

Decision Notice



Decision 144/2010 Mr P and the Scottish Prison Service

Psychometric tests used during Sex Offender Treatment Programme

Reference No: 200901952

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Summary

Mr P requested from the Scottish Prison Service (the SPS) information relating to the content, scoring and appeal process for psychometric testing relevant to the Core Sex Offender Treatment Programme (SOTP) used by the SPS. The SPS responded by withholding some of this information in terms of the exemption contained in section 30(c) of the Freedom of Information (Scotland) Act 2002 (FOISA). Following a review, Mr P remained dissatisfied and applied to the Commissioner for a decision.

During the investigation, the SPS released additional information to Mr P, who subsequently narrowed the scope of his application for decision to focus only on his request for the questions contained within the psychometric tests. The Commissioner found that the SPS had dealt with this part of Mr P's request for information in accordance with Part 1 of FOISA. He did not require the SPS to take any action.

Relevant statutory provisions and other sources

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) and (6) (General entitlement), 2(1) (effect of exemptions) and 30(c) (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 5 August 2009, Mr P wrote to the SPS requesting the following information:
 - a. A list of all the questions contained within the psychometric testing relevant to participating on the Core SOTP 2000 programme;
 - b. The procedure followed in relation to the scoring of said psychometric testing;
 - c. Information on who carries out the markings of said testings and their qualifications;
 - d. Information in regards to an appeal against scoring procedure;



- e. Information regarding procedure to have psychometrics independently scored.
2. The SPS responded on 26 August 2009 indicating that it was relying on the exemption in section 30(c) of FOISA to withhold the information requested in Mr P's first three questions. In response to the final two questions the SPS indicated that it was not aware of any mechanisms in place to allow an appeal against the scoring procedure or to facilitate the tests to be independently scored.
3. On 9 September 2009, Mr P wrote to the SPS requesting a review of its decision. Mr P challenged the application of the exemption in section 30 (c) of FOISA to the information sought in parts a, b and c of his request.
4. The SPS notified Mr P of the outcome of its review on 30 September 2009. The SPS maintained its position of withholding the information sought in part a of the request in terms of section 30(c) of FOISA. However, the SPS modified its decision with respect to parts b and c and provided Mr P with some relevant information and provided details of a publication scheme where further information could be obtained. However, this response still did not fulfil these parts of the request.
5. On 4 November 2009, Mr P wrote to the Commissioner, stating that he was dissatisfied with the outcome of the SPS review and applying to the Commissioner for a decision in terms of section 47(1) of FOISA.
6. The application was validated by establishing that Mr P 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

7. The SPS is an executive agency of the Scottish Ministers ("the Ministers") and, in line with agreed procedures, the Ministers were contacted on 10 December 2009, notified that an application had been received from Mr P and 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.
8. 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' reliance any provisions of FOISA considered applicable to the information requested.
9. The Ministers responded on 24 February 2010, confirming their application of section 30(c) of FOISA and adding that they also considered the information requested to be exempt by virtue of the exemptions contained in section 35(1)(a) & (c) of FOISA. The Ministers provided arguments supporting their application of all three exemptions.



10. Mr P was invited to comment on why he believed disclosure of psychometric testing questions and assessment procedures would be in the public interest. These are summarised and considered (along with the Ministers' submissions) in the Commissioner's analysis and findings section below.
11. During the course of the investigation the Ministers indicated that they no longer considered the information requested by Mr P in parts b and c of his request to be exempt and provided him with some further information. Mr P thereafter withdrew his application for a decision in respect of those elements of his request. Accordingly this decision notice relates only to the information withheld by the Ministers in relation to part a of Mr P's request, namely a list of the questions contained in the psychometric testing process used in the SOTP 2000 programme.

Commissioner's analysis and findings

12. In coming to a decision on this matter, the Commissioner has considered all of the withheld information and the submissions made to him by both Mr P and the Ministers and is satisfied that no matter of relevance has been overlooked.

