



Decision Notice 217/2024

Having photographs taken within prisons

Authority: Scottish Prison Service

Case Ref: 202400271

Summary

The Applicant asked the Authority for any guidance or policy in relation to prisoners having their photographs taken within prisons for provision to family and friends. The Authority disclosed some information, but the Applicant raised concern that the information given to him was incomplete. The Commissioner investigated and found that the Authority partially breached FOISA by failing to identify all the information it held at the time of the request. He required the Authority to disclose information later identified.

Relevant statutory provisions

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1), (2) and (6) (General entitlement); 47(1) and (2) (Application for decision by Commissioner)

Background

1. On 7 December 2023, the Applicant made a request for information to the Authority. He asked for:

“...all and any information held by [the Authority], in terms of guidance or policy in force as of 7 December 2023, insofar as this concerns prisoners in the following establishments having photographs taken within the establishment for provision to friends and family outwith the prison: - (1) HMP Edinburgh; (2) HMP Glenochil; (3) HMP Shotts; (4) HMP Perth; (5) HMP Grampian; (6) HMP Barlinnie; and (7) HMP Low Moss.”
2. The Authority responded on 4 January 2024. It disclosed some information to the Applicant, but it advised him that it held no information in respect of HMP Grampian and HMP Barlinnie, as neither of those establishments had a recorded policy in place

3. On 8 January 2024, the Applicant wrote to the Authority requesting a review of its decision. The Applicant stated that he was dissatisfied with the decision because he believed the Authority's response was incomplete. The Applicant understood that information on local policy and practice, falling within the scope of his request, was contained in an email exchange between the FOI Team at HMP Edinburgh and an Authority employee. He expressed concerns that this information had been improperly withheld, and no exemptions had been applied.
4. The Authority notified the Applicant of the outcome of its review on 2 February 2024. The Authority upheld the original response, with modifications, and partially disclosed the email exchange referred to in the Applicant's requirement for review, withholding email addresses under section 38(1)(b) of FOISA.
5. On 14 February 2024, the Applicant wrote to the Commissioner, applying for a decision in terms of section 47(1) of FOISA. The Applicant stated that he considered that the Authority had withheld information falling within the scope of his request, without applying any exemption to this information. He also stated that the focus of his application was the Authority's failure to disclose information on the arrangements for HMP Edinburgh. The Applicant also raised concerns about comments made by the Authority specifying how he should make his requests for information.

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 6 March 2024, the Authority was notified in writing that the Applicant had made a valid application.
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 how it searched for, located and identified information that fell within scope of the request.

Commissioner's analysis and findings

9. The Commissioner has considered all of 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 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 the information that an applicant believes an authority should hold. If no relevant information is held by the authority, section 17(1) of FOISA requires the authority to give the applicant notice to that effect.

12. It is important to bear in mind that this obligation relates to information actually held by an authority when it receives the request, as opposed to information an applicant believes the authority should hold.
13. 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 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. While it may be relevant as part of this exercise to explore expectations about what information the authority should hold, ultimately the Commissioner's role is to determine what relevant recorded information is (or was, at the time the request was received) actually held by the public authority.
14. The Applicant submitted that since making his application, he had become aware of a process for the facilitation of photographs during ordinary family visits and that this process included paperwork in the style of forms to be signed that included policy not previously disclosed in response to his request.
15. The Authority described the searches it had carried out for information that fell within scope of the request in relation to HMP Edinburgh. The Authority explained that it had carried out a search of its internal SharePoint site using the search parameters "family", "visits" and "photograph" and in doing so, it identified that it held the procedure "OPS 118 Photographs at Visits" which it disclosed to the Applicant in its original response.
16. In relation to the email exchange referenced by the Applicant in his letter of 8 January 2024, the Authority argued that it did not intentionally withhold this information, but rather it did not consider it to be within scope "in terms of guidance or policy". The Authority submitted that, in the interests of transparency it had disclosed the email referenced by the Applicant, in its review outcome.
17. The Authority acknowledged that there was now a second process in place for the facilitation of photographs during ordinary family visits but it submitted that, at the time it received the Applicant's request no such process existed - there was no procedure, written process or guidance in place and consequently it held no specific information in relation to this.

