



Scottish Information
Commissioner

Mr Pugh and the Scottish Prison Service

Request for information regarding Scottish prisoners' access to computers, the internet and free legal postage.

Applicant: Mr David Pugh
Authority: The Scottish Prison Service
Case No: 200500865
Decision Date: 4 October 2005

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Scottish Information Commissioner
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Decision 029/2005 – Mr Pugh and the Scottish Prison Service

Request for information regarding Scottish prisoners' access to computers, the internet, digital television, and free legal postage - information withheld due to excessive cost

Facts

Mr Pugh asked the Scottish Prison Service (the SPS) to supply him with:

- The number of computers/word processing units provided by the SPS for use by prisoners within residential areas of each Scottish prison
- The number of prisoners within each SPS establishment currently permitted to possess personal computers for word processing purposes which have not been supplied by the SPS
- Information about any plans the SPS has for implementing internet access for prisoners either on a trial or permanent basis
- A list of the prisons which generally allow prisoners access to all BBC and ITV digital television channels
- A list of the prisons in Scotland which generally cover the cost of outgoing legal postage.

The information was withheld from Mr Pugh on the grounds of excessive cost. Mr Pugh was dissatisfied with the response he received from the SPS to his initial request and to his subsequent request for review. He lodged an application with the Commissioner to ascertain whether the SPS had complied with the Freedom of Information (Scotland) Act 2002 (FOISA) in responding to his request for information.

Outcome

The Commissioner found that the SPS had not dealt with Mr Pugh's request for information in accordance with Part 1 of FOISA and accordingly ordered the release of the information requested by Mr Pugh.



Appeal

Should either the SPS or Mr Pugh wish to appeal against the Commissioner's 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 of receipt of this notice.

Background

1. On 5 January 2005 Mr Pugh wrote to the SPS, asking it to supply him with the information set out above.
2. The SPS responded to Mr Pugh's request for information on 21 January 2005. The SPS refused to release the information requested by Mr Pugh on the basis that it was not held centrally.
3. Mr Pugh sought a review of this decision on 14 February 2005, arguing that under FOISA information should be released regardless of whether the information was held centrally or not.
4. The SPS carried out the review and, on 3 March 2005, advised Mr Pugh of the outcome of the review. On review, the SPS released certain information to Mr Pugh, but withheld other information, stating that to release the remainder would incur excessive costs.
5. On 7 March 2005, Mr Pugh applied to the Scottish Information Commissioner for a decision as he was dissatisfied with the response he had received to his request for information.
6. The case was allocated to an investigating officer.

The Investigation

7. Mr Pugh's appeal was validated by establishing that he had made a request to a Scottish public authority and had sought a decision from the Commissioner only after requesting that the authority review its decision to withhold information.



8. A letter was sent from my Office on 11 March 2005 to the SPS informing it that Mr Pugh's application had been received and that an investigation into the matter would now begin.
9. The SPS was asked to provide:
 - A copy of the procedures followed in responding to requests for information made under FOISA
 - A written summary of the methods used to gather the information which Mr Pugh had asked for
 - A copy of the calculations made to determine the cost of responding to Mr Pugh's request for information
 - Copies of the information used to determine the statements given to Mr Pugh in answer to his request for information.
10. The SPS responded to this request on 31 March 2005. My Office subsequently entered into further correspondence with the SPS to clarify additional points. During the course of this correspondence, the SPS agreed to release further information to Mr Pugh.
11. The information was subsequently released to Mr Pugh on 27 June 2005 and my Office wrote to Mr Pugh to ask whether he was now happy to settle on the basis of the information provided to him.
12. Mr Pugh responded on 8 July 2005 stating that he was not satisfied with the information that he had received, and that he wished me to come to a decision on his application.

Analysis and Findings

13. Mr Pugh's dissatisfaction with the SPS focussed on three points. Firstly, he was dissatisfied with the manner in which the SPS had responded to his request for information and subsequent request for review. In addition, he did not believe that the calculation of the cost of releasing the information had been carried out correctly. Finally, Mr Pugh disputed whether the SPS had released all of the information to him in response to his request. I will consider these three points in turn.

Did the SPS comply with FOISA in the manner in which it handled Mr Pugh's request for information?

14. I find that the manner in which the SPS responded to Mr Pugh's initial request for information did not comply with its obligations under FOISA.