Section 30(c) – Prejudice to effective conduct of public affairs

13. The Ministers applied the exemption in section 30(c) of FOISA to the information under consideration. Section 30(c) exempts information if its disclosure "would otherwise prejudice substantially, or be likely to prejudice substantially, the effective conduct of public affairs". (The word "otherwise" is used here to differentiate this particular exemption from the other types of substantial prejudice - such as substantial inhibition to the free and frank provision of advice or exchange of views – covered in other parts of section 30.) This is a qualified exemption, and as such is subject to the public interest test required by section 2(1)(b) of FOISA.
14. Section 30(c) applies where the harm caused, or likely to be caused, by disclosure is at the level of substantial prejudice. The Commissioner's published guidance¹ on this exemption makes it clear that the damage caused by disclosure must be real and significant, as opposed to hypothetical or marginal. Authorities should therefore consider disclosing the information asked for unless it would (or would be likely to) cause real, actual and significant harm.

¹ <http://www.itspublicknowledge.info/nmsruntime/saveasdialog.asp?IID=2582&SID=117>



15. In their submissions on this exemption, the Ministers indicated that the psychometric tests formed part of specialists interventions and programmes aimed both at reducing the risks presented by sex offenders and the likelihood of them re-offending. They went on to state that these programmes are a critical process playing, in a wider sense, a key part of the SPS's conduct of public affairs. They highlighted that the programmes had been at the core of sex offender treatment for a considerable period and would continue to be so. The development of reliable assessment tools, such as the psychometric tests, required considerable effort and expertise and had taken several years involving large scale testing and validation. The Ministers asserted that it was crucial that the integrity of such tools was maintained and withholding the information requested protected both the validity of the tests and the quality and reliability of their outcomes.
16. The Ministers argued that disclosure of the questions requested by Mr P would compromise the integrity of the psychometrics by allowing an individual to manipulate the outcome of the testing.
17. The Ministers highlighted the timing of administering the tests was critical to their validity explaining that the tests were taken at specific time intervals before and after treatment thus creating standardised conditions for all offenders undertaking them. The Ministers asserted that if an offender had viewed the questions prior to treatment they may have an opportunity to practice their responses and respond in a socially desirable way thereby manipulating the outcome. The Ministers explained that the implications for such compromise of the test validity are severe as the outcomes are used to inform treatment needs and treatment progress. The Ministers further argued that if the test results were manipulated and thereby rendered invalid reliable clinical judgements regarding the risks and needs of the offender may be jeopardised.
18. The Ministers also argued that offending behaviour programmes used by Her Majesty's Prison Service (HMPS), upon which the SPS programmes are based, utilise aggregated psychometric data to examine the components of treatment interventions and programme efficacy. They indicated that future evaluations of these programmes may be put in jeopardy if there was a loss of confidence in the validity of the aggregated data resulting in a detriment to public protection.
19. The Ministers also drew the attention of the Commissioner to guidance issued by British Psychological Society, entitled "Statement on the conduct of psychologists providing Expert Psychometric Evidence to Courts and Lawyers"². This guidance states on page 2:

² A copy of the full guidance document can be found at the following link: ([http://www.bps.org.uk/document-download-area/document-download\\$.cfm?file_uid=A83A1E6C-1143-DFD0-7E62-15AB90E2714A&ext=pdf](http://www.bps.org.uk/document-download-area/document-download$.cfm?file_uid=A83A1E6C-1143-DFD0-7E62-15AB90E2714A&ext=pdf))



“Confidentiality and security of tests

Psychologists should be mindful at all times of the confidential nature of test materials. Many tests are invalidated by prior knowledge of the specific content of tests and their objectives. Psychologists who use tests are required to respect the confidentiality of test materials and to avoid release of test materials into the public domain (unless this is explicitly allowed in the nature of the test and by the test publisher). A court, though, can legally request test materials and such disclosure is allowed within the Data Protection Act. Psychologists, however, should take reasonable steps to prevent misuse of test data and materials by others. Misuse includes release of such data and materials to unqualified individuals...which may result in harm to the client and/or release of data and materials without an adequate explanation with regard to how they are to be interpreted or used.”

And on page 3:

“Why is the security of test materials important?

