

Decision Notice



Decision 024/2009 Mr B and the Scottish Prison Service

Supervised medication

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Summary

Mr B requested from the Scottish Prison Service (the SPS) information relating to a supervised medication policy at Peterhead prison. The SPS responded, following a request for clarification, by stating that some of the information requested was exempt from disclosure under section 30(b)(ii) of FOISA and that it did not hold the remainder. Following a review, Mr B remained dissatisfied and applied to the Commissioner for a decision.

Following an investigation, the Commissioner found that the SPS had partially failed to deal with Mr B's request for information in accordance with Part 1 of FOISA. The Commissioner found that the SPS was correct in its application of section 30(b)(ii) of FOISA to the information withheld, being satisfied that its disclosure would, or would be likely to, substantially inhibit the free and frank exchange of views for the purposes of deliberation. However, by making an unnecessary request for clarification under section 1(3) of FOISA, the SPS failed to respond to Mr B within 20 working days and therefore failed to comply with section 10(1) of FOISA. He did not require the SPS to take any action in respect of this failure.

Relevant statutory provisions and other sources

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1), (3) and (6) (General entitlement); 2(1)(b) (Effect of exemptions); 10(1) (Time for compliance) and 30(b)(ii) (Prejudice to effective conduct of public affairs).

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 12 August 2008, Mr B wrote to the SPS requesting the following information:
 - Copies of all communications (including electronic communications) involving SPS local and national management and personnel and Health Care Centre personnel concerning the "supervised medication" regime introduced within Peterhead prison [the previous] weekend



- Any risk management assessment or other document produced or considered by local SPS management in connection with the introduction of this “supervised medication” regime, to include documents canvassing the balance of risks with the right to privacy and dignity of the prisoners concerned.
2. The SPS wrote to Mr B on 20 August 2008 requesting that he provide clarification of his request. In particular, the SPS asked whether he sought documents relating solely to the “weekend” in question, and if so to supply “the specific dates in question”.
 3. On 22 August 2008, Mr B wrote to the SPS, stating that he believed his original request was sufficiently clear but confirming the weekend in question to be Friday 8 August - Sunday 10 August 2008. He also provided further details of the regime which was the subject of his request.
 4. The SPS responded on 16 September 2008. In response to the first element of Mr B’s request the SPS identified 2 emails which it withheld under section 30(b)(ii) of FOISA. In response to the second element of Mr B’s request, the SPS provided notice under section 17 of FOISA that the information requested was not held.
 5. On 19 September 2008, Mr B wrote to the SPS requesting a review of its decision. In particular, Mr B was not satisfied with the SPS’s application of section 30(b)(ii) to the information identified and asked the SPS to be more specific in relation to its assertion that other information was not held.
 6. The SPS notified Mr B of the outcome of its review on 19 October 2008, upholding its original decision in its entirety.
 7. On 10 November 2008, Mr B wrote to the Commissioner’s Office, stating that he was dissatisfied with the outcome of the SPS’s review (insofar as it related to the withholding of information under section 30(b)(ii) and the SPS’s request for clarification) and applying to the Commissioner for a decision in terms of section 47(1) of FOISA.
 8. The application was validated by establishing that Mr B 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.

Investigation

9. The SPS is an executive agency of the Scottish Ministers (“the Ministers”) and, in line with agreed procedures, the Ministers were contacted on 20 November 2008 and notified that an application had been received from Mr B, being asked to provide the Commissioner with any information withheld from the applicant. The Ministers responded with the information requested and the case was then allocated to an investigating officer.



10. The investigating officer subsequently contacted the Ministers, giving them an opportunity to provide comments on the application (as required by section 49(3)(a) of FOISA) and asking them to respond to specific questions. In particular, the Ministers were asked to justify the SPS's reliance on any provisions of FOISA considered applicable to the information requested.
11. In their response, the Ministers submitted that the SPS also wished to rely on section 29(1)(a) of FOISA in withholding the 2 emails which were identified as falling within the scope of Mr B's request.

Commissioner's analysis and findings

12. In coming to a decision on this matter, the Commissioner has consider all of the withheld information and the submissions made to him by both Mr B and the Ministers and is satisfied that no matter of relevance has been overlooked.
13. Within his application to this office, Mr B indicated firstly that he was dissatisfied with the manner in which his request was handled, in particular arguing that the SPS's request for clarification was unnecessary and therefore that the SPS failed to respond to him within the appropriate statutory timescale. Secondly, he did not accept that section 30(b)(ii) had been legitimately applied, citing public interest arguments relating to human rights and compliance with SPS policies. The SPS has now applied both sections 29(1)(a) and 30(b)(ii) to the information withheld. The Commissioner will consider the application of section 30(b)(ii) of FOISA in the first instance.

