

# Decision Notice



Decision 169/2010 Mr N and the Scottish Prison Service

Sex Offender Treatment Programme and other information

Reference No: 201000525

Decision Date: 21 September 2010

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**Kevin Dunion**

Scottish Information Commissioner

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## Summary

Mr N asked the Scottish Prison Service (the SPS) to supply a variety of information, some relating to sex offender treatment programmes.

The SPS provided some of the information requested, but advised Mr N that his other requests were considered to be invalid. However, after a review had been requested and carried out, the SPS provided some additional information, while advising Mr N that it did not hold certain information and withholding other information under sections 30(c) and 35(1)(a) and (c) of the Freedom of Information (Scotland) Act 2002 (FOISA). Mr N remained dissatisfied with this response and applied for a decision from the Commissioner.

During the investigation of his application, more information was released to Mr N.

The Commissioner accepted the SPS's arguments that it did not hold certain information. He also accepted that the SPS had been correct in withholding information under section 35(1)(a) of FOISA, which relates to substantial prejudice to the prevention or detection of crime.

## Relevant statutory provisions and other sources

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Freedom of Information (Scotland) Act 2002 (FOISA) section 1(1) and (6) (General entitlement); 2(1)(b) (Effect of exemptions); 17(1) (Information not held); 35(1)(a) and (c) (Law enforcement).

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

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1. On 28 December 2009, Mr N made a 7-part information request to the SPS. He asked for:
  - i) The complete applications for accreditation, including all supplementary documentation, submitted to the Joint Accreditation Panel, for the new Sex Offender Treatment Programme (SOTP) planned for introduction in 2010 and the Adapted Sex Offender Treatment Programme (Adapted SOTP); together with the responses (including but not limited to any required modifications, changes or adaptations of these programmes) of the Joint Accreditation Panel.



- ii) The Social Functioning Checklist referred to at Standard 3.2 of the Core SOTP Application for Accreditation dated September 2006.
- iii) Annual Report and Accounts of the Scottish Prison Service for 2007-08 and 2008-09.
- iv) Using the PR2 database and broken down by the type of disability listed therein, how many prisoners with disabilities have been in the estate since 4 December 2006 and how many are currently within it?
- v) SPS Disability Equality Scheme 2009-12
- vi) The name and postal contact details for the accountable manager responsible for SPS compliance with the Disability Discrimination Act 2005.
- vii) The postal address of the principal office for Reliance Custodial Services in Scotland.

He advised that he did not have access to the internet, and therefore would like to receive the information in hard copy form.

2. On 29 January 2010 the SPS wrote to Mr N, addressing each of his requests in turn. It provided some statistical information in response to request iv, and the contact details required in requests vi and vii. However, the SPS advised Mr N that his other requests (i, ii, iii and v) were invalid on the ground that they did not describe the information he was looking for.
3. On 1 February 2010, Mr N wrote to the SPS, expressing the view that its responses to his requests i, ii, iii and v were incompatible with guidance issued by the Commissioner. He asked the SPS to “reconsider and expedite” these requests. Mr N also asked for some “clarification” with respect to the data provided in response to request iv, in the form of 4 additional questions or information requests.
4. On 1 March 2010, Mr N wrote to the SPS to complain that he had not had a response to his letter of 1 February 2010. He asked for a review.
5. On 2 March 2010, the SPS wrote to advise Mr N that a response to his letter of 1 February 2010 had been sent that day, which it believed to be within the statutory timescale for response. It advised Mr N of his right to seek a review and appeal to the Commissioner if dissatisfied with the response.
6. The response sent to Mr N was dated 4 March 2010, although the SPS later asserted that it was sent on 2 March 2010. In this response, the SPS advised that Mr N’s requests for clarification in relation to request iv had been treated as new information requests, and provided a response to those requests. The letter did not make any reference to requests i, ii, iii or v of the original information request of 28 December 2009.
7. On 8 April 2010, the SPS provided Mr N with a review of the response sent to him on 29 January 2010. It advised that further information was being issued to him, and provided copies of the SPS Annual Reports and Accounts for 2007-08 and 2008-09 (request iii).



8. In relation to request i, the SPS advised Mr N that there had been no completed application for accreditation for the new Sex Offender Treatment Programme. It therefore gave him notice that it did not hold this information. Information relating to the Adapted Sex Offender Treatment Programme (request i) and the Social Functioning Checklist (request ii) was withheld under sections 30(c) and 35(1)(a) of FOISA. The SPS gave reasons for applying these exemptions, which are considered later in this decision.
9. In relation to request v (SPS Disability Equality Scheme 2009-12), the SPS gave notice in accordance with section 17(1) of FOISA that it did not have such a document and the information was therefore not held. It provided a copy of the SPS Disability Equality Scheme 2006-2009.
10. Mr N remained dissatisfied with the SPS's response and, on 22 April 2010, applied for a decision from the Commissioner in terms of section 47(1) of FOISA. He provided reasons for his dissatisfaction with the responses he had received from the SPS, which are discussed later in this decision.
11. The application was validated by establishing that Mr N had made a request for information to a Scottish public authority and had applied for a decision from the Commissioner only after asking the authority to review its response to that request.

