



Scottish Information
Commissioner

**Decision 097/2006 – Mr H and the Scottish Prison
Service**

*Request for a copy of the Health and Safety Policy for Her Majesty's
Prison Dumfries*

**Applicant: Mr H
Authority: Scottish Prison Service
Case No: 200503172
Decision Date: 5 June 2006**

**Kevin Dunion
Scottish Information Commissioner**

Kinburn Castle
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Decision 097/2006 – Mr H and the Scottish Prison Service

Request for a copy of the Health and Safety Policy for Her Majesty's Prison (HMP) Dumfries – partially withheld on basis of section 35(1)(f) of the Freedom of Information (Scotland) Act 2002 (FOISA) – law enforcement

Facts

Mr H submitted an information request to HMP Dumfries, which is part of the Scottish Prison Service (the SPS), for a copy of the Health and Safety Policy for HMP Dumfries. The SPS provided Mr H with a copy of the General Statement of Health and Safety Policy for HMP Dumfries. Mr H submitted a request for review on 19 October 2005, and the Governor of HMP Dumfries subsequently provided Mr H with a redacted version of the Health and Safety Policy for HMP Dumfries. The SPS relied on the exemption under section 35(1)(f) of FOISA (maintenance of security and good order in prisons) for withholding some of the information contained in the Policy from Mr H.

Outcome

The Commissioner found that the SPS (SPS) complied with Part 1 of FOISA in withholding the redacted information from Mr H.

However, the Commissioner found that the SPS breached Part 1 of FOISA in the manner in which it handled Mr H's request in that it failed to comply with the requirements of sections 10, 16 and 21.

Appeal

Should either Mr H or 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 of receipt of this notice.



Background

1. On 1 September 2005, Mr H submitted an information request to the Governor of HMP Dumfries (the Governor) for a copy of the Health and Safety Policy for HMP Dumfries (the Policy).
2. The SPS responded on 10 October 2005 and provided Mr H with a copy of the General Statement of Intent for the Health and Safety Policy for HMP Dumfries.
3. On 19 October 2005, Mr H submitted a request for review in respect of his request for a copy of the Policy.
4. The Governor provided Mr H with a redacted version of the Policy on 11 November 2005.
5. On 22 November 2005, Mr H applied to me for a decision as to whether the SPS had breached Part 1 of FOISA in withholding information from him. The case was subsequently allocated to an investigating officer.

The Investigation

6. Mr H's appeal was validated by establishing that he had made a valid information request to a Scottish public authority under FOISA and had appealed to me only after asking the authority to review its response to his request.
7. A letter was sent by the investigating officer to the SPS on 1 December 2005, in terms of section 49(3)(a) of FOISA. The SPS was asked to provide amongst other items, a copy of the information which had been withheld and a detailed analysis of the exemption(s) that it had relied upon in withholding the information from Mr H. The SPS was also asked to provide a detailed analysis of its consideration of the public interest test in relation to these exemptions, where relevant.
8. A response was subsequently received from the Scottish Executive's Freedom of Information Unit on behalf of the SPS (the SPS is an Executive Agency of the Scottish Executive). The references in this decision to submissions made by the SPS are to submissions made on behalf of the SPS by the Scottish Executive.



Submissions from the SPS

9. In its submissions to my Office, the SPS sought to rely on the exemption under section 35(1)(f) of FOISA for withholding information contained in the Policy from Mr H.
10. I will consider the SPS's reasoning for relying on this exemption further in the section on Analysis and Findings below.

The Commissioner's Analysis and Findings

11. In its response to my Office, the SPS provided a redacted and an unredacted copy of the Policy, together with an explanation of the exemption that it was relying on in not disclosing the redacted information to Mr H.
12. As mentioned above, the SPS has sought to rely on the exemption under section 35(1)(f) for withholding the information from Mr H.

