

Decision Notice



Decision 256/2013 Mr G and the Scottish Prison Service

Work party allocation

Reference No: 201300835

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Summary

On 24 December 2012, Mr G asked the Scottish Prison Service (the SPS) for a list of work party vacancies and details of any relevant conditions. The SPS subsequently responded to a request for a review to the effect that it held no information falling within the scope of the request. Following an investigation, the Commissioner refused to accept this but, given the general availability of the information at the time it was requested, did not require the SPS to take any action. She also identified a failure to respond to the request within the statutory timescale and asked the SPS to satisfy her that it had taken steps to ensure that similar requests were identified and dealt with timeously in future.

Relevant statutory provisions

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1), (4), (5) and (6) (General entitlement); 2(1)(a) and (2)(a) (Effect of exemptions); 8 (Requesting information); 10(1)(a) (Time for compliance); 17(1) (Notice that information is not held); 25(1) (Information otherwise accessible)

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. Mr G made a complaint (on a complaint form (PCF1)) to the SPS on 24 December 2012. Contained within that complaint, Mr G made a request for:
“... a list of any such vacancies [i.e. current vacancies on a workparty] and details of any conditions pertaining to same.”
2. The SPS responded to Mr G's complaint on 11 January 2013. They did not respond to his information request.
3. Having received no response to his information request, Mr G wrote to the SPS again on 21 February 2013, requesting a review in respect of its failure to respond.



4. The SPS notified Mr G of the outcome of its review on 19 March 2013, stating that it did not hold the information he had requested. It apologised for not responding to the initial information request.
5. On 25 March 2013, 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.
6. The application was validated by establishing that Mr G 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) and, in line with agreed procedures, the Ministers were notified in writing that an application had been received from Mr G and that an investigation into the matter had commenced. The Ministers were given an opportunity to provide comments on the application (as required by section 49(3)(a) of FOISA) and were asked to respond to specific questions. These related largely to the steps taken by the SPS to establish what relevant information it held.
8. Subsequent references in this decision to submissions sought and received from the SPS are to be read as including submissions sought and received from the Ministers on behalf of the SPS.
9. Mr G also provided comments during the investigation.

Commissioner's analysis and findings

10. 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 G and the SPS. She is satisfied that no matter of relevance has been overlooked.

Section 10 - time to respond

11. Section 10(1) of FOISA allows Scottish public authorities a maximum of 20 working days after receipt of a request to comply with a request for information, subject to certain qualifications which are not relevant in this case.



12. Mr G made his information request within an internal prison complaint, signing the complaint form on 24 December 2012. He has provided submissions in support of his assertion that he submitted the complaint and request (within the prison) on that date, while the SPS has been unable to confirm the date on which it was received.
13. In any event, the SPS has acknowledged that the request should have been identified (by the member of staff responsible for dealing with the complaint) by 9 January 2013 at the latest. It has also acknowledged that it did not provide Mr G with a response to the request within the required 20 working days. In responding to Mr G's request for review, it apologised for this delay.
14. In its submissions to the Commissioner, the SPS commented that the request was contained within a complaint form. It acknowledged that this was legitimate in terms of FOISA, but also submitted that the request was "concealed" within the complaint and this contributed to it being overlooked. Had reference been made to an information request, the SPS believed, the request would have been dealt with separately from the standard complaints procedure (which does not have the same deadlines for response as those in FOISA). In the absence of such reference, it submitted that it had no reason to conclude the complaint form contained anything other than Mr G's submissions in respect of his complaint.
15. The Commissioner has noted the SPS's explanation, but has concluded that (even assuming receipt of the request on 9 January 2013) it failed to comply with the timescale required by section 10(1) of FOISA. In passing, she would observe that the date of receipt would be the date on which the request was placed in the hands of an SPS employee within the prison, not the date on which it reached whoever was assigned responsibility for dealing with the complaint: this was a request to the SPS as a Scottish public authority, not to that particular individual.
16. Mr G's application referred to a previous decision, *Decision 182/2012*¹, where there was also an initial failure to identify and respond to a request contained within an internal prison complaint.
17. Mr G made additional comments in response to those received from the SPS. He highlighted the importance of not constructing obstacles to members of the public seeking information from public authorities, which he believed had the capacity to identify different kinds of communication and to deal with these appropriately. He also highlighted that the FOISA regime allowed requesters to make their request in any written form to any employee or agent of an authority, whilst permitting the authority to devise its own internal procedures for dealing with such requests. He identified what he considered to be positive reasons for making requests for information in the context of written complaints, concluding that he considered it entirely foreseeable that a request might be made in the context of a written complaint (and authorities should be alive to this possibility).

