

Decision Notice

Decision 045/2015: Mr A and the Scottish Prison Service

Notes taken at ICC meeting

Reference No: 201402478

Decision Date: 31 March 2015



Scottish Information
Commissioner

Summary

On 4 March 2015, Mr A asked the Scottish Prison Service (the SPS) for the information within notes written during a complaint hearing. The SPS informed Mr A that he had requested his own personal data and therefore he should seek it under the DPA. Referring to previous similar requests, it considered this request to be vexatious and therefore refused to respond.

Following an investigation, the Commissioner found that the information was Mr A's personal data, with the result that the SPS was entitled to withhold it under section 38(1)(a) of FOISA. She also found that the SPS was not entitled to refuse the request as vexatious.

Relevant statutory provisions

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) and (6) (General entitlement); 2(1)(a) and (2)(e)(i) (Effect of exemptions); 38(1)(a) (Personal information)

Data Protection Act 1998 (the DPA) section 1(1) (Basic interpretative provisions) (definition of "personal data")

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 4 March 2014, Mr A made a request for information to the SPS. He referred to a meeting he had attended that day with the Internal Complaints Committee (ICC) and requested:

"... all and any information contained within the notes of the SPS employed notetaker at the meeting."
2. The SPS responded on 24 March 2014, explaining how to obtain the information Mr A sought by a separate route (i.e. by means of a subject access request under the DPA). It stated that the request was vexatious, although it referred to section 14(2) of FOISA (which relates to repeated requests).
3. On 26 March 2014, Mr A wrote to the SPS, requesting a review of its decision because:
 - i. He did not consider section 14(2) could apply;
 - ii. He believed the SPS had failed to consider whether there was any non-exempt information within the notes, looking at their actual content.
4. The SPS notified Mr A of the outcome of its review on 22 April 2014. It cited a number of previous occasions on which it took the view he had asked for information properly requested under a subject access request, applying section 14(1) of FOISA on the basis that this request was vexatious.
5. On 21 October 2014, Mr A wrote to the Commissioner. He applied to the Commissioner for a decision in terms of section 47(1) of FOISA. Mr A stated he was dissatisfied with the

outcome of the SPS's review because the information was not provided to him: he did not believe the SPS had justified the application of either section 14 or section 38(1)(a).

Investigation

6. The application was accepted as valid. The Commissioner confirmed that Mr A made a request for information to a Scottish public authority and asked the authority to review its response to that request before applying to her for a decision.
7. On 10 November 2014, the SPS was notified in writing that Mr A had made a valid application. The SPS was asked to send the Commissioner the information withheld from him. The SPS provided the information and the case was allocated to an investigating officer.
8. Section 49(3)(a) of FOISA requires the Commissioner to give public authorities an opportunity to provide comments on an application. The investigating officer wrote to the SPS, inviting comment on this application and asking it to answer specific questions. In particular, it was asked to comment on its application of sections 14 and 38(1)(a) of FOISA.
9. In response, the SPS confirmed that it no longer wished to rely upon section 14 of FOISA. It continued to argue that section 38(1)(a) applied to the information requested by Mr A.
10. On 15 January 2015, the investigating officer informed Mr A that the SPS was no longer relying upon section 14 of FOISA and asked Mr A if he wished to offer further comment on this or on the application of section 38(1)(a).
11. Mr A informed the investigating officer on 30 January 2015, that he was awaiting the outcome of the Court of Session case involving both himself and the Commissioner. He believed that outcome might have a bearing on the present investigation. He reserved the right to make further comments after the Court issued its opinion.
12. The Court issued its opinion of 3 March 2015, finding in favour of the Commissioner. The investigating officer wrote to Mr A on 18 March 2015, reminding him that he had not yet provided any comments and asking him to comment by 27 March 2015.
13. Mr A responded (27 March 2015). In respect of section 14, he asked the Commissioner to reach a decision on whether the SPS complied with its obligations under FOISA. Also, he reiterated that he did not accept the information he requested was entirely his own personal data.

Commissioner's analysis and findings

14. 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 her by both Mr A and the SPS. She is satisfied that no matter of relevance has been overlooked.

Section 14 of FOISA

15. Following its review, the SPS confirmed that it was applying section 14(1) of FOISA to the request, on the basis that the request was vexatious. Its original response to the request appeared to deem the request vexatious, but referred to section 14(2) rather than section 14(1). Given the clarification provided by the review outcome, it is not for the Commissioner to consider whether the SPS was correct to refer to section 14(2) in the first instance.

