

# Decision Notice



Decision 097/2012 Mr H and the Scottish Ministers

Statutory instruments

Reference No: 201200381  
Decision Date: 11 June 2012

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**Rosemary Agnew**  
Scottish Information Commissioner

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## Summary

Mr H asked the Scottish Ministers (the Ministers) for copies of two statutory instruments. The Ministers forwarded the request to the Scottish Prison Service (the SPS) to respond. The SPS responded under section 25(1) of FOISA, stating that it was not required to provide the information as it was reasonably accessible to Mr H. Following a review, which upheld the position that the information was reasonably accessible, Mr H remained dissatisfied and applied to the Commissioner for a decision.

Following an investigation, the Commissioner found that the Ministers had dealt with Mr H's request for information in accordance with Part 1 of FOISA, being satisfied that the information was reasonably accessible to him. However, she also found that they had failed to provide reasonable advice and assistance on where the information might be obtained, as required by section 15(1) of FOISA.

## Relevant statutory provisions and other sources

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Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) and (6) (General entitlement); 2(1)(a) and (2)(a) (Effect of exemptions); 15(1) (Duty to provide advice and assistance); 25(1) (Information otherwise accessible)

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 3 July 2011, Mr H wrote to the Ministers asking for the Data Protection (Functions of Designated Authority) Order 2000 [Statutory Instrument No.186] and the Data Protection (Subject Access Modification) (Social Work) Order 2000 [Statutory Instrument No. 415].
2. The Ministers forwarded his request to the SPS to deal with.
3. On 15 July 2011, the SPS acknowledged Mr H's request.
4. The SPS responded on 5 August 2011. It informed Mr H that it was not required to provide the information requested as it was reasonably accessible to Mr H otherwise than by requesting it under FOISA. It provided Mr H with the address for the Stationery Office, Edinburgh, where he could obtain the information.



5. On 16 August 2011, Mr H wrote to the SPS, referring to its letter of 15 July 2011 and asking the SPS to review its decision.
6. On 23 August 2011, the SPS wrote to Mr H, asking him to clarify why he wished a review to be carried out as he had not provided any reason for his dissatisfaction.
7. Mr H wrote to the SPS on 24 August 2011, stating that he had requested a review on the basis that the SPS had failed to respond to his request of 3 July 2011.
8. On 1 September 2011, the SPS wrote to Mr H and informed him that it had responded to his request on 5 August 2011. The SPS concluded that it had complied with the requirements of FOISA, but provided Mr H with a further copy of the response of 5 August 2011.
9. Mr H wrote to the SPS again on 2 September 2011. He referred to the fees structure under sections 9 and 12 of FOISA and disputed that the information was reasonably accessible to him, given that he was a prisoner on a very low income. He also queried the Ministers' actions in passing the request on to the SPS.
10. The SPS responded on 9 September 2011. It did not believe that the information was not reasonably accessible to him simply because he was a prisoner on a low income.
11. On 21 February 2012, following further correspondence, Mr H wrote to the SPS stating that the Stationery Office was no longer trading from the address provided in its response of 5 August 2011, and asked why he had been provided with inaccurate information.
12. On 23 February 2012, Mr H 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.
13. The SPS responded to Mr H on 9 March 2012, drawing attention to its previous correspondence and advising him that the address provided had been obtained from a web site at the time it responded to his request. The SPS stated that the information had been provided in good faith and apologised for any inconvenience.
14. Further correspondence followed between Mr H and the Commissioner's office. On 30 April 2012, Mr H wrote to the Commissioner confirming his reasons for his dissatisfaction with the way the Ministers had handled his request.
15. The application was validated by establishing that Mr H 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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16. On 8 May 2012, the Ministers were notified in writing that an application had been received from Mr H. As required by section 49(3)(a) of FOISA, they were asked to provide comments on the application and, in particular, to justify their reliance on section 25(1) of FOISA. The Ministers were also asked to comment on why they had handled Mr H request as they did.
17. The Ministers responded on 18 May 2012, adhering to their reliance on section 25(1) of FOISA and expanding on their reasoning. The relevant submissions received from both the Ministers and Mr H will be considered fully in the Commissioner's analysis and findings below.