15. The SPS stated that it would not release the information to Mr Pugh as it was not held centrally. Section 1(1) of FOISA states that a person who requests information from a Scottish public authority which holds it is entitled to be given it by that authority. If an authority chooses to withhold information from an applicant, it must do so only on the basis of one of the grounds contained in FOISA. The fact that the information is not held centrally is not a ground for withholding the information under FOISA.
16. On receipt of a valid request for information, a public authority has three main options: release the information to the applicant; issue a formal notice to the applicant stating that the authority does not hold the information or issue a formal refusal notice to the applicant. I consider that the SPS's letter of 21 January 2005 can only be treated as a refusal notice. Sections 16 and 19 of FOISA clearly set out the information which must be included in a refusal notice in order for that notice to be valid. The notice must:
 - disclose that the public authority holds the information;
 - specify the exemption that applies to the information;
 - state why the exemption applies (including consideration of the public interest test, where relevant);
 - provide information about the applicant's right to request that the authority conduct a review of their decision, and
 - give information about the applicant's right to apply for a decision from the Commissioner.
17. Although it could be argued that the SPS implicitly disclosed that it held the information that Mr Pugh requested in its response, none of the other requirements set out in FOISA were complied with. Therefore, I find that the SPS failed to meet its obligations under FOISA in its initial response to Mr Pugh. However, I note that in the comments submitted to my Office, the SPS has accepted that the initial failure to recognise Mr Pugh's request as a valid request made under FOISA meant that subsequently the request was not handled in accordance with the provisions of FOISA.
18. When Mr Pugh requested that the SPS review its decision to withhold the information he had requested, the SPS responded by providing him with certain information in response to his request, and stating that the information released was proportionate to the request in terms of the cost of the time taken by staff to gather the information. The issue of cost calculations is addressed in paragraphs 23- 26. However, I do not find that the manner in which the SPS responded to Mr Pugh's request for review complies with FOISA.
19. Section 21 of FOISA requires an authority to carry out a review in response to an applicant's request to do so. Following the review, it must issue a written notice to the applicant, which must include details about the requester's right of application to me for decision and about the right to appeal against any decisions by me to the Court of Session. This information was not included in the SPS's response to Mr Pugh's request that it review its decision not to release the information.



20. Paragraphs 63 to 70 of the Scottish Ministers' Code of Practice on the Discharge of Functions Carried Out by Public Authorities under the Freedom of Information (Scotland) Act 2002 ("the Section 60 Code of Practice") states that authorities should put in place clear procedures for carrying out reviews. It asserts that a review should be carried out by a different member of staff, should be fair, impartial, and should allow for different decisions to be made. In this case, the authority did not assign a different staff member to carry out the review. In its submission to me the SPS recognised that in this its service had fallen short of what was required by FOISA.
21. From my investigation, I cannot see clear evidence of the SPS carrying out a full review of its decision to withhold information from Mr Pugh in this case. Therefore I cannot judge whether the process of review was fair and impartial in the case of Mr Pugh. Nevertheless, I recognise that the SPS changed its decision to withhold all information from Mr Pugh during the process of review, which indicates that the process did serve to reassess Mr Pugh's request for information. I also note that the SPS has accepted that as it did not recognise Mr Pugh's request for information as one made under FOISA, the request was not handled in accordance with the obligations placed upon it. Furthermore, in its submissions to me, the SPS has stated that it is currently revising its guidance for staff on FOISA, which will include additional material on handling requests for reviews made by applicants.

Did the SPS calculate the cost of responding to Mr Pugh's request for information correctly?

22. Under section 12(1) of FOISA, an authority is not obliged to comply with a request for information if the authority estimates that the cost of complying with the request would exceed the amount prescribed in the Freedom of Information (Fees for Required Disclosure) (Scotland) Regulations 2004 (the Fees Regulations). Regulation 5 of the Fees Regulations states that the prescribed maximum amount is £600.
23. In its submission of 31 March 2005, the SPS stated that the cost of complying with Mr Pugh's request for information was £1410.00, which clearly exceeds the maximum amount chargeable under the Fees Regulations. As a result, the SPS claimed that it was not obliged to comply with Mr Pugh's request. It should be noted that although the SPS did not consider itself obliged to respond to Mr Pugh, it did, however, release part of the information requested in its response to his request for review.
24. The SPS did not comply with Mr Pugh's request for information as it believed that to provide it would exceed the maximum amount prescribed for the purposes of section 12(1) of FOISA. However, during subsequent correspondence between my Office and the SPS, it became clear that the SPS had misunderstood Mr Pugh's request for information. Mr Pugh wished to access a list of the prisons which generally covered the cost of legal postage for prisoners. The SPS had understood that Mr Pugh had requested a list of all of the occasions when Scottish prisoners had been granted legal postage costs, and it argued that to gather this information would exceed the maximum amount prescribed for the purposes of section 12(1). When, during the investigation, the terms of Mr Pugh's request was clarified to the SPS, the SPS agreed that to gather the information requested would not exceed the amount prescribed in the Fees Regulations.



25. I therefore find that, initially, the SPS did not comply with section 12(1) of FOISA in responding to Mr Pugh's request.

Did the SPS release all of the information it held in response to Mr Pugh's request?

