



# Decision Notice 087/2024

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## Education services in Scottish prisons – audit of contract

**Authority: Audit Scotland**  
**Case Ref: 202200922**

### Summary

The Applicant asked the Authority for information relating to its audit of an education services contract between the Scottish Ministers/Scottish Prison Service (SPS) and Fife College. The Authority stated that it did not hold the information requested. The Commissioner investigated and was satisfied that the Authority did not hold the information requested, but he found that its response only partially complied with FOISA.

### Relevant statutory provisions

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1), (2) and (6) (General entitlement); 10(1) (Time for Compliance); 15(1) (Duty to provide advice and assistance); 17(1) (Notice that information is not held); 21(10) (Review by Scottish public authority); 47(1) and (2) (Application for decision by Commissioner)

The full text of each of the statutory provisions cited above is reproduced in Appendix 1 to this decision. The Appendix forms part of this decision.

### Background

1. On 10 June 2022, the Applicant made (by recorded delivery) the following request for information to the Authority in relation to a five-year education services contract between the Scottish Ministers/SPS and Fife College, which was due to expire on 31 July 2022:

“... I am interested to know whether your agency has audited the current contract or been involved in the process to ‘extend it’. I am accordingly requesting all and any information

held by your agency in relation to any audits of the current contract and its possible 'extension'."

2. The Authority failed to respond to the Applicant's request of 10 June 2022.
3. On 19 July 2022, the Applicant wrote to the Authority requesting a review on the basis that it had failed to respond to their request for information.
4. The Authority notified the Applicant of the outcome of its review on 5 August 2022. The Authority explained that it had not received the original request, stating it shared premises with other organisations and had been unable to identify who had "signed for" the request. The Authority confirmed that it did not hold the information requested in terms of section 17 of FOISA. The Authority considered that the request related to the audit of Fife College and explained that a named private firm were the College's auditors and would hold any papers or information relating to the audit of the College (but would not themselves be subject to FOISA). The Authority provided a copy of Fife College's published annual report (publicly available on its website) and directed the Applicant to the College's FOI team for further information requests on the topic.
5. On 12 August 2022, the Applicant wrote to the Commissioner, applying for a decision in terms of section 47(1) of FOISA. The Applicant stated that they were dissatisfied with the outcome of the Authority's review because:
  - by responding in terms of Fife College's audit arrangements, the Authority had failed to understand their specific request and, consequently, not carried out appropriate searches before applying section 17 of FOISA
  - their request related to the auditing of a specific contract and to advice regarding its extension
  - the Authority had failed to respond to their original request and its review response had failed to include the statutory right of appeal content required by FOISA.

## **Investigation**

6. The Commissioner determined that the application complied with section 47(2) of FOISA and that he had the power to carry out an investigation.
7. On 1 September 2022, the Authority was notified in writing that the Applicant had made a valid application and the case was subsequently allocated to an investigating officer.
8. Section 49(3)(a) of FOISA requires the Commissioner to give public authorities an opportunity to provide comments on an application. The Authority was invited to comment on this application and to answer specific questions. These focused on the Authority's interpretation of the request, how it established what information (if any) it held falling within the scope of that request, its failure to respond to the initial request and the content of its review response.

## Commissioner's analysis and findings

9. The Commissioner has considered all of the submissions made to him by the Applicant and the Authority.

### Section 17(1) – Notice that information is not held

10. Section 1(1) of FOISA provides that a person who requests information from a Scottish public authority which holds it is entitled to be given that information by the authority, subject to qualifications which, by virtue of section 1(6) of FOISA, allow Scottish public authorities to withhold information or charge a fee for it. The qualifications contained in section 1(6) are not applicable in this case.
11. The information to be given is that held by the authority at the time the request is received, as defined in section 1(4). This is not necessarily to be equated with information an applicant believes the authority should hold. If no such information is held by the authority, section 17(1) of FOISA requires it to give the applicant notice in writing to that effect.
12. The standard of proof to determine whether a Scottish public authority holds information is the civil standard of the balance of probabilities. In determining where the balance of probabilities lies, the Commissioner considers the scope, quality, thoroughness and results of the searches carried out by the public authority. He also considers, where appropriate, any reason offered by the public authority to explain why it does not hold the information.
13. The Commissioner's remit here, however, extends only to the consideration of whether the Authority actually held the relevant information requested and whether it complied with Part 1 of FOISA in responding to the request. The Commissioner cannot comment on whether a public authority should have recorded any, or more, information about a particular event or process.