16. During the investigation, the SPS withdrew its reliance on section 14 of FOISA in relation to Mr A's request. In the circumstances, the Commissioner concludes that the SPS was incorrect (and in breach of section 1(1) of FOISA) to respond to Mr A's requirement for review, on this occasion, in terms of section 14(1) of FOISA.
17. The Commissioner will now go on to consider the application of section 38(1)(a) of FOISA, which the SPS still wishes to rely on in relation to the information requested by Mr A.

Section 38(1)(a) of FOISA

18. Section 38(1)(a) of FOISA contains an absolute exemption in relation to personal data of which the applicant is the data subject. The fact that it is absolute means that it is not subject to the public interest test set out in section 2(1) of FOISA.
19. This exemption exists under FOISA because individuals have a separate right to ask for their own personal data (commonly known as a "subject access request") under section 7 of the DPA. This is to be contrasted with access to information under FOISA, which involves disclosure to the world at large and not simply to the individual concerned (the data subject). The DPA will therefore usually determine whether a person has a right to his or her own personal data, and govern the exercise of that right. Section 38(1)(a) of FOISA does not deny individuals a right to access to information about themselves, but ensures that the right is exercised under the DPA and not under FOISA.
20. Personal data are defined in section 1(1) of the DPA as data which relate to a living individual who can be identified: a) from those data, or b) from those data and other information which is in the possession of, or is likely to come into the possession of, the data controller (the full definition is set out in the Appendix).
21. Although the exemption was referred to in conjunction with section 14 of FOISA, the SPS's responses to Mr A, both initially and on review, made it clear that it considered the requested information to be exempt under section 38(1)(a) of FOISA. The SPS informed Mr A he should request the information under the DPA.
22. In his application, Mr A argued that this exemption was incorrectly applied to the information he requested. He contended that the SPS failed to explain sufficiently why the information was entirely his own personal data. The investigating officer provided Mr A with a summary of the SPS's submissions to the Commissioner on the application of section 38(1)(a): having read the summary, Mr A suggested that the SPS might not have given adequate consideration to the actual information requested in this case.
23. During the investigation, the SPS referred to its submissions in the case which led to the Commissioner's *Decision 233/2014*¹. It argued that the notes were a contemporaneous record of the discussion between Mr A and the chairperson at the ICC hearing. All that was discussed was Mr A's complaints. Mr A was identifiable throughout the information and, in the circumstances described, that information related to him.
24. In his letter dated 27 March 2015, Mr A asked the Commissioner to determine the applicability of this exemption on the basis of (a) the nature and quality of the withheld information and (b) the application of the approach "approved by the Courts in the *Durant* jurisprudence" [*Durant v Financial Services Authority* [2003] EWCA Civ 1746].

¹ <http://www.itspublicknowledge.info/ApplicationsandDecisions/Decisions/Decisions.php>

25. The Commissioner has considered the information withheld from Mr A carefully. She has considered all of his submissions on this point, along with those received from the SPS. As she explained in *Decision 233/2014*, the focus of her attention must be the actual information in these ICC notes, not ICC notes as a class. That is what she has considered.
26. Having considered the content of the withheld information in this case, the Commissioner is satisfied that it is all Mr A's personal data. As the SPS has explained, it is a record of discussion between Mr A and the ICC chairperson. It is a record of discussion of concerns specific to Mr A, and of nothing else. It is information which focuses on, and is biographically significant in relation to, him. It relates to him, as a living individual, and he can be identified from it.
27. Having considered the withheld information, therefore, the Commissioner is satisfied that the SPS was entitled to withhold this information under section 38(1)(a) of FOISA.

Decision

The Commissioner finds that the Scottish Prison Service (the SPS) partially failed to comply with Part 1 (and in particular section 1(1)) of the Freedom of Information (Scotland) Act 2002 (FOISA) in responding to the information request made by Mr A. In all the circumstances, she finds that section 14(1) of FOISA was incorrectly applied to the request.

However, the Commissioner also finds that the SPS was entitled to withhold the requested information under section 38(1)(b) of FOISA, and so does not require the SPS to take any action in this particular case, in response to Mr A's application.

Appeal

Should either Mr A or the SPS 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

31 March 2015

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 –

...

- (e) in subsection (1) of section 38 –

- (i) paragraphs (a), (c) and (d); and

...

38 Personal information

- (1) Information is exempt information if it constitutes-

- (a) personal data of which the applicant is the data subject;

...

Data Protection Act 1998

1 Basic interpretative provisions

(1) In this Act, unless the context otherwise requires –

...

“personal data” means data which relate to a living individual who can be identified –

(a) from those data, or

(b) from those data and other information which is in the possession of, or is likely to come into the possession of, the data controller,

and includes any expression of opinion about the individual and any indication of the intentions of the data controller or any other person in respect of the individual;

...

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