

# Decision Notice



Decision 015/2010 Mr William Lauchlan and the Scottish Prison Service

Policy on same sex partners

Reference No: 200901814

Decision Date: 29 January 2010

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**Kevin Dunion**

Scottish Information Commissioner

Kinburn Castle  
Doubledykes Road  
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## Summary

Mr Lauchlan requested from the Scottish Prison Service (the SPS) copies of documents setting out SPS policy or guidance as to contact between same sex partners. The SPS responded by providing Mr Lauchlan with a notice under section 17 of the Freedom of Information (Scotland) Act 2002 (FOISA) that information relevant to his request was not held. Following a review, Mr Lauchlan remained dissatisfied and applied to the Commissioner for a decision.

Following an investigation, the Commissioner found that the SPS had dealt with Mr Lauchlan's request for information in accordance with Part 1 of FOISA. He did not require the SPS to take any action.

## Relevant statutory provisions and other sources

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Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) (General entitlement); 15 (Duty to provide advice and assistance); 17(1) (Notice that information is not held)

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

## Background

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1. On 29 August 2009, Mr Lauchlan wrote to the SPS requesting the following information:  
Copies of all and any documents within the possession of the SPS setting out SPS policy or guidance as to contact between same sex partners (whether or not registered), such policy or guidance having been in force at any time since 1 January 2008 and being held or distributed in any form including electronic and conventional documentation.
2. The SPS responded on 10 September 2009, providing Mr Lauchlan with a notice under section 17 of FOISA advising that at the relevant time the SPS had no formal policy or guidance in place relating to contact between "Same Sex Partners".



3. On 21 September 2009, Mr Lauchlan wrote to the SPS requesting a review of its decision. In particular, Mr Lauchlan drew the SPS's attention to discussions with a particular member of staff who had referred to the existence of such a policy. Mr Lauchlan also commented on his understanding that legal equality and diversity provisions required the SPS to treat same sex partnerships in the same way as other partnerships, and to that extent he suggested that a policy existed by default.
4. The SPS notified Mr Lauchlan of the outcome of its review on 9 October 2009, upholding its original decision and reiterating that it had no such policy or guidance. Having discussed the matter with the member of staff concerned, it disagreed with Mr Lauchlan's contention that he had been advised of the existence of such a policy.
5. On 19 October 2009 Mr Lauchlan wrote to the Commissioner, stating that he was dissatisfied with the outcome of the SPS's review and applying to the Commissioner for a decision in terms of section 47(1) of FOISA.
6. The application was validated by establishing that Mr Lauchlan had made a request for information to a Scottish public authority and had applied to the Commissioner for a decision only after asking the authority to review its response to that request. The case was then allocated to an investigating officer.

## Investigation

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7. The SPS is an agency of the Scottish Ministers (the Ministers) and, in line with agreed procedures, the Ministers were notified in writing on 17 November 2009 that an application had been received from Mr Lauchlan and that an investigation into the matter had commenced.
8. The Ministers were also given an opportunity to provide comments on the application (as required by section 49(3)(a) of FOISA) and asked to respond to specific questions. In particular, the Ministers were asked what steps (and specifically what searches, with details) the SPS had undertaken in order to establish that no relevant information was held by it. Subsequent references to submissions from the SPS are therefore references to submissions made by the Ministers' Freedom of Information Unit on behalf of the SPS.
9. The Ministers responded on behalf of the SPS on 18 December 2009, providing their comments and detailing the searches carried out to establish whether any relevant information was held.



## Commissioner's analysis and findings

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10. In coming to a decision on this matter, the Commissioner has considered all of the submissions made to him by both Mr Lauchlan and the SPS and is satisfied that no matter of relevance has been overlooked.

### Court of Session Opinion – requests for documents

11. The Commissioner notes that the information request by Mr Lauchlan was for copies of documents. In the case of *Glasgow City Council and Dundee City Council v Scottish Information Commissioner* [2009] CSIH 73, the Court of Session emphasised that FOISA provides a right to information, not documents. However, the Court said, in paragraph 45 of its Opinion, that where a request refers to a document which may contain the relevant information, it may nonetheless be reasonably clear in the circumstances that it is the information recorded in the document that is relevant. The Court also said that, if there is any doubt as to the information requested, or as to whether there is a valid request for information at all, the public authority can obtain clarification by performing its duty under section 15 of FOISA, which requires a public authority, so far as it is reasonable to expect it to do so, to provide advice and assistance to a person who proposes to make, or has made, a request for information to it.
12. In this case, the Commissioner notes that there is no indication in the correspondence he has seen between Mr Lauchlan and the SPS that the SPS questioned the validity of the information request. In addition, there is nothing to suggest from correspondence which the SPS has subsequently had with the Commissioner that the SPS was unclear as to what the information request sought.
13. The Commissioner is satisfied that the request is reasonably clear and that the information request is therefore valid.

### Section 17 – Notice that information is not held

14. Section 17(1) of FOISA requires that, where an authority receives a request for information that it does not hold, then it must give the applicant notice in writing to that effect.
15. In order to determine whether the SPS dealt with Mr Lauchlan's request correctly, the Commissioner must be satisfied as to whether, at the time it received Mr Lauchlan's request, the SPS held any information which would fall within the scope of that request.
16. With this in mind, the investigating officer asked the SPS for details of any searches it had carried out to determine whether any relevant information was held.



17. The SPS advised that in responding to Mr Lauchlan's request, staff at the relevant prison checked the Prison Rules and sought advice from the Prisons Directorate, the SPS department responsible for the implementation of all policies relating to prisoners, to establish whether or not the SPS had any policy or guidance on contact between same sex partners (irrespective of whether registered or not). The SPS explained that local management at the prison were advised that there was no relevant policy, guidance or rule on this matter.
18. The SPS submitted that it was under no legal duty to hold information on contact between same sex partners, although it was required to comply with the Prison Rules and all relevant legislation in relation to people detained in prisons. It drew the Commissioner's attention to the terms of the Prisons and Young Offenders Institutions (Scotland) Rules 2006, which regulate the management of prisons and the classification, treatment, employment, discipline and control of persons required to be detained there. It noted that these rules made no reference to either same sex or opposite sex partnerships.
19. In his application, Mr Lauchlan referred to his understanding that a same sex couple currently within another prison, who were planning a civil registration, had been advised that they would each be detained separately following this registration. He believed this to be indicative of the existence of a policy. In response, the SPS advised that it was not aware of any prisoners within the prison mentioned by Mr Lauchlan having applied for a civil partnership. It advised that no local policy decisions had been taken relating to two individuals in custody who entered a civil partnership.
20. Having considered the submissions received from both the SPS and Mr Lauchlan, including the Prisons and Young Offenders Institutions (Scotland) Rules 2006, the Commissioner is satisfied in the circumstances as to the adequacy of the steps taken by the SPS to determine whether, at the time Mr Lauchlan's request was received, it held any information falling within the scope of request. The Commissioner is therefore satisfied that the SPS was correct to give Mr Lauchlan notice in terms of section 17(1) of FOISA that it did not hold the information. The Commissioner should also make it clear that it is not his function to determine whether the SPS *should* have had a policy or guidance on the matters identified by Mr Lauchlan, but simply to determine whether such a policy

## DECISION

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



## Appeal

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Should either Mr Lauchlan or the Scottish Prison Service wish to appeal against this decision, there is an 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 notice.

**Margaret Keyse**  
**Head of Enforcement**  
**29 January 2010**



## Appendix

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### 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.

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##### 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).

##### 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.

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