### *The Applicant's submissions*

14. The Applicant considered the Authority failed to understand their specific request and, consequently, failed to carry out appropriate searches before issuing a section 17 notice under FOISA.
15. The Applicant explained that the Authority provided information in its review response about the general auditing arrangements of Fife College as an institution and not in terms of their specific request relating to the audit and provision of advice around a specific contract and its extension.
16. The Applicant noted that the SPS had previously entered into a five-year service contract with Fife College (ending July 31 2022) that they believed was worth £22 million. The Applicant expressed concerns about the quality of service provided under that contract and stated that it was their understanding that the Authority had entered into a two-year extension of the contract without undertaking a competitive tendering process.
17. The Applicant argued that the Authority has statutory responsibility for the oversight of devolved public sector bodies in relation to financial management and governance, including "value for money", in service delivery and, as such, it was conceivable that it may have offered advice about the propriety of a contract extension between SPS and Fife College.

### *The Authority's submissions*

18. The Authority explained that it understood the request to be seeking all the information it held in relation to any audits of the current contract and its possible extension and its response was framed accordingly.
19. The Authority provided further submissions to the Commissioner about its role, the process by which public bodies are audited and why it would not hold the specific information sought.
20. The Authority's review response addressed the Applicant's request in terms of Fife College and provided a copy of the College's Annual Audit Report of December 2021.
21. The Commissioner asked the Authority why it did not respond in terms of all the public authorities named in the Applicant's request: Fife College, the SPS and the Scottish Ministers.
22. The Authority explained that it was not, at the time of the request, the auditor of either Fife College or the SPS and provided details of the naming the two private firms appointed to audit those bodies and the process and law by which those appointments were made. The Authority stated that, once appointed, auditors act independently in carrying out their duties and reporting the results of their work to the audited body.
23. The Authority noted that appointed firms are required to provide a copy of a public body's Annual Audit Report to it for [publication on its website](#)<sup>1</sup> but that, in line with [Decision 126/2008](#)<sup>2</sup> of the Commissioner, these firms are not subject to FOISA.
24. The Authority stated that any working documents relating to audits of public bodies are held by the auditing firm, not by it. The Authority also confirmed there is no exchange of information between it and the private firms carrying out individual audits (e.g., working papers).
25. The Authority explained that, in general terms, the circumstances under which a review of a contract held by a public body, by its appointed auditors, may take place as part of the annual audit process and be reported in the Annual Audit Report for that public body.
26. The Authority stated that it had reviewed the Annual Audit Report for the SPS for 2019/20 to 2021/22 (available on its website) and found no reference to Fife College.
27. Having explained that it was not the auditor of Fife College or the Scottish Prison Service, the Authority also noted that it is independent of the Scottish Government and does not provide advice on specific contracts.
28. In view of this, and given that FOISA does not require a public authority to create information to respond to an information request, the Authority stated that there was not (and would not be) any information to search for within the scope of the Applicant's request.

### *The Commissioner's view*

29. In view of the Authority's review response, which deals directly only with audit arrangements at Fife College, the Commissioner understands why the Applicant considers that it misinterpreted their request.

