

Decision Notice



Decision 127/2012 Mr Q and the Scottish Prison Service

Whether request vexatious

Reference No: 201200522

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Summary

Mr Q asked the Scottish Prison Service (the SPS) for information from CCTV footage of a specified location within a prison. The SPS refused to comply with this request on the basis that it considered it to be vexatious. Following an investigation, the Commissioner accepted that it had been correct to do so.

Relevant statutory provisions

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) and (6) (General entitlement); 14(1) (Vexatious or repeated requests); 15(1) (Duty to provide advice and assistance); 21(8) and (9) (Review by Scottish public authority); 47(1) (Application for decision by 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.

Background

1. On 6 December 2011, within a fax message about the handling of outgoing mail, Mr Q asked the SPS to provide him with information from CCTV footage of a certain post box in HMP [] over a specified period.
2. The SPS responded on 5 January 2012. It indicated that it considered Mr Q's request to be vexatious, with the result that (by virtue of section 14(1) of FOISA) it was not obliged to comply with the request. The SPS provided reasons for this decision.
3. On 7 January 2012, Mr Q wrote to the SPS requesting a review of its decision. He referred to the Commissioner's guidance on section 14(1) and did not accept that the necessary tests had been met.
4. On 6 March 2012, the SPS responded to Mr Q's requirement for review. It noted that, under section 21(8) of FOISA, it was not obliged to comply with a requirement for review if the original request for information was refused under section 14(1) of FOISA because it was vexatious. As Mr Q's original request was refused on this basis, and there was nothing in his requirement for review to suggest that this decision was incorrect, the SPS considered that it was not obliged to comply with the requirement for review.



5. On 15 March 2012, Mr Q wrote to the Commissioner's office, stating that he was dissatisfied with the SPS's response to his requirement for review and applying to the Commissioner for a decision in terms of section 47(1) of FOISA. This followed earlier correspondence between Mr Q and the Commissioner's office in relation to technical aspects of the handling of his request.
6. The application was validated by establishing that Mr Q made a request for information to a Scottish public authority and 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

7. The SPS is an executive agency of the Scottish Ministers (the Ministers) and, in accordance with agreed procedures, the investigating officer dealt with the Ministers (acting on the SPS's behalf) in carrying out the investigation. References to the SPS in this decision should, therefore, be read as including references to the Ministers acting on the SPS's behalf.
8. On 16 April 2012, the SPS was notified in writing that an application had been received from Mr Q and asked to provide comments on that application, all as required by section 49(3)(a) of FOISA. In particular, the SPS was asked if it wished to provide any further arguments in support of its application of section 14(1) of FOISA, in addition to the reasons provided in its initial response to Mr Q.
9. The SPS confirmed that it had set out its full consideration of section 14(1) in that initial response.
10. The relevant submissions received from both the SPS and Mr Q will be considered fully in the Commissioner's analysis and findings below.

Commissioner's analysis and findings

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

Section 14(1) – vexatious requests

12. Section 14(1) of FOISA does not oblige a Scottish public authority to comply with a request for information under section 1(1) (which confers a general entitlement to information held by such authorities) if the request is vexatious.



Whether a request is vexatious

13. FOISA does not define the word "vexatious". The Commissioner's general approach (although each case will be considered on its merits) is that a request will be vexatious where it would impose a significant burden on the public authority and one or more of the following conditions can be met:
- (a) it has the effect of harassing the public authority; and/or
 - (b) it does not have a serious purpose or value; and/or
 - (c) it is designed to cause disruption or annoyance to the public authority; and/or
 - (d) it would otherwise, in the opinion of a reasonable person, be considered to be manifestly unreasonable or disproportionate.

As she has indicated in other decisions (see, for example, *Decision 089/2012 Ms Fiona Townsley and Perth and Kinross Council*¹), the Commissioner does not exclude the possibility that, in any given case, a request may be vexatious without involving a significant burden. One or more of the other listed factors may be of such overwhelming significance that it would be appropriate to consider the request vexatious in any event. She also recognises that other factors, in addition to those listed, may result in a request being found to be vexatious.

Submissions from the SPS

14. In its response to Mr Q's information request, the SPS informed him that it considered responding to the request would impose a significant burden. It noted that the request was made in the context of a complaint that an item of outgoing mail had been delayed in entering the postal system. It also noted that the item was posted within the prison on Friday 2 December 2011 and delivered to the recipient on Tuesday 6 December 2011. It did not believe he disputed that the item had arrived, and noted that Mr Q had not provided any evidence to support his position that delivery was unreasonably delayed.
15. The SPS understood that Mr Q sought one hour of CCTV footage to ascertain whether the mail was collected on 2 December. It explained that this would require the transfer of data from the hard drive of the CCTV recording system to a disk, following which the footage would require to be reviewed in the light of the SPS's obligations under the Data Protection Act 1998. The footage would almost certainly identify individuals and therefore some "pixilation" would be required to prevent identification. This was a technical task, which the SPS would require to outsource: it did not do this frequently, and therefore it would be required to identify a provider and obtain an estimate of the cost. Given the sensitivity of the information and the length of footage requested, robust arrangements (involving a manager at the prison) would be required to manage the request.
16. While it considered there to be evidence of a significant burden in this case, the SPS also took the view that other factors were of such overwhelming significance that Mr Q's request could be considered vexatious in the absence of such a burden.

