



Decision Notice 173/2024

Copies of new self-change programmes

Applicant: The Applicant

Authority: Scottish Prison Service

Case Ref: 202200077

Summary

The Applicant asked the Authority for copies of the new self-change programmes replacing the [Moving Forward Making Changes treatment programme](#). The Authority refused to disclose this information as it considered disclosure would prejudice substantially the effective conduct of public affairs. The Commissioner investigated and found that although the Authority partially failed to comply fully with FOISA it had been entitled to refuse to provide the Applicant with the information falling within scope of the request.

Relevant statutory provisions

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1), (2) and (6) (General entitlement); 2(1)(b) (Effect of Exemptions); 30(c) (Prejudice to effective conduct of public affairs) (47(1) and (2) (Application for decision by Commissioner)

Background

1. On 14 October 2021, the Applicant made a request for information to the Authority. He asked for the headquarters address of HM Inspectorate of Prisons for Scotland and for copies of the new self-change programmes that replaced MF:MC [Moving Forward Making Changes](#), both the medium intensity and high risk manuals.
2. The Authority responded on 5 November 2021. It provided the address of HM Inspectorate of Prisons for Scotland but withheld the other information (on the new self-change programmes) on the grounds that the information fell within the scope of section 35(1)(c) of FOISA.

3. On 8 November 2021, the Applicant wrote to the Authority requesting a review of its response. The Applicant stated he was dissatisfied with the Authority's response because he did not think that the exemption applied to his circumstances, which he described.
4. The Authority notified the Applicant of the outcome of its review on 30 December 2021. It upheld its original response that the information should be withheld by virtue of section 35(1)(c) of FOISA.
5. On 11 January 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 he did not agree that the exemption cited by the Authority (section 35(1)(c)) applied to the information he had 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 15 March 2022, the Authority was notified in writing that the Applicant had made a valid application. The Authority was asked to send the Commissioner the information withheld from the Applicant. The Authority provided the information, and the case was 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 related to why it considered the exemption in section 35(1)(c) of FOISA to apply to the information falling within the scope of the Applicant's request.
9. The Authority provided the Commissioner with its submissions, and during the course of the investigation changed its position: it no longer relied on section 35(1)(c) to withhold the information, but now submitted that section 35(1)(f) (Law Enforcement (Security and good order in prisons, etc.)) of FOISA applied.
10. The Authority informed the Applicant of its change in position on 7 November 2023.
11. The Applicant provided his comments to the Commissioner on the application of the exemptions in sections 35(1)(c) and 35(1)(f).
12. Further into the investigation, the Authority changed its position again, no longer relying on section 35(1)(f) to withhold the information, but it instead considered that section 30(c) (Prejudice to effective conduct of public affairs) of FOISA applied.
13. The Applicant provided his comments to the Commissioner on the application of the exemption in section 30(c) of FOISA.
14. The Commissioner's investigation must consider the position at the time of the response to the Applicant's requirement for review. As noted in paragraph 4, this was to withhold all of the information falling within the scope of the Applicant's request under section 35(1)(c) of FOISA. As the Authority has now withdrawn its reliance on section 35(1)(c) of FOISA, the Commissioner must conclude that it failed to comply fully with Part 1 of FOISA in responding to the Applicant's request.

Commissioner's analysis and findings

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

Background to requested information

16. The Applicant's request was for copies of the new self-change programmes that were replacing MF:MC. [Moving Forward Making Changes](#)¹ MF:MC was an intensive group-based treatment programme for sex offenders aimed at reducing the re-offending of men convicted of sexual offences and increasing their opportunities and capacities for meeting needs by non-offending means. [The Self-Change Programme](#)² (SCP) is described as a high-intensity cognitive-behavioural intervention that aims to reduce violence (including general, sexual and intimate partner violence) in high-risk adult male offenders.

Section 30(c) – Prejudice to effective conduct of public affairs

17. Section 30(c) of FOISA exempts information if its disclosure "would otherwise prejudice substantially, or be likely to prejudice substantially, the effective conduct of public affairs."
18. The use of the word "otherwise" distinguishes the harm required from that envisaged by the exemptions in sections 30(a) and (b). This is a broad exemption, and the Commissioner expects any public authority citing it to show what specific harm would (or would be likely to) be caused to the conduct of public affairs by disclosure of the information, and how that harm would be expected to follow from disclosure.
19. This exemption is subject to the public interest test in section 2(1)(b) of FOISA.
20. In order for the exemption in section 30(c) to be upheld, the prejudice caused by disclosure must be substantial and therefore of real and demonstrable significance. The Commissioner expects authorities to demonstrate a real risk or likelihood of substantial prejudice at some time in the near (certainly foreseeable) future, not simply that such a prejudice is a remote or hypothetical possibility. Each request should be considered on a case by case basis, taking into consideration the content of the information and all other relevant circumstances.

