

# Decision Notice



Decision 162/2008 Mr N and the Scottish Prison Service

Smoking Policy at HM Prison Peterhead

Reference No: 200801256

Decision Date: 19 December 2008

[www.itspublicknowledge.info](http://www.itspublicknowledge.info)

**Kevin Dunion**

Scottish Information Commissioner

Kinburn Castle  
Doubledykes Road  
St Andrews KY16 9DS  
Tel: 01334 464610



## Summary

Mr N requested specific information on the smoking policy at HM Prison Peterhead from the Scottish Prison Service (the SPS). The SPS failed to reply in writing to his request but supplied him with a copy of a notice. Following a review, Mr N 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 N's request for information in accordance with Part 1 of FOISA in failing to provide Mr N with such advice and assistance as would reasonably have been expected. He found that the SPS failed in its obligations under sections 15 and 19 of FOISA.

## Relevant statutory provisions and other sources

---

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) (General entitlement); 11(4) (Means of providing information); 15(1) (Duty to provide advice and assistance); 17(1) (Notice that information is not held); 20 (Requirement for review of refusal etc.) and 21 (Review by Scottish public authority)

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 10 July 2008 Mr N handed a written request for information to a representative of the SPS, seeking copies of the following:
  - any notice issued within the prison [HMP Peterhead] since 30 June 2008 concerning the issue of smoking within open areas of the prison (including the "exercise yard") and
  - any Direction issued pursuant to Rule 31 of the Prison Rules 2006 insofar as it may affect smoking policy at HMP Peterhead.
2. The SPS did not provide a written response to Mr N's information request. He was handed a copy of a notice dated 30 June 2008 and informed verbally that the relevant Direction was available on request within the prison.



3. On 13 August 2008, Mr N wrote to the SPS requesting a review of its decision. Mr N indicated that he had not received a written response to indicate what information, if any, was held. He indicated he had, however, been provided with information in respect of the first part of his request.
4. The SPS wrote to Mr N on 26 August 2008, noting that the first part of his request had been dealt with. Additional information was disclosed in relation to the second part.
5. On 28 August 2008, Mr N 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.
6. The application was validated by establishing that Mr N 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. The case was then allocated to an investigating officer.

## 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 17 September 2008 in terms of section 49(3)(a) of FOISA, asking for their comments on the application and in particular for submissions in support of the SPS's reliance on any provisions of FOISA considered applicable to the information requested.
8. In their response, the Ministers commented that they understood the SPS had asked Mr N if he wished his request for information to be dealt with in accordance with "formal FOISA procedure" (i.e. the right to a written response within 20 working days, citing relevant exemptions and/or other provisions of FOISA and considering the public interest test etc.) but that Mr N had indicated he did not. The Ministers also confirmed the steps the SPS had taken in dealing with Mr N's request and provided further comment on information held at the time of the request.

## Commissioner's analysis and findings

---

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



10. Within his application to the Commissioner, Mr N was not satisfied that he had been provided with a copy of the direction applicable to the smoking policy at HMP Peterhead in force at the time of his request. He indicated he had been provided with a copy of what was claimed to be the relevant direction in response to his request for review, but that this in fact post-dated both his request and his request for review. He also raised specific concerns regarding the manner in which the SPS dealt with his request, in particular his perceptions that the SPS had failed to provide him with an adequate response to his information request or to address that failure in dealing with his request for review.
11. It may be helpful to provide some background to this application, which originated in an information request made by a prisoner at HMP Peterhead against whom a charge of indiscipline had been brought for not adhering to the Prison's smoking policy. At the time of submitting the request, the applicant was attending a hearing on this charge. The applicant was found guilty on this charge but the finding was overturned on appeal in the absence of an applicable direction under the Prison Rules 2006.