¹ <http://www.itspublicknowledge.info/ApplicationsandDecisions/Decisions/2012/201201419.aspx>



18. Mr G “positive reasons” to support his application were:
- (i) The possibility that authorities might have clearly defined existing procedures for logging written complaints, but no comparable procedures for logging information requests.
 - (ii) The possibility that a request “made in the abstract” might be more likely to be treated as vexatious because it was viewed as frivolous.
 - (iii) A request in the context of a formal complaint would remind the authority that the requester expected the [complaint] response “to be founded upon an accurate understanding of the information upon which the authority will act to resolve the complaint”.
19. The Commissioner notes these points, but they are essentially assertions with no specific allegations, or explanation or evidence to back them up. The Commissioner would expect any authority to have adequate tracking and monitoring systems, to deal with each case on its merits in respect of vexatiousness and to respond to complaints accurately. She also notes in relation to the third point, that all the Commissioner can do is make a decision about whether information should or should not be disclosed: it is not for her to comment on its accuracy or how a ‘complainer’ would interpret it. Any alleged failures in relation to how information is used during the course of a complaint investigation are ultimately a matter for the Scottish Public Services Ombudsman.
20. The Commissioner has set out in her *Tips for Requesters*², her advice that it is good practice for requesters to make information requests separate from other correspondence. Under the heading *Keep FOI separate*, she recommends this approach with a view to avoiding requests being overlooked by authorities. Having considered his reasons for making requests within complaints, she would still recommend it to Mr G: she does not accept that separating requests and related complaints would necessarily undermine the proper handling of either.
21. Notwithstanding this advice, the Commissioner acknowledges that any request, whether part of a complaint or other correspondence, is still an information request for the purposes of section 1(1) of FOISA, provided it meets the requirements of section 8. The Commissioner can see no reason for treating the request as other than valid, and none has been suggested to her by either the SPS or Mr G.
22. The Commissioner understands Mr G’s point that it is foreseeable that a request might be contained within an internal complaint. All SPS staff should be alive to the possibility that any item of correspondence might contain an information request. Given the nature of complaints and the general level of FOI awareness the Commissioner would expect of staff in any Scottish public authority, it is not unreasonable to expect some scrutiny of complaints (on receipt) for such requests.

² <http://www.itspublicknowledge.info/YourRights/Tipsforrequesters.aspx#foi-separate>



23. The Commissioner notes Mr G's reference to *Decision 182/2012*, which is clearly relevant to this point. More recently, the same issue has also arisen in *Decision 077/2013*³, which relates to a different SPS establishment. With a view to securing good practice, the Commissioner now expects the SPS to provide her with evidence that it has given adequate reminders to all staff of the need to scrutinise correspondence for potential information requests: she expects the SPS to do this by 31 January 2014.

Information requested by Mr G

24. In terms of section 1(4) of FOISA, the information to be provided in response to a request under section 1(1) is that falling within the scope of the request and held by the authority at the time the request is received, subject to certain qualifications which are not applicable in this case.
25. Under section 17(1) of FOISA, where an authority receives a request for information it does not hold, it must give an applicant notice in writing to that effect.
26. The SPS's review outcome stated that it did not hold the information requested by Mr G, as it did not keep or record past vacancy sheets and the database used was "maintained in real time."
27. During the investigation, the SPS explained that the prison in question operated a vacancies database, following a process in place since October 2012. This database was updated on at least a weekly basis and was therefore a "live" database. Each Friday, a member of its staff circulated the vacancy notices to managers, who in turn placed these in the accommodation wings of the prison to alert prisoners to the vacancies within the prison. Contained within the vacancy notices were the "eligibility criteria" for work areas, for example, the need for manual handling certificates to be held by applicants.
28. The SPS supplied examples of such notices to the Commissioner. It explained that each week the vacancy notice was replaced and the old one destroyed.
29. The SPS explained that when Mr G's requirement for review was received on 21 February 2013 (and the request was then dealt with), the database had been subject to a number of changes to reflect the changes in vacancies since the date of his request (24 December 2012). It also explained that the database was not updated on Friday, 21 December and that no vacancy notices were circulated that week.
30. The SPS confirmed that the prison in question had an *ad hoc* system in place for posting vacancies, employing an Excel spreadsheet of its own creation. This was overwritten weekly and that data were not saved or archived. The spreadsheet was on standalone computer, which was not connected to the SPS's corporate systems. The SPS submitted that the database was simply a practical tool to meet a particular need: there was no more formal requirement to maintain it and its operation was not covered by any records management code or policy.

