

Decision Notice



Decision 118/2011 Mr T and the Scottish Prison Service

Information relating to disciplinary proceedings

Reference No: 201100491

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Scottish Information Commissioner

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Summary

Mr T asked the Scottish Prison Service (the SPS) for information relating to disciplinary proceedings in which he was involved, and the post responsible for the retention of such records. The SPS responded by explaining that no one post is responsible for this task. It withheld the information relating to the disciplinary proceedings on the basis that this was Mr T's own personal data, exempt from disclosure in terms of section 38(1)(a) of the Freedom of Information (Scotland) Act 2002 (FOISA). Following a review, the SPS indicated that it actually no longer held the information previously considered exempt under section 38(1)(a), as it had been destroyed some months earlier. Mr T 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 T's request for information in accordance with Part 1 of FOISA. The Commissioner found that the SPS had been correct in notifying Mr T on review (in line with section 17(1)) that the information he had requested relating to specified disciplinary proceedings was not held.

However, the Commissioner found that, since no particular post was responsible for the retention of such records, this information was not held by the SPS. Since the SPS had not notified Mr T that it did not hold that information, it failed to comply with Part 1, and in particular section 17(1) of FOISA.

The Commissioner did not require the SPS to take any action in response to this decision.

Relevant statutory provisions and other sources

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) and (4) (General entitlement) and 17(1) (Notice that information is not held)

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 6 December 2010, Mr T wrote to the SPS, advising it that he had been convicted of a disciplinary offence under Prison Rules on a specific date. He explained that he understood that a record of this hearing should be retained at the establishment for the period that the prisoner remains in custody or three years after the adjudication, whichever is the greater, in case of subsequent complaint or legal action. Mr T then requested the following information;
 - a. the record of proceedings pertaining to the disciplinary offence;
 - b. the verdict and punishments;
 - c. the Officer's Report of a Suspected Breach of Discipline;
 - d. the Notice of a Breach of Discipline (Charge Sheet) for a specified charge number;
 - e. the list of witness(s) requested;
 - f. his own written defence submission and
 - g. details of the post that is responsible for the retention of orderly room paperwork.
2. The SPS responded on 5 January 2011, notifying Mr T that the information requested in i - vi was exempt from disclosure under section 38(1)(a) of FOISA, as it considered this to be Mr T's own personal data. The SPS advised Mr T that it would deal with these parts of his request as a subject access request under the Data Protection Act 1998 (DPA) and requested the associated payment from Mr T. In response to part vii of Mr T's request, the SPS explained that the retention of orderly room paperwork is a general administrative task which is carried out in the general office.
3. On 14 February 2011, Mr T wrote to the SPS, requesting a review of its decision. In particular, he drew the SPS's attention to the terms of paragraph 5 of Annex 1 of its Guidance on Orderly Room Procedures, which states, "If at any time a prisoner found guilty at adjudication asks for copies of the record of the hearing, including statements of witnesses, the governor should allow him to have them. No charge for photocopies should be made since a prisoner ought not to be impeded in any way should he wish to consider seeking a review of the hearing. This also applies to copies of documents supplied to a prisoner's legal representative." Mr T commented that he would not be paying the SPS for paperwork that he considered he was legally entitled to have access to, and requested that the information sought by i - vi be provided to him in early course.
4. In relation to part vii of his request, Mr T advised that he did not accept the SPS's response and wanted to know who is responsible for the retention of all orderly room paperwork. Mr T explained that he did not require a name, just the post.



5. The SPS notified Mr T of the outcome of its review on 11 March 2011. Having reviewed parts i to vi of Mr T's request, it notified Mr T that the information requested no longer existed as it had been destroyed in September 2010. The SPS provided Mr T with correspondence which had communicated this fact to Mr T's solicitor at the time. The SPS did not make any comment on Mr T's request that it review its decision in relation to the information he requested at part vii.
6. On 17 March 2011, Mr T 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. In particular, Mr T indicated that he did not accept that the information he had requested in parts i - vi of his request had been destroyed, and he highlighted relevant content within the SPS Guidance on Orderly Room Procedures in support of his case.
7. Mr T also explained that he wished to know who is responsible for the retention of all orderly room paperwork, and that he does not require the name, only the post. Mr T commented also that the member of staff who responded to his request for review was the adjudicator during the relevant orderly room proceedings. He maintained that this individual should not have taken part in the review process as the member of staff was not impartial.
8. The application was validated by establishing that Mr T 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 agency of the Scottish Ministers (the Ministers) and, in line with agreed procedures, the Ministers were notified in writing (on 4 April 2011) that an application had been received from Mr T and that an investigation into the matter had commenced. The Ministers were also given an opportunity to provide comments on the application (as required by section 49(3)(a) of FOISA) and asked to respond to specific questions.
10. Subsequent references to submissions requested and received from the SPS in this decision are references to those sought and received from the Ministers' Freedom of Information Unit on behalf of the SPS.
11. The SPS was asked to explain why the paperwork sought by parts i to vi of Mr T's request was destroyed when the SPS's Guidance on Orderly Room Procedures suggests that it should be retained. Submissions were also sought from the SPS on the nature of the searches that it carried out to determine whether information was held which would address these parts of Mr T's request. The SPS was also asked to explain why it was unable to provide Mr T with the name of the post responsible for the retention of orderly room paperwork.



