation of Mr X’s request, the Commissioner considers it reasonable to conclude that the both the list and the other items fell within the scope of the request. From the way in which the SPS responded to the investigation, it appears the SPS acknowledged this during the investigation.
17. Having reached this conclusion, the Commissioner must find that the SPS should have dealt with the request from the outset on the basis that it held information covered by the request. In not doing so, the authority failed to deal with the request in accordance with section 1(1) of FOISA.
18. The consequence of the failure to interpret the request properly at the outset was that section 12 was not considered by the SPS until the Commissioner’s investigation, and advice and assistance under the duty in section 15 was not provided during the SPS’s handling of the request.
19. The Commissioner must now consider the submissions made by the SPS during the investigation in relation to that information.

(a) – number and description of permitted items

Section 12(1) - excessive cost of compliance

20. 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.
21. 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, the authority reasonably estimates it is likely to incur in
 - (i) locating
 - (ii) retrieving and
 - (iii) providingthe information requested in accordance with Part 1 of FOISA. The maximum rate a Scottish public authority can charge for staff time is £15 per hour.



22. 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.
23. Although its submissions did not expressly state that it had disaggregated Mr X's request into two separate requests, the SPS responded in such a way that it is reasonable to conclude that this was the approach it was taking. The SPS sought to apply section 12 only to part (a), making no reference to its applicability to (b) in respect of which it provided additional information. The Commissioner accepts this approach as explained further in the section below on section 15, and has made her decision on the basis that (a) and (b) were correctly treated (from this point) as two separate requests for information.
24. The SPS submitted that the only way to establish the numbers of relevant instruments permitted in use in the prison would be to check each of the prisoner's property cards as there was no central record of these items. It also explained why it would cost more than £600 to do this, with the result that section 12(1) of FOISA would apply.
25. In its submissions, the SPS made reference to *Decision 108/2012*¹, in which the Commissioner found that it would cost more than £600 to check prisoners' property cards at HMP Glenochil for records of DVDs held by prisoners there. The SPS submitted that there would be more property cards to check in the current case, with only insignificant differences in the format of the property cards used at each prison. The SPS argued, therefore, that the substance of its arguments in *Decision 108/2012* would also apply in this case.
26. Mr X pointed out that his request differed from that in *Decision 108/2012* in what he believed to be significant respects. His request related to sentenced prisoners only, so records relating to unconvicted prisoners would not have to be searched. Even if there were unconvicted prisoners in the same units as sentenced ones, their cards would not be so extensive. Also, the earlier request sought more detailed information (DVD titles) and it should be simpler to extract the information he was seeking here.
27. The SPS explained that that it was not evident from the cards whether a prisoner was sentenced or not, so further work would be required to locate the relevant cards.
28. Having taken account of the submissions made by both Mr X and the SPS, together with the terms of section 12(1) of FOISA 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 X's request for information, and that the request could not have been dealt with within the £600 cost limit.
29. Consequently, the Commissioner is satisfied that the SPS was entitled to rely on section 12(1) of FOISA in relation to (a), and therefore was under no obligation to comply with the request.

¹ <http://www.itspublicknowledge.info/applicationsanddecisions/Decisions/2012/201200806.aspx>



Section 15 - the duty to advise and assist

30. Mr X submitted that, if the SPS wished to apply section 12(1) (to (a)), it should have offered advice as to how the request could be brought within the £600 limit.
31. 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. Examples of such advice and assistance given in the Scottish Ministers' Code of Practice on the discharge of functions by Scottish public authorities under FOISA and the Environmental Information (Scotland) Regulations 2004 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."
32. The SPS acknowledged that it had not provided Mr X with advice and assistance in relation to his request. The Commissioner notes that it would not have had reason to do this when originally responding to Mr X, as the narrow interpretation of his request meant that section 12 was not a consideration at that time. During the Commissioner's investigation, when the full scope of the request was understood and further information located, the cost issues became apparent and the SPS suggested to the Commissioner that it could provide an analysis of a sample of the prisoner records (in relation to (a)) within the cost limit. The SPS's submissions are unclear as to whether this was also put to Mr X during the investigation, but it appears not.
33. The Commissioner has noted the submissions she received on this point. That the SPS has acknowledged it did not provide advice and assistance does not automatically lead to a conclusion that it failed in its duty. Section 15(1) also requires consideration of the reasonableness of expecting the authority to do so.
34. If the SPS had interpreted the request properly at the outset, it should have reached the conclusion that the information could not be provided within the £600 limit. It would have been reasonable to expect the authority, at that point, to advise and assist Mr X by informing him of this and by suggesting what could be provided or how the scope might be narrowed. Such suggestions may have included, for example, offering sample information or explaining what other information could be provided within the limit.
35. Specifically in respect of (a), the SPS was able to advise in its submission to the Commissioner that it could provide a sample of the information. It is reasonable to assume, therefore, that it was also able to give the same advice to Mr X, and would have been able to do so earlier had information been located at request or review stages. This engagement could have been directly with Mr X.
36. The Commissioner would observe that, in his communications on this case, Mr X demonstrated he is an experienced and knowledgeable requester. He is familiar with *Decision 108/2012* and the circumstances which led up to it, and was able to make reasoned arguments referring to it. The Commissioner acknowledges Mr X's points about perceived differences between the two requests and prisons and can appreciate why he raised them. Nevertheless, she believes it would have been reasonable to conclude that there were



