

Decision Notice

Decision 162/2014 Mr Q and the Scottish Prison Service

Policy and Guidance

Reference No: 201400696

Decision Date: 22 July 2014



Scottish Information
Commissioner

Summary

On 18 July 2013, Mr Q asked the Scottish Prison Service (the SPS) for information relating to the calling of witnesses at complaint meetings. The SPS informed Mr Q that he could obtain the information from the Prison Library and so it was not required to provide him with it. Following an investigation, the Commissioner accepted that the information requested was reasonably obtainable by Mr Q at the time of his request, but also found that the SPS should have given him more advice and assistance to help him locate the information.

Relevant statutory provisions

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); 21(1) (Review by Scottish public authority); 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

1. On 18 July 2013, Mr Q wrote to the SPS requesting the following information:
... all and any information held by your authority amounting to guidance or policy in force relative to the calling of witnesses to ICC meetings, such as may have been in force as of 1 June 2013.
2. The SPS responded on 15 August 2013. It informed Mr Q that the information he sought was available within the reference section of the Prison Library and that, in line with section 25(1) of FOISA, it was not obliged to provide information that was otherwise reasonably accessible.
3. On 26 August 2013, Mr Q wrote to the SPS requesting a review of its decision. He stated that the SPS had not explained what information was held in the library, to allow him to access the information. He further submitted that as prisoner access to the library was a privilege rather than a right, and there were also more practical limitations to access, information in the library could not be considered reasonably accessible.
4. The SPS notified Mr Q of the outcome of its review on 30 September 2013. The SPS apologised for the lateness of its response but confirmed its original decision that section 25(1) of FOISA applied to the information. It explained that the information was contained in the Prison Rules and the SPS Disciplinary Hearing guidance, both of which were available within the reference section of the Prison Library. It explained why it considered the arrangements for access to the library to be adequate for section 25(1) to apply.
5. On 27 March 2014, Mr Q 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 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 requests. The case was then allocated to an investigating officer.

Investigation

7. On 21 May 2014, the investigating officer notified the SPS in writing that an application had been received from Mr Q, giving the SPS the opportunity to provide comments on the application (as required by section 49(3)(a) of FOISA). In particular, the SPS was asked to comment on:
 - (i) the application of section 25(1) of FOISA,
 - (ii) whether it had complied with section 15(1) of FOISA in responding to Mr Q's request, and
 - (iii) its apparent failure to respond to Mr Q's requirement for review within the time allowed.
8. The SPS responded, providing submissions in support of its position that the information requested was reasonably obtainable by Mr Q. It accepted that it had failed to respond to Mr Q's requirement for review within the time allowed, and apologised for this. It acknowledged that the Disciplinary Hearing guidance, referred to above, was not relevant to ICC meetings and therefore did not fall within the scope of Mr Q's request: it referred to another guidance document (the "Staff Guidance on Prisoner Complaints and Disciplinary Appeals under the 2011 Rules" [the Staff Guidance]), however, which it did consider relevant.
9. Mr Q also provided submissions explaining his dissatisfaction with the SPS's responses to him. These focused on both access to the library and the advice and assistance provided by the SPS to enable him to locate the information there. He confirmed that he was not asking the Commissioner to require the disclosure of any further information.

Commissioner's analysis and findings

10. 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 Q and the SPS. She is satisfied that no matter of relevance has been overlooked.

Section 25(1) – information otherwise accessible

11. 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(1) is absolute, in that it is not subject to the public interest test set out in section 2(1)(b) of FOISA.
12. In its response and review outcome, the SPS informed Mr Q that it was relying upon section 25(1) of FOISA on the basis that the information was readily accessible to Mr Q within the reference section of the Prison Library. In the review outcome, it stated that the information was to be found in the Prison Rules.