Availability of test items to an unqualified person can not only render the test invalid for any future use with that individual, but also jeopardises the security and integrity of the test for other persons who may be exposed to test items and responses. Such release imposes very concrete harm to the general public – loss of effective assessment tools. Because there are a limited number of standardised psychological tests considered appropriate for a given purpose (in some instances only a single instrument), they cannot easily be replaced or substituted if an individual obtains prior knowledge of item content or the security of the test is otherwise compromised. Development and refinement of items and norms for individual intelligence tests, personality assessment techniques, and achievement tests often require many years of research and considerable effort and expense. Improper disclosure of test items or other test materials also may result in damage to those parties which have developed or have ownership in the test and possibly result in breach of contract claims against psychologists who violate the terms of their test purchase or lease agreements.”

20. Although this guidance relates to the release of testing materials in a court setting, the Ministers argued that the same principles be relevant in this case, since disclosure under FOISA would have the effect of disclosure into the public domain.
21. Mr P’s submissions to the Commissioner highlighted that the same questions were used in the psychometric tests undertaken before and after undertaking the treatment programme and contended that this in itself could allow manipulation of outcomes.
22. Mr P also provided the Commissioner with details of four previous requests for information relating to psychometric tests used in connection with sex offender programmes that had resulted in the information being provided or being available on payment of a fee. He expressed concern that there was inconsistency in the approach taken by different public authorities, with some, as in this case, refusing to provide the information and others providing or being willing to provide substantially similar information.



23. The first instance related to a FOISA request submitted to a Scottish local authority requesting a copy of the manual for the use and scoring of the risk assessment tool known as "Stable and Acute 2007"(SA07). This request is the subject of the Commissioner's Decision Notice 133/2009 (Neil D Robertson and Aberdeenshire Council)³. The Commissioner upheld the local authority's decision to withhold the information under section 30(c) of FOISA although during the investigation the local authority did release one section (known as Tab03) of the manual after establishing that this information had previously been released under FOISA by a different local authority.
24. The second instance related to a request made by Mr P to a Scottish local authority also seeking information relating to the SA07 risk assessment tool. The local authority provided Mr P with five sections of the SA07 (not including the section previously provided to Mr Robertson) along with very basic information concerning the scoring of the tests.
25. The third instance related to a request Mr P made to the same local authority one part of which related to obtaining a copy of the psychometric test used in its sex offender management programme. The local authority indicated that a copy of the test could be made available on payment of a fee.
26. The investigating officer contacted the relevant local authority to confirm that it had responded to the requests described in paragraphs 24 and 25 above in these terms. However, when that local authority responded, it also indicated that its approach to both requests was erroneous and it now considered the information to be exempt. It indicated that if a similar request was received in future, it would issue a refusal notice.
27. The fourth request highlighted by Mr P involved a request for information submitted to the SPS in November 2008 seeking copies of the questions contained in psychometric tests used as part of the Sex Offender Treatment Programme. The SPS provided the applicant with copies of seven question papers used in connection with the programme in response to this request. The Ministers confirmed this to be the case but indicated that they now considered the release of this information to have been erroneous. They referred to the arguments submitted in this case, in particular the guidance issued by the British Psychological Society, to support their position.

Commissioner's conclusions on section 30(c)

28. The Commissioner has consistently indicated that he will consider each application for a decision on a case by case basis. However he will take into consideration previous decisions to ensure consistency in his approach and also the manner in which a public authority has dealt with previous requests relating to identical, or substantially similar, information.
29. The Commissioner is not bound to order the release of information previously released under FOISA, or otherwise, by a public authority if he is satisfied that the information is exempt. However, a public authority will have to provide a persuasive argument to justify its change of

³ <http://www.itspublicknowledge.info/UploadedFiles/Decision133-2009.pdf>



position if it is to demonstrate that information is exempt from disclosure where it has been disclosed in the past, particularly given that FOISA is applicant and purpose blind.