Information identified during the investigation

18. During the investigation, the Authority identified some additional information. This additional information included documents referenced within the disclosed procedure "OPS 118 Photographs at Visits", namely "GMA 15A/14 The Use and Storage of Cameras/Videos and other Image/Sound Recording Devices in Prisons" (GMA 15A/14). In its submissions, the Authority stated that it considered GMA 15A/14 to be outwith the scope of the request because it detailed the process for the management of image and sound recording devices within prison establishments and did not relate to the request.
19. The Commissioner has considered the request.

He notes that the request sought “all and any information held by [the Authority] in terms of guidance or policy in force as of 7 December 2023, insofar as this concerns prisoners in the following establishments having photographs taken within the establishment for provision to friends and family outwith the prison”.

20. The Commissioner has also carefully considered the content of GMA 15A/14. He notes that most of the document is not relevant to the request; however, he is satisfied that some of the content does contain guidance material that falls within the scope of the request. Specifically, he finds that the first two paragraphs of the introduction, the section titled “Cameras taken into prisons – by visitors – for a specific purpose”, and Annex 2 in its entirety are within scope, and should either be disclosed to the Applicant or be withheld under one of the exemptions provided in Part 2.
21. In failing to identify, consider and disclose the information in response to the Applicant’s request, the Commissioner must find that the Authority failed to comply with section 1(1) of FOISA.
22. Despite this failing, having considered the submissions and explanations provided by the Authority, the Commissioner is satisfied that, by the end of his investigation, the Authority had identified all of the information held and falling within the scope of the Applicant’s information request.

Other matters

23. In his application to the Commissioner, the Applicant discussed his rights in relation to making a subject access request (SAR). The right to make a SAR is conferred by data protection legislation. The Scottish Information Commissioner is not responsible for enforcing data protection legislation. Any concerns or comments that the Applicant has about the receipt or processing of SARs should be raised with the UK Information Commissioner’s Office.
24. The Applicant raised a further matter with the Commissioner, in his application, related to comments made by the Authority’s Internal Complaints Committee (ICC) in its own decision in relation to a formal complaint made to it by the Applicant.

“The information [the Applicant] is referring to was located in emails between departments, such requests should be done through official channels such as Subject Access Requests and Freedom of Information Requests and not simply handed out at will by hall staff. [The Applicant] is aware of these channels and the ICC advise that he use these for [sic] such requests”

The Applicant raised his concern that the comments were an attempt by the ICC to prescribe, beyond the terms of the law, the manner in which requests for information should be submitted to the Authority.

25. The Commissioner sought comment from the Authority on this particular matter. The Authority stated that the comments were intended as a reminder to staff to follow official procedures when receiving information requests and not to respond on an informal, ad hoc basis.
26. The Commissioner has considered the comments made by the ICC, referred to in the Applicant’s application.

He notes that while there is nothing within FOISA that precludes applicants from discussing their FOI requests with officials or reminding them of various sections of the Act, it is also reasonable for an authority to remind officials and requesters that there are policies and procedures in place for processing requests for information.

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 by providing some information in response to the request, the Authority complied with Part 1 of FOISA in relation to the information disclosed.

However, by failing to identify and disclose other information falling within scope of the request, the Authority failed to comply with Part 1 of FOISA in relation to that information.

The Commissioner therefore requires the Authority to either disclose the following parts of the document entitled “GMA 15A/14 The Use and Storage of Cameras/Videos and other Image/Sound Recording Devices in Prisons”

- the first two paragraphs of the introduction,
- the complete section titled “Cameras taken into prisons – by visitors – for a specific purpose”, and
- Annex 2

or notify the Applicant that it is withholding this information under one of the exemptions set out in Part 2 of FOISA.

He requires the Authority to take the above action by **18 November 2024**.

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.

Enforcement

If the Authority fails to comply with this decision, the Commissioner has the right to certify to the Court of Session that the Authority has failed to comply. The Court has the right to inquire into the matter and may deal with the Authority as if it had committed a contempt of court.

Euan McCulloch
Head of Enforcement

3 October 2024