13. In his submissions to the Commissioner, Mr Q outlined various reasons why he did not consider he had reasonable access to the library. He referred to periods during which the library was closed and pointed out that access was regulated even when it was open. There were, therefore, only limited scheduled opportunities for visiting the library, not all of which happened and which were of relatively short duration (20 minutes) when they did. He went on to explain that reference material had to be requested from the librarian: the librarian was not employed by the SPS, had no particular knowledge of its policies and no time during scheduled library sessions to search for information.
14. Mr Q also stated that there were no photocopying facilities in the library and prisoners were not generally allowed to carry writing materials when accessing the library from their work party. Finally, he submitted that access to the library was privilege rather than a right under the prison rules; access could not be enforced and therefore material in the library could not be said to be accessible to him.
15. The SPS submitted that Mr Q had access to the library twice a week, once from his workplace and once from his accommodation block. It submitted that the library had been accessible to him on 16 occasions between 18 July 2013 (the date Mr Q made the request) and 30 September 2013 (the date on which the SPS notified Mr Q of the outcome of the review). Records showed that he attended the library at least once during that period. The relevant portions of the Prison Rules were brief, the SPS explained, and only a short period would be required to access them.
16. It does not appear to be disputed that the information sought by Mr Q was to be found in the Prison Library. Even accepting that access to the library is a privilege rather than an enforceable right in terms of the Prison Rules, it does not appear to be disputed that access to the library was (as a matter of fact) available to Mr Q in the period immediately following his information request. Even in the absence of full agreement as to the extent to which the library was in fact open during that period, it appears clear that there were occasions on which he could visit the library. He would appear to have done so.
17. The relevant paragraphs of the Prison Rules, as identified by the SPS in its submissions, are not substantial. Neither are those portions of the Staff Guidance which are relevant to the calling of witnesses at ICC meetings. It should, assuming it was clear to Mr Q what he was looking for (i.e. what, exactly, was held in the library), have been quite straightforward for him to access the information within the scheduled session. He could have taken writing materials, provided he was not going to the library from his workplace.
18. Mr Q has noted (correctly) that the requester's individual circumstances may be relevant in determining whether section 25(1) applies to any given request for information. He also believes that the SPS failed to have regard to the particular circumstances he described when seeking a review: having considered all relevant submissions, the Commissioner does not accept that this conclusion is justified, in relation to the authority's application of section 25(1).
19. In all the circumstances, therefore, the Commissioner is satisfied that the information sought by Mr Q was in fact 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 the request.

Section 15 – duty to provide advice and assistance

20. As paragraph 17 suggests, it is essential to any requester pursuing a right to information that (where the public authority is not simply providing the information, but rather is directing the requester to a place where it may be obtained) they know enough about where to look for it to be able to pursue the right effectively. To this end, the authority's duty to provide advice and assistance can be vital.
21. 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 who proposes to make, or has made, a request for information to it. Mr Q expressed dissatisfaction that the SPS failed to identify or specify adequately where precisely the information he was seeking could be found. The SPS acknowledged that it failed to provide any such assistance in its initial response, although the review outcome did refer to the Prison Rules.
22. In his submissions, Mr Q expressed concern that he had not been provided with adequate guidance as to where the information he was seeking could be found. He acknowledged that he was aware of the existence of the Staff Guidance, but could not be sure if this was information the SPS considered relevant to his request.
23. The Commissioner accepts that the SPS provided Mr Q with some explanation of where the information could be found. In the review outcome, it referred to the Prison Rules, although not to the precise provisions it considered relevant or explicitly to the Staff Guidance. In the context of the library visiting arrangements as she understands them, the Commissioner does not believe this was enough to allow Mr Q to access the information readily in the library within the time available. The SPS may have understood Mr Q to have a sufficient understanding of the Prison Rules and related documents to be able to locate the information readily, without any further detail. However, while the SPS was entitled to take Mr Q's personal circumstances into account in determining what advice and assistance it was required to give, on balance it appears to the Commissioner that the authority may have assumed too much if it expected him to know exactly where this information was to be found.
24. In all the circumstances, therefore, the Commissioner is not satisfied that the SPS provided Mr Q with adequate advice and assistance to meet its duty fully under section 15(1) of FOISA, in the context of the information being considered reasonably obtainable in terms of section 25(1). Mr Q is not seeking any action from the SPS in this case, so the Commissioner will not require any steps to be taken in response to this failure.

Section 21 – Review by Scottish public authority

25. Section 21(1) of FOISA gives Scottish public authorities a maximum of 20 working days following the date of receipt of the requirement to comply with a requirement for review. This is subject to qualifications which are not relevant in this case.
26. In its submissions to the Commissioner, the SPS accepted that the review outcome was not provided within the time allowed by section 21(1) of FOISA.
27. Given that the SPS did not respond to Mr Q's requirement for review of 26 August 2013 until 30 September 2013, the Commissioner must find that the SPS failed to respond to Mr Q's requirement for review in accordance with section 21(1) of FOISA.

Decision

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

The Commissioner finds that the SPS was entitled to apply section 25(1) of FOISA to the request. However, by failing to provide reasonable advice and assistance to help Mr Q locate the information, the SPS failed to comply with section 15(1) of FOISA. In failing to respond to Mr Q's requirement for review within 20 working days, the SPS also failed to comply with section 21(1).

The Commissioner does not require the SPS to take any action in respect of these failures in response to Mr Q's application.

Appeal

Should either Mr Q 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
22 July 2014

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.

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.

...

21 Review by Scottish public authority

- (1) Subject to subsection (2), a Scottish public authority receiving a requirement for review must (unless that requirement is withdrawn or is as mentioned in subsection (8)) comply promptly; and in any event by not later than the twentieth working day after receipt by it of the requirement.

...

25 Information otherwise accessible

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

...

Scottish Information Commissioner

Kinburn Castle
Doubledykes Road
St Andrews, Fife
KY16 9DS

t 01334 464610

f 01334 464611

enquiries@itspublicknowledge.info

www.itspublicknowledge.info