

Decision Notice

Decision 206/2017: Mr Y and the Scottish Prison Service

Information regarding an undertaking made by the SPS

Reference No: 201701400

Decision Date: 8 December 2017



Scottish Information
Commissioner

Summary

The SPS was asked about an undertaking made to a court. The SPS failed to respond to the initial request, but in its review outcome it disclosed information that it claimed met the terms of the request.

During the investigation, the SPS notified the Commissioner that it held significantly more information falling within the scope of the request, but that provision of that information would exceed the £600 limit set out in the Fees Regulations.

Given that the SPS's current interpretation of the request differs so markedly from its initial view, the Commissioner requires the SPS to carry out a new review of its handling of Mr Y's request and provide him with a different decision and with appropriate advice and assistance.

Relevant statutory provisions

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) and (4) (General entitlement); 21(4)(b) Review by Scottish public authority

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

1. On 14 May 2017, Mr Y made a request for information to the Scottish Prison Service (the SPS):

“In making his decision the Deputy Governor has referred (page 3) to a “previous undertaking given to the court” to which I have not been a party and of which I have no knowledge. In order to make sense of this reference I request *all and any information held by the SPS relative to the undertaking to which Mr Michie refers.*”
2. The SPS failed to respond to this request.
3. On 28 July 2017, Mr Y wrote to the SPS requesting a review of its decision on the basis that it had not responded to his request for information.
4. The SPS notified Mr Y of the outcome of its review on 7 August 2017. It explained that information about the undertaking could be found in “decisions of the court” and it provided Mr Y with copies of these decisions.
5. On 9 August 2017, Mr Y applied to the Commissioner for a decision in terms of section 47(1) of FOISA. He was dissatisfied with the outcome of the SPS's review because he considered that it was withholding information that fell within the scope of his request, and had not applied any exemptions to the information it was withholding.

Investigation

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

7. On 18 August 2017, the SPS was notified in writing that Mr Y had made a valid application.
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 this application and answer specific questions including justifying its reliance on any provisions of FOISA it considered applicable to the information requested.

Commissioner's analysis and findings

9. In coming to a decision on this matter, the Commissioner considered all of the withheld information and the relevant submissions, or parts of submissions, made to him by both Mr Y and the SPS. He is satisfied that no matter of relevance has been overlooked.

Information held by the SPS

10. 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.
11. Section 1(4) of FOISA provides that the information to be given to the applicant is that held by the authority at the time the request is received, as defined in section 1(4). This is not necessarily to be equated with information an applicant believes the authority should hold, although the applicant's reasons may be relevant to the investigation of what is actually held.
12. In its submissions to the Commissioner, the SPS explained that it had initially interpreted Mr Y's request as seeking information on the content of the undertaking referred to by Mr Michie. In light of this, its review outcome had provided Mr Y with detailed background on the undertaking, the court's analysis and the failures of the SPS. The SPS considered that the court decisions are a helpful and precise summary of these matters.
13. However, having reviewed the request again, the SPS submitted that its interpretation of the request had been too narrow and did not take account of Mr Y's use of the term "*all and any*". The SPS explained that the information it holds covers a period of around seven years. It includes information surrounding three court hearings and the SPS's investigations, responses and actions in light of events since 2010 and the resulting Court decisions.
14. The SPS submitted that (in relation to the broader interpretation of Mr Y's request) the information it holds is voluminous and varied and is held in separate filing systems across the SPS estate. Information falling within the scope of the request will also be contained within individuals' email accounts. The SPS noted that an analysis of the emails held by one individual had identified at least 1,800 emails over the period.
15. The SPS submitted that, when reviewing its response to Mr Y's request, instead of disclosing the courts' decisions to him, it should have notified Mr Y that section 12 of FOISA was applicable. (In other words, that complying with his request would cost more than the £600 limit set out in the Freedom of Information (Fees for Required Disclosure) (Scotland) Regulations 2004 and therefore the SPS was not required to comply.) The SPS noted that it should also have offered Mr Y advice and assistance on how to limit the scope of his request to bring it within the cost ceiling, and indicated that it had since written to Mr Y in those terms.
16. The Commissioner asked the SPS to explain why it considered the scope of the request to be so broad as to include information from 2010 onwards, when the undertaking itself was established on 21 February 2013.

