

Decision Notice



Decision 060/2014 Mr G and the Scottish Prison Service

Application of Rule 123 of the Prison Rules 2011

Reference No: 201302447
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Summary

On 6 June 2013, Mr G asked the Scottish Prison Service (the SPS) for information amounting to advice or guidance on the application of Rule 123 of the Prison Rules 2011. The SPS responded by providing information.

Following an investigation, the Commissioner found that the SPS failed to provide all the information it held and which fell within the terms of his request. This information was supplied to Mr G during the investigation.

The Commissioner also found that the SPS failed to inform Mr G properly about his rights of appeal.

Relevant statutory provisions

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) and (4) (General entitlement); 19 (Content of certain notices); 21(10) (Review by Scottish public authority)

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

1. On 6 June 2013, Mr G wrote to the SPS (handing his request to an SPS employee) requesting:
“ ... all and any information amounting to advice or guidance relative to the application of Rule 123 of the Prison Rules 2011 such as may have been in force within the SPS since 1 September 2012, to include communications from SPS Headquarters, GMA [Governors' and Managers' Action] notices and other forms of written guidance.”
2. The SPS responded on 28 June 2013 and supplied Mr G with a number of items of information.



3. On 17 August 2013, Mr G wrote to the SPS requesting a review of its decision. He wrote again (in the same terms) on 23 August 2013, as his letter of 17 August 2013 was not received in legible form by the SPS. Mr G believed the SPS to hold further relevant information. In particular, he understood advice to have been issued by SPS headquarters (which he believed would have been in force during the period covered by his request) following the upholding by the Scottish Public Services Ombudsman (the SPSO) of a number of complaints relating to the calling of witnesses at Internal Complaints Committees (ICCs).
4. The SPS notified Mr G of the outcome of its review on 23 September 2013, providing him with additional information.
5. On 15 October 2013, Mr G wrote to the Commissioner, stating that he was dissatisfied with the outcome of 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 G made a request for information to a Scottish public authority and 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

7. The SPS is an agency of the Scottish Ministers (the Ministers) and, in line with agreed procedures, the Ministers were notified in writing that an application had been received from Mr G and that an investigation into the matter had commenced. The Ministers were given an opportunity to provide comments on the application (as required by section 49(3)(a) of FOISA) and were asked to respond to specific questions.
8. Submissions were received from the SPS directly.

Commissioner's analysis and findings

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

Information requested by Mr G

10. In terms of section 1(4) of FOISA, the information to be provided in response to a request under section 1(1) is that falling within the scope of the request and held by the authority at the time the request is received, subject to qualifications which are not applicable here.



11. Mr G's application to the Commissioner referred (as had his request for review) to recommendations made by the SPSO on rule 123 and the calling of witnesses at ICCs. He understood SPS headquarters to have provided advice to ICC chairs about this.
12. The investigating office asked the SPS how it had ensured that all information falling within Mr G's request had been identified and located.
13. The SPS responded that it had carried out searches of the electronic files and folders held within its SharePoint repository, which contained the current recorded guidance and all advice issued to staff and prisoners. It described the resource and the searches carried out, with details of the search terms used.
14. The SPS confirmed that it had carried out a further search during the investigation, using an additional search terms. This identified two more GMAs, which were given to Mr G. The SPS acknowledged that these could be considered to contain information falling within the scope of the request, on a broad reading of the request. The Commissioner agrees with this conclusion, although the information does not appear directly relevant to the concerns identified by Mr G in his requirement for review and his application to the Commissioner. In the circumstances, she must find that the SPS failed to deal with Mr G's request fully in accordance with section 1(1) of FOISA.
15. Mr G referred to a meeting at which an ICC chair told him the prison had sought and received advice from SPS headquarters about the calling of witnesses to ICC meetings. He stated that he was not provided with the advice at the time, or with anything of this description in response to his request.
16. The SPS responded that it held no such advice. The SPS commented that it was common for those working in prisons to contact its Legal Services Branch to discuss matters concerning the Prison Rules, frequently on questions of interpretation. It stated that this advice seldom required to be recorded and it was not considered either necessary or practical to do so. The Legal Services Branch could recall discussions with at least four managers (who were chairs of ICCs) in two prisons on Mr G's interpretation of rule 123.
17. The SPS identified the officer who provided the advice alluded to by Mr G. During the investigation, this officer searched his own emails and folders, including a folder specific to advice provided in relation the Prison Rules. The SPS confirmed that no further relevant information was identified, providing evidence of their search results.
18. Mr G also referred to his disagreements with the SPS on the proper interpretation of rule 123(7), which relates to the calling of witnesses at an ICC, and to his related complaint to the SPSO. He suggested that internal legal advice might have been sought on this matter, and also referred to correspondence (created after his request was received and therefore not covered by the request) which he believed suggested that the SPS should have held information on the development of new processes following the outcome of his SPSO complaint.