The application of section 35(1)(f) – law enforcement

13. In terms of section 35(1)(f) of FOISA, information is exempt information if its disclosure under FOISA would, or would be likely to, prejudice substantially the maintenance of security and good order in prisons or in other institutions where persons are lawfully detained.
14. Although there is no definition of substantial prejudice under FOISA, it is my view that for an authority to be able to show that release of the information would be substantially prejudicial it would have to show that the damage caused by disclosing the information would be real or very likely, not hypothetical. The SPS would also have to show that the harm caused by such a release would be significant, not marginal, and it would have to occur in the near future and not in some distant time.
15. The exemption under section 35(1)(f) of FOISA is subject to the public interest test contained in section 2(1)(b) of FOISA . This means that even if the SPS considered that the release of the information would, or would be likely to, prejudice substantially the maintenance of security and good order in prisons etc., the information should still have been released if, in all the circumstances of the case, the public interest in disclosing the information was outweighed by the public interest in maintaining the exemption.



16. The information withheld from Mr H includes the names of personnel who are involved in key tasks and roles that are covered by the Policy. The SPS has indicated that if this information were to be disclosed, prisoners may use this information to predict the movements of particular prison staff in the event of a Health and Safety incident. The SPS contends that this could have implications for staff safety and security of the prison.
17. Details of the location of three documents referred to within the version of the Policy provided to Mr H have also been withheld on the basis that should prisoners know where these documents are held, they may attempt to access these documents (and other associated documents) during a disturbance. The SPS contend that this could lead to prisoners being able to predict the movements of staff and that prisoners may target (through making constant requests and demands) qualified staff. The SPS has stated in relation to one document, that release of the whereabouts of this document would be of assistance to a prisoner wishing to start a fire.
18. In considering the public interest test, the SPS sought to balance the public interest in disclosing the information against the public interest in withholding the information. In doing so, the SPS argued that the essential information about health and safety requirements at the prison has already been released to Mr H and has acknowledged that while there is a public interest in accessing general details on health and safety (although technically the health and safety at work requirements do not apply directly to prisoners as they are not employees), there is little or no public interest in document locations and identities of staff being made available. Consequently, the SPS considers that the public interest in maintaining this exemption outweighs the public interest in disclosure of the information.
19. The SPS has also submitted that disclosure of the information to Mr H may lead to him disrupting the running of the prison and targeting and intimidating specific staff members, and that this is another example as to why the public interest lies in favour of withholding the information.
20. In order to determine whether the SPS has relied upon the exemption under section 35(1)(f) correctly I must firstly consider whether the information disclosed would come within the scope of this exemption. I must then go on to consider the application of the substantial prejudice test. Finally, if I am satisfied that the information is exempt under section 35(1)(f), I must consider the application of the public interest test.



21. In considering the submissions from the SPS in respect of its reliance on the exemption under section 35(1)(f), I must be satisfied that the SPS has shown that disclosure of the information withheld would, or would be likely to, prejudice substantially the maintenance of security and good order in prisons or in other institutions where persons are lawfully detained. I am satisfied that the information which has been withheld from Mr H is information which is used in the running of HMP Dumfries. I am satisfied that disclosure of this information would prejudice substantially the maintenance of security and good order in the prison on the basis that the effective working of personnel who are involved in carrying out key tasks in the event of, for example, a fire taking place, would, or would be likely to, be blocked or curtailed (and therefore prejudiced substantially) should this information be released. As a result this may lead to the health and safety issue becoming less manageable. I also accept that release of this information may lead to targeting and intimidating named staff and this would prejudice substantially the maintenance of security and good order in the prison. I am therefore satisfied that the information which has been withheld from Mr H would be exempt under section 35(1)(f).
22. Because I am satisfied that the information which has been withheld from Mr H is exempt under section 35(1)(f) I am now required to go on to consider the application of the public interest test. FOISA does not define the public interest but it has been described as something which is of serious concern and benefit to the public. It has also been held that public interest does not mean what is of interest to the public but what is in the interest of the public. I am required to consider whether the public interest in disclosing the information which has been withheld from Mr H is outweighed by the public interest in withholding it.
23. In taking into consideration the submissions made by the SPS I accept that the key information relating to the Health and Safety Policy for HMP Dumfries has been released to Mr H. I also accept that if this redacted information were to be disclosed and subsequently misused then this could affect the running and security of the prison and that this would not be in the public interest. It is my view that the general public have an expectation that prisons are run in a manner which ensures that they are kept secure, safe and that good order is maintained for the benefit of those detained within the prison and also the staff members employed by the prison. As a result, I accept that where release of this information may impact on and affect the security, safety and good order of the prison it is not in the public interest to require disclosure. I accept that on balance the public interest in withholding the redacted information from Mr H outweighs the public interest in disclosure.