### Handling of the request

12. Regarding the first part of the request set out in paragraph 1 above, Mr N acknowledges that following the request he was given a copy of the relevant notice. As Mr N appears to be satisfied that this was the information to which the first part of his request applied, the Commissioner is not required to give further consideration to this part of the request. While he notes Mr N's dissatisfaction with the form of the response given, a Scottish public authority responding to a request for information by giving the applicant that information complies with section 1(1) of FOISA in doing so, without being required to provide any covering information in addition.
13. Mr N is also, however, concerned that he did not receive a written response to the second part of his request, in relation to a direction issued pursuant to Rule 31 of the Prison Rules 2006, "insofar as it may affect smoking policy at HMP Peterhead". Instead, the SPS advised that he was informed verbally where the information could be obtained within the Prison. In other words, he was (in the SPS's view at least) given an opportunity to inspect the information, which might (depending on the circumstances) be a reasonable means of complying with section 1(1). Section 11(4) of FOISA provides that subject to section 11(1), which relates to means specified by the applicant, information given in compliance with section 1(1) may be given by any means which are reasonable in the circumstances. Affording an opportunity for inspection would therefore be compliant with section 1(1), although the applicant would always be entitled to seek a review if he did not consider the proposed means of provision reasonable in the circumstances.
14. In any event, Mr N was not satisfied and requested a review from the SPS. This met all of the requirements for a valid request for review set out in section 20 of FOISA, the full text of which is contained in the Appendix. He appears at this point to have claimed that he had received no response (presumably in any form) to the second part of his request. On review, a Scottish public authority is entitled (in terms of section 21(4) of FOISA) to do various things with its original decision in respect of the information request, including substituting a different decision or reaching a decision where the complaint is that none has been reached.



15. In response to Mr N's request for review, the SPS provided Mr N with a photocopy of what it stated was the direction he had requested. This document will be considered further later in this decision. In relation to the first part of Mr N's request, the SPS noted that he had been provided with a copy of the notice he had requested and accordingly considered that part of the request to have been dealt with: it should be clear from the terms of paragraph 12 above that the Commissioner would consider this to be an appropriate response on this point following a review.
16. While the SPS's letter to Mr N of 26 August 2008 purports to be an initial response to a new request for information under FOISA, it is clear from the terms of the letter that the SPS has substantially addressed the points made in Mr N's request for review and the letter advises him of the outcome largely as required by section 20(5) of FOISA. It remains of concern to the Commissioner, however, that the SPS failed to identify the request for review as such and deal with it accordingly. He notes that this arose from the SPS's understanding that Mr N had agreed that he did not want his request dealt with "according to formal FOI procedures".
17. As the Commissioner indicated in *Decision 150/2008*, there will be many cases where it is perfectly appropriate for Scottish public authorities to deal with routine requests for information by releasing information to the applicant without active consideration of the application of FOISA, on what has come to be known as a "business as usual" basis. It does not follow, however, that the applicant cannot follow such a response with a request for review under FOISA, should he be dissatisfied with that response. The right to require a review under section 20(1) is absolute provided the initial request met the requirements of Part 1 of FOISA (which does not appear to be disputed in this case) – as indeed is the right to apply to the Commissioner where all relevant requirements are met – and the Commissioner is aware of no statutory basis on which an applicant can be asked to waive his remedies under FOISA. It is of particular concern that this applicant was asked to do so in the circumstances in which he found himself at the time of his request, given the relative inequality of bargaining power that might at least have been perceived at that point.
18. In all the circumstances, the Commissioner must conclude that Mr N submitted a valid requirement for review to the SPS and that the SPS failed to deal with that requirement fully in accordance with section 21 of FOISA. While the responses it did give Mr N may have been intended to be helpful and fully in the spirit of FOISA, as the Ministers have suggested, the Commissioner cannot accept that in fact they had that effect. Accordingly, the Commissioner does not consider that in dealing with this request the Ministers discharged their duty to provide Mr N with reasonable advice and assistance under section 15(1) of FOISA.

**Was Mr N given the information he had requested?**



19. There remains the question of the content of the information provided to Mr N in response to the second part of his information request. As Mr N has pointed out, the direction copied to him with the SPS's letter of 13 August 2008 was dated 15 August 2008 and therefore could not have been in force at the time of his information request. While the SPS has since identified an equivalent direction in force for the SPS prisons estate at the time of the request, this earlier direction is explicit in not applying to HMP Peterhead. While the Commissioner is satisfied that Mr N could have ascertained its lack of relevance upon inspection, this particular direction does not in fact constitute information falling within the scope of Mr N's request and the Commissioner is also satisfied from his investigation that no such information was held at the relevant time. The SPS now appears to accept this.
20. Section 17(1) of FOISA requires a Scottish public authority to give an applicant notice to that effect when it does not hold information the applicant has requested. In all the circumstances, the Commissioner concludes that SPS should have given Mr N such a notice in response to the second part of his request.

## DECISION

The Commissioner finds that 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 N.

However, the SPS failed to comply with Part 1 in certain respects, in particular by failing to

- (i) provide Mr N with reasonable advice and assistance as required by section 15(1),
- (ii) deal with Mr N's requirement for review fully in accordance with section 21
- (iii) give Mr N notice in terms of section 17 to the effect that the information falling within the scope of the second part of his request was not held.