12. The SPS responded with its comments and answers to the investigating officer's questions on 19 April 2011. The SPS subsequently provided further submissions and background information in response to further questions raised by the investigating officer.
13. All submissions received from the SPS and Mr T, in so far as relevant, will be considered in the Commissioner's analysis and findings below.

Commissioner's analysis and findings

14. In coming to a decision on this matter, the Commissioner has considered all of the submissions made to him by both Mr T and the SPS and is satisfied that no matter of relevance has been overlooked.

Section 17 of FOISA – Information not held

15. In terms of section 1(4) of FOISA, the information to be provided in response to a request made under section 1(1) is that held at the time the request is received. Where a Scottish public authority receives a request for information that it does not hold, it must, in line with section 17(1) of FOISA, notify the applicant in writing that it does not hold the information.
16. Following its review, the SPS notified Mr T that it did not hold the information sought by parts i to vi of his request, since the information had been destroyed in September 2010. During the investigation, the SPS also maintained that it did not hold the information sought by part vii of Mr T's request, since responsibility for retaining the relevant information was not the responsibility of any particular post.
17. In order to determine whether the SPS has dealt with Mr T's request correctly, the Commissioner must be satisfied as to whether, at the time it received Mr T's request, the SPS held any information which would fall within the scope of the request.

Parts i to vi - Information relating to particular disciplinary proceedings

18. In parts i to vi of his request, Mr T requested copies of various documents relating to his own disciplinary hearing. It is relevant to note at this stage that, although Mr T was found guilty of misconduct, this finding was later quashed.
19. The SPS explained that no searches were undertaken in relation to these parts of Mr T's request, since it was initially identified as a subject access request under the DPA (since the SPS considered the information to be Mr T's own personal data).
20. The SPS also explained that no searches were undertaken during the SPS's review, as the individual member of staff conducting that review was able to recall the case. Due to their own awareness of the incident, the reviewer was able to identify that the records had been destroyed following the overturning of the charge.



21. The SPS advised the Commissioner that, as a consequence of the finding of guilt against Mr T being quashed, and in line with Rule 131(2) of the Prisons and Young Offenders Institutions (Scotland) Rules 2006, the records of the adjudication were destroyed. The SPS explained that this involved removing the record of the disciplinary inquiry from its electronic prisoner database. The SPS provided the Commissioner with correspondence confirming this action.
22. The Commissioner has considered the terms of Rule 131(2) of the Prisons and Young Offenders Institutions (Scotland) Rules 2006, which state:
 - (1) *The Scottish Ministers may in relation to a prisoner who has been found guilty of any breach of discipline-*
 - (a) *quash any finding of guilt;*
 - (b) *remit or mitigate any punishment (other than a punishment imposed under sub paragraph (b), (d), (e) or (g) of rule 119(1) where the period for which the punishment was imposed has expired); or*
 - (c) *substitute another punishment which is, in the Scottish Ministers' opinion, less severe.*
 - (2) *If the Scottish Ministers quash any finding of guilt, the Governor shall destroy any record in the prisoner's file which relates to the alleged breach of discipline except where the record, or a part of it, relates to any other finding or breach of discipline which continues to form part of the prisoner's record.*
23. The Commissioner accepts that the SPS was acting in accordance with Rule 131(2) of the Prisons and Young Offenders Institutions (Scotland) Rules 2006 in destroying any record on Mr T's file which related to the alleged breach of discipline, where the finding of guilt had been quashed.
24. The requirement for destruction of records set out in these Rules applies to any record contained in the prisoner's file. The investigating officer contacted the SPS during the course of the investigation to ascertain whether the information requested by Mr T was held anywhere else by the SPS.
25. The SPS explained that the specific information that Mr T requested would normally be held in particular locations. The SPS advised what these locations were, and also advised the Commissioner that these are the areas from which the records were destroyed in September 2010 in line with Rule 131(2) (as detailed above). The SPS advised that there are no other areas where the requested information is held.
26. Having considered the submissions received from the SPS, together with its overall handling of this part of Mr T's request, he recognises that Rule 131(2) of the Prisons and Young Offenders Institutions (Scotland) Rules 2006 required the Governor of HMP Dumfries to destroy any record of the adjudication in Mr T's case, where the finding of guilt was quashed, and he accepts that such steps were taken in this case.