17. The SPS submitted that the request captures information from 2010 to the date of the request, because Mr Y had used the term “*all and any information relative to the undertaking*”. The SPS argued that, given the ordinary meaning of the request, Mr Y was seeking all and any information connected either logically or casually about the undertaking. The SPS maintained that this includes events afterwards and submitted that if this had not been the case, Mr Y would have stated so in his application to the Commissioner in light of the information released to him in the SPS’ review outcome.
18. The SPS submitted that the undertaking is not finite or limited by time and continues to be in force today. It continues to generate information about the undertaking and is currently considering changes to its IT systems solely on the basis of compliance with the undertaking. The SPS argued that the broader interpretation of Mr Y’s request for information is reasonable. It explained why a narrower interpretation had initially been given to the request: it had understood Mr Y to be seeking information on the content of the undertaking.
19. In his submissions to the Commissioner, Mr Y disputed the SPS’s review outcome, arguing that it must hold more information than the court decisions it had disclosed to him. After Mr Y was advised by the SPS that it considered the scope of his request to be so broad that compliance would exceed the cost limit set out in the relevant Fees Regulations, he queried whether all of the information encompassed by the SPS’s more generous interpretation of his request was actually relevant.
20. The Commissioner has considered the terms of Mr Y’s request for information carefully and he is satisfied that it encompasses more information than that disclosed to Mr Y by the SPS in its review outcome. The scope of the request is much broader than one simply seeking the content of two court decisions. Mr Y asked for “*all and any information held by the SPS relative to the undertaking to which Mr Michie refers*”. Given the nature of the undertaking and the matters referred to in the court decisions provided to Mr Y, it is clear to the Commissioner that the SPS will hold significantly more information than that which it initially identified. The Commissioner considers the SPS’s initial interpretation of Mr Y’s request to be overly narrow and unreasonably limited.
21. The Commissioner notes that the SPS now considers the request to encompass many hundreds (if not thousands) of documents dating from 2010 onwards. The Commissioner has not reached a view on whether Mr Y’s request would encompass all of the information claimed by the SPS, but he is satisfied that the SPS holds more information than it identified or considered in its review outcome to Mr Y.
22. In the circumstances, the Commissioner finds that the SPS failed to comply fully with section 1(1) of FOISA.
23. The Commissioner notes that the SPS wrote to Mr Y during his investigation and advised him that it had re-interpreted his original request for information and would now refuse the request under section 12(1) of FOISA, on the grounds that compliance would exceed the £600 cost ceiling set out in the Fees Regulations.
24. Given that the SPS’s current interpretation of the request differs so markedly from its initial view, the Commissioner requires the SPS to carry out a new review of its handling of Mr Y’s request and (in terms of section 21(4)(b) of FOISA) provide him with a different decision and appropriate advice and assistance.

Decision

The Commissioner finds that the Scottish Prison Service failed to comply with Part 1 of the Freedom of Information (Scotland) Act 2002 (FOISA) in responding to the information request made by Mr Y. The SPS provided some information, but failed to identify all information covered by Mr Y's request. In doing so, it failed to comply with section 1(1) of FOISA.

Given that the SPS has now taken a different view of Mr Y's request, the Commissioner has required the SPS to issue a revised review outcome, in terms of section 21(4)(b) of FOISA, by **22 January 2018**.

Appeal

Should either Mr Y 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.

Enforcement

If the Scottish Prison Service (SPS) fails to comply with this decision, the Commissioner has the right to certify to the Court of Session that the SPS has failed to comply. The Court has the right to inquire into the matter and may deal with the SPS as if it had committed a contempt of court.

Margaret Keyse
Head of Enforcement

8 December 2017

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.

...

21 Review by Scottish public authority

....

- (4) The authority may, as respects the request for information to which the requirement relates-

...

- (b) substitute for any such decision a different decision; or

....

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