

Decision Notice



Decision 213/2013 Mr F and Scottish Prison Service

Policy review relating to purchase of personal laptop

Reference No: 201301006

Decision Date: 26 September 2013

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Rosemary Agnew

Scottish Information Commissioner

Kinburn Castle
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Summary

On 22 December 2012, Mr F asked the Scottish Prison Service (the SPS) for all correspondence held in relation to any policy review relating to the purchase by a prisoner of a personal laptop. The SPS responded by stating that it would cost more than £600 to provide the information and therefore it was not required to respond to Mr F' request. Following a review, at which point the SPS stated that it did not hold the information sought, Mr F remained dissatisfied and applied to the Commissioner for a decision.

Following an investigation, the Commissioner found that the SPS had largely dealt with Mr F' request for information in accordance with Part 1 of FOISA, except in failing to provide adequate notice of the outcome of its review. Given that the nature of this technical failure is clear from this decision, she did not require the SPS to take any action.

Relevant statutory provisions

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) and (6) (General entitlement); 10(1)(a) (Time for compliance); 21(4) and (5) (Review by Scottish public authority); 74(2)(a) (Giving of notice etc.)

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 22 December 2012, Mr F wrote to the SPS requesting the following information:
... all and any information held in relation to any policy review carried out by the SPS in connection with the formal recommendations set out in para 32 of the Final Report per the SPCC [the Scottish Prisons Complaints Commission] dated 29 September 2010 relative to complaint PH/7/2010 insofar as this relates to the policy described in para 32 of Decision 161/2012 as concerning "... the purchase by a prisoner of a personal laptop ..." to be permitted 'in use' by that prisoner.



2. The SPS responded on 24 January 2013. It stated that the cost of locating, retrieving and providing the information on prisoner access to laptops would exceed the upper cost limit of £600 and consequently, under section 12 of FOISA, it was not required to comply with this request.
3. The SPS explained that following the SPCC report a review of the “Prisoner’s access to Laptops Policy” was carried out. It explained a copy was available within the prison library.
4. On 20 February 2013, Mr F wrote to the SPS requesting a review of its decision. Mr F did not accept the SPS’s reliance on section 12, arguing that the authority had misunderstood the meaning of his request. He explained that he was seeking information about the review of the policy on prisoners having their own personal laptop PCs in possession, whereas it had been interpreted as seeking information about the policy on lending laptops to prisoners for specific purposes.
5. Mr F submitted that the SPS’s response in terms of section 12 related to its laptop loan scheme, which had no bearing on his request.
6. In addition, Mr F was not satisfied that the SPS had responded to his request within the required 20 working days. He explained why he considered this to be the case.
7. The SPS notified Mr F of the outcome of its review on 20 March 2013. The SPS concluded that “the original decision should be confirmed without modification”.
8. The SPS confirmed in this response that it had not reviewed its policy on prisoners’ access to computers in relation to the instructions issued by way of Governors & Managers Action Notices 84A/98 and 15A/99. The SPS stated that it interpreted this policy to be in relation to prisoners’ requests to purchase a personal laptop. It confirmed that this policy had not been the subject of a review and therefore there was no information available.
9. The SPS also clarified that, as recommended in paragraph 32 of the SPCC investigation report of 29 September 2010 (referred to in Mr F’ original request), it had reviewed its protocol for prisoner access to laptops. For the avoidance of doubt, the SPS stated that it had interpreted the recommendation for updating the eligibility criteria for “a laptop in use” as being an update of this SPS protocol, not the policy as outlined by the GMAs referred to above.
10. The SPS also confirmed that it believed the request had been responded to within the appropriate statutory timescale.
11. On 25 April 2013, Mr F wrote to the Commissioner, stating that he was dissatisfied with the outcome of SPS’s review and applying to the Commissioner for a decision in terms of section 47(1) of FOISA.
12. The application was validated by establishing that Mr F 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

13. The SPS is an agency of the Scottish Ministers (the Ministers) and, in line with agreed procedures, the Ministers were notified in writing on 31 May 2013 that an application had been received from Mr F and that an investigation into the matter had commenced. The Ministers were provided with an opportunity to provide comments on the application (as required by section 49(3)(a) of FOISA) and asked to respond to specific questions on its handling of the case.
14. Subsequent references in this decision to submissions requested and received from the SPS are references to those submissions sought and received from the Ministers' Freedom of Information Unit on behalf of the SPS.
15. On 13 June 2013, Mr F provided the Commissioner with further submissions to support his grounds for dissatisfaction. These focused in the change in the SPS's position between its initial response and the review outcome.

Commissioner's analysis and findings

16. 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 F and the SPS. She is satisfied that no matter of relevance has been overlooked.
17. Mr F appealed to the Commissioner on the following grounds:
 - a) the SPS's initial response should not have sought to rely on section 12 of FOISA;
 - b) the review response was wrong to assert that the initial response was confirmed without modification, when it was clear that the information was not held;
 - c) the SPS's failure to respond to his initial request within 20 working days;
 - d) the SPS's review response failed to recognise the delay in the initial response and failed to apologise for this.
18. In his application to the Commissioner, Mr F did not question the apparent conclusion of the SPS's review, i.e. that the information was not held.