27. The Commissioner accepts that the information was destroyed in line with Rule 131(2) and that, at the time Mr T made his information request, no information relevant to parts i to vi of his request was held by the SPS. As a consequence, the Commissioner accepts that the SPS was correct to notify Mr T, in its response to his request for review, that it does not (and did not at the time of receiving his request) hold any information falling within the scope of parts i to vi of his request.

Part vii - post responsible for retention of orderly room paperwork

28. In this part of his request, Mr T asked for confirmation as to the post within the SPS that has a duty to retain orderly room paperwork. The SPS explained in response that this is a general administrative job which is carried out in the general office.
29. During the investigation, the SPS submitted that there is no specific post that has responsibility for the retention of relevant paperwork, and this responsibility is shared amongst a team of administrators, as it is a general administrative task. It indicated that, although its response to Mr T's request did not formally indicate that the information was not held, it considered that the terms of section 17 applied to this information.
30. The SPS considered that it had complied with its duty to provide reasonable advice and assistance to Mr T (under section 15 of FOISA) in providing Mr T with the response it did in relation to this part of his request.
31. Having considered the submissions from the SPS, the Commissioner accepts that the SPS does not (and did not at the time of receiving his request) hold information as to the name of the post responsible for the retention of orderly room paperwork, because this responsibility is not held by any particular post.
32. While the Commissioner appreciates that the SPS sought to fulfil its duty to provide advice and assistance in advising Mr T that the post he was seeking information about is a general administrative role which is carried out in the general office, he notes that this response neither provided the information requested nor explained why it was not being supplied.
33. The Commissioner finds that the SPS should have notified Mr T in line with section 17 of FOISA that it did not hold the information he had requested. In failing to provide such a notice, the Commissioner finds that the SPS breached Part 1 of FOISA.
34. However, as the Commissioner is satisfied that no relevant information is held by the SPS, and since this fact is made clear by this decision, he does not require the SPS to take any action in relation to this breach.

Other matters of dissatisfaction

35. In his application to the Commissioner, Mr T commented that the person who responded to his request for review was the adjudicator at the disciplinary proceedings in which he was involved. He submitted that this person was not impartial, so should not have taken part in the review process.



36. The SPS has advised that, as the member of staff who undertook and responded to Mr T's request for review was not involved in responding to his original request, it could see no reason why that staff member should not have been involved in the review.
37. The SPS submitted that this approach was in line with the requirements set out in section 5.4 of the Scottish Ministers' Code of Practice on the Discharge of Functions by Scottish Public Authorities under the Freedom of Information (Scotland) Act 2002 and the Environmental Information (Scotland) Regulations 2004, which states that "The review should, where practicable, be handled by staff who were not involved in the original decision". The SPS also submitted that the fact that the particular member of staff had had previous dealings with Mr T in HMP Dumfries does not preclude them from undertaking a review of an FOI case.
38. The Commissioner concurs with this view of the SPS. The Commissioner considers it to be good practice for an authority covered by FOISA and the EIRs to involve staff with specialist knowledge of the subject matter of the request when seeking to determine whether relevant information is held and how best to respond to a request. The Commissioner therefore considers the action taken by the SPS here to be appropriate.

DECISION

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

The Commissioner is satisfied that none of the information sought by Mr T is held by the SPS. As a consequence, the Commissioner finds that the SPS was correct to notify Mr T, in line with section 17(1) of FOISA, that it did not hold the information sought by parts i to vi of his request.

However, the Commissioner also finds that the SPS failed to provide Mr T with a notice in line with section 17(1) of FOISA when responding to part vii of his information request.

The Commissioner does not require the SPS to take any action in response to this failure.



Appeal

Should either Mr T 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.

Margaret Keyse
Head of Enforcement
14 May 2011



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.

....

- (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.

17 Notice that information is not held

- (1) Where-

- (a) a Scottish public authority receives a request which would require it either-
- (i) to comply with section 1(1); or
 - (ii) to determine any question arising by virtue of paragraph (a) or (b) of section 2(1),

if it held the information to which the request relates; but

- (b) the authority does not hold that information,

it must, within the time allowed by or by virtue of section 10 for complying with the request, give the applicant notice in writing that it does not hold it.