



Decision Notice 103/2024

Information about the mobile phone review board

Authority: Scottish Prison Service

Case Ref: 202200803

Summary

The Applicant asked the Authority for information about the mobile phone review board and the authority to remove a prisoner's entitlement to a personal communication device. The Applicant was dissatisfied with the Authority's response as he did not consider that it provided him the information he requested.

The Commissioner investigated and found that the Authority had partially breached FOISA in responding to the request. While the Commissioner found that the Authority had failed to give the Applicant notice, in writing, that some information was not held, and that other information was otherwise accessible to him, he was satisfied that it had complied with the Applicant's request for information.

Relevant statutory provisions

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1), (2) and (6) (General entitlement); 15(1) (Duty to provide advice and assistance); 16(1) (Refusal of request); 17(1) (Notice that information is not held); 25(1) (Information otherwise accessible); 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 7 May 2022, the Applicant made a request for information to the Authority. He referred to a complaint he had submitted to the Authority earlier, and he asked:
 - (i) What is the mobile phone review board [MPRB] and what is their official role within the prisoner disciplinary process?
 - (ii) What is the official process referred to by staff above?
 - (iii) If a prisoner is to be deprived of civil rights other than those inherent in the fact of being deprived of liberty, it requires to be done by, or with, the clear authority of Scottish Ministers. A copy of the Statutory Instrument(s) that provide authority to remove a prisoner's entitlement to an in-cell telephone for 5 months.
2. The Authority responded on 8 June 2022, and provided information in response to each part of the Applicant's request.
3. On 17 June 2022, the Applicant wrote to the Authority requesting a review of its decision. The Applicant stated that he was dissatisfied with the decision because the Authority's response did not provide him with the information that he requested.
4. The Authority notified the Applicant of the outcome of its review on 4 July 2022. It upheld its original decision without modification.
5. On 20 July 2022, the Applicant wrote to the Commissioner, applying for a decision in terms of section 47(1) of FOISA. The Applicant stated that he was dissatisfied with the outcome of the Authority's review because the Authority had not provided him with the information that he requested.

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 21 September 2022, and in line with section 49(3)(a) of FOISA, the Commissioner gave the Authority notice in writing of the application and invited its comments.
8. The case was subsequently allocated to an investigating officer.

Commissioner's analysis and findings

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

Section 1(1) – General entitlement

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 by section 1(4). This is not necessarily to be equated with information an

applicant believes the public authority should hold. If no such information is held by the public authority, section 17(1) of FOISA requires it to give the applicant notice in writing to that effect.

The Applicant's submissions

12. The Applicant argued, for each request, that the Authority had not provided him with the information he had requested. In his comments on request (i), the Applicant submitted that the Authority had not explained the "official role" of the MPRB within the prison disciplinary process. In his comments on request (ii), the Applicant argued that the Scottish Ministers had not issued such a Direction, and he questioned the accuracy of the information provided. In his comments on request (iii), the Applicant again argued that the information had not been provided and he stated that he wanted the Authority to provide him with a copy of the Direction.

The Authority's submissions

13. In its comments on request (i), the Authority maintained that it had provided information in response to the Applicant's question "*What is the MPRB*". For the second aspect of that question "*...and what is their official role within the prisoner disciplinary process?*", the Authority said that it did not hold any information because there was no role for the MPRB in the disciplinary process.
14. With reference to request (ii), the Authority explained the process and work of the MPRB to the Commissioner and it outlined the role of a disciplinary hearing, with reference to The Prison and Young Offenders Institutions (Scotland) Rules 2011 (the 2011 Rules). The Authority explained that a prisoner who commits a breach of the 2011 Rules in respect of their abuse of an authorised personal communication device (APCD) will face an appropriate charge under the 2011 Rules, which may result in an appropriate punishment. The Authority submitted that the MPRB meets monthly to consider whether it is appropriate to allow a prisoner to keep, or receive a replacement, APCD. It noted that the number of APCD's are finite and it submitted that it was reasonable to ensure that those who demonstrate compliance in their use, should have first access to them, to maintain a ready supply.
15. The Authority submitted that the Direction, referred to by the Applicant in his request (iii), does exist. It explained that the Direction is available to the Applicant under the Rules. It noted that all Directions to the Rules are available in each hall of each establishment and that the Applicant has been informed of this and "only needs to make his request to the hall staff to be given access".
16. In relation to request (iii), the Authority submitted that it was relying on section 25(1) of FOISA. It provided the Commissioner with a copy of the Direction.

The Commissioner's view

17. The Commissioner will now consider each request in turn and provide his view as to whether he considers the Authority has fully complied with the request.

Request (i)

18. As noted above, there are two parts to request (i). The Applicant firstly asked "*What is the MPRB*" and then he went on to ask "*...and what is their official role within the prisoner disciplinary process?*". The Commissioner has viewed the information that the Authority provided in relation to the first part of request (i) and he is satisfied that it complied with Part

1 of FOISA. He notes that in its response to the Applicant, the Authority stated the job titles of persons comprising the MPRB and it explained its role and function.

19. In relation to the second part of request (i), the Authority notified the Commissioner that it did not hold any information falling within the scope of this part of the request, as there was no role in the disciplinary process for the MPRB. The Authority submitted that it had spoken to the Applicant directly, and advised him of this. The Authority commented that this was also evidenced in the Disciplinary Guidance to which the Applicant has access – and which makes no reference to a MPRB role in Disciplinary Hearings.
20. Regardless of the Authority's verbal communications with the Applicant, section 17(1) of FOISA requires an Authority to notify the requester in writing if it does not hold the information that has been requested. In this case, the Authority failed to give the Applicant notice in writing that the information was not held. While the Commissioner is satisfied, based on the explanation provided by the Authority, that the information is not held, he must find that, by failing to give the Applicant notice in writing that the information was not held, it failed to comply with section 17(1) of FOISA.

