

# Decision Notice

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## Decision 112/2015: Mr H and the Scottish Prison Service

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### Payments to prisoners

Reference No: 201500573

Decision Date: 14 July 2015



Scottish Information  
Commissioner

## Summary

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On 12 December 2014, Mr H asked the Scottish Prison Service (SPS) about payments made to prisoners at a named prison. The SPS informed Mr H that some of the information was already accessible to him and that it did not hold other information covered by his request.

Following an investigation, the Commissioner found that the SPS was correct to inform Mr H that some information was accessible to him, but was wrong to state that it did not hold other information. The SPS made this information available to Mr H during the investigation.

## Relevant statutory provisions

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Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1), (4) and (6) (General entitlement); 2(1)(a) and (2)(a) (Effect of exemptions); 17(1) (Notice that information is not held); 21(4) and (5) (Review by Scottish public authority); 25(1) (Information otherwise accessible)

The full text of each of the statutory provisions cited above is reproduced in Appendix 1 to this decision. The Appendix forms part of this decision.

## Background

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1. On 12 December 2014, Mr H asked the SPS for “the level assigned and rate of earnings applicable to every purposeful activity/work role available to prisoners at [a named prison]”. Mr H also asked for other information which is not the subject of this decision.
2. The SPS responded on 12 January 2015. It stated that, under section 25(1) of FOISA, it was not required to provide information which was already reasonably accessible to Mr H. The SPS stated that the information was available within the Prisoner Wage Earning Policy (the Policy) in the reference section of the prison library.
3. On 14 January 2015, Mr H wrote to the SPS requesting a review of its decision. Mr H stated that the specific information he had requested was not included in the Policy and it was therefore not reasonably accessible to him.
4. The SPS notified Mr H of the outcome of its review on 5 February 2015. It confirmed that the Policy was accessible to Mr H, but noted that the Policy did not contain details of every purposeful activity/work role (“named employment”). The SPS stated that it would issue a revised Notice to prisoners which would include such information.
5. On 23 March 2015, Mr H wrote to the Commissioner, applying for a decision in terms of section 47(1) of FOISA. Mr H stated that he was dissatisfied with the outcome of the SPS’s review, because he did not consider that all the information he had requested had been disclosed to him. He was also dissatisfied with the way the SPS carried out the review.

## Investigation

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6. The application was accepted as valid. The Commissioner confirmed that Mr H made a request for information to a Scottish public authority and asked the authority to review its response to that request before applying to her for a decision.

7. On 8 April 2015, the SPS was notified in writing that Mr H had made a valid application and the case was allocated to an investigating officer.
8. Section 49(3)(a) of FOISA requires the Commissioner to give public authorities an opportunity to provide comments on an application. The SPS was invited to comment on Mr H's application and to answer specific questions, including substantiating its position that the requested information was otherwise accessible to Mr H. It was also asked whether it considered that its review of the response to Mr H's request complied with FOISA. The SPS was asked to provide the Commissioner with a copy of the revised Notice to prisoners (the revised Notice), and did so. The Notice was dated 5 February 2015.
9. On 15 May 2015, Mr H confirmed that the SPS had provided him with a copy of the revised Notice.
10. Later in the investigation, the SPS provided a copy of an earlier letter to Mr H, dated 16 June 2014, which enclosed a copy of the Policy.

## **Commissioner's analysis and findings**

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

### **Section 25(1) of FOISA – Information otherwise accessible**

12. 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 set out in section 2(1)(b) of FOISA.
13. The SPS initially argued that the information requested by Mr H was available in the Policy (as described in paragraph 2 above). It provided evidence that it had sent Mr H a copy of the Policy on 16 June 2014.
14. The Commissioner notes that the Policy includes details of payments for general work and the performance standard expected for that work. This information is also contained within a Notice to prisoners issued in November 2014.
15. In his correspondence, Mr H stated that he was not provided with a copy of the November 2014 version of the Notice, so the information was not otherwise accessible to him. However, the Commissioner notes that Mr H had already received a copy of the Policy, in June 2014, which included some information covered by his request. Even though Mr H had not received the November 2014 version of the Notice, the fact that he had access to the Policy meant that much of the information covered by his request was accessible to him in that document. The only information included in the Notice which was not found in the Policy was information about "named employment".
16. The Commissioner concludes that, at the date of his request, Mr H had access to most of the information he requested, except for information about named employment.
17. In all the circumstances, therefore, the Commissioner is satisfied that the majority of the information sought by Mr H was reasonably obtainable by him, other than by making a request for it under section 1(1) of FOISA. Therefore, the SPS was entitled to apply section

25(1) of FOISA to this information. She will go on to consider the SPS's response in relation to the information covered by Mr H's request which was not included in the Policy.