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<sup>1</sup> <https://www.audit-scotland.gov.uk/our-work/annual-audits>

<sup>2</sup> <https://www.itspublicknowledge.info/sites/default/files/Decision180-2021.pdf>

30. The Commissioner considers that the Authority should have responded in terms of the specific elements of the Applicant's request and ensured that its response addressed all of the public authorities they had named.
31. Given the Authority's stated role is to check public bodies are spending public money properly, efficiently and effectively, the Commissioner agrees that, on the face of it, it was reasonable to think it may have held information relating to a [contract reportedly valued at £22 million](#).<sup>3</sup>
32. However, from the Authority's submissions, the Commissioner is satisfied that the Authority did understand the Applicant's request. He is also satisfied with its explanation that it did not audit either Fife College or the SPS, that working documents relating to audits are held by the auditing body and that it does not provide specific advice to the Scottish Government on contracts.
33. In the specific circumstances, the Commissioner is satisfied, on balance, that the Authority does not (and did not, on receipt of the request) hold the information requested by the Applicant.
34. The Commissioner therefore concludes that the Authority was correct to give the Applicant notice, in terms of section 17(1) of FOISA, to that effect.
35. That said, the Commissioner was satisfied of his position based on submissions the Authority provided to him during the course of his investigation. In other words, the Commissioner was persuaded on the basis of explanations that were not provided to the Applicant in the Authority's response to their information request.
36. In view of this, the Commissioner will now go on to consider the Authority's duty, under section 15 of FOISA, to provide advice and assistance to the Applicant.

### **Section 15 – Duty to advise and assist**

37. Section 15(1) of FOISA provides that 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.
38. As noted above, the Commissioner considers that the Authority's review response – in terms of Fife College's audit arrangements only – would have created the reasonable impression in the Applicant's mind that it had not fully understood their request.
39. While technically correct (in terms of stating that the information was not held), the Commissioner does not consider that the Authority's review response was as clear or helpful to the Applicant as it should have been.
40. As set out earlier, the Authority provided more detailed explanation setting out why it did not hold the information requested (including that relating to contracts or advice on contracts).
41. The Commissioner notified the Authority during his investigation that he considered this information should have been provided to the Applicant as part of its review response in order to satisfy its duty under section 15 of FOISA (which it subsequently did).

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<sup>3</sup> <https://www.thecourier.co.uk/fp/news/fife/485255/college-wins-22-million-prison-education-contract/>

*The Commissioner's view*

42. Taking all of the above into consideration, the Commissioner considers that the Authority failed to comply with its duty under section 15(1) of FOISA to provide advice and assistance.
43. However, given that the Authority subsequently provided further advice and assistance to the Applicant during the course of his investigation, the Commissioner does not require any further action be taken in respect of this failure.

**Section 10(1) – failure to respond to original request**

44. Section 10(1) of FOISA gives Scottish public authorities a maximum of 20 working days following the date of receipt of the request to comply with a request for information. This is subject to qualifications which are not relevant in this case.
45. The Applicant submitted their request for information via recorded delivery on 10 June 2022. The delivery was “signed for” on 14 June 2022 by “AUDIT” but the Authority failed to respond to the request.

*The Authority's submissions*

46. The Authority, in its review response, stated that it had not received the Applicant's initial request and that their request for review was the first notification of the request.
47. The Authority acknowledged the proof of delivery provided by the Applicant but noted that a search had been unable to locate the original request, nor the individual responsible for signing for its delivery.
48. The Authority explained that its office is within a shared building and that its reception desk is operated by the building's landlord. The Authority noted that, at the time of request, authority staff were primarily working from home and post collected by reception staff was forwarded to employees' home addresses and it had made enquiries at reception following receipt of the Applicant's review request, but these had been unsuccessful in locating the original request.
49. The Authority also confirmed that it was not aware of significant issues with this system in terms of missing deliveries.
50. The Authority submitted that, while the request had been misplaced, it considered it had not received it and that it had not therefore been responsible for it being misplaced,

*The Commissioner's view*

51. On the basis of the proof of delivery provided by the Applicant and the fact they sent it to the address listed on the Authority's website for written FOI requests, the Commissioner considers, on balance, that their information request was received by the Authority.
52. The Commissioner therefore considers that the Authority failed to respond to the request in line with the timescale set out in section 10(1) of FOISA.
53. However, based on the Authority's submissions and its description of its processes regarding recorded delivery, the Commissioner considers that its failure to respond to the Applicant's request an aberration and, as such, he does not require it take any further action.