¹ <http://www.itspublicknowledge.info/applicationsanddecisions/Decisions/2012/201101469.asp>



17. In the SPS's view, Mr Q's request also lacked serious purpose or value. The SPS explained that (while it must act reasonably in all the circumstances) it was not subject to any statutory or regulatory timescales for processing prisoners' mail. In this case, it reiterated that the item in question was received within three working days of posting, which suggested that there was no undue delay. It did not believe Mr Q had provided any basis for his belief that the mail was unduly delayed by the SPS and, given that the item was received within what should be considered a reasonable timescale (even outwith the festive season), was unclear as to what could be achieved by compliance with his request.
18. The SPS went on to submit that Mr Q's expectations in this regard were manifestly unreasonable, and therefore that his request was manifestly unreasonable and disproportionate. In this connection, it referred to its own expectation that genuine failings of the kind referred to in his complaint would be the subject of a greater number of complaints by the remaining prisoners.
19. The SPS also put forward other arguments in support of its decision, which the Commissioner has not found it necessary to consider in this case.

Submissions from Mr Q

20. Mr Q confirmed his request had been submitted in the context of a complaint related to the perceived failure of local SPS management to ensure that prisoners' outgoing mail was properly collected at the appropriate published time. He referred to arguments put to the SPS when he sought a review.
21. Mr Q believed the question of whether the request would impose a significant burden should be addressed in the light of the particular attributes and resources of the authority in question, and the relative facility with which the information could be provided. He noted that the SPS had dealt with a previous request for CCTV footage, which he considered similar to that under consideration here, without arguing that to do so would present a significant burden.
22. He considered the SPS to be a large, well-resourced authority maintaining a large number of CCTV cameras. It was concerned with issues of security and employed a large number of specially trained staff both locally and nationally. From its handling of the case referred to in paragraph 21, he believed it had the technical capacity to transfer the footage to a disk (with expert advice, where required) with relative facility. He also understood that the SPS made regular operational use of CCTV footage and was required to respond to frequent requests for excerpts from that footage. He questioned why data protection issues should present greater challenges here than in the case referred to in paragraph 21. Overall, he considered the request to be relatively modest, taken in the context of the resources available to the SPS.



23. Mr Q did not accept that his request lacked serious purpose or value. He referred to prisoners' legal rights to unimpeded correspondence and to the various legal duties binding the SPS as a public authority. He also referred to previous issues he had taken up in relation to the SPS's handling of mail, highlighting the importance of this mode of communication in the light of restrictions imposed on his use of other modes. He did not believe the Governor at the prison in question to have any authority to withhold mail submitted by prisoners for posting on a Friday morning before 8.30 from the Royal Mail collection the same afternoon, other than on cause shown in particular circumstances, in accordance with the relevant provisions of the Prison Rules or directions made thereunder.
24. Mr Q went to explain what he believed had happened to the letter in question after posting in the prison. He noted that the letter was postmarked 5 December, from which he understood that it was not received by the Royal Mail until the Monday afternoon following submission for posting. It was then delivered the following day, as was another item submitted for posting on the Monday morning. His concern was with the (still) unexplained delay in placing the item in the hands of the postal service, given that he understood mail was collected from the prison on the Friday afternoon. He contended that this concern was legitimate, bearing in mind that (in his particular circumstances) he required a reliable mail service.
25. Finally, Mr Q did not consider the SPS to have provided any relevant arguments to the effect that his request was manifestly unreasonable or disproportionate. He had identified a specific problem for which the SPS was unable to provide an explanation. While he was not in a position to comment on the number of mail-related complaints made by other prisoners, he did not believe this to be relevant to his own request. That request was about mail submitted via a particular box on a particular morning: while more general concerns might exist, it was not his purpose to air them.

The Commissioner's conclusions

26. The Commissioner has considered the SPS's submissions carefully, along with those received from Mr Q.
27. The Commissioner's briefing on section 14 of FOISA² states that a request will impose a significant burden on a public authority where dealing with it would require a disproportionate amount of time, and the diversion of an unreasonable proportion of its financial and human resources away from its core operations. In this connection, it is important to note the use of the words "disproportionate" and "unreasonable". The authority may have the resources available to deal with the applicant's request, but it may still be legitimate in the circumstances for it to ask itself whether it would be a proportionate and reasonable use of those resources (including its time) to deal with that particular request. Each case must be considered on its own merits, taking account of the nature of the request and all other relevant considerations, and consequently there may be good reasons (depending on the context of each) for distinguishing between two requests for the same kind of information.