30. The fundamental basis of the argument provided by the Ministers in support of their application of section 30(c) is relatively straightforward. In effect the Ministers contend that providing the questions to be used in a test, which should be conducted under controlled conditions, to anybody intending to take that test some time in advance of taking the test will have the potential to affect the result. The Commissioner has no difficulty in understanding and accepting this basic premise, particularly having taken into consideration the guidance from the British Psychological Society that is set out in paragraph 19 above.
31. The Commissioner also accepts that the psychometric tests form a core element of the Sex Offender Treatment Programme delivered by the SPS specifically and more generally by Her Majesty's Prison Service elsewhere in the United Kingdom. He also accepts that the integrity and effectiveness of the psychometric testing process depends heavily on the open and honest participation of those individuals undertaking the tests.
32. The Commissioner accepts the arguments and evidence put forward by the Ministers in relation to the degree of harm likely to be caused by disclosure of the questions used in the psychometrics. The Commissioner is aware that the psychometric tests are used by agencies involved in risk assessment and treatment of sex offenders, and accepts that the reliability of the risk assessment conclusions and treatment provision reached by using the tests would be undermined if the information relating to the content the tests was disclosed and generally available.
33. The test for the Commissioner to consider is whether disclosure of the tests would cause substantial prejudice to the effective conduct of public affairs. The Commissioner accepts that disclosure of the tests would have the effect of undermining the risk assessment procedures and treatment provisions used by the SPS and other agencies involved in the treatment of sex offenders and that, accordingly, the exemption in section 30(c) applies.
34. However, as noted above, the exemption in section 30(c) is subject to the public interest test, so information can only be withheld under this exemption if the public interest in maintaining the exemption outweighs the public interest in disclosure.

Consideration of the public interest test

35. Mr P has indicated in his submissions that he believes that the nature of the questions used in the psychometric testing programme are unfair and infringe his human rights, in particular his Article 3 rights relating to torture and inhumane and degrading treatment or punishment.
36. The Commissioner accepts that there is a public interest in allowing scrutiny of the questions to ensure that the psychometric testing programme complies with the provisions contained in the Human Rights Act, or to support a case that it does not.



37. In addressing the public interest, the Ministers did not identify any strong factors which would support disclosure of the information in the public interest. They acknowledged that disclosure of information would increase Mr P's understanding of the processes and also acknowledged that there was a general level of interest amongst the public in the operation of psychometric tests.
38. The Ministers indicated that there was a clear public interest in the SPS being able to effectively conduct public affairs in terms of administering the various Sex Offender Treatment Programmes. In support of this position the Ministers stated that the public would expect that such programmes were effectively administered both in the interests of the public and the long term interests of the offenders. They further indicated that any action, such as the release of the questions and assessment criteria that critically compromised these procedures could not be in any public interest.
39. The Ministers further indicated that they considered the public interest lay with the ability of the SPS to undertake its responsibilities effectively ensuring that all reasonable and effective steps are taken to ensure public protection and minimising the risks presented by offenders. The Ministers expanded on this point by indicating that the Sex Offender Treatment Programmes form part of a long-term and ongoing process aimed at treating sex offenders and it could not, therefore, be considered to be in the public interest to release any information critical to the effective functioning of these programmes. Accordingly, the Ministers assessed that the public interest lay in maintaining the exemption in section 30(c) of FOISA.
40. The Commissioner must take into account that information disclosed under FOISA enters the public domain, and is potentially accessible thereafter to any person. When considering Mr P's reasons for requiring the information, he must also bear in mind any other ways in which the information could be used. After examining the information withheld, and for the reasons indicated previously in this Decision Notice, he is satisfied that disclosure of the psychometric tests and associated assessment procedures would be likely to reduce the effectiveness of the risk assessment and offender treatment procedures. The Commissioner finds that this creates a compelling reason why disclosure would not be in the public interest.
41. Having conducted the balancing exercise required by section 2(1)(b), the Commissioner has concluded that the public interest in maintaining the exemption outweighs the public interest in disclosure.
42. Having found that the information requested by Mr P is exempt information under section 30(c) of FOISA, the Commissioner does not require to go on to consider the exemptions contained in section 35(1)(a) and (b) of FOISA.



DECISION

The Commissioner finds that the Scottish Prison Service complied with Part 1 of the Freedom of Information (Scotland) Act 2002 (FOISA) in responding to part a of the information request made by Mr P by advising him that the information was exempt by virtue of section 30(c) of FOISA.

Appeal

Should either Mr P or the Ministers 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
23 August 2010



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.

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

30 Prejudice to effective conduct of public affairs

Information is exempt information if its disclosure under this Act-

...

- (c) would otherwise prejudice substantially, or be likely to prejudice substantially, the effective conduct of public affairs.