

# Decision Notice



Decision 099/2010 Mr X and the Scottish Prison Service

SPS policies and procedures

Reference No: 201000372  
Decision Date: 15 June 2010

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**Kevin Dunion**  
Scottish Information Commissioner

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## Summary

Mr X requested from the Scottish Prison Service (the SPS) information relating to SPS policies and procedures. The SPS responded by providing Mr X with some information on SPS processes. It also advised Mr X that it did not hold certain information, and that some information was exempt from disclosure under section 25 of FOISA because it was information which he could reasonably obtain himself without making an information request for it. Following a review, Mr X remained dissatisfied and applied to the Commissioner for a decision.

Following an investigation, the Commissioner found that the SPS had dealt with Mr X's request for information in accordance with Part 1 of FOISA by providing information in response to certain parts of his request, by correctly notifying him in terms of section 17 of FOISA that it did not hold certain information and by correctly applying the exemption in section 25(1) of FOISA to certain information.

## 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); 17(1) (Notice that information is not held); 21(10) (Review by Scottish public authority); 25(1) (Information otherwise accessible) and 47(1) and (4) (Application for decision by the Commissioner)

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.

The Prisons and Young Offenders Institutions (Scotland) Rules 2006 (SSI 2006/94)

Scottish Ministers' Code of Practice on the Discharge of Functions by Public Authorities under the Freedom of Information (Scotland) Act 2002 (the Section 60 Code)

## Background

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1. On 21 December 2009, Mr X wrote to the SPS requesting the following information:
  - 1) What legal training is currently available for adjudicators of orderly room proceedings within the SPS?



- 2) What percentage of adjudicators at HMP Dumfries have legal training commensurate with their duties to uphold the law?
- 3) What percentage of Internal Complaints Committee (ICC) members at HMP Dumfries who examine orderly room processes and decisions have received legal training?
- 4) In the past 12 months, what percentage of orderly room hearings at HMP Dumfries were adjourned to allow the adjudicator to contact SPS legal counsel and receive expert advice?

It is SPS policy that the Service has no authority to confiscate a prisoner's property even if the prisoner is not authorised to have the property. If there are any circumstances where officers are authorised to confiscate property from a prisoner's cell (other than illegal items), the reasons and specific authority given should be advised accordingly.

- 5) If a prison officer fails to comply with procedure in this regard, do such acts or omissions constitute misconduct?
- 6) Is it permissible for a prison officer to destroy a prisoner's personal property, if so, under what set of circumstances?

2. The SPS responded on 20 January 2010. In relation to parts 1), 2), and 3), the SPS explained the type of training that is provided to staff. In relation to part 4), the SPS notified Mr X that it did not hold this information. In relation to part 5), the SPS explained that cases of alleged misconduct are assessed on their own merits. In relation to part 6), the SPS advised Mr X that it considered the information exempt from disclosure under section 25 of FOISA on the basis that it was available in the Prisons and Young Offenders Institutions (Scotland) Rules 2006 (the PYOIRs) (which was available to him in the prison) and was therefore otherwise accessible to him.
3. On 25 January 2010, Mr X wrote to the SPS requesting a review of its decision. Mr X indicated that he considered the responses to his requests were incomplete or inaccurate.
4. The SPS notified Mr X of the outcome of its review on 2 February 2010, upholding its previous decision without amendment.
5. On 19 February 2010, Mr X 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 X 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 15 March 2010 that an application had been received from Mr X 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. Subsequent references to submissions from the SPS are 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 6 April 2010, providing their comments and responding to the specific questions posed by the investigating officer.

## 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 X and the SPS and is satisfied that no matter of relevance has been overlooked.

### Parts 1, 2 and 3 of Mr X's information request

11. The SPS's response to these parts of Mr X's information request provided an explanation of the general nature of the training that is provided to adjudicators and also explained that written guidance is provided to adjudicators.
12. The SPS additionally explained that all adjudicators and staff who chair ICC hearings relating to orderly room proceedings also receive training in adjudicating such proceedings.
13. The SPS submitted that the responses issued to Mr X confirmed that all staff who conduct these proceedings are provided with training in procedure and comprehensive guidance to allow them to manage incidents of indiscipline within prisons. The SPS noted that such proceedings are conducted by prison staff and not by lawyers or legal professionals.
14. In his submissions to the Commissioner, Mr X said he considered that the SPS's responses suggested that no legal training was in fact provided. He therefore considered that the response to part 1) of his information request was inaccurate and, as a consequence, he also considered that the responses to parts 2) and 3) were also inaccurate.



15. The Commissioner has considered the terms of part 1) of the request and the submissions provided by Mr X and the SPS. Given the general term “legal training” used by Mr X in part 1) of his request (without specifying any particular type or degree), the Commissioner considers that the explanation provided by the SPS of the type of training provided to staff was reasonable in the circumstances and fulfilled the requirements of section 1(1) of FOISA.
16. Given that the Commissioner is satisfied that the SPS’s response to part 1) of the request meets the requirements of section 1(1) of FOISA, he has consequently concluded that the SPS’s responses to part 2) and 3) of the request similarly fulfil the requirements of section 1(1) of FOISA.

