

Decision Notice

Decision 002/2015: Mr C and the Scottish Prison Service

Notes taken at ICC meeting and related information

Reference No: 201401934

Decision Date: 7 January 2015



Summary

On 26 November 2013, Mr C asked the Scottish Prison Service (the SPS) for the information contained within the notes taken by the SPS's notetaker at a specific complaints meeting, together with information relating to preliminary enquiries about the complaint considered at the meeting.

The SPS initially informed Mr C that the information pertaining to the notetaker's notes was his own personal data which he could request under the Data Protection Act 1998 (the DPA). On review, it confirmed that it was withholding this information under section 38(1)(a) of FOISA. It also provided some information pertaining to the other part of his request.

The Commissioner investigated and found that the SPS had partially failed to respond to Mr C's request for information in accordance with Part 1 of FOISA. She accepted that it was correct to withhold the notes under section 38(1)(a) of FOISA, but found that it had not provided Mr C with all of the information it held pertaining to preliminary enquiries. As the SPS provided Mr C with this information during the investigation, she did not require the SPS to take any action.

Relevant statutory provisions

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) and (6) (General entitlement); 2(1)(a) and (2)(e)(i) (Effect of Exemptions); 17(1) (Notice that Information is not held); 38(1)(a) (Personal information).

Data Protection Act 1998 (the DPA) section 1(1) (Basic interpretative provisions) (definition of "personal data")

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 26 November 2013, Mr C made a request for information to the SPS. He asked for:
 - (i) all and any information contained within the notes taken by the notetaker employed by the SPS to take notes at the meeting of the Internal Complaints Committee (ICC) held on 26 November 2013, and
 - (ii) all and any information pertaining to preliminary enquiries in relation to the issues canvassed within the complaint.
2. The SPS responded on the same day, explaining how to obtain a copy of the ICC minutes via a separate route, namely by way of a subject access request under the DPA.
3. On 18 January 2014, Mr C wrote to the SPS requesting a review of its decision on two counts:
 - (i) a failure to provide the information he requested; and

- (ii) the response did not comply with the formal requirements in FOISA, as it contained no reference to exemptions, and did not provide information on review procedures and appeal procedures.
- 4. The SPS notified Mr C of the outcome of its review on 4 February 2014. It acknowledged that it should have provided a relevant exemption, confirming that it considered the notes to be exempt under section 38(1)(a) of FOISA. It also provided details of Mr C's right to apply to the Commissioner if he was dissatisfied with the outcome of the review.
- 5. On 9 April 2014, the SPS provided a further response to Mr C in relation to his request for information. Responding to part (ii) of the request, it provided Mr C with a copy of relevant email correspondence. The SPS explained that further discussions had been conducted verbally, so it held no further information.
- 6. On 31 July 2014, Mr C applied to the Commissioner for a decision in terms of section 47(1) of FOISA. Mr C stated he was dissatisfied with the outcome of the SPS's review because:
 - (i) he contended that the SPS had incorrectly relied upon the exemption in section 38(1)(a) to withhold the information contained in the notetaker's notes;
 - (ii) he believed that the SPS had withheld information falling within the scope of his request without applying an exemption; and
 - (iii) the initial response from the SPS failed to comply with the formal requirements of FOISA.

Investigation

- 7. The application was accepted as valid. The Commissioner confirmed that Mr C made a request for information to a Scottish public authority and asked the authority to review its response to that request before applying to her for a decision.
- 8. The case was allocated to an investigating officer. On 25 September 2014, the SPS was notified in writing that Mr C had made a valid application.
- 9. Section 49(3)(a) of FOISA requires the Commissioner to give public authorities an opportunity to provide comments on an application. The SPS was invited to comment on this application and answer specific questions. These related to the SPS's application of section 38(1)(a) of FOISA and the searches it carried out to establish what information it held relevant to part (ii) of the request. The SPS was also asked to send the Commissioner the information withheld from Mr C (namely the information contained within the notetaker's notes) – this was provided.
- 10. During the investigation, the SPS located further information falling within the scope of part (ii) of Mr C's request. It disclosed this information to Mr C. Mr C was still not satisfied that he had received all of the information falling under this part of his request.

Commissioner's analysis and findings

11. In coming to a decision on this matter, the Commissioner considered all of the withheld information and the relevant submissions, or parts of submissions, made to her by both Mr C and the SPS. She is satisfied that no matter of relevance has been overlooked.