sufficient similarities in the circumstances of the two requests that similar cost-related issues were likely to arise in relation to both. Applying a combination of knowledge of *Decision 108/2012* and Mr X's own experience, it is reasonable to conclude that it was open to him to ask for advice and assistance. He could have asked for a sample of the information or other suggestions on how the scope might otherwise be narrowed. What was not open to Mr X in this case was the opportunity to ask for advice and assistance during the SPS's handling of the request and review, because the information had not been located and considered under section 12 at that time.

37. The Commissioner has balanced these two sets of considerations in deciding whether it would have been reasonable to expect the authority to provide advice and assistance, particularly in relation to the narrowing of what was asked for in (a). In the circumstances of this case, the Commissioner has concluded that it was reasonable to expect the SPS to provide advice and assistance to Mr X. Given the approach taken by the SPS during the Commissioner's investigation, it is also reasonable to expect such advice and assistance to have explained why the request was being disaggregated.
38. Having reached this conclusion, the Commissioner must find that the SPS failed in its duty under section 15 of FOISA to provide advice and assistance to Mr X.
39. The Commissioner would also comment that, in light of this experience, it would be good practice for Mr X, given his situation, to engage with the SPS directly in similar circumstances.
40. Having reached the above conclusions, the Commissioner requires the SPS to advise and assist Mr X by explaining the costs of providing the information requested, and what information it could provide within the cost limit.

(b) – written guidance

41. The Commissioner notes that, at the initial request stage, the SPS provided Mr X with a copy of the prison's *pro forma* request sheet and order form. Then, at the review stage, the SPS upheld its initial decision, stating that extensive searches of notices and documents had been carried out, but that no additional documents had been located.
42. The Commissioner also notes that additional documents were identified and provided to Mr X as a result of further searches carried out during her investigation.
43. The SPS explained that the initial searches of its Sharepoint document management system were carried out using the alphabetical directory within the system. It considered these adequate, noting that the additional documents were identified during the investigation because of the personal knowledge and experience of the individual responding to the investigation. A further search was carried out by the SPS, but no further information was identified in addition to those documents it had already provided to Mr X.
44. The SPS supplied copies of the system of privileges for HMP Edinburgh to the investigating officer and to Mr X. It explained how rules 45(2), 45(3) and 47(2) of the prison rules interacted



with the system of privileges and the pro forma/order form, to provide the framework for property prisoners were allowed in their cell/room.

45. The Commissioner has considered the submissions, along with the relevant provisions of the prison rules, and the related documents as provided to her and Mr X. In all the circumstances, the Commissioner is satisfied that by the close of her investigation the SPS had taken adequate steps to identify and locate any information falling within the scope of (b) and to provide that information to Mr X.
46. However, given that the searches carried out in dealing with Mr X's information request and requirement for review failed to achieve this, she must also conclude that these were not adequate in the circumstances and that, in that respect, the SPS failed to deal with (b) of the request in accordance with section 1(1) of FOISA.
47. The Commissioner does not require the SPS to taken any action in relation to this failure as adequate searches were conducted during the investigation, and any information located was provided to Mr X. However, the Commissioner would encourage the SPS to reflect on whether it could improve its approach to how it searches for information to prevent this situation occurring in the future.

DECISION

The Commissioner finds that the Scottish Prison Service (the SPS) partially complied with Part 1 of FOISA in responding to the information request from Mr X.

The Commissioner finds that:

1. The SPS failed to comply fully with the requirements of section 1(1) of FOISA by failing to identify, locate and provide all the information it held falling within the scope of the request.
2. The SPS was not obliged to provide any information falling within the scope of the request at (a), as the cost of doing so would exceed the statutory limit of £600 and therefore section 12(1) of FOISA applied.
3. The SPS failed in its duty under section 15 of FOISA to provide advice and assistance to Mr X.

The Commissioner requires the SPS to advise and assist Mr X about the application of section 12 (1) of FOISA to his request at (a), as detailed at paragraph 40 above.

The Commissioner does not require SPS to take any action in respect of the failures she has identified in response to the request at (b), as she is satisfied with the steps taken by the SPS to comply with it.



Appeal

Should either Mr X 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.

Rosemary Agnew
Scottish Information Commissioner
10 January 2014



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.
- ...
- (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.
- ...

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.
- (2) A Scottish public authority which, in relation to the provision of advice or assistance in any case, conforms with the code of practice issued under section 60 is, as respects that case, to be taken to comply with the duty imposed by subsection (1).



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.