## Section 21 – content of review response

54. Section 21(10) of FOISA requires an authority to include in its review response the right of application to the Commissioner for a decision (conferred by section 47(1)), and the right of appeal to the Court of Session on a point of law (conferred by section 56).
55. The Commissioner notes that the Authority's review response contains neither of those statutory rights.
56. The Authority explained that the right of application to the Commissioner is added as standard to the footer of emails issued in response to FOI requests but, as the review response was issued to the Applicant in hard copy, this had not been added to the response. The Authority apologised for its oversight and provided an example of the right being included in a response to a previous information request.
57. However, the Authority was unaware of the requirement to provide the right of appeal to the Court of Session in its review response.
58. The Commissioner signposted the Authority to his guidance on the [content of notices](#)<sup>4</sup> and it apologised for its oversight and committed to adding this right of appeal to future review responses.

### *The Commissioner's view*

59. As the Authority's review response contained neither of the statutory rights of appeal required, the Commissioner must find that the Authority failed to comply with section 21(10) of FOISA.
60. The Commissioner accepts that the Authority's failure to comply was part aberration and part lack of awareness, and he is satisfied with its commitment to ensuring future responses will contain the necessary statutory rights of appeal. The Commissioner therefore does not require any further action in respect of these failures.

## Decision

The Commissioner finds that the Authority partially complied with Part 1 of the Freedom of Information (Scotland) Act 2002 (FOISA) in responding to the information request made by the Applicant.

The Commissioner finds that the Authority was correct to notify the Applicant that it did not hold the information requested at the time of their request.

However, the Commissioner finds that Authority should have responded to the Applicant's initial request, advised them of their statutory rights of appeal in terms of section 21(10) of FOISA and given them more advice and assistance in terms of section 15.

Given that the Authority subsequently provided the Applicant with sufficient advice and assistance in relation to its response that it did not hold the information requested, its failure to respond to the initial request was an aberration and it has committed to including the statutory rights of appeal in future review responses, the Commissioner does not require any further action in respect of these failures.

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<sup>4</sup> <https://www.itpublicknowledge.info/sites/default/files/2022-03/BriefingContentOfNotices.pdf>

## **Appeal**

Should either the Applicant or the Authority 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.

**David Hamilton**  
**Scottish Information Commissioner**

**14<sup>th</sup> May 2024**



## **Appendix 1: 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.
- (2) The person who makes such a request is in this Part and in Parts 2 and 7 referred to as the “applicant.”
- ...
- (6) This section is subject to sections 2, 9, 12 and 14.

#### **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 not by later than the twentieth working day after –
  - (a) in a case other than that mentioned in paragraph (b), the receipt by the authority of the request; or

...

#### **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.

...

#### **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.

## **21 Review by Scottish public authority**

...

- (10) A notice under subsection (5) or (9) must contain particulars about the rights of application to the Commissioner and of appeal conferred by sections 47(1) and 56.

## **47 Application for decision by Commissioner**

- (1) A person who is dissatisfied with -
- (a) a notice under section 21(5) or (9); or
  - (b) the failure of a Scottish public authority to which a requirement for review was made to give such a notice.

may make application to the Commissioner for a decision whether, in any respect specified in that application, the request for information to which the requirement relates has been dealt with in accordance with Part 1 of this Act.

- (2) An application under subsection (1) must -
- (a) be 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) state the name of the applicant and an address for correspondence; and
  - (c) specify –
    - (i) the request for information to which the requirement for review relates;
    - (ii) the matter which was specified under sub-paragraph (ii) of section 20(3)(c); and
    - (iii) the matter which gives rise to the dissatisfaction mentioned in subsection (1).