

Decision Notice

Decision 095/2014 Mr R and the Scottish Prison Service

Notes of meetings

Reference No: 201302891/ 201400126

Decision Date: 2 May 2014



Scottish Information
Commissioner

Summary

On 4 July 2013 and 19 September 2013, Mr R asked the Scottish Prison Service (the SPS) for notes taken at meetings held on those respective dates. In relation to the first request, the SPS advised Mr R to submit a subject access request under the Data Protection Act 1998 (the DPA). The SPS failed to respond to the other request and, on review, stated that it was repeated.

During the investigation, as all the information had been made available to Mr R under the DPA, the SPS concluded that it was otherwise accessible to him and applied section 25(1) of FOISA. The Commissioner accepted this following her investigation.

The Commissioner identified failures in the time taken to respond to one request and its eventual rejection as repeated.

Relevant statutory provisions

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) and (6) (General entitlement); 2(1)(a) and (2)(a) (Effect of exemptions); 10(1) (Time for compliance); 14(2) (Vexatious or repeated requests); 25(1) (Information otherwise accessible); 38(1)(a) (Personal information)

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

Request 1

1. On 4 July 2013, Mr R wrote to the SPS, requesting a copy of the handwritten and transcribed notes of an Internal Complaints Committee (ICC) meeting held that day to discuss a complaint he had made.
2. On 8 July 2013, the SPS responded, stating that a response would be included as part of its response to his complaint. Mr R sought a review of this response, which declined to provide the information, on 18 July 2013.
3. The SPS notified Mr R of the outcome of its review on 2 October 2013. The SPS stated that it considered the notes to be Mr R's own personal data and therefore exempt from disclosure under section 38(1)(a) of FOISA. He was advised to make a subject access request under the DPA.

Request 2

4. On 19 September 2013, Mr R wrote to the SPS, requesting all information contained within the notes of an ICC meeting held that day to discuss another complaint he had made.
5. On 24 October 2013, Mr R wrote to the SPS, requesting a review on the basis that it had failed to respond to the request.
6. The SPS notified Mr R of the outcome of its review on 8 November 2013. The SPS stated that his request was identical to one complied with on 22 August 2013. Consequently, it was

refusing to comply with the request because it considered it to be repeated, in terms of section 14(2) of FOISA.

7. On 4 December 2013 and 13 January 2014, Mr R wrote to the Commissioner, stating that he was dissatisfied with the outcome of the SPS's reviews and applying to the Commissioner for a decision on each request in terms of section 47(1) of FOISA.
8. The applications were validated by establishing that Mr R made requests for information to a Scottish public authority and applied to the Commissioner for a decision only after asking the authority to review its responses to those requests. The case was then allocated to an investigating officer.

Investigation

9. On 7 January and 18 February 2014, the investigating officer contacted the SPS, giving it an opportunity to provide comments on the applications (as required by section 49(3)(a) of FOISA) and asking it to respond to specific questions. It was asked to justify its reliance on any provisions of FOISA it considered applicable to the information requested.
10. In its submissions to the Commissioner, the SPS withdrew its reliance on section 14(2) of FOISA, explaining that it had been applied in error. It submitted that all of the requested information was exempt under section 38(1)(a) of FOISA, but later changed its position, applying section 25(1) of FOISA on the basis that the information was otherwise accessible to Mr R.
11. Mr R confirmed to the investigating officer that he had received the information to which these applications related, as a result of a subject access request.

Commissioner's analysis and findings

12. 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 R and the SPS. She is satisfied that no matter of relevance has been overlooked.
13. Under section 25(1) of FOISA, information which an applicant can reasonably obtain other than by requesting it under section 1(1) of FOISA is exempt information. The exemption in section 25 is absolute, in that it is not subject to the public interest test set out in section 2(1)(b) of FOISA.
14. Section 25 states that Scottish public authority does not need to provide information requested under section 1 of FOISA, where that information is reasonably obtainable by the applicant by other means, even where a fee may be charged. Section 25 is one of the few exemptions where the identity of the applicant is a relevant factor.
15. Where section 25 applies, authorities do not have to supply the information requested, but it is good practice for authorities to tell the applicant why they believe the information is available through other means. Given public authorities' duties to provide advice and assistance to applicants (under section 15 of FOISA), this will normally include telling the applicant where the information can be obtained.
16. 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. Section 38(1)(a) of FOISA does not deny individuals a right to access to information about themselves, but

ensures that the right is exercised under the DPA and not under FOISA (i.e. under a regime providing for access by the individual concerned rather than the world at large).

17. In dealing with both of his requests, the SPS advised Mr R to submit a subject access request under the DPA. Mr R has confirmed receipt of the information sought in both requests, as a result of a subject access request.
18. In all the circumstances, therefore, the Commissioner is satisfied that the information requested by Mr R could reasonably be obtained by him other than by requesting it under section 1(1) of FOISA. In light of this, it is unnecessary for her to consider the application of section 38(1)(a) to this information. She accepts that the SPS was entitled to withhold it under section 25(1) of FOISA.
19. However, the Commissioner must also conclude that the SPS failed to comply with section 1(1) of FOISA, by originally refusing Mr R's request 2 on the basis that it was repeated. During the investigation, it acknowledged that it had done this in error.
20. The SPS also failed to respond to Mr R's request within 20 working days, as required by section 10(1) of FOISA.

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 requests made by Mr R.

The Commissioner finds that the SPS was entitled to withhold the information under section 25(1) of FOISA.

However, in failing to respond to request 2 within the required statutory timescale, and by initially applying section 14(2) of FOISA to this request, the SPS failed to comply with sections 10(1) and 1(1) of FOISA.

The relevant information having been provided to Mr R, the Commissioner does not require the SPS to take any action in respect of these failures in response to Mr R's application.

Appeal

Should either Mr R 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
2 May 2014

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 –
 - (a) section 25;
...

10 Time for compliance

- (1) Subject to subsections (2) and (3), a Scottish public authority receiving a request which requires it to comply with section 1(1) must comply promptly; and in any event by not later than the twentieth working day after-
 - (a) in a case other than that mentioned in paragraph (b), the receipt by the authority of the request; or
 - (b) in a case where section 1(3) applies, the receipt by it of the further information.
...

14 Vexatious or repeated requests

- (2) Where a Scottish public authority has complied with a request from a person for information, it is not obliged to comply with a subsequent request from that person which is identical or substantially similar unless there has been a reasonable period of time between the making of the request complied with and the making of the subsequent request.

25 Information otherwise accessible

- (1) Information which the applicant can reasonably obtain other than by requesting it under section 1(1) is exempt information.
...

38 Personal information

- (1) Information is exempt information if it constitutes –
- (a) personal data of which the applicant is the data subject;
 - ...

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