## Commissioner's analysis and findings

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

### Handling of the request

19. In his correspondence with the SPS and in his application to the Commissioner, Mr H asked why, when he had submitted a FOISA request to the FOI Unit of the Scottish Government, the SPS had responded.
20. The Ministers commented that they were aware through previous contact that Mr H was a prisoner in the custody of the SPS. They were also aware that prison libraries contained a number of documents and that requesters were able to purchase items if necessary. As the FOI Unit would not be aware if these documents were already available to Mr H in the prison library on this occasion, they considered it to be in the best interests of the applicant for the request to be forwarded to the SPS for a response.
21. The Commissioner notes that the SPS is an agency of the Ministers and therefore, in law, is part of the Ministers as a Scottish public authority: there is no separate designation of the SPS for the purposes of FOISA. In the circumstances, she accepts that the Ministers were entitled to engage with the SPS in relation to Mr H's request and, where they considered it appropriate, to arrange for the SPS to respond to Mr H: such a response was, for the purposes of FOISA, a response by the Ministers. While the Commissioner might speculate that there could be circumstances in which such an approach to the handling of the request might not be the most helpful from the applicant's perspective, she can identify no basis for concluding that it should make any difference in this particular case, given the provisions of FOISA under consideration.



### **Section 25(1) – information otherwise accessible**

22. 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. Section 25(2)(a) confirms that information may be reasonably obtainable even if payment is required to access it. The exemption in section 25(1) is absolute, in that it is not subject to the public interest test set out in section 2(1)(b) of FOISA.
23. In their submissions to the Commissioner, the Ministers stated that the information requested by Mr H was available online and also for purchase from the Stationery Office. Acknowledging that Mr H, as a prisoner, did not have access to the internet, the Ministers submitted that he did have access to a library in prison. They explained that, where a document or book was not located in the prison library, Mr H could ask that the prison or library operator to obtain it for reference purposes. Where the document was not held or could not be obtained in this fashion, the other remaining option open to Mr H was to purchase the document.
24. The Ministers submitted that the Stationery Office had agents in Aberdeen, Glasgow and Edinburgh. The Ministers also submitted that Mr H could obtain a copy of the information requested by writing to the Stationery Office Ltd, PO Box 29, Norwich, NR3 1GN, where they operated a “print on demand” service at a cost of £4. They believed the applicant to be capable of utilising this service.
25. The Commissioner has considered all of the above submissions carefully. She has also considered the information available on the Stationery Office’s website as to the availability of the information. While accepting that Mr H may have limited access to funds with the prison regime, and that he does not have access to the internet, the Commissioner is satisfied that the information he requested could reasonably be obtained by him other than by requesting it under section 1(1) of FOISA. Consequently, the Commissioner is satisfied that the information was properly withheld under section 25(1) of FOISA.

### **Section 15 – duty to provide advice and assistance**

26. Section 15 of FOISA requires a Scottish public authority, so far as it is reasonable to expect it do so, to provide advice and assistance to a person proposes to make, or has made, a request for information to it. One type of advice and assistance will be to provide a requester with details as to where information can otherwise be obtained.
27. Mr H expressed dissatisfaction that, having informed the Ministers that the Stationery Office was no longer trading at the address provided, the Ministers failed to provide him with advice and assistance, in terms of section 15 of FOISA. He pointed out that in its letter of 9 March 2012, the SPS acknowledged that the address provided was out of date, but made no effort to provide a current address from where he could obtain the information requested.
28. In their submissions to the Commissioner, the Ministers maintained that they had complied with section 15 of FOISA by initially providing the address. They stated that, had Mr H brought it to their attention that the address was no longer in use, he would have received advice and assistance to identify the correct address or another provider.



29. As mentioned in the above paragraph, however, the Ministers were made aware that the Edinburgh address provided was out of date and did not provide advice and assistance as to an alternative address or supplier. In any event, while failure to identify an inaccuracy of this kind might be accepted as reasonable in other circumstances, the Commissioner would expect the Ministers to be able to identify potential sources of official publications accurately.
30. In the light of all of the above, the Commissioner considers that the Ministers failed in their duty to provide reasonable advice and assistance to Mr H and therefore failed to comply with section 15(1) of FOISA.

## DECISION

The Commissioner finds that the Ministers partially complied with Part 1 of the Freedom of Information (Scotland) Act 2002 (FOISA) in dealing with the information request made by Mr H. While the Ministers were correct to apply section 25(1) of FOISA to the information requested, they failed to provide reasonable advice and assistance on where the information might be obtained, as required by section 15(1) of FOISA.

In the circumstances, the Commissioner does not require the Ministers to take any action.

## Appeal

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Should either Mr H or the Scottish Ministers 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**  
**11 June 2012**



## 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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- (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;

...

##### 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.

...

##### 25 Information otherwise accessible

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

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