Section 30(b)(ii)

14. Generally speaking, the exemptions in section 30(b) of FOISA allow for information to be withheld if its disclosure would, or would be likely to, inhibit substantially the commissioning or imparting of advice, or the requesting or offering of opinions or views. Section 30(b)(ii) states that information is exempt information if its disclosure under FOISA would, or would be likely to, inhibit substantially the free and frank exchange of views for the purposes of deliberation. This exemption is subject to the public interest test in section 2(1)(b) of FOISA.
15. As the Commissioner has said in previous decisions, it his view that the standard to be met in applying the tests contained in section 30(b)(ii) is high. In applying this exemption, the chief consideration is not whether the information constitutes advice or opinion, but whether the release of the information would, or would be likely to, inhibit substantially the exchange of views for the purposes of deliberation. In *Decision 105/2008 Mr Rob Edwards and the Scottish Ministers* (building on previous relevant decisions) the Commissioner sets out his views on the key issues that should be considered in deciding whether the exemptions in section 30(b)(i) and (ii) can apply. These can be summarised as follows:



- Information must be treated on a case-by-case basis: release of information in one case need not imply release in another case
 - The nature and content of the information in question must be considered, rather than considering “advice” or “exchange of views” as categories of information
 - If the information withheld does not in itself constitute advice or an exchange of views, the argument for exemption under section 30(b) may be weaker
16. Section 30(b)(ii) requires the public authority to show substantial inhibition to the free and frank exchange of views. The term “inhibit” is not defined in FOISA. However, the Commissioner takes the view that in the context of these exemptions it means to restrain, decrease or suppress the freedom with which opinions or options are expressed. The inhibition must be substantial, in other words of real and demonstrable significance.
17. Where an authority seeks to exempt information under section 30(b)(ii), it must be able to demonstrate that there is a real risk or likelihood that substantial inhibition would (or would be likely to) follow disclosure of the information. The authority will be expected to be specific about the inhibition in question and give the reasons for expecting it to occur in the near or foreseeable future. If there is only a remote possibility of substantial inhibition, then the exemption will not apply.
18. The Ministers identified 2 emails withheld under section 30(b)(ii) of FOISA. The emails consist of an exchange between two SPS officials where both express views and comment regarding a change in policy regarding the management of particular medication. The Ministers submitted that these emails were clearly written in the context of ongoing discussion about the matter. They also highlighted that one of the emails was dated the same date as Mr B’s request, which they argued emphasised the currency of the issue at the time the request was made.
19. The Ministers expressed the view that if these emails were released officials would feel substantially inhibited from expressing free and frank opinion and comment in the future, whether that be supportive or critical of a particular policy. The Ministers did not believe that either email would have been written if either official had anticipated that it might enter the public domain, referring to their contents in support of this argument.
20. The Ministers explained that the concerns raised in the exchange, including personal opinion, could expose the SPS to risk in several areas, for example:
- the risk of prisoners being identified and placed at risk;
 - the risk of personal views being taken out of context and cited as official SPS views;
 - the risk that if information was disclosed then staff would be reluctant to answer via email in future but simply provide a verbal response;
 - the risk that certain issues could be used by malicious prisoners or others against the SPS.



As a consequence, the Ministers contended that the release of such communications, both in terms of style and content, would substantially inhibit the nature and substance of future communication between officials.

21. The Commissioner has considered the content and timing of these email exchanges and while not accepting fully all the arguments presented in the paragraphs above he is satisfied, particularly given the sensitivity of the subject matter, that at the time of Mr B's request (a matter of days after these views were exchanged and the regime implemented), and for that matter at the time the SPS dealt with his request for review, their disclosure would have inhibited substantially, or would have been likely to inhibit substantially, the free and frank exchange of views for the purposes of deliberation.

The public interest test

22. Where the Commissioner has found that information falls within the exemption in section 30(b)(ii) of FOISA, he must consider whether, in all the circumstances of the case, the public interest in maintaining the exemption outweighs that in disclosure of the information. Unless he finds that it does, he must order the information to be disclosed (unless one or more exemptions are found to apply to that information).
23. The Ministers acknowledged a general public interest in matters concerning drug use in prisons but contended that this was outweighed by the public interest in officials being able to freely and frankly discuss such sensitive issues without their privately expressed opinions immediately being placed in the public domain, particularly in the first days of a revised policy being put into operation and before any assessment could be made of its effectiveness.
24. The Ministers did not consider the public interest to be served by release of such internal communication as they believed the impact of release, particularly out of context, would curtail officials' willingness to freely and frankly provide comment for the purpose of deliberation. This, they submitted, would be contrary to the public interest in officials being able to fully and constructively debate all relevant issues without feeling that their views should be moderated or even withheld due to concern about early release and potential misinterpretation or manipulation of privately voiced opinion.
25. The Commissioner recognises the public interest in ensuring transparency in the decision making process and also acknowledges the controversy surrounding this particular subject matter and the more specific concerns raised by Mr B. However, the Commissioner accepts on balance that the public interest is better served in this case by allowing the free frank exchange of views to continue unhindered. In reaching this conclusion, he has taken into account the sensitivity of the subject matter, the timing of the request and the role of Her Majesty's Chief Inspector of Prisons in assessing such regimes.
26. The Commissioner is satisfied, therefore, that the SPS was correct in its application of section 30(b)(ii) of FOISA to the information withheld. As the Commissioner has reached this conclusion, he is not required to go on and consider the application of section 29(1)(a) of FOISA.