Ground a)

19. Section 21(4) of FOISA provides that an authority may, in relation to the request for information to which the requirement for review relates –
- confirm a decision complained of, with or without such modifications as it considers appropriate (21(4)(a));
 - substitute for any decision a different decision (21(4)(b)); or
 - reach a decision, where the complaint is that no decision had been reached (21(4)(c)).
- Consequently, as FOISA allows Scottish public authorities to alter their original position at review, the Commissioner cannot comment on the SPSs' initial reliance on section 12 in response to Mr F' request.

Ground b)

20. In its response to his requirement for review, the SPS's letter to Mr F stated it had concluded that "the original decision should be confirmed without modification".
21. The SPS's initial response to Mr F' was a refusal to comply with the request, on the basis that section 12 of FOISA applied.
22. During the investigation, the SPS confirmed its position that it did not hold the information requested. It would be reasonable to conclude this from the terms of the review outcome, read as a whole, but it was not correct for the SPS to state that the original decision was "confirmed without modification".
23. In terms of section 21(5) of FOISA, an authority is required to give the applicant notice in writing of what it has done in terms of section 21(4) and a statement of its reasons for doing so. In stating that it had confirmed its original decision without modification, the SPS failed to reflect the outcome of the review accurately. Consequently, the SPS failed to comply fully with section 21(5). This was clearly an oversight, but one which carried with it the potential for confusion: the content of notices issued under FOISA is an area where care is required.

Grounds c) and d)

24. Section 10(1) of FOISA gives Scottish public authorities a maximum of 20 working days following the date of receipt of the request to comply with a request for information, subject to certain exceptions which are not relevant in this case.



25. Mr F' request was received on 22 December 2012. The SPS's response was dated 24 January 2013. Taking account of the statutory bank holidays over this period, this response was (as Mr F has acknowledged) dated the twentieth working day following receipt of the request. Mr F stated that the response was provided to him on 30 January 2013, via the SPS internal mail system. He also stated that, had the response been posted to him on 24 January (as opposed to delivered via the internal mail system), there would have been a rebuttable presumption that it had been provided timeously. In the circumstances, given the apparent delivery time, he did not believe the response had been provided timeously.
26. Section 10(1) sets a maximum period of 20 working days for compliance with a request. It is not necessary for the applicant to receive the response within 20 working days, as long as it is issued within that period. The Commissioner cannot agree with Mr F that there would be a rebuttable presumption that the response was given timeously, had that response been posted on 24 January. Section 74(2)(a) of FOISA applies to all communications made for the purposes of FOISA, whether by the applicant or the authority, and provides that any item posted is presumed not to have been received until the third day after the day of posting. It does not provide that the item must be received within that period if other related timescales stipulated in FOISA are to be met, or confer any special status on items posted (as opposed to those, say, sent by an internal mail system or by courier). In any event, the presumption can be rebutted by evidence to the contrary, so it cannot apply to any communication where it can be proved that it arrived on a particular day before or after the third day.
27. The presumption in section 74(2)(a), therefore, has no relevance in this case. What the Commissioner must consider is whether, on the balance of probabilities and having considered the submissions of both parties, it is reasonable to conclude that the SPS complied with Mr F' request within 20 working days. She notes that there is some disagreement in this case as to whether the response was sent wholly by means internal to the authority, or whether an external courier service was used for part of the process. In any event, she acknowledges that there may be good operational reasons for the SPS to use internal means for delivering communications to prisoners. Given the general scheme of Part 1 of FOISA and the nature of the SPS and its establishments, she does not believe it would be reasonable to require the SPS to include this internal delivery time in the time allowed for compliance with the request, provided the delivery time is not itself unreasonable. Here, the question is whether any adverse inference on compliance with the relevant timescale can be drawn from the time which elapsed between the date of the response and the date on which Mr F received it: the Commissioner does not believe it would be reasonable to draw such an inference in the circumstances.
28. In this instance, therefore, the Commissioner is not satisfied that there is any basis for the concluding that the SPS failed to comply with Mr F' request for information within the timescale of 20 working days set out in section 10(1) of FOISA.



DECISION

The Commissioner finds that the SPS largely (in the respects specified in Mr F' application) complied with Part 1 of the Freedom of Information (Scotland) Act 2002 (FOISA) in responding to the information request made by Mr F.

The Commissioner finds that by failing to provide adequate notice under section 21(5) of FOISA, the SPS failed to comply with Part 1.

Given that the nature of this technical failure is clear from this decision, the Commissioner does not require the SPS to take any action in respect of the failure in response to Mr F' application.

Appeal

Should either Mr F 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
26 September 2013



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.

10 Time for compliance

- (1) Subject to subsections (2) and (3), a Scottish public authority receiving a request which requires it to comply with section 1(1) must comply promptly; and in any event by not later than the twentieth working day after-

- (a) in a case other than that mentioned in paragraph (b), the receipt by the authority of the request; or

...

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.

...



74 Giving of notice etc.

...

(2) For the purposes of any provision of this Act, a thing-

- (a) posted is presumed not to be received until the third day after the day of posting;
and

...