#### **Part 4 of Mr X’s information request**

17. 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. In this instance, the SPS notified Mr X that it did not hold any information in response to part 4) of his request of 21 December 2009.
18. In order to determine whether the SPS dealt with Mr X’s request correctly, the Commissioner must be satisfied as to whether, at the time it received Mr X’s request, the SPS held any information which would fall within the scope of that request.
19. In its submissions to the Commissioner, the SPS explained that it had no record of any adjournment of the type specified by Mr X within the specified time period. The SPS noted that its guidance on orderly room proceedings did not provide for proceedings to be adjourned in order “to allow the adjudicator to contact SPS legal counsel and receive expert advice” as stated by Mr X.
20. The SPS explained that it does not employ legal counsel or “experts” to provide advice on orderly room proceedings. The SPS contacted its legal services division to ascertain if they had been contacted in such circumstances and found that they had not. Additionally, all staff involved in conducting the adjudication and monitoring of orderly room proceedings were asked whether they were aware of any adjournments in such circumstances and it was confirmed that they were not aware of this having happened.
21. Having considered the submissions provided by the SPS, the Commissioner is satisfied that no orderly room proceedings were adjourned in the circumstances envisaged by part 4) of Mr X’s request. The Commissioner therefore accepts that the SPS was correct to respond to this part of the request in terms of section 17 of FOISA.

#### **Part 5 of Mr X’s information request**

22. The SPS’s response to this part of Mr X’s request explained that any cases of alleged misconduct by prison officers would be assessed on their own merits in accordance with the SPS Code of Conduct policy and its Personal Performance Management System.



23. In his letter to the SPS requesting a review of its original decision and in his application to the Commissioner, Mr X made reference to the conduct of orderly room proceedings and the alleged failure of SPS staff to adhere to orderly room procedures. The Commissioner notes, however, that parts 5) and 6) of his information request were prefaced by a contextual paragraph which made reference to the confiscation of property from a prisoner's cell. In the circumstances, the Commissioner must consider the SPS's response to this part of Mr X's request in that context, i.e. on the basis that the procedure to which Mr X made reference in part 5) of his request related to the confiscation of property as opposed to the conduct of orderly room proceedings.
24. The Commissioner notes that Mr X has essentially posed a hypothetical question rather than making a request for recorded information. However, by explaining to Mr X the process by which the behaviour and actions of its staff are managed under the SPS Code of Conduct and Personal Performance Management System, the Commissioner has concluded that the SPS fulfilled the requirements of section 1(1) of FOISA in responding to this part of his request.

#### **Part 6 of Mr X's information request**

25. The SPS responded to part 6) of Mr X's information request by advising him that the information being sought was exempt from disclosure under section 25 of FOISA on the basis that it was information which he could reasonably obtain other than by requesting it under FOISA.
26. 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.
27. In this case, the SPS advised Mr X that the information he was seeking was available in Part 7 of the PYOIRs and that a copy should be available in the prison library.
28. The SPS also explained that rule 7 of the PYOIRs (Availability of Rules and directions) requires prison governors to ensure that a copy is available for inspection by prisoners in accommodation blocks and in the prison library. In its submissions to the Commissioner, the SPS confirmed that copies of the PYOIRs were held in the appropriate areas of the establishment in which Mr X was a prisoner.
29. Having considered the terms of the PYOIRs, and in particular rule 51 (Storage or disposal of personal property of prisoners), the Commissioner is satisfied that the information contained therein would fulfill this part of Mr X's request. The Commissioner is also satisfied that the information is reasonably obtainable by Mr X other than by requesting it under FOISA. He is therefore satisfied that the SPS was correct to rely on section 25(1) of FOISA in respect of part 6) of Mr X's information request.



### Content of notice

30. In his application to the Commissioner, Mr X expressed dissatisfaction with the SPS's failure (in its response to his requirement for review which was issued on 2 February 2010) to advise him of the timescale for applying to the Commissioner for a decision under section 47(1) of FOISA.
31. Section 21 of FOISA describes how an authority is required to comply with a request for a review of its decision.
32. Section 21(10) of FOISA provides that a notice (under section 21(5)) must contain particulars about the rights of application to the Commissioner conferred by section 47(1) of FOISA, and the subsequent right of appeal to the Court of Session provided by section 56.
33. Paragraph 70 of the Section 60 Code states that “any notice confirming the authority’s original decision should include the necessary particulars explaining the applicant’s right to appeal the review decision within certain time limits”.
34. While the SPS’s letter of 2 February 2010 did advise Mr X of his right to apply to the Commissioner for a decision, it did not advise him of the timescale for applying to the Commissioner. The Commissioner therefore finds that, although the SPS complied with its statutory obligations under section 21(10) of FOISA, it failed in so doing to follow good practice as described in paragraph 70 of the Section 60 Code.
35. The Commissioner does not require the SPS to take any action in response to this decision but would urge the SPS to include the requisite timescale in any notices issued under section 21 of FOISA in future.



## DECISION

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

The Commissioner finds that by providing information in response to certain parts of Mr X's request, the SPS complied with section 1(1) of FOISA.

The Commissioner finds that by correctly advising Mr X that it did not hold certain information, the SPS complied with Part 1 of FOISA, and particularly section 17(1).

The Commissioner also finds that the SPS acted in accordance with Part 1 of FOISA by withholding certain information in terms of section 25(1) of FOISA.

The Commissioner does not require the SPS to take any action in response to this decision.

## Appeal

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Should either Mr X or the SPS 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**  
**Scottish Information Commissioner**  
**15 June 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.

...

- (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;

...

##### 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.

- (2) Subsection (1) is subject to section 19.

...

## **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.

## **25 Information otherwise accessible**

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

...

## **47 Application for decision by the Commissioner**

- (1) A person who is dissatisfied with-
- (a) a notice given under section 21(5) or (9); or

...

may make application to the Commissioner for a decision whether, in any respect specified in that application, the request for information to which the requirement relates has been dealt with in accordance with Part 1 of this Act.

...

- (4) Subject to subsection (5), an application to the Commissioner under subsection (1) must be made-
- (a) where the application concerns a matter mentioned in paragraph (a) of subsection (1), before the expiry of six months after the date of receipt by the applicant of the notice complained of;

...