19. In relation to these points, the SPS submitted that the searches conducted to date were reasonable and proportionate, and would have shown if any such information were held. It stated that Mr G's claims were unsubstantiated. The SPS also submitted that the issue arose from an interpretation peculiar to Mr G, and had no wider application. In the circumstances, it had not been found necessary to issue formal corporate advice on the issue. It acknowledged that the affected ICC chairs might have discussed the issue with other prison staff, but submitted that further searches of staff emails would be disproportionate in the circumstances. It concluded that it held no information advising on the attendance of witnesses, as described in Mr G's submissions.
20. With regard to the "new processes" referred to in paragraph 18 above, the SPS referred to GMA 58A/12, which was the guidance produced as a result of the relevant SPSO decision. It stated that this was the information provided to Mr G with the review outcome of 23 September 2013.
21. It is not for the Commissioner to interpret rule 123 of the Prison Rules, or to comment on competing interpretations (by the SPS, Mr G or anyone else) of any part of this rule. Her role is to consider whether the SPS dealt with Mr G's information request in accordance with Part 1 of FOISA. Specifically, she is concerned with the steps taken by the SPS to identify and locate any information falling within the scope of the request.
22. Given the terms of the request, and taking account of Mr G's submissions, the Commissioner considers it reasonable to interpret the request as relating to corporate advice provided to SPS staff, either in general terms or in relation to specific circumstances, rather than less formal deliberation on the rule within prisons.
23. The standard of proof to apply in determining whether a public authority holds information (or held it, at the material time) is the civil standard of the balance of probabilities. In deciding where the balance lies, the Commissioner will consider the scope, quality, thoroughness and results of the searches carried out by the public authority. She will also consider, where appropriate, any other reason offered by the public authority to explain why the information is not held.
24. Having considered all relevant submissions, the Commissioner is not satisfied that that the SPS took adequate proportionate steps to determine whether it held relevant information when responding to Mr G's request and review request. However, the Commissioner is satisfied that since then, all relevant information has been located and disclosed by the SPS.
25. In all the circumstances of this case, the Commissioner accepts that the SPS now holds no further information falling within the scope of the request made by Mr G, in addition to that already supplied.



Notice of appeal procedures

26. Mr G's application to the Commissioner submitted that the SPS "failed to provide proper notice of appeal procedures at each stage of dealing with the request". He stated that neither the initial response to the request nor the review outcome contained contact details for the Commissioner, nor any reference to the applicant's right of appeal to the Court of Session.
27. The Commissioner would first observe that section 19 of FOISA did not apply to the SPS's initial response in this case. This section, which provides for applicants being given details of their right to seek a review and apply to the Commissioner for a decision, applies to various specified kinds of notice given by the authority. These are, in summary:
 - a. A fees notice under section 9 of FOISA
 - b. A refusal notice under section 16 of FOISA
 - c. A notice that information is not held, under section 17 of FOISA
 - d. A refusal notice under the "neither confirm nor deny" provision in section 18 of FOISA.
28. In this case, the SPS's letter of 28 June 2013 purported to provide Mr G with all the relevant information it held. A Scottish public authority doing that (and that alone) is not obliged to comply with section 19 in doing so. Therefore, although the Commissioner recommends providing equivalent information in such cases as good practice, she cannot find a failure to comply with section 19 if the authority does not do so.
29. The position is different following a review. Under section 21(10) of FOISA, the notice (under section 21(5)) communicating the outcome of the review must contain details of the applicant's rights to apply to the Commissioner and appeal to the Court of Session.
30. The SPS explained that the template letter which would have contained the relevant information was not used on this occasion. It had since held two awareness sessions with managers at the prison in question, to convey the importance of using templates and to improve management of FOI. It also submitted that Mr G was fully aware of his rights under FOISA.
31. The question of Mr G's right of appeal to the Court of Session (under section 56 of FOISA) is relatively easy to deal with. Section 21(10) requires that applicants are provided with "particulars" of their rights of application and appeal. Even allowing the authority a degree of latitude in determining what particulars it is required to provide, the Commissioner does not believe section 21(10) can be interpreted as allowing it to provide no particulars at all. That is what happened in relation to Mr G's rights under section 56, so in that respect the Commissioner can only find that through a simple procedural failure, the SPS failed to comply with section 21(10) of FOISA.
32. The review outcome did state that Mr G had the right to apply to the Commissioner if he was not satisfied with the outcome. Mr G did not believe this was enough, noting that no contact details were provided for the Commissioner. The question for the Commissioner, therefore, is whether section 21(10) obliged the SPS to provide such contact details.