Section 38(1)(a) of FOISA

12. Section 38(1)(a) of FOISA contains an absolute exemption in relation to personal data of which the applicant is the data subject. The fact that it is absolute means that it is not subject to the public interest test set out in section 2(1)(b) of FOISA.
13. This exemption exists under FOISA because individuals have a separate right to make a request for their own personal data (commonly known as a "subject access request") under section 7 of the DPA. The DPA will therefore usually determine whether a person has a right to their own personal data, and govern the exercise of that right. Section 38(1)(a) of FOISA does not deny individuals a right of access to information about themselves, but ensures that the right is exercised under the DPA and not under FOISA. In this way, the individual's personal data are not disclosed to the world at large, as they would be if disclosed under FOISA.
14. Personal data are defined in section 1(1) of the DPA as data which relate to a living individual who can be identified: a) from those data, or b) from those data and other information which is in the possession of, or is likely to come into the possession of, the data controller (the full definition is set out in the Appendix).
15. The SPS's initial response to Mr C was that the minutes of the ICC meeting were accessible under the DPA. At review, it explained why it was withholding the information in the notetaker's notes, contending it was entirely Mr C's own personal data and so the exemption in section 38(1)(a) of FOISA was being applied. The SPS acknowledged that this exemption should have been cited in its earlier correspondence.
16. In his application, Mr C contended that the SPS had improperly relied on the exemption in section 38(1)(a) of FOISA (in relation to the notetaker's notes).
17. In its submissions, the SPS explained that the role of the ICC was to hold a hearing into a complaint and then (where appropriate) make recommendations to the Governor.
18. As a contemporaneous record of discussion at the hearing, between Mr C and the ICC Chairperson, the SPS considered the notes to relate to a living individual (Mr C). Mr C was exercising his right to refer **his complaints** (SPS's emphasis) to the ICC and these complaints were all that was considered there. He was identifiable, from the notes, by information unique to him.
19. The Commissioner has considered the information withheld from Mr C (i.e. the notetaker's notes) carefully. The focus of her attention must be the actual information in the notetaker's notes, not ICC notes as a class. The context, in particular the role of the ICC hearing, is relevant, but not to the exclusion of the content. In this case, on any tenable interpretation of the term "personal data" (as defined in section 1(1) of the DPA), the Commissioner is satisfied that the SPS was correct in concluding that the information requested by Mr C was his personal data.
20. The Commissioner accepts that the withheld information is a record of discussion between Mr C and the ICC Chairperson, relating to concerns specific to Mr C. Further consideration

of these concerns might have led to the identification of issues of wider concern, but she does not believe it would be reasonable to characterise the record of the discussion as relating to such wider issues. This information is about Mr C, as an identifiable living individual. Even applying more restrictive notions of biographical significance and focus on the individual, the information would (on any reasonable interpretation) relate to him.

21. Whilst not all information recorded at an ICC hearing will necessarily fall within the definition of personal data, in this particular case the Commissioner has concluded that it does.
22. Having considered the withheld information, therefore, the Commissioner is satisfied that the SPS was entitled to withhold the information requested by Mr C under section 38(1)(a) of FOISA.

The other information requested – preliminary enquiries

23. In his application to the Commissioner, Mr C also raised his concern that the SPS had withheld information falling within the scope of his request without the application of an exemption. This was the information covered by part (ii) of Mr C's request: the Commissioner notes that the SPS only responded to this part of the request on 9 April 2014, some time after it purported to give Mr C the outcome of its review.
24. During the investigation, the SPS located (and disclosed to Mr C) further information falling within the scope of this part of the request.
25. The SPS submitted that this further information was not identified as falling within the scope of this part of Mr C's request, due to the similarity of the information covered by a separate request made by Mr C, and the close proximity of the dates of the review responses to the two requests.
26. Mr C remained dissatisfied that he had received all of the information held by the SPS and falling under the scope of the second part of his request. The Commissioner raised this with the SPS and sought evidence of searches carried out to identify any information held which fell within the scope of this part of the request.
27. The Commissioner also asked Mr C what further information he believed to be held by the SPS, and whether or not he was already in possession of this information (for example, through separate requests he had made to the SPS).
28. The SPS provided evidence of searches carried out to locate the information falling within the scope of part (ii) of Mr C's request.
29. Mr C explained that he believed information had been gathered by a named member of SPS staff in advance of the ICC hearing on 26 November 2013, upon which the outcome of that hearing had been determined. Mr C confirmed he was not in possession of this information, which he believed to be held by the SPS.
30. Mr C also suggested that the SPS might have provided this information to the Scottish Public Services Ombudsman (SPSO) in connection with a complaint Mr C had raised with the SPSO.
31. The SPS was asked to confirm whether it had furnished the SPSO with any information, not already disclosed to Mr C, which fell within the scope of part (ii) of the request.
32. The SPS provided the Commissioner with copies of the files they had sent to the SPSO in connection with the complaint Mr C had raised with the SPSO. The SPS submitted that none

of the information contained within these files fell within the scope of part (ii) of Mr C's request.