Request for clarification

27. Mr B did not consider the SPS's request for clarification to have been necessary, there being in his opinion no scope for dubiety as to the interpretation of his request. He therefore did not regard the SPS as having been entitled to extend the period for responding to his request by virtue of such clarification being required, and submitted that the SPS had failed to respond to him within the appropriate statutory timeframe.
28. Section 1(3) of FOISA provides that an authority may request such further information as it requires from the applicant in order to identify and locate the information requested. Provided the requirement for clarification is reasonable, the authority is not obliged to give the requested information until it has the further information.
29. In any case where section 1(3) applies, section 10(1)(a) of FOISA provides that the period of 20 working days allowed for complying with the request will not start until the authority has received the further information it requires. On this point, paragraph 20 of the Ministers' Code of Practice on the discharge of functions by Public Authorities under FOISA states that:

“The 20 working day period will run from the date of clarification but authorities should note that the Commissioner will take a hard stance against any authority that uses clarification as a means of delaying dealing with an application”
30. On 12 August 2008, Mr B's made a request in the following terms:

“Please provide me with copies of all communications (including electronic communications) involving SPS local and national management and personnel and Health Care Centre personnel concerning the 'supervised medication' regime introduced within Peterhead prison *last weekend*.” [emphasis added]
31. The SPS requested clarification of this request on 20 August 2008. In particular, it asked Mr B to clarify whether he was seeking documents relating solely to the “weekend” in question, and if so to “supply the dates in question”.
32. From the Commissioner's reading of Mr B's initial request, he is satisfied that it was sufficiently clear for the SPS to identify and locate the information in question. Mr B clearly identifies the subject matter of his request, that being the regime of “supervised medication”, and when the regime was introduced (“last weekend”). While there may have been some scope for ambiguity as to which weekend Mr B was referring to, there appears to have been no ambiguity as to the regime he was concerned about: in the circumstances, the Commissioner is satisfied that the focus of the request was the regime, with reference to when it was introduced being included simply for the sake of completeness. Clarification of particular dates appears to have been wholly unnecessary.
33. The Commissioner therefore concludes that the SPS's requirement for clarification was not reasonable in the circumstances, so section 1(3) could not apply and consequently neither could section 10(1)(b).



34. Mr B submitted that had delivered his request by hand on 12 August 2008 and this was confirmed by the Ministers. A response was provided to Mr B on 16 September 2008. Section 10(1)(a) of FOISA (which, as indicated above, applied in this case) gives Scottish public authorities a maximum of 20 working days from receipt of the request to comply with a request for information. In this case, the SPS failed to comply within that timescale.

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 B.

The Commissioner finds that by withholding information under section 30(b)(ii) of FOISA the SPS complied with Part 1.

However, as it did not reasonably require clarification of Mr B's request in order to identify and locate the requested information, the SPS was required to comply with the request within the period specified in section 10(1)(a) of FOISA rather than that specified in section 10(1)(b). In awaiting clarification from Mr B, the SPS failed to comply with section 10(1) and thus failed to comply with Part 1. In the circumstances, the Commissioner does not require the SPS to take any action in response to this particular application in relation to this failure.

Appeal

Should either Mr B 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.

Kevin Dunion
Scottish Information Commissioner
4 March 2009



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.

...

- (3) If the authority –

- (a) requires further information in order to identify and locate the requested information; and
- (b) has told the applicant so (specifying what the requirement for further information is),

then provided that the requirement is reasonable, the authority is not obliged to give the requested information until it has the further information.

...

- (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 –

...

- (b) in all the circumstances of the case, the public interest in disclosing the information is not outweighed by that in maintaining the exemption.

...



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
 - (b) in a case where section 1(3) applies, the receipt by it of the further information.

...

30 Prejudice to effective conduct of public affairs

Information is exempt information if its disclosure under this Act-

...

- (b) would, or would be likely to, inhibit substantially-
- (ii) the free and frank exchange of views for the purposes of deliberation; or

...