³ <http://www.itspublicknowledge.info/ApplicationsandDecisions/Decisions/2013/201300450.aspx>



31. Section 1(5) of FOISA states that information requested has not to be destroyed before it can be given, unless it is not reasonably practicable in the circumstances to prevent that destruction. The SPS was asked to comment on section 1(5), and in particular on whether or not it was reasonably practicable for it to prevent the occurrence of any destruction of the relevant records which did take place.
32. The SPS replied that having identified the request, it was not reasonably practicable in the circumstances to prevent the destruction of the records. The database was a live database. The SPS explained that the vacancies available would change on a daily basis, but the overall picture was only gathered on a weekly basis for the purpose of informing prisoners of vacancies. Given the nature of the database and the destruction arrangements narrated above, it did not hold the information when it came to deal with the request.
33. In response to the SPS's comments, Mr G maintained that, on any view, the information requested was held at the time of the request and the fact that it was no longer held at some later point simply reflected the authority's failure to retain the information in conformity with the requirements of FOISA. He did not take issue with the accuracy of the SPS's narration of the process for dealing with workparty vacancies.
34. The Commissioner finds it difficult to establish exactly what information falling within the scope of Mr G's request was held by the SPS on the date it received the request. On the balance of probabilities, having considered the SPS's submissions, she considers it likely that information on the workparty vacancies then current would have been held on receipt of the request. While the arrangements for managing that information narrated by the SPS appear reasonable and proportionate given the nature of the information, the Commissioner also considers it likely that it would have been reasonably practicable to prevent the destruction of the information held at that time.
35. In all the circumstances, therefore, the Commissioner must find that the SPS failed to deal with Mr G's request in accordance with section 1(1) of FOISA. She does not, however, consider it necessary in the circumstances to require the SPS to take any steps to rectify that failure. She has taken into consideration the fact that the information is routinely made available to prisoners in their accommodation areas, as narrated by the SPS in its submissions. Mr G was made aware of this aspect of the SPS's submission during the investigation and made no comment. In the circumstances, the Commissioner is inclined to accept that he should have been aware of that general availability when he made his request.
36. While the SPS did not choose to do so, there would appear to be no reason why it should not have given Mr G notice that the information he had requested was exempt under section 25(1) of FOISA. In the circumstances, it would appear perverse to require the SPS to take any action in respect of its failure to prevent the destruction of the information.



DECISION

The Commissioner finds that the Scottish Prison Service (the SPS) partially complied with Part 1 of the Freedom of Information (Scotland) Act 2002 (FOISA) in responding to the information request made by Mr G. In failing to take reasonable steps to prevent the destruction of the requested information on receipt of the request, the SPS failed to comply with section 1(1) of FOISA. Given the general availability of the information, the Commissioner does not require the SPS to take any action in response to this failure.

The Commissioner also finds that the SPS failed to respond to Mr G's request within the timescale set by section 10(1) of FOISA. While she has asked for certain action to be taken with a view to securing good practice in this connection, she can identify no steps she can require the SPS to take to comply with section 10(1) in relation to this particular breach.

Appeal

Should either Mr G or the Scottish Prison Service (the SPS) 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
19 November 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.
...
- (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.

2 Effect of exemptions

- (1) To information which is exempt information by virtue of any provision of Part 2, section 1 applies only to the extent that –
 - (a) the provision does not confer absolute exemption; and
...
- (2) For the purposes of paragraph (a) of subsection 1, the following provisions of Part 2 (and no others) are to be regarded as conferring absolute exemption –
 - (a) section 25;
...

8 Requesting information

- (1) Any reference in this Act to "requesting" information is a reference to making a request which-



- (a) is 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) states the name of the applicant and an address for correspondence; and
 - (c) describes the information requested.
- (2) For the purposes of paragraph (a) of subsection (1) (and without prejudice to the generality of that paragraph), a request is to be treated as made in writing where the text of the request is-
- (a) transmitted by electronic means;
 - (b) received in legible form; and
 - (c) capable of being used for subsequent reference.

10 Time for compliance

- (1) Subject to subsections (2) and (3), a Scottish public authority receiving a request which requires it to comply with section 1(1) must comply promptly; and in any event by not later than the twentieth working day after-
- (a) ..., the receipt by the authority of the request; or
- ...

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.

...



25 Information otherwise accessible

- (1) Information which the applicant can reasonably obtain other than by requesting it under section 1(1) is exempt information.

...