

Decision Notice



Decision 151/2013 Mr S and the Scottish Prison Service

Whether request vexatious

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Summary

On 7 December 2012, Mr S asked the Scottish Prison Service (the SPS) for information about specific impact assessments. The SPS informed Mr S that it considered his request to be vexatious in terms of section 14(1) of FOISA. Following an investigation, the Commissioner did not accept that the request was vexatious: consequently, the SPS was obliged to comply with the request.

Relevant statutory provisions and other sources

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) and (6) (General entitlement); 14(1) (Vexatious or repeated requests); 21(8)(b) (Review by Scottish public authority)

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 7 December 2012, Mr S wrote to the SPS. This letter contained a request for information, referring to the Commissioner's *Decision 182/2012*¹ and seeking the following:
 - a) *all and any information held by the SPS relative to the "impact assessment" said to have been completed on 19 June 2012 (para 15 of the Decision)*
 - b) *all and any information held by the SPS relative to the "impact assessment" carried out in relation to: (a) GMA 12/11; (b) GMA 45A/11*
 - c) *all and any information held by the SPS within the "... guide to conducting practical impact assessments ..." provided to the SIC (para 7 of the Decision)*
 - d) *all and any information held by the SPS relative to the "steps" being taken to "address" the issue of the "inconsistent" practice of committing impact assessments to a "permanent record" (para 15 of the Decision).*

¹ <http://www.itspublicknowledge.info/applicationsanddecisions/Decisions/2012/201201419.asp>



2. On 31 December 2012, the SPS wrote to Mr S and informed him that under section 14(1) of FOISA it was not required to respond to his request as it considered the request to be vexatious. It provided reasons for this conclusion.
3. On 10 January 2013, Mr S wrote to the SPS requesting a review of its decision. He provided reasons why he did not believe his request to be vexatious.
4. The SPS responded to Mr S on 15 January 2013 in terms of section 21(8) of FOISA, informing him that no review would be carried out on the basis that it considered the request to be vexatious in terms of section 14(1) of FOISA.
5. On 25 January 2013, Mr S wrote to the Commissioner, stating that he was dissatisfied with the way in which the SPS had dealt with his request for information 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 S 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 SPS is an agency of the Scottish Ministers (the Ministers). On 15 February 2013, in line with agreed procedures, the Ministers were notified in writing that an application had been received from Mr S. They were invited to comment on the application, as required by section 49(3)(a) of FOISA, and in particular were asked to explain why they considered Mr S' request to be vexatious.
8. Subsequent references to contact with or submissions from the SPS are therefore references to contact with or submissions from the Ministers on behalf of the SPS.
9. The SPS responded on 6 March 2013, providing an explanation of its position.

Commissioner's analysis and findings

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



Section 14(1) – vexatious requests

11. Under section 14(1) of FOISA, a Scottish public authority is not obliged to comply with a request for information made under section 1(1) if the request is vexatious.
12. The Commissioner's guidance on the application of section 14(1) has been reviewed and amended since the SPS dealt with Mr S' information request and requirement for review. The approach taken to section 14(1) in this decision reflects the guidance in place at that earlier time.

Identity of applicant

13. While acknowledging the Commissioner's general view that requests under FOISA should be considered "applicant blind" and that neither the identity of the requestor nor their perceived reasoning for requesting the information should be taken into account, the SPS advised that in this case it had (it believed correctly) taken account of the applicant's identity and the context of his request in reaching its decisions.
14. The SPS submitted that, in this case that the
 - history of Mr S' dealings with the public authority in relation to this matter,
 - nature and effect of the request,
 - surrounding circumstances and
 - continuation of a pattern of behaviourwere all relevant and therefore it was reasonable to take the identity of the applicant into consideration.
15. While the Commissioner's view is that the terms "vexatious" must be applied to the request and not the requester, she also acknowledges that the applicant's identity, and the history of their dealings with a public authority, *may* be relevant in considering the nature and effect of the request and the surrounding circumstances. It may be reasonable, for example, for the authority to conclude that a particular request represents a continuation of a pattern of behaviour it has deemed vexatious in another context and therefore refuse the request as vexatious. This may be the case particularly where all relevant information has already been disclosed to the applicant *or* where (the matter having been fully addressed already through the appropriate procedures of the authority) it is unlikely that additional information would inform or alter the applicant's situation. It does not follow that such an applicant's requests should automatically be refused: each decision has to be based on its own facts and circumstances.
16. Considering the submissions made by the SPS, the Commissioner is satisfied in this case that it was appropriate for the applicant's identity and the context of the request to be taken into account in coming to a decision as to whether the request was vexatious.