24. In his submissions to my office Mr H expressed his concern that four policy documents which are listed at the back of the Health and Safety Policy had not been provided to him. This was despite the fact that the Health and Safety Policy indicates that these policy documents are attached. In communication, the SPS has advised that these policies do not comprise an intrinsic component of the Health and Safety Policy. The SPS state that reference to these being attached to the Health and Safety Policy refer to the location of these policies and not that they are physically attached to the Health and Safety Policy itself. The SPS contends that it did not consider that these policies came within the scope of Mr H's Freedom of Information request and as such these were not provided to him.
25. I am satisfied that these policies are related to the procedures for ensuring health and safety in HMP Dumfries. However, I am not satisfied that the policies themselves stand alone from the Health and Safety Policy that has been provided to Mr H. The fact that the narrative under paragraph 20 of the policy indicates that these documents are attached to the policy suggests that this is the case and also that these have a bearing on the overall health and safety policy. I therefore do not accept the submissions from the SPS that these policies would not fall within the scope of Mr H's Freedom of Information request.
26. I require the SPS to release the following policies to Mr H;
 - Smoking Policy
 - Blood and Body Fluid Spillage Policy
 - Visitors Health and Safety Policy
 - Green Policy

The application of section 39(1) – health, safety and the environment

27. In its submissions to my office the SPS indicated that it had considered the application of the exemption under section 39(1) but that it had decided that the exemption in section 35(1)(f) was more appropriate. Although the SPS has not relied on the exemption under section 39(1), for completeness I have considered whether reliance on this exemption would be appropriate in this case. Following further communication with the SPS it has provided my office with reasons why it considered the application of the exemption under section 39(1).
28. The exemption under section 39 is a qualified exemption and so the application of the public interest test which has been explained in paragraph 22 above would also be applicable in this case.



29. In order for a public authority to rely on this exemption, it must show that the disclosure of the information would, or would be likely to, endanger the physical or mental health or the safety of an individual. I consider that this exemption is sufficiently broad to cover information that may indirectly harm a person or a group of persons. It is broad enough to cover harm which could foreseeably occur in the future as well as immediate harm. Danger to physical health could mean a danger to a person as a result of physical injury, illness or disease. Danger to mental health could mean any type of psychological illness which results from information being released.
30. In justifying its consideration of the exemption under section 39 the SPS has submitted that it has relied on the same arguments as it advanced for reliance on the exemption under section 35(1)(f). The SPS contend that if the redacted information was disclosed to Mr H then this could lead to prisoners being able to predict staff movements and to target individual staff. The SPS asserts that it is a real concern that if the information were to be released this could lead to it being misused to orchestrate particular events that would involve certain staff members. Where this may occur the SPS states that this would allow prisoners to predict where staff will be deployed to and what their movements would be.
31. The SPS states that it is concerned that there is a programme of intended disruption and intimidation on going in some areas and that this is used to seek to target, manipulate and intimidate certain staff members. The SPS conclude that this possible manipulation of staff could constitute both a security risk to the prison and a potential personal safety risk to the officers who could suffer some degree of physical and mental harm.
32. In considering the application of the public interest test the SPS has relied on the same arguments as it advanced for the public interest test under section 35(1)(f). This is detailed in paragraphs 18 and 19 above.
33. In considering the submissions from the SPS in respect of its consideration of the application on the exemption under section 39(1) I am satisfied that the redacted information that has been withheld from Mr H would be exempt under section 39(1). I am satisfied that if this information were to be released it may cause prisoners to have information which could lead to them being able to predict or orchestrate staff movements and this could pose a risk to the health and safety of the individual officers concerned. I am satisfied that this could foreseeably lead to a health and safety risk to prison staff in the future.