Authority's submissions on section 30(c)

21. The Authority explained that its principal objective was to contribute to making Scotland safer and stronger in line with [The Vision for Justice in Scotland](#)³. It submitted that it had a duty to protect the public from harm by keeping those who have been sentenced in safe and secure custody, and its commitment to public safety was delivered through constructive engagement with those in its care, focussing on recovery and reintegration. The Authority explained that the offending behaviour programmes that it delivers form an integral part of this principal objective and therefore the integrity and effectiveness of these programmes and interventions are vital to achieving those aims.
22. The Authority considered that disclosure of the information falling within the scope of the request would significantly erode the effectiveness and integrity of the programme, which in

¹ [1. Introduction and background - Moving Forward Making Changes: evaluation of a group-based treatment for sex offenders - gov.scot \(www.gov.scot\)](#)

² [HQ21253 Attachment - Interventions Booklet8206_3748.pdf](#)

³ <https://www.gov.scot/publications/vision-justice-scotland/>

turn would prejudice substantially, or be likely to prejudice substantially the effective conduct of it in carrying out its core duties.

23. The Authority stated that to be at its most effective, it is best practice that participating individuals enter into the SCP 'blind' with no, or as little as possible, opportunity to pre-prepare.
24. The Authority accepted that those in its care who are participating or have complete the SCP can speak to others about it but considered that this was significantly different to making the whole Programme Manual available, that included far more information than that provided to participants.
25. It believed that disclosing the information would provide potential participants with a significant advantage, and would weaken the facilitator's ability to challenge the individual, thus, undermining the process, and providing an individual assessed as high risk, who has been identified as required to complete the programme with the opportunity to manipulate their participation and presentation on the programme which could falsify their risk level.
26. The Authority acknowledged that there must be at least a significant probability that substantial prejudice would occur in order for the exemption at s30(c) to be correctly engaged, and that there must be a genuine link between disclosure and harm, but that in its assessment the risk was genuine.
27. Additionally, the Authority submitted that there was the potential that the information once disclosed could be widely shared with others assessed as needing to complete the SCP, and that it would be highly sought after.
28. The Authority was concerned that disclosure could set a precedent for the release of information of this nature, as it has a range of programmes that have been developed to target specific risks.
29. It was worried that, if any similar requests of this nature for information in relation to these other programmes were made, then the precedent would have been set, and the information would be released.
30. The Authority submitted that the risk and harm disclosure of this information could cause cannot be underestimated and would cause significant prejudice to the effective conduct of the Authority in carrying out its score principal objectives.

Applicant's submissions on s30(c)

31. The Applicant commented that this was the third change of position of the Authority, and he did not consider that s30(c) applied to this case, and that it had no bearing on the effectiveness of the programme nor on the Authority carrying out its duties.
32. The Applicant considered that as he never intended to participate in these programmes that rendered the Authority's position invalid. He also submitted that he did not believe that the material requested would give prisoners the answers required or inform them of what to say as suggested by the Authority.
33. The Applicant stated that participants are provided with the material he had requested to read in their cells before they started programme work.
34. He considered that the Authority had failed to demonstrate how and why disclosure would harm the effective conduct of public affairs. The Applicant believed that the Authority's

position was clearly hypothetical and did not show a genuine link between disclosure and harm.

The Commissioner's view on section 30(c)