33. There is no definition of “particulars” for the purposes of section 21(10). FOISA does not specify what these particulars must include. The precise content of the particulars is, therefore, left to the Scottish public authority giving notice under section 21(5), although the Commissioner takes the view that the authority must provide the applicant with sufficient information to allow them to exercise their right of application under section 47(1) of FOISA. As a general rule, the authority should state:
- (i) that the right exists
 - (ii) how and where the Commissioner may be contacted
 - (iii) that an application must, in terms of section 47(4) of FOISA, be made within six months.
34. The Commissioner considers it good practice to provide the above information, as a minimum, in all cases. There may be cases in which, depending on known needs of the applicant, it would be appropriate (and possibly necessary) to provide more information, but she does not consider it is generally appropriate to provide less.
35. The Commissioner acknowledges that there will be applicants whose knowledge of FOISA is such that they are able to exercise their rights under FOISA (and particularly those under section 47(1)) fully without being given particulars of those rights by the authority. Mr G may be such an applicant. It might be argued that the section 21(10) obligation could be met in relation to such a person by providing less information than would be required for an applicant with little or no prior knowledge of the FOISA regime. That would need to be a conscious decision of the authority, which the Commissioner would expect it to justify by reference to particular circumstances and evidence, but not an approach which she would recommend.
36. In any event, this is not a case where the SPS chose to provide Mr G with less information than it would usually provide to applicants on their section 47(1) rights. It simply omitted to provide the “usual” information. In those circumstances, the Commissioner finds that the SPS failed to comply fully with section 21(10) of FOISA in responding to Mr G’s request.
37. Having reached the above conclusions, the Commissioner acknowledges that Mr G is (and was, when the SPS dealt with his requirement for review) fully aware of his rights under sections 47(1) and 56. He was not disadvantaged in his exercise of these rights by the SPS’s failures to comply with section 21(10). In the circumstances, and noting the steps taken by the SPS to raise awareness of its managers already (see paragraph 30 above), she does not require the SPS to take any further action in respect of these failures, in response to Mr G’s application.



DECISION

The Commissioner finds that the Scottish Prison Service (the SPS) partially complied with Part 1 of the Freedom of Information (Scotland) Act 2002 (FOISA) in responding to the information request made by Mr G. The Commissioner finds that by failing to provide some information falling within the scope of the request, the SPS failed to comply with section 1(1) of FOISA.

The Commissioner finds that the SPS failed to comply with section 21(10) of FOISA, in relation to Mr G's request, by failing to inform him fully of his rights of application to the Commissioner and of appeal.

In all the circumstances of this case, the Commissioner does not require the SPS to take action in respect of either of these failures, in response to Mr G's application.

Appeal

Should either Mr G 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.

Rosemary Agnew
Scottish Information Commissioner
07 March 2014



Appendix

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.
- ...
- (4) The information to be given by the authority is that held by it at the time the request is received, except that, subject to subsection (5), any amendment or deletion which would have been made, regardless of the receipt of the request, between that time and the time it gives the information may be made before the information is given.
- ...

19 Content of certain notices

A notice under section 9(1) or 16(1), (4) or (5) (including a refusal notice given by virtue of section 18(1)) or 17(1) must contain particulars-

...

- (b) about the rights of application to the authority and the Commissioner conferred by sections 20(1) and 47(1).

21 Review by Scottish public authority

...

- (10) A notice under subsection (5) or (9) must contain particulars about the rights of application to the Commissioner and of appeal conferred by sections 47(1) and 56.