## Investigation

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12. The SPS is an agency of the Scottish Ministers (the Ministers) and, in line with agreed procedures, the Ministers were notified in writing on 19 May 2010 that a valid application for decision had been received from Mr N. In the course of previous communications on this case, the Ministers had provided the Commissioner with copies of most of the information withheld from Mr N.
13. The case was allocated to an investigating officer, who contacted the Ministers on 3 June 2010 to invite their comments in terms of section 49(3)(a) of FOISA. In particular, the Ministers were asked to justify their reliance on any provisions of FOISA they considered applicable to the information requested. They were also asked to comment on Mr N's statement that similar information had been released into the public domain by the (United Kingdom) Ministry of Justice. A letter from the Ministry of Justice to Mr N was enclosed for the Ministers' attention.
14. Subsequent references to submissions from the SPS are references to submissions made by the Ministers' Freedom of Information Unit on behalf of the SPS.



15. The SPS responded on 2 July 2010. It considered that the information withheld was either exempt from disclosure in terms of sections 30(c) and 35(1)(a) and (c) of FOISA, or was not held by the SPS. Detailed reasons in support of these views were provided. All submissions received from the SPS and Mr N, insofar as relevant, are considered in the next part of this decision.
16. In relation to Mr N's assertion that similar information had been provided by the Ministry of Justice, the SPS believed it was not possible to comment without having sight of the information provided. The Ministry of Justice later provided the Commissioner with copies of the information it had sent Mr N, for comparison with the information withheld by the SPS. Only one document (the Social Functioning Checklist) was found to be similar in nature and content to any of the information withheld by the SPS. A copy of this document was sent to the SPS for comment.
17. Following further consideration, the SPS decided that it no longer wished to apply any exemptions in relation to the Social Functioning Checklist (request ii). During the earlier stages of the investigation, the checklist had been part of a treatment programme still in use by the SPS: however, the SPS had subsequently moved on to a new treatment programme which did not utilise the checklist, and therefore considered that it could now be released. The SPS provided Mr N with a copy of the Social Functioning Checklist on 21 July 2010.

## Commissioner's analysis and findings

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18. In coming to a decision on this matter, the Commissioner has considered all of the information withheld and the submissions which have been presented to him and is satisfied that no matter of relevance has been overlooked.

### Information not held by the SPS

19. The SPS advised Mr N that no completed application for accreditation for the new SOTP (request i) yet existed. It advised the Commissioner that any application for accreditation was unlikely to be made before autumn 2011. Mr N argued that in these circumstances he would expect the SPS to provide a copy of the accreditation application as soon as it was submitted. However, the SPS has submitted – and the Commissioner accepts – that there is no statutory requirement for a Scottish public authority to log requests for information which does not currently exist but might exist in future.
20. The Commissioner notes the SPS's explanation that no application for accreditation will be prepared until a pilot of the new programme is completed and assessed. In the circumstances, he accepts the SPS's assertion that this information was (and indeed is) not held. Therefore, he finds that the SPS complied with Part 1 of FOISA by advising Mr N (as required by section 17(1)) that it did not hold information relating to a completed application for accreditation for the new SOTP.



21. The SPS also advised that information relating to its Disability Equality Scheme 2009-12 (request v) was not held, as the scheme did not exist. The SPS explained that it was required to produce a Single Equality Scheme, which would bring together a number of new and existing SPS schemes, including Race, Disability and Gender: however, work on the Single Equality Scheme had not yet commenced. Mr N understood that the Single Equality Scheme had been produced and that request v should have been interpreted as embracing this document, which should therefore have been provided.
22. There would appear to be no basis for Mr N's belief and, on balance, the Commissioner accepts the SPS's assertion there is no Disability Equality Scheme for the relevant period and that work on the Single Equality Scheme has not commenced. He therefore accepts that no information covered by request v was (and indeed is) held by the SPS, even if (as appears likely) it would have been reasonable to interpret the request as embracing the Single Equality Scheme, and finds that the SPS complied with Part 1 of FOISA by advising Mr N (as required by section 17(1)) that it did not hold this information.
23. It is perhaps unfortunate, however, that the initial response to Mr N's request (29 January 2010) referred to a document called "The Disability Equality Scheme 2009-12", giving the clear impression that such a document existed.