33. The SPS explained that searches of documentation pertaining to complaints had been carried out, both at HMP Edinburgh and at the SPS Headquarters, and confirmed that these files held no information further to that already provided to Mr C as a result of his information requests.
34. Having considered all relevant submissions, the Commissioner accepts that (by the close of the investigation) the SPS had carried out adequate searches to establish whether it held any further information falling within the scope of the second part of Mr C's request (i.e. information pertaining to preliminary enquiries).
35. The Commissioner is satisfied that the information located during the investigation has now been provided to Mr C. She also accepts, on the balance of probabilities, that the SPS does not hold any further information falling within the scope of this part of Mr C's request.
36. However, it is evident that adequate searches were not carried out in dealing with Mr C's information request and requirement for review. If they had been, the Commissioner believes all relevant information should have been identified, located and provided to Mr C at that time.
37. In failing to take adequate steps to identify, locate and provide the requested information, the SPS failed to comply with section 1(1) of FOISA.

Other matters

38. In his application to the Commissioner, Mr C raised his concern that the initial response to his request (dated 26 November 2013) failed to cite an exemption under FOISA, but withheld the information he had requested. More generally, he submitted that this response failed to comply with the technical requirements of FOISA.
39. In its response of 26 November 2013, the SPS explained that the information was available under the DPA, with details of how Mr C could obtain it under that legislation. The Commissioner accepts that it did not refer to any applicable exemption in FOISA, or provide Mr C with any information on his rights under FOISA.
40. Mr C sought a review and the SPS responded on 4 February 2014. In this response, it identified section 38(1)(a) of FOISA as the applicable exemption and gave Mr C details of his right to apply to the Commissioner if he was dissatisfied with the outcome of the review. In doing so, the review of 4 February 2014 confirmed the original decision to withhold the information (i.e. the notetaker's notes), with modifications, in accordance with section 21(4)(a) of FOISA.
41. By the time Mr C applied to the Commissioner for a decision, on 31 July 2014, he had also received the SPS's letter of 9 April 2014, which addressed part (ii) of his request. In his application to the Commissioner, Mr C accepted this further response as *"having been sent in good faith in order to address deficiencies in the initial and review responses"*.
42. Where a requester has received notice of the outcome of a review in relation to their information request, the role of an application to the Commissioner (under section 47(1) of FOISA) is to address their dissatisfaction with that outcome. The matters raised by Mr C, as described in paragraph 38 above, relate to his dissatisfaction with the outcome of the original request and not that of the review. These matters were addressed by the SPS in its review outcome (augmented by the SPS's letter of 9 April 2014, which Mr C appears to accept

addressed any relevant shortcomings in the response and review outcome) and the Commissioner does not, in the circumstances, consider it to be within her remit to revisit them now.

Decision

The Commissioner finds that the Scottish Prison Service partially complied with Part 1 of the Freedom of Information (Scotland) Act 2002 (FOISA) in responding to the information request made by Mr C.

In relation to the first part of Mr C's request (for the notetaker's notes), the Commissioner finds that the SPS was entitled to apply section 38(1)(a) of FOISA and therefore complied with Part 1.

In relation to the second part of Mr C's request (information pertaining to preliminary enquiries carried out), the Commissioner finds that the SPS incorrectly withheld information from Mr C without the application of an exemption.

Given that the SPS has now provided Mr C with the information it held falling within the scope of this part of the request, the Commissioner does not require the SPS to take any action in respect of this failure in response to Mr C's application.

Appeal

Should either Mr C or the Scottish Prison Service 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.

Margaret Keyse
Head of Enforcement

7 January 2015

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.

...

(6) This section is subject to sections 2, 9, 12 and 14.

2 Effect of exemptions

(1) To information which is exempt information by virtue of any provision of Part 2, section 1 applies only to the extent that –

(a) the provision does not confer absolute exemption; and

...

(2) For the purposes of paragraph (a) of subsection 1, the following provisions of Part 2 (and no others) are to be regarded as conferring absolute exemption –

...

(e) in subsection (1) of section 38 –

(i) paragraphs (a), (c) and (d); and

...

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.

...

38 Personal information

(1) Information is exempt information if it constitutes-

(a) personal data of which the applicant is the data subject;

...

Data Protection Act 1998

1 Basic interpretative provisions

(1) In this Act, unless the context otherwise requires –

...

“personal data” means data which relate to a living individual who can be identified –

(a) from those data, or

(b) from those data and other information which is in the possession of, or is likely to come into the possession of, the data controller,

and includes any expression of opinion about the individual and any indication of the intentions of the data controller or any other person in respect of the individual;

...

