

Decision Notice



Decision 114/2008 Mr Mohammad Hamza and the Scottish Prison Service

British Psychological Society guidance

Reference No: 200800668

Decision Date: 17 September 2008

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Scottish Information Commissioner

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Summary

Mr Hamza requested a copy of guidance issued by the British Psychological Society (BPS) from the Scottish Prison Service (SPS). The SPS refused to release a copy of the guidance stating it was available directly from the BPS. The SPS appeared subsequently to sent an additional response stating that the information requested was being withheld under section 30(b)(i) and (ii) of the Freedom of Information (Scotland) Act 2002 (FOISA). Upon review the SPS stated that it did not hold a copy of the guidance and relied upon section 17 of FOISA. Mr Hamza remained dissatisfied and applied to the Commissioner for a decision.

Following an investigation, during which it was clarified that the exemptions were cited in relation to a different information request made on the same date, the Commissioner found that the SPS had correctly informed Mr Hamza that the guidance requested was not held. However, the Commissioner found that the SPS had breached Part 1 of FOISA by failing to provide a notice to Mr Hamza in line with the requirements of sections 17 and 19 of FOISA. The Commissioner also noted that the SPS's review was conducted by the same person who had first responded to Mr Hamza's request, and so this was not compliant with guidance contained in the Section 60 Code of Practice. He did not require the SPS to take any action.

Relevant statutory provisions and other sources

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) (General entitlement), 17(1) and (2) (Notice that information is not held) and 19 (Content of certain notices)

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 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

1. On 24 March 2008, Mr Hamza wrote to the SPS requesting a copy of the guidance it had received from the BPS stating that individuals should not be given copies of raw data from cognitive functioning assessments (the guidance).



2. The SPS responded on 25 March 2008. It stated that the guidance could be obtained directly from the BPS and provided Mr Hamza with a correspondence address for the BPS.
3. The SPS wrote again to Mr Hamza on 10 April 2008, apparently providing a further response to his request of 24 March. This letter stated that the information requested was being withheld under sections 30(b)(i) and (ii) of FOISA.
4. On 11 April 2008, Mr Hamza wrote to the SPS requesting a review of this decision. In particular, Mr Hamza was dissatisfied that the SPS had changed its decision; stating that the guidance was now being withheld under section 30(b)(i) and (ii) of FOISA and he considered that this exemption could not be upheld.
5. The SPS wrote again to Mr Hamza on 16 April 2008, notifying him of the outcome of its review. This letter stated in terms section 17 of FOISA that the guidance requested was not held by the SPS. The SPS again advised Mr Hamza that a copy could be obtained directly from the BPS.
6. On 6 May 2008, Mr Hamza 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.
7. Mr Hamza's application indicated that he did not accept that the information requested was not held. He also expressed dissatisfaction with various aspects of the handling of his request, including the SPS's failure to notify him of his rights of review and appeal; its apparently changing responses to his request; and the fact that the person who initially responded to his information also appeared to have reviewed the request.
8. The application was validated by establishing that Mr Hamza 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

9. The SPS is an agency of the Scottish Ministers (the Ministers) and, in line with agreed procedures, the Ministers were contacted on 10 June 2008 in terms of section 49(3)(a) of FOISA asking for their comments on the application, whether a copy of the guidance was held by the SPS, the searches undertaken and an explanation of the changing approach adopted by the SPS in its responses to Mr Hamza.
10. The Ministers responded on 24 June 2008 stating that the SPS did not hold a copy of the guidance. The Ministers also provided an internet link to the guidance on the BPS website.



11. The Ministers explained that the SPS's letter of 10 April was actually intended as a response to another information request that Mr Hamza had also made on 24 March 2008. In the light of this clarification, the Ministers stated that they believed the SPS had been consistent in its responses to the request under consideration in this case.
12. The Ministers acknowledged that there had been various technical deficiencies in the SPS's handling of Mr Hamza's request, and apologised for these oversights.

Commissioner's analysis and findings

13. In coming to a decision on this matter, the Commissioner has considered all of the submissions that have been presented to him by both Mr Hamza and the Ministers and he is satisfied that no matter of relevance has been overlooked.
14. Having received the Ministers' clarification over the SPS's apparently changing approach to this request, the Commissioner has focussed on the question of whether the guidance requested by Mr Hamza is held by the SPS, and on the SPS's failure to comply with various technical provisions within Part 1 of FOISA.

Is the requested information held?