Whether a request is vexatious

17. FOISA does not define the word "vexatious". However, the Commissioner's *general* approach is that a request (which may be a single request, the latest in a series of requests, or one among a large number of individual requests) may be vexatious where it would impose a significant burden on the public authority and one or more of the following conditions can be met:
- it has the effect of harassing the public authority; and/or
 - it does not have a serious purpose or value; and/or
 - it is designed to cause disruption or annoyance to the public authority; and/or
 - it would otherwise, in the opinion of a reasonable person, be considered to be manifestly unreasonable or disproportionate.
18. In this case, the SPS acknowledged that it did not consider the request to represent a significant burden. It stated that there were other factors which were of such overwhelming significance that the request should still be considered vexatious.
19. Notwithstanding the Commissioner's general approach is as set out in paragraph 18 above, she recognises that each case must be considered on its merits and in all the relevant circumstances. She does not exclude the possibility that, in any given case, a request may not involve a significant burden, but one or more of the other listed factors may be of such significance that it would be appropriate to consider the request as vexatious in the absence of a significant burden.
20. In the circumstances, the Commissioner will go on to consider the other submissions made by the SPS as to why the request should be treated as vexatious, along with the relevant submissions received from Mr S.

Comments from Mr S

21. In his application to the Commissioner, Mr S stated that the background to his application was set out in *Decision 182/2012*. That decision concerned the circumstances in which the SPS had apparently failed to conduct an impact assessment prior to giving effect to a Governors' & Managers' Action (GMA) notice concerning prisoners' access to their own personal funds for sundry purchases such as telephone credits.
22. Mr S identified a number of points which he believed had emerged from *Decision 182/2012*. He understood it to have been recognised in that investigation that the impact assessment process in relation to the authority's policies was a matter worthy of inquiry and serious comment.
23. Mr S also submitted that information of the kind he sought was readily made available in England and Wales. He stated that the purpose of his request was to evaluate the extent to which the SPS had conducted a proper impact assessment to the policy in question.



24. Mr S did not accept the SPS's reasons for deeming his request vexatious and, in particular, given the purposes outlined above, could not accept that it lacked serious purpose or value. During the investigation, he submitted that he had sought advice from his legal Counsel as to the legality of the policy in question and that the information requested was required by Counsel for this purpose.

Submissions by the SPS

25. The SPS submitted that the request focused on GMA3A/12, which was the subject of *Decision 182/2012* as mentioned above. It further submitted that Mr S had raised legal proceedings in relation to decisions taken in accordance with that SPS policy.
26. It explained that in these legal proceedings, Mr S sought to challenge (amongst others) the above decision on the transfer of funds and therefore the application of GMA3A/12. It provided a copy of the Summons (Mr S' application to the Court). It explained that the proceedings were currently sisted.
27. The SPS submitted that the information request which led to *Decision 182/2012* followed a refusal to provide additional funds. It submitted that the request under consideration in this decision was made in the same circumstances - a refusal (or lack of a decision) on a request from Mr S for additional funds.
28. The SPS explained that Mr S had raised at least two other FOI questions in relation to access to funds constrained by this policy (12 June 2012 and 30 January 2013). He had also corresponded significantly with the SPS on this matter, including complaints going back to at least November 2011.

Request does not have a serious purpose or value

29. The SPS submitted that (in its opinion) Mr S had no desire to seek the information requested. It explained that the existence, or otherwise, of the impact assessment would have no bearing on the decisions taken on the transfer of funds, nor would it change the application of the policy to future decisions. The SPS pointed out that in his legal action, Mr S sought to challenge the decisions which had arisen in relation to the application of the policy. The impact assessment of the policy, it contended, was irrelevant for the purpose of challenging what was a discretionary matter for the Governor (as provided in rule 51 of the Prisons and Young Offenders Institutions (Scotland) Rules 2011).

Request has the effect of harassing the public authority

30. The SPS submitted that given the significant history and volume of communications on this matter, it considered that Mr S' request represented a continuation of a pattern of behaviour and had the effect of harassing the authority.



31. The SPS submitted that in the past 12 months it received 423 requests for information from prisoners. Based on an average daily population of 8175, this equated to 0.05 requests per prisoner annually. In the same period, the SPS stated that Mr S made 25 requests for information (5.9% of the total) – 500 times the average number of requests per prisoner.
32. The SPS observed that Mr S' requests almost exclusively followed a complaint or were made within a complaint raised by him. It considered this to be an abuse of FOISA and to amount to attempts to harass the authority and prolong the complaints process. It continued that the proper approach when an individual was dissatisfied would be to allow the complaints process to be concluded. It noted that any complainant had recourse to the Scottish Public Services Ombudsman (SPSO) and ultimately to the courts.
33. The SPS submitted that since April 2012, Mr S had raised 126 complaints, of which 13 had been the subject of determination by the SPSO. The SPS stated that it was providing these figures to demonstrate that Mr S' motivation in relation to complaints could not be construed as being other than to harass the authority. It contended that this motivation was also evident in Mr S' use of FOISA.