Request (ii)

21. In this request, the Applicant asked *What is the official process referred to by staff above?* In the Commissioner's view, to answer this part of the request the Authority must first identify *the official process referred to by staff above*. In this context, it would seem reasonable to look at the rest of the Applicant's letter to the Authority. Having considered this, along with the comments from the Applicant in his application, the Commissioner is satisfied that in request (ii) the Applicant was seeking information about the role of the MPRB and its functions.
22. In its response, the Authority referred the Applicant to his response to request (i), which explained that the MPRB has no role in the disciplinary process, and that it sits monthly to review cases on an individual basis, and responses are provided in writing to the individuals. It noted that prisoners have the right to submit self-representation to the MPRB.
23. The Commissioner is satisfied that the Authority has provided the Applicant with information about the role and function of the MPRB and how it works in practice. He considers that this fulfils the terms of request (ii) and he is satisfied that the Authority has complied with Part 1 of FOISA in relation to this request.

Request (iii)

24. In this request, the Applicant asked for *a copy of the Statutory Instrument(s) that provide authority to remove a prisoner's entitlement to an in-cell telephone for 5 months*.
25. While the Authority originally responded to this request by providing the Applicant with a copy of Rule 62A(1) of the 2011 Rules, in its submissions to the Commissioner, the Authority argued that section 25(1) of FOISA applied to this request. It reiterated its previous arguments that copies of the 2011 Rules, along with Direction referred to in the Applicant's application form, are available in every hall in each prison establishment. It noted that all prisoners can access this information on request, with facilities available for them to view the information, and take notes.
26. The Authority acknowledged that it had not provided the Applicant with this advice in writing, but it maintained that the Applicant had been verbally offered advice and assistance on

making requests and on seeking the information from hall staff and from the local Business Improvement Manager on numerous occasions.

27. Under section 25(1) of FOISA, information which a requester can reasonably obtain, other than by requesting it under section 1(1) of FOISA, is exempt information. The exemption in section 25 is absolute, in that it is not subject to the public interest test in section 2(1)(b) of FOISA.
28. Having considered the submissions and explanations provided by the Authority in this case, the Commissioner is satisfied that the information asked for in request (iii) is available to the Applicant other than by requesting it under section 1(1) of FOISA. However, section 16(1) of FOISA requires an Authority to give the requester notice in writing (a "Refusal notice") when it applies any exemption covered by Part 2 of FOISA. The Commissioner finds, by not providing the Applicant with a Refusal Notice, explaining that the information was held in each hall in the establishment and could be accessed by the Applicant without making a request under section 1(1) of FOISA, the Authority has not complied with section 16(1) of FOISA.

Section 15(1) – duty to advise and assist

29. Section 15 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.
30. As noted above, the Authority failed to notify the Applicant that it did not hold any information falling within the scope of the second part of request (i), neither did it advise the Applicant that he could access the information he requested in request (iii) in the prison hall. The Commissioner acknowledges the Authority's assertions that the Applicant was given verbal advice, but given the circumstances, it is reasonable to expect any advice or assistance provided to be documented.
31. Furthermore, the Commissioner notes that in its response to the Applicant's request for review, the Authority did not provide the same clear explanation to the Applicant that was given to the Commissioner in relation to the information that the Authority does hold. The review provided no explanation of the Authority's position, and did not inform the Applicant that it was applying certain exemptions available to it under sections 17(1) and section 25 of FOISA.
32. Taken together, the Commissioner considers that this demonstrates that the Authority did not comply with its duties under section 15(1) of FOISA.

Other comments

33. As stated in previous decisions, the Commissioner's remit extends only to consideration of whether a Scottish public authority has complied with Part 1 of FOISA in responding to an Applicant's request.
34. In this application, it is clear in the correspondence that the Applicant expresses concerns seeks explanations and questions the responses provided by the Authority. Although there are requests for recorded information, which the Commissioner has considered in the Applicant's application, there are other issues raised by the Applicant in his correspondence with the Authority that do not fall within the remit of the Commissioner. As these issues are outwith the Commissioner's remit, he has not considered them in this decision.

Decision

The Commissioner finds that the Authority failed to comply fully with Part 1 of the Freedom of Information (Scotland) Act 2002 (FOISA) in responding to the information request made by the Applicant. Specifically, he finds that the Authority failed to provide the Applicant with statutory notices in accordance with sections 16(1) and 17(1) of FOISA, and that it did not comply with the duties contained in section 15(1) of FOISA.

The Commissioner does not require the Authority to take any action in response to these failures.

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

23 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.

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).

16 Refusal of request

- (1) Subject to section 18, a Scottish public authority which, in relation to a request for information which it holds, to any extent claims that, by virtue of any provision of Part 2, the information is exempt information must, within the time allowed by or by virtue of section 10 for complying with the request, give the applicant a notice in writing (in this Act referred to as a "refusal notice") which-
 - (a) discloses that it holds the information;
 - (b) states that it so claims;
 - (c) specifies the exemption in question; and
 - (d) states (if not otherwise apparent) why the exemption applies.

...

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.

....

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).