26. The request from Mr Pugh covered five separate topics. Firstly, Mr Pugh requested the number of computers which were provided by the SPS for use by prisoners within residential areas of each Scottish prison. During the investigation, the SPS maintained that the information was not covered by FOISA as it was not held centrally. All recorded information held by a public authority is subject to FOISA unless exempted by a provision of FOISA. Information not held centrally is not excluded by FOISA. Therefore all information that the SPS hold, including information held within prisons, should be considered in terms of FOISA.
27. Next, Mr Pugh requested the number of prisoners within each SPS establishment which are currently permitted to have in their possession a personal computer which has not been provided by the SPS. The SPS responded that no prisoner was permitted to possess a personal computer which was not provided by the SPS. The SPS has also stated during the course of the investigation that no prisoners currently possess a personal computer which has not been provided by the SPS. During the course of the investigation, the SPS stated that to access the information that Mr Pugh required it had referred to its Governors and Managers Action Notice 88A/03 which sets out a list of the electronic equipment prisoners are permitted to own. The list does not include personal computers. Therefore, I find that the SPS did provide Mr Pugh with the recorded information that it held. However, the SPS may have found it useful to consider releasing the document itself to Mr Pugh in order to provide him with the context of its response.
28. Mr Pugh also asked whether the SPS had plans to implement internet access for prisoners either on a trial or permanent basis. The SPS responded that there were no plans for access at present. In his letter to this Office of 30 June 2005, Mr Pugh has stated that he is satisfied with the information provided to him by the SPS, and I find that the SPS has complied with FOISA in responding to this aspect of his request.
29. Mr Pugh requested a list of establishments where prisoners generally have access to all BBC and ITV digital television channels. As part of its response to Mr Pugh's request for review, the SPS stated that no prisons had general access to digital television. Mr Pugh was not satisfied with this response, as he felt that several prisons did have access to digital facilities. During the course of my investigation, the SPS provided him with the names of the two prisons which did have general access to digital television, and stated that certain other prisons have limited access. I find that in responding to Mr Pugh's original request for information, the SPS did not comply with Section 1(1) of FOISA as it did not provide Mr Pugh with a list of prisons which generally provide prisoners with access to all BBC and ITV digital television channels. However, I note that the SPS did provide Mr Pugh with this information during the course of the investigation.



30. Finally, Mr Pugh requested a list of SPS establishments which routinely paid the cost of postage of outgoing legal correspondence. In responding to Mr Pugh's request for review, the SPS advised Mr Pugh that rule 53(1)(3) of the Prisons and Young Offenders Institutions (Scotland) Rules 1994 (the 1994 Rules) authorises Governors to allow prisoners to send letters at the expense of the Scottish Ministers if it is justified in the prisoner's circumstances. However, I do not consider this to be a sufficient response to Mr Pugh's request.
31. Rule 53 of the 1994 Rules also states that every prisoner shall be allowed to send one letter each week, the postage for which shall be paid for by the Secretary of State, and the Governor shall provide the prisoner with the necessary writing materials for this purpose. The rule does not specifically mention legal correspondence. Having consulted with a number of prisons within Scotland, I have found that some prisons also cover the cost of all legal postage for prisoners on remand, and that some record instances of extra postage costs being provided. The SPS therefore holds further information about which SPS prisons routinely pay the cost of outgoing legal correspondence, which should have been provided to Mr Pugh.
32. I find that the SPS has not released all of the information that it holds in relation to Mr Pugh's request for information. As such, it has not complied fully with section 1(1) of FOISA.

Conclusion

33. The SPS has not complied with FOISA in responding to Mr Pugh's request for information. Firstly, the SPS did not respond to either Mr Pugh's original request or his subsequent request for review in the manner set out in sections 16, 17, 19, or 21 of FOISA. However, in its submission to me of 3 March 2005 it accepted that this was the case, and apologised for the way in which the request had been handled
34. Due to the SPS misunderstanding the information requested by Mr Pugh, it did not apply the Fees Regulations correctly to the information, and thus did not comply with section 12(1) of FOISA. Again, the SPS has accepted that this misunderstanding had occurred, and has subsequently supplied Mr Pugh with some further information in response to his request.
35. Finally, the SPS did not comply with section 1(1) of FOISA in responding to Mr Pugh as it has not supplied Mr Pugh with all of the information that it holds in response to his request.



Decision

I find that the SPS did not deal with Mr Pugh's request for information in accordance with Part 1 of the Freedom of Information (Scotland) Act 2002 (FOISA). In failing to issue a formal notice in response to Mr Pugh's request, the SPS breached sections 16, 17 and 19 of FOISA. In failing to advise Mr Pugh of his right to appeal to me following the review, the SPS breached section 21(10) of FOISA. The SPS also failed to have regard to paragraphs 63-70 of the Scottish Ministers' Code of Practice on the Discharge of Functions by Public Authorities under the Freedom of Information (Scotland) Act 2002, in carrying out a review of its decision, and in so doing failed to comply with section 15 of FOISA.

However, the SPS has noted these errors and has apologised for them. The SPS is currently revising its internal freedom of information guidance to include additional material on reviews and appeals. As a result, I do not require the SPS to take any steps in relations to these technical breaches of FOISA.

I find that the SPS has failed to comply with Part 1 of FOISA in that it has breached section 1(1) in refusing to disclose:

- The number of computers/word processing units provided by the SPS for use by prisoners within residential areas of each Scottish prisons and
- A list of the prisons in Scotland which generally cover the cost of outgoing legal postage.

I require that the SPS provide Mr Pugh with the information listed above. I require the SPS to provide this information to Mr Pugh within two months of receipt of this decision notice.

Kevin Dunion
Scottish Information Commissioner