Request would otherwise, in the opinion of a reasonable person, be considered to be manifestly unreasonable or disproportionate.

34. The SPS submitted that the application of the policy in question was subject to ongoing legal proceedings (see above) and had been the subject of a significant volume of communications (including additional information requests). In the circumstances, it believed a reasonable person would consider the request to be manifestly unreasonable.
35. The SPS further submitted that it did not appear proportionate that such a burden of costs should arise from a complaint and that, in the view of any reasonable person, the applicant's use of FOISA was neither reasonable nor necessary. It considered the sole purpose of the request was to harass the authority.
36. The SPS stated that, in its opinion, Mr S request for information arose exclusively as a result of the lack of a decision in relation to a request for access to his funds. In its view, a reasonable person could only conclude that it was made with the intention of harassing the decision maker (and therefore the authority) in an attempt to bring undue pressure and manipulate Mr S' desired outcome. As noted above, it considered this to be part of a pattern of behaviour by Mr S, which it regarded as unacceptable. It submitted that it was not an appropriate use of taxpayers' funds for the SPS, two other public authorities and a court to be engaged in what was essentially the same matter.

The Commissioners' conclusions

37. The Commissioner has considered the SPS's submissions carefully, along with those received from Mr S.



38. The Commissioner notes that, in his application to her, Mr S claimed that *Decision 182/2012* “concerned the circumstances in which the SPS had apparently failed to conduct an impact assessment”, and from that decision it emerged that “the authority’s initial response in terms of the impact assessment being carried out in conjunction with the promulgation of the policy was unsustainable”. While this may be the opinion of Mr S, the Commissioner notes that *Decision 182/2012* merely found that the SPS did not hold certain information requested by Mr S.
39. As mentioned above, in this case the Commissioner accepts that the applicant’s identity – and the history of his dealings with the SPS – is relevant in considering the nature and effect of the request and the surrounding circumstances. She does not accept, though, that a pattern of behaviour (as described by the SPS) could be said to emerge in this case from Mr S’ complaints and requests for information. She does not find sufficient evidence to support this contention in the information provided by the SPS.
40. Taking into consideration the volume of Mr S’ information requests to the SPS, with the relevant submissions she has received, the Commissioner has no difficulty in accepting that any reasonable person would consider that volume to be significant. Taken as a proportion of requests from prisoners as a whole, that significance becomes all the more marked. Whilst that context is relevant in considering whether the request was vexatious, there would appear to be little in the terms of this particular request or the other surrounding circumstances as presented by the SPS which would support a conclusion that this request was a continuation of a pattern of behaviour.
41. Also, on the basis of the information she has been provided with, she does not consider it reasonable to conclude that the request lacked serious purpose or value, was designed to cause disruption or annoyance, or would otherwise (in the opinion of a reasonable person) be considered manifestly unreasonable or disproportionate.
42. In coming to this decision, the Commissioner notes the SPS’s acknowledgement that dealing with the request would not cause a significant burden. Therefore, to be satisfied that the request was vexatious, the Commissioner would have to be convinced that there was an adequate link between one or more of the other factors identified by the SPS and the actual request under consideration here. On the basis of the submissions presented to her, while it may be true that there is a general pattern of behaviour exhibited in Mr S’ dealings with the SPS in relation to complaints and information requests, the Commissioner is not prepared to accept that the key behavioural characteristics claimed by the SPS are present in this particular case.
43. Taking all relevant circumstances into consideration, therefore, the Commissioner is not satisfied that the SPS was entitled to refuse to comply with Mr S’ request for information, on the basis that it was vexatious in terms of section 14(1) of FOISA. She therefore requires the SPS to deal with the request in accordance with Part 1 of FOISA, other than in terms of section 14(1).



DECISION

The Commissioner finds that the Scottish Prison Service (the SPS) failed to comply with Part 1 of the Freedom of Information (Scotland) Act 2002 (FOISA) in dealing with the information request made by Mr S. In particular, she finds that the SPS was not entitled to refuse to comply with the request on the basis that it was vexatious, in terms of section 14(1) of FOISA. She therefore requires the SPS to deal with the request in accordance with Part 1 of FOISA, other than in terms of section 14(1), by 9 September 2013.

Appeal

Should either Mr S 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.

Rosemary Agnew
Scottish Information Commissioner
25 July 2013



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.

...

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

14 Vexatious or repeated requests

- (1) Section 1(1) does not oblige a Scottish public authority to comply with a request for information if the request is vexatious.

...

28 Review by Scottish public authority

...

- (8) Subsection (1) does not require a Scottish public authority to comply with a requirement for review if –

...

- (b) the request for information to which the requirement for review relates was one with which, by virtue of section 14, the authority was not obliged to comply.

...