Given that the position in respect of the direction requested by Mr N is now clear, the Commissioner does not require the Scottish Prison Service to take any further action in response to this particular application in relation to these failures.

## Appeal

---

Should either Mr N 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 Investigations**  
**19 December 2008**



## 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.

...

##### 11 Means of providing information

...

- (4) Subject to subsection (1), information given in compliance with section 1(1) may be given by any means which are reasonable in the circumstances.

...

##### 15 Duty to provide advice and assistance

- (1) A Scottish public authority must, so far as it is reasonable to expect it to do so, provide advice and assistance to a person who proposes to make, or has made, a request for information to it.

...

##### 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.

...

## 20 Requirement for review of refusal etc.

- (1) An applicant who is dissatisfied with the way in which a Scottish public authority has dealt with a request for information made under this Part of this Act may require the authority to review its actions and decisions in relation to that request.
- (2) A requirement under subsection (1) is referred to in this Act as a "requirement for review".
- (3) A requirement for review must-
  - (a) be in writing or in another form which, by reason of its having some permanency, is capable of being used for subsequent reference (as, for example, a recording made on audio or video tape);
  - (b) state the name of the applicant and an address for correspondence; and
  - (c) specify-
    - (i) the request for information to which the requirement for review relates; and
    - (ii) the matter which gives rise to the applicant's dissatisfaction mentioned in subsection (1).
- (4) For the purposes of paragraph (a) of subsection (3) (and without prejudice to the generality of that paragraph), a requirement for review is treated as made in writing where the text of the requirement is as mentioned in paragraphs (a) to (c) of section 8(2).
- (5) Subject to subsection (6), a requirement for review must be made by not later than the fortieth working day after-
  - (a) the expiry of the time allowed by or by virtue of section 10 for complying with the request; or
  - (b) in a case where the authority purports under this Act-
    - (i) to comply with a request for information; or



- (ii) to give the applicant a fees notice, a refusal notice or a notice under section 17(1) that information is not held,

but does so outwith that time, the receipt by the applicant of the information provided or, as the case may be, the notice.

- (6) A Scottish public authority may comply with a requirement for review made after the expiry of the time allowed by subsection (5) for making such a requirement if it considers it appropriate to do so.
- (7) The Scottish Ministers may by regulations provide that subsections (5) and (6) are to have effect as if the reference in subsection (5) to the fortieth working day were a reference to such other working day as is specified in (or determined in accordance with) the regulations.
- (8) Regulations under subsection (7) may-
  - (a) prescribe different days in relation to different cases; and
  - (b) confer a discretion on the Scottish Information Commissioner.
- (9) In subsection (1), the reference to "actions" and "decisions" includes inaction and failure to reach a decision.

## **21 Review by Scottish public authority**

- (1) Subject to subsection (2), a Scottish public authority receiving a requirement for review must (unless that requirement is withdrawn or is as mentioned in subsection (8)) comply promptly; and in any event by not later than the twentieth working day after receipt by it of the requirement.
- (2) If-
  - (a) the authority is the Keeper of the Records of Scotland; and
  - (b) a different authority is, by virtue of section 22(4), to review a decision to which the requirement relates,subsection (1) applies with the substitution, for the reference to the twentieth working day, of a reference to the thirtieth working day.
- (3) A requirement for review may be withdrawn by the applicant who made it, by notice in writing to the authority, at any time before the authority makes its decision on the requirement.
- (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.
- (6) The Scottish Ministers may by regulations provide that subsections (1) and (5) and section 47(4)(b) are to have effect as if the reference in subsection (1) to the twentieth (or as the case may be the thirtieth) working day were a reference to such other working day as is specified in (or determined in accordance with) the regulations.
- (7) Regulations under subsection (6) may-
- (a) prescribe different days in relation to different cases; and
  - (b) confer a discretion on the Scottish Information Commissioner.
- (8) Subsection (1) does not oblige a Scottish public authority to comply with a requirement for review if-
- (a) the requirement is vexatious; or
  - (b) the request for information to which the requirement for review relates was one with which, by virtue of section 14, the authority was not obliged to comply.
- (9) Where the authority considers that paragraph (a) or (b) of subsection (8) applies, it must give the applicant who made the requirement for review notice in writing, within the time allowed by subsection (1) for complying with that requirement, that it so claims.
- (10) A notice under subsection (5) or (9) must contain particulars about the rights of application to the Commissioner and of appeal conferred by sections 47(1) and 56.