34. In taking into consideration the public interest test arguments that have been advanced by the SPS I am satisfied that the public interest in withholding the redacted information from Mr H would outweigh the public interest in disclosure. I am satisfied that this is the case as I accept the submission made by the SPS that Mr H has received the key information about the Health and Safety Policy for HMP Dumfries. It is my view that there is no public interest in disclosing information which may lead to an individual or a group of individual's health or safety being compromised. On balance I am therefore satisfied that the public interest in withholding the redacted information under the exemption in section 39 is not outweighed by the public interest in disclosing the information.
35. Had the SPS chosen to apply the exemption under section 39(1) in this instance I would have accepted that it had been applied correctly.

Information that has been disclosed to Mr H

36. I am satisfied that the information which has been disclosed to Mr H provides him with the key information relating to the Health and Safety Policy for HMP Dumfries. However, in taking into consideration the submissions that have been made by Mr H I accept that the redacted version of the Health and Safety Policy that he has received does appear to be somewhat jumbled and incoherent. In particular, the table of contents that has been provided to Mr H lists points 1-18 when in fact the document contains entries under 20 individual points. Also, the following listings on the contents page do not tie up with the narrative in the main body of the document.

- The descriptions given for the information which appears under points 16, 17 and 18 do not actually reflect what does appear under these points in the main body of the document.
- The table of contents that Mr H has received details the Fire Safety Officer and the Deputy Fire Safety Officer at point 4 and point 4.1 respectively, however within the document, at point 4 mention is made of the Fire Safety Executive and the Fire Safety Officer, while no indication is given as to the Deputy Fire Safety Officer.
- At point 15 in the table of contents mention is made of the Staff Training and Development Officer, however in the document itself under point 15 the title given is Staff Training and Development Manager.
- The table of contents listing ends at point number 18, however the content of the document itself ends at point 20.

As a result, although I am satisfied with the information that has been disclosed to Mr H I would require the SPS to provide Mr H with an accurate copy of the table of contents page.

37. The SPS did not respond to Mr H's request for information within 20 working days as laid down in section 10 of FOISA.



38. The SPS did not respond to Mr H's request for review within 20 working days as laid down in section 21 of FOISA.
39. When the SPS did respond to Mr H it did not provide him with an explanation or cite any exemptions under FOISA as to why some of the information within the Health and Safety Policy for HMP Dumfries had been withheld from him. This is contrary to section 16 of FOISA.
40. In its submissions to my office the SPS has indicated that it has acknowledged that there have been several procedural defects in its dealing with Mr H's case. The SPS has accepted that it did not respond to Mr H's initial request for information, or his request for a review within the timescales laid down in FOISA. The SPS also accepts that it did not provide Mr H with a written explanation of the reasons for the non-release of the information. The SPS has identified that there is a difficulty in recognising a Freedom of Information request under the current system and so it is considering using another method for the submission of Freedom of Information Requests.

Decision

I find that, in withholding the redacted information from the HMP Dumfries Health and Safety Policy from Mr H the SPS dealt with Mr H's request for information in accordance with Part 1 of the Freedom of Information (Scotland) Act 2002. I find that the exemption in section 35(1)(f) was relied upon correctly by the SPS.

As indicated in paragraph 26 above I do require the SPS to provide Mr H with the following policies; Smoking Policy, Blood and Body Fluid Spillage Policy, Visitors Health and Safety Policy and the Green Policy.

As indicated in paragraph 36 above I do require the SPS to provide Mr H with an accurate copy of the table of contents page.

I require the SPS to provide Mr H with this information within 42 days of the date of this decision notice.

I find that the SPS failed to comply with Part 1 of the Freedom of Information (Scotland) Act 2002 by failing to comply with section 10 of FOISA in responding to Mr H's request for information.

I find that the SPS failed to comply with Part 1 of the Freedom of Information (Scotland) Act 2002 by failing to comply with section 21 of FOISA in responding to Mr H's request for a review.



I find that the SPS failed to comply with Part 1 of the Freedom of Information (Scotland) Act 2002 by failing to comply with section 16 in not providing Mr H with a refusal notice.

I am not directing the SPS to take any specific action in relation to these technical breaches on the basis that I accept that the SPS has recognised its shortcomings and is taking steps to ensure this does not reoccur. I am satisfied that these breaches on the part of the SPS did not curtail Mr H in exercising his rights.

Kevin Dunion
Scottish Information Commissioner
5 June 2006