15. In order to determine whether the SPS was correct to respond to Mr Hamza's request by stating that the information requested was not held, the Commissioner must establish whether the SPS holds (or held at the time of Mr Hamza's request) a copy of the guidance.
16. In their letter dated 24 June 2008, the Ministers confirmed that the SPS did not hold a copy of the guidance. It was noted that psychologists within the SPS would not refer to guidance of this type regularly, but when they did, they would need to refer the latest version. It was noted that they would refer to the BPS website rather than keeping a printed copy.
17. Having considered all the submissions made by the Ministers on behalf of the SPS, the Commissioner is satisfied that the SPS does not hold a copy of the guidance requested by Mr Hamza. Although this was not made clear to Mr Hamza in the SPS's initial response to his request, the SPS properly notified Mr Hamza following its review that the information requested was not held.
18. The Commissioner has also noted that, had the information been held, it would have been exempt from disclosure under the terms of section 25(1) of FOISA, on the grounds that it was reasonably accessible to Mr Hamza by contacting the BPS directly.

Technical breaches of sections 17 and 19

19. Although the Commissioner accepts that the SPS does not hold the information requested by Mr Hamza, he has noted that its responses to his request breached the technical requirements of FOISA.



20. Where information is not held, section 17 requires an authority to provide notice that this information is not held. Under the terms of section 19 of FOISA, this notice should have provided details of the SPS's procedure for dealing with complaints about its handling of information requests; and providing details of the rights to request a review and to make an application to the Commissioner.
21. Since none of this information was supplied to Mr Hamza, the Commissioner finds that the SPS's initial response to Mr Hamza's information request failed to comply with the requirements of sections 17(1) and (2) and section 19 of FOISA.

Conduct of the review

22. Mr Hamza has also expressed dissatisfaction with the SPS's review of his request. In this case, the same person provided responses to both his initial request and his request for review. The response provided by the SPS also failed to clarify the confusion that had arisen through the exchange of correspondence concerning Mr Hamza's two information requests.
23. FOISA does not itself specify how a review should be conducted, but the Scottish Ministers' Code of Practice on the Discharge of Functions by Public Authorities under the Freedom of Information (Scotland) Act 2002 (commonly known as the Section 60 Code) provides guidance on what is expected of public authorities when carrying out reviews. Paragraphs 65 and 66 state the following:

65. It is important that authorities put in place appropriate and accessible procedures for handling reviews. The review procedure should be fair and impartial and it should enable different decisions to be taken if appropriate. [...] The procedure should be straightforward and capable of producing a determination of the review promptly and in any event, within 20 working days of receipt of the request for the review.

66. Where the requirement for review concerns a request for information under the general right of access, the review should generally be handled by staff who were not involved in the original decision. While this may not always be possible, it is important that the review procedure enables the matter to be considered afresh.

24. It is clear in this case that the review of Mr Hamza's request did not comply with guidance in the Section 60 Code, and so it fell short of good practice.

Comments on the handling of Mr Hamza's request

25. The Ministers acknowledged the shortcomings in the SPS's handling of Mr Hamza's request and apologised for these.

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26. The Ministers noted that the SPS had recently conducted a review of procedures for handling requests under FOISA (in response to an earlier decision of the Commissioner *Decision 147/2007 Mr Stuart Nicolson of the Scottish Daily Mail and the Scottish Prison Service*). Following this review, it had undertaken a programme of presentations to SPS establishments about the revised procedures that had been developed. The Ministers pointed out that the presentation at the workplace of the person dealing with Mr Hamza's request took place in May 2008, more than a month after the responses to Mr Hamza's request had been provided.
27. In the circumstances, and particularly given the recent review of procedures and training provided to staff by the SPS, the Commissioner does not require any additional steps to be taken in respect of these particular failings in response to this decision.

DECISION

The Commissioner finds that the Scottish Prison Service (SPS) acted partially in accordance with Part 1 of the Freedom of Information (Scotland) Act 2002 (FOISA) in responding to Mr Hamza's information request.

The Commissioner has found that, following its review, the SPS correctly notified Mr Hamza in terms of section 17 of FOISA that the information requested was not held. However, the Commissioner found that the SPS breached the requirements of Part 1 by failing to provide a notice in the form required by sections 17(1) and (2) and section 19 of FOISA when responding to Mr Hamza's request.

Given that the SPS has recently reviewed its procedures for handling requests under FOISA and provided additional training to its staff, the Commissioner does not require any further action in response to this particular application in relation to these failures.

Appeal

Should either Mr Hamza 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
Head of Investigations
17 September 2008



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.

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.

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-

- (a) of the procedure provided by the authority for dealing with complaints about the handling by it of requests for information; and
- (b) about the rights of application to the authority and the Commissioner conferred by sections 20(1) and 47(1).