#### **Information withheld under section 35(1)(a) and (c) of FOISA**

24. Section 35(1)(a), under which the SPS withheld information pertaining to the Adapted SOTP (the remaining part of request i), provides that information is exempt information if its disclosure under FOISA would, or would be likely to, prejudice substantially the prevention or detection of crime. If satisfied that this exemption applies, the public authority must go on to consider the public interest test in section 2(1)(b) of FOISA.

#### *Submission from the SPS*

25. The SPS believed the public had an expectation that the primary function of the administration of justice was to tackle reoffending and thus contribute to a safer society. It explained that the Adapted SOTP was the main programme for tackling sex offending behaviour for those who were unable to participate in the main Core SOTP. The aim of the Adapted SOTP was to reduce the likelihood of future offending (i.e. the prevention of crime). It considered that this would be undermined by disclosure of the withheld information.
26. The SPS advised that the documents in question were used to help assess how much progress had been made in an individual's ability to manage the factors that had played a part in him committing serious sexual offences. Disclosure of the information would allow participants in the programme to either hide the presence of risk factors or present in a way that would indicate a lower level of risk than was actually the case.



27. The SPS explained that assessments of an individual's progress in the programme were relied upon when making decisions about onward movement and release. The SPS argued that disclosure could invalidate the assessment process by providing prior knowledge of the questions, and considered that there could be major consequences for the wider public, given the direct bearing of assessment on questions of release. In this connection, it highlighted the risk of loss of confidence in the current programme depriving it of a robust risk assessment and management tool, with the consequent increased risk of future offending.
28. The SPS therefore argued that although there might be a degree of public interest in disclosure of the information, this was outweighed by the public interest in ensuring the prevention of crime. The SPS submitted that the programme was key to tackling offending behaviour and reducing the likelihood of crime in future. It did not believe that it would be in the public interest to undermine the operation of the programme by disclosure of key information.

#### *The Commissioner's findings*

29. The Commissioner acknowledges the importance of the sex offender treatment programmes in managing sex offenders' treatment, and assessing and managing their risk of re-offending. He accepts that the successful operation of these programmes will play a significant part in reducing crimes of this nature, by making it less likely that a high risk offender will be wrongly assessed as posing a low risk of re-offending and therefore be considered for release. The Commissioner shares the SPS's view that in order for the risk of re-offending and potential response to treatment to be properly assessed, it is essential that offenders are not given access to information which would allow them to manipulate the results of the assessment.
30. Having examined the information withheld, the Commissioner finds that it would be likely to assist any person undergoing assessment who wished to influence the outcome. The information has been created to help the assessor, and disclosure would enable anyone undergoing assessment to understand in greater detail how the assessor reaches their decision, and to adapt their responses or behaviour accordingly in order to influence that decision. Given the key role played by the sex offender treatment programmes in managing sex offenders, the Commissioner accepts that disclosure of the information withheld would, or would be likely, to substantially prejudice the prevention of crime.
31. The Commissioner therefore accepts that the exemption in section 35(1)(a) applies. He is required to go on to consider whether the public interest in disclosing the information is outweighed by the public interest in maintaining the exemption.
32. Given that disclosure would release into the public domain information which the Commissioner accepts would, or would be likely to, substantially prejudice the prevention of crime, he finds there is a strong public interest in withholding the information. While there may be a countervailing public interest in, for example, enabling greater understanding of the decision process followed by the SOTP assessors, on balance he finds that this is outweighed by the strong public interest he has identified in maintaining the exemption.



33. The Commissioner therefore finds that the SPS was correct to withhold the information in question under section 35(1)(a) of FOISA. This being so, he is not required to consider whether the exemptions in section 30(c) of FOISA was correctly applied, or whether the exemption in section 35(1)(c) was applicable.

#### **Information released during the investigation**

34. During the investigation of Mr N's application, the SPS provided him with copies of two documents. The Commissioner is satisfied that one of these (application for accreditation for the Adapted Sex Offender Programme, February 2005) comprised information not covered by the terms of Mr N's request, and accordingly he is not required to consider whether it should have been provided at the time Mr N made his request or his request for review.
35. The other document released was the Social Functioning Checklist (see paragraph 17 above), which comprised information covered by the scope of Mr N's request. For the reasons outlined in paragraphs 29-32 above, noting that at that time the Checklist remained in use for the then current SOTP, the Commissioner is satisfied that this information was correctly withheld under section 35(1)(a) of FOISA at the time the SPS dealt with Mr N's request for review.

## **DECISION**

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

## **Appeal**

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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.

**Kevin Dunion**  
**Scottish Information Commissioner**  
**21 September 2010**





## Appendix

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### 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.

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- (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.

...

##### 35 Law Enforcement

- (1) Information is exempt information if its disclosure under this Act would, or would be likely to, prejudice substantially-

- (a) the prevention or detection of crime;

...

- (c) the administration of justice

...