### **Section 17(1) of FOISA - Information not held**

18. In its review response, the SPS stated that it did not hold the information on named employment which was covered by Mr H's request, but it would update the Notice to prisoners to include such information. The SPS did this after Mr H made his application to the Commissioner, in February 2015.
19. During the investigation, Mr H informed the Commissioner that the SPS had revised the Notice again on 28 May 2015, to include information which was missing from the version of the Notice issued in February 2015.
20. Section 1(1) of FOISA provides that a person who requests information from a Scottish public authority which holds it is entitled to be given that information by the authority. The information to be given is that held by the authority at the time the request is received (section 1(4) of FOISA). If no such information is held by the authority, section 17(1) of FOISA requires it to give the applicant notice in writing to that effect.
21. The SPS was asked if it held any information about named employment at the date of Mr H's request. The SPS investigated further and confirmed that it had held this information at that date. It explained that the information was contained in fields in a large database application, and held only for the purpose of prisoner wage payment. It was not possible to provide an extract of the information from the database in a single database generated report, as the database was not constructed to provide such information.
22. The SPS explained that most of the purposeful activity/work roles listed in the database are historic entries which no longer apply, but which cannot be removed from the system. The SPS explained that the information in this system was used to produce the revised Notice, to include information about named employment.
23. Based on the above submissions, the Commissioner finds that, at the date when Mr H made his request, the SPS held information about named employment. In these circumstances, the SPS was wrong to give Mr H notice, in terms of section 17(1) of FOISA, that it did not hold information which fell within the scope of his request. In failing to provide Mr H with information which was covered by his request and which it held, the SPS failed to comply with section 1(1) of FOISA.
24. The Commissioner notes that the SPS issued revised Notices in February and May 2015, and accepts that the information about named employment is now accessible to prisoners (including to Mr H). The Commissioner does not require the SPS to take any further action with respect to its failure to comply with Part 1 of FOISA.

### **Section 21 of FOISA - Review by Scottish public authority**

25. In his application to the Commissioner, Mr H expressed dissatisfaction with the SPS's response to his requirement for review. Specifically, he submitted that the person who conducted the review should not have been involved as he could not reach an independent decision. Mr H stated that there was "an appearance of bias", in terms of the structural

independence envisaged by *Ruddy v Chief Constable, Strathclyde Police and another* [2012] UKSC 57<sup>1</sup>.

26. Section 21(4)(a) of FOISA provides that an authority which receives a requirement for review may confirm a decision complained of, with or without such modifications as it considers appropriate. Section 21(5) requires authorities to notify an applicant of the outcome of the review and give a statement of its reasons.
27. In this case, the SPS notified Mr H on 5 February 2015 that the original response had been amended, after accepting that not all the requested information was otherwise accessible to him.
28. Mr H submitted that the reviewer should not have conducted the review. FOISA does not stipulate how a review should be carried out or who should (or should not) be involved. Paragraphs 10.3.3 and 10.3.4 of Scottish Ministers' Code of Practice on the Discharge of Functions by Scottish Public Authorities under FOISA and the EIRs<sup>2</sup> states that it is good practice for the reviewer to be a person who did not respond to or advise on the original request, where possible or practicable: the aim of a review is to allow the authority to take a fresh look at its response to an information request, and the review procedure must be fair and impartial.
29. The Commissioner notes that the response to Mr H and the review response were issued by different people. The review resulted in a modified decision on Mr H's request. Mr H has not explained why he believes the reviewer in question was not capable of conducting an unbiased review of the response to his request. The Commissioner is satisfied that the review carried out by SPS followed good practice, and that the SPS did not breach the requirements of section 21(4) and (5) of FOISA in responding to Mr H's requirement for review.

#### **Other matters**

30. In his application and correspondence with the Commissioner, Mr H noted that within the Policy, it is stated that the Notice should be made available to all prisoners in the residential areas. Mr H complained that the Notice was only displayed in the residential area after he made his application to the Commissioner.
31. The Commissioner's remit in carrying out this investigation extends to the consideration as to whether the SPS held the requested information, whether it was entitled to withhold the requested information, and whether its responses complied with FOISA. All of these matters have been considered above. The Commissioner cannot comment on whether the SPS should have made the Notice available to all prisoners in the residential area, as this falls outwith her remit.

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<sup>1</sup> <https://www.supremecourt.uk/cases/uksc-2011-0258.html>

<sup>2</sup> <http://www.gov.scot/Resource/0046/00465757.pdf>

## Decision

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

The Commissioner finds that some of the requested information was otherwise accessible to Mr H and exempt from disclosure under section 25(1) of FOISA. However, the SPS wrongly gave notice that it did not hold other information covered by Mr H's request. This was a breach of section 1(1).

The Commissioner finds that the SPS complied with the requirements of section 21 of FOISA, in relation to its review of Mr H's request.

Given that all the information covered by his request is now available to Mr H, the Commissioner does not require the SPS to take any further action in respect of its failure to comply fully with Part 1 of FOISA.

## Appeal

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Should either Mr H 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**

**14 July 2015**

### 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.

...

- (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;

...

- (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.

...

## **21 Review by Scottish public authority**

...

- (4) The authority may, as respects the request for information to which the requirement relates-
  - (a) confirm a decision complained of, with or without such modifications as it considers appropriate;
  - (b) substitute for any such decision a different decision; or
  - (c) reach a decision, where the complaint is that no decision had been reached.
- (5) Within the time allowed by subsection (1) for complying with the requirement for review, the authority must give the applicant notice in writing of what it has done under subsection (4) and a statement of its reasons for so doing.

...

## **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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