² <http://www.itspublicknowledge.info/nmsruntime/saveasdialog.asp?IID=2513&SID=2591>



28. In this case, the Commissioner considers the questions of proportionality and reasonableness to be inextricably intertwined with the other arguments advanced by the SPS and set out above. Having considered both sets of arguments, she accepts those put forward by the SPS to the effect that Mr Q's request lacked serious purpose or value.
29. The Commissioner does not question the importance attached by Mr Q (and prisoners in general) to having access to an adequate postal service – or indeed their right to such a service. It is not the Commissioner's remit to state what is adequate in terms of a postal service, but in considering whether a request lacks serious purpose or value she must consider the matter in the context of the situation in question, and the reasonableness of the expectations of the parties. In this particular case, the Commissioner has considered Mr Q's expectation of what constitutes unreasonable delay by the SPS. The facts are that a letter was posted by Mr Q on Friday 2 December 2011 which was then delivered to the recipient on Tuesday 6 December 2011 – four days in total. During that time, it would presumably have been collected by the SPS, handed to the Royal Mail, processed and then delivered by the Royal Mail. Given the time of year and the process followed, four days of itself does not seem unreasonable, especially as Mr Q has not explained why he thought the delay was attributable to the SPS.
30. Furthermore, Mr Q's original request was made in the text of a complaint to the SPS about the postal service. Neither in that complaint nor in his submissions, did Mr Q explain why having the CCTV footage would enable him to form a conclusive view that the alleged delay was the result of action or lack of action by the SPS, nor did he give the SPS opportunity to respond to his complaint about the service (which might have given him the information he sought anyway – i.e. the collection time of the post).
31. In all the circumstances, therefore, the Commissioner agrees with the SPS in considering it unclear what purpose, if any, would be achieved by compliance with Mr Q's request. *Decision 078/2012 Mr David Rule and the Scottish Ministers* concluded that there must be a point at which it is reasonable for an authority to ask itself whether the content of a request is such that the demands placed on its time and resources in dealing with that request would be wholly disproportionate to any purpose served. The Commissioner considers this to be such a case.
32. Consequently, having taking all of the relevant submissions into consideration, the Commissioner is satisfied that dealing with Mr Q's request did, in the circumstances, present a significant burden to the SPS. She finds that it would have been manifestly unreasonable and disproportionate to require the SPS to deal with the request, and that it was appropriate for the authority to conclude that it lacked serious purpose or value. Even if she had not considered there to be a significant burden in this case, the Commissioner would have found the request to be vexatious on the basis of the other factors considered above.
33. In conclusion, the Commissioner finds that the SPS was correct in refusing to comply with Mr Q's request for information, on the basis that it was vexatious and therefore section 14(1) of FOISA applied.



Provision of advice and assistance

34. Section 15(1) of FOISA requires a Scottish public authority, so far as it is reasonable to expect it to do so, to provide advice and assistance to any person who proposes to make, or has made, a request for information to it. Mr Q considered the SPS to have failed in this duty in responding to his information request, by purporting to require him to seek a review in advance of any application to the Commissioner (although it was not required to respond to a review request where it deemed the original information request vexatious) and thereafter by failing to respond to the review request timeously.
35. The Commissioner can identify no failure to comply with section 15(1) in this case. While the authority may not be obliged to comply with a requirement for review in the circumstances described by Mr Q, it would still be required to respond to the requirement, in accordance with section 21(9) of FOISA. Further, section 47(1) of FOISA, clearly envisages that a requirement for review will have been made by the applicant before an application can be made to the Commissioner. Consequently, the SPS was correct to advise Mr Q to seek a review if he was dissatisfied with its decision to consider his request vexatious.
36. Equally, the Commissioner cannot accept that a failure to respond to a requirement for review timeously is a breach of section 15(1) of FOISA. There may have been such a failure (which would be a breach of section 21(1) of FOISA), but the Commissioner fails to see how it could be characterised (on any reasonable interpretation) as a failure to provide advice and assistance. Given Mr Q's familiarity with FOISA, this is not a point the Commissioner considers it would be beneficial to explore further.



DECISION

The Commissioner finds that the Scottish Prison Service complied with Part 1 of the Freedom of Information (Scotland) Act 2002 in dealing with the information request made by Mr Q.

Appeal

Should either Mr Q or the Scottish Prison Service 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.

Rosemary Agnew
Scottish Information Commissioner
01 August 2012



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.

...

- (6) This section is subject to sections 2, 9, 12 and 14.

14 Vexatious or repeated requests

- (1) Section 1(1) does not oblige a Scottish public authority to comply with a request for information if the request is vexatious.

...

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.

...

21 Review by Scottish public authority

...

- (8) Subsection (1) does not oblige a Scottish public authority to comply with a requirement for review if-
- (a) the requirement is vexatious; or
 - (b) the request for information to which the requirement for review relates was one with which, by virtue of section 14, the authority was not obliged to comply.
- (9) Where the authority considers that paragraph (a) or (b) of subsection (8) applies, it must give the applicant who made the requirement for review notice in writing, within the time allowed by subsection (1) for complying with that requirement, that it so claims.



...

47 Application for decision by Commissioner

(1) A person who is dissatisfied with-

(a) a notice given under section 21(5) or (9); or

(b) the failure of a Scottish public authority to which a requirement was made to give such a notice,

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.

...