35. The Commissioner has considered the submissions made by both the Authority and the Applicant, together with the withheld information.
36. For section 30(c) to be engaged there must at least be a significant probability that substantial prejudice would occur, and there must be a genuine link between disclosure and harm.
37. The Commissioner notes the Authority's emphasis on one of the primary roles it performs in protecting the public from harm through engagement with those in its care, and the key part programmes such as the SCP play in its aim of assisting high risk offenders to recover and reintegrate, whilst reducing the risk of harm. In the case of this programme, from violence.
38. The Commissioner notes that the withheld information contains detailed information aimed at those delivering the programme and accepts the Authority's arguments about the risks associated with putting all of this material into the public domain, which is the consequence of a disclosure under FOISA.
39. In particular, the Commissioner accepts the difference between the material that may be provided to participants (and thus potentially shared within the wider prison community) whilst engaging with the course, to that contained within the information falling within the scope of this request.
40. The Commissioner notes the Applicant's point, that he himself does not intend to be a participant. Nevertheless, as mentioned above, disclosure under FOISA is a disclosure to the public at large and not limited to the Applicant.
41. The Commissioner is satisfied that if the withheld information in this case were to be disclosed in response to the Applicant's request it is likely to affect the Authority's ability to deliver this programme in the manner in which it is intended. This, in turn, is likely to have an effect on how effective the programme is in delivering its aims and objectives.
42. The Commissioner does not accept the arguments made by the Authority with regard to precedent being set in relation to the risk to other similar information were he to decide that the information in this case should be disclosed. The Commissioner is clear that when an appeal is made to him, each case is considered on its own merits.
43. For the reasons outlined the Commissioner is satisfied that disclosure of the information falling within the scope of the Applicant's request in this case would otherwise prejudice substantially, or be likely to prejudice substantially, the effective conduct of public affairs. He therefore finds that the Authority was entitled to rely on the exemption in section 30(c) of FOISA to withhold the information requested by the Applicant.

Public interest test – section 30(c)

44. As mentioned above, the exemption in section 30(c) is subject to the public interest test in section 2(1)(b) of FOISA. As the Commissioner has found that the exemption in section 30(c) was correctly applied to the withheld information, he is now required to consider whether, in all the circumstances of the case, the public interest in disclosing the information is outweighed by the public interest in maintaining the exemption.

45. The public interest is not defined in FOISA but has been described in previous Decisions as “something which is of serious concern and benefit to the public”, not merely something of individual interest. It has also been held that the public interest does not mean “of interest to the public” but “in the interests of the public”, i.e. disclosure must serve the interests of the public.

The Authority’s view on the public interest

46. The Authority recognised the public interest in knowing that it was utilising and developing appropriate and effective programmes to those in its care. It also acknowledged the public interest in ensuring that those programmes were robust interventions which targeted the needs of those identified as requiring to complete them to prepare for release.

47. However, the Authority’s assessment was that the public interest was better served by ensuring the effectiveness and integrity of the SCP was maintained. This is to ensure it can be delivered in the manner it was designed and intended. Thereby having maximum benefit and value in achieving its purpose and aim, to reduce general, sexual, or intimate partner violence.

48. Additionally, as an individual’s performance on the programme was used to inform and advise on their ongoing management or release, it was further assessed that the public interest was better served in upholding the exemption to ensure that public safety was not jeopardised.

The Applicant’s view on the public interest

49. The Applicant considered the public interest favoured disclosure for the following reasons:

- The public have a right to know if the programmes are effective
- The public have a right to know if the programmes are value for money
- To allow academic scrutiny
- To check if compatible with Human Rights law and with UK and Scots law
- To hold the programme authors/creators to account
- To check if it is based on up to date science and if it has scientific inaccuracies
- For potential legal proceedings and for seeking legal advice
- For exercising and defending rights

The Commissioner’s view on the public interest

50. The Commissioner has considered all of the arguments presented to him in relation to the public interest in withholding or disclosing the information relating to the SCP.

51. Having done so, the Commissioner recognises the public interest in ensuring that intervention programmes delivered by the SPS are effective and lead to the desired outcomes, along with being value for money. He also accepts that there is some public interest in being able to hold the authors and creators of the programme to account.

52. However, given the established routes and mechanisms which exist to enable information to be obtained, should it be required for potential legal proceedings or to seek legal advice, the Commissioner does not agree with the Applicant that this supports a public interest in disclosure.

53. Similarly, the Commissioner does not agree that disclosure of the withheld information in this case would be necessary to satisfy the other public interest aims raised by the Applicant.
54. Given the key role that the delivery of this programme fulfils in terms of the overall public function of the Authority, together with the Commissioner's acknowledgement of the likely harm that would follow from disclosure of this information, the Commissioner does not consider that it would be in the interests of the public for the requested information to be disclosed in this case. It is the Commissioner's view that these interests would be better served by maintaining the exemption in this case to ensure the effective delivery of the programme.
55. On balance, the Commissioner find that the public interest in disclosing the withheld information is outweighed by that in maintaining the exemption in section 30(c) of FOISA. Consequently, he is satisfied that the Authority was entitled to maintain the exemption.

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.

While the Commissioner accepts that the Authority was entitled to withhold the information the Applicant requested, it should have made it clear that the appropriate exemption was section 30(c) of FOISA. Given this decision has set out the Authority's revised position, which the Commissioner accepts, there is no requirement for the Authority to take any action in relation to this application.

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

26 August 2024