

# Decision Notice



Decision 074/2010 Mr H and the Scottish Prison Service

Information relating to SPS policies

Reference No: 201000316  
Decision Date: 26 May 2010

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**Kevin Dunion**  
Scottish Information Commissioner

Kinburn Castle  
Doubledykes Road  
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## Summary

Mr H requested from the Scottish Prison Service (the SPS) information relating to SPS policies concerning certain specified scenarios. The SPS responded by advising Mr H that it did not hold the requested information. Following a review, Mr H remained dissatisfied and applied to the Commissioner for a decision.

Following an investigation, the Commissioner found that the SPS had dealt with Mr H's request for information in accordance with Part 1 of FOISA by issuing a notice in terms of section 17 of FOISA that it did not hold the information requested.

## Relevant statutory provisions and other sources

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Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) (General entitlement); 17(1) (Notice that information is not held) and 73 (Interpretation) (definition of "information")

The full text of each of the statutory provisions cited above is reproduced in Appendix 1 to this decision. Appendix 1 (and Appendix 2) form part of this decision.

The Prisons and Young Offenders Institutions (Scotland) Rules 2006 (PYOIRs)

Scottish Prison Service Employee Code of Conduct (the Code of Conduct)

*Decision 010/2010 Mr H and the Scottish Prison Service*

## Background

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1. On 11 October 2009, Mr H wrote to the SPS with a number of requests relating to SPS policies concerning the conduct of prisoners and prison officers in specified circumstances. Although some of these requests made reference to recorded information (e.g. requesting the SPS to cite specific policies, rules, regulations, directives or statutory provisions), other requests were expressed as questions seeking explanations or opinions.
2. This decision has considered only requests numbered 1, 4 and 5 in Mr H's letter, and these are set out in full in Appendix 2 to this decision.



3. The SPS responded on 28 October 2009. In its response, the SPS stated that, given the hypothetical nature of Mr H's enquiries, its position was that it did not hold the requested information.
4. On 6 November 2009, Mr H wrote to the SPS requesting a review of its decision in relation to requests 1, 4 and 5. Mr H considered that the SPS had not responded to his questions suitably or sufficiently.
5. The SPS did not respond to Mr H's request for a review within the timescale set down in section 20(1) of FOISA.
6. Mr H applied to the Commissioner for a decision on the SPS' failure to respond to his request for review
7. The SPS notified Mr H of the outcome of its review in a letter dated 4 December 2009. However, due to an administrative error on the part of the SPS, this was not delivered to Mr H until 21 December 2009. In its response to Mr H's request for review, the SPS upheld its previous decision that the information requested was not held by it.
8. The Commissioner subsequently issued a decision (*Decision 010/2010 Mr H and the Scottish Prison Service*) in respect of the breach of the technical requirements of FOISA in the SPS's handling of Mr H's request.
9. On 12 February 2010, Mr H 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.
10. The application was validated by establishing that Mr H 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

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11. The SPS is an agency of the Scottish Ministers (the Ministers) and, in line with agreed procedures, the Ministers were notified in writing on 5 March 2010 that an application had been received from Mr H and that an investigation into the matter had commenced.
12. 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. In particular, the Ministers were asked what steps the SPS had undertaken in order to establish that no relevant information was held by it. The Ministers were also asked to clarify whether the specific conduct mentioned by Mr H would be addressed in any of the sources mentioned by him in his request.



13. The Ministers responded on behalf of the SPS on 30 March 2010, providing their comments and detailing the searches carried out to establish whether any relevant information was held. Subsequent references to submissions from the SPS are references to these submissions made by the Ministers' Freedom of Information Unit on behalf of the SPS.

## Commissioner's analysis and findings

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

### Section 17 – Notice that information is not held

15. Section 17(1) of FOISA requires that, where an authority receives a request for information that it does not hold, then it must give the applicant notice in writing to that effect.
16. In this case, the SPS notified Mr H, both in its original response of 28 October 2009, and in its review response dated 4 December 2009, that it did not hold the requested information.
17. In order to determine whether the SPS dealt with Mr H's request correctly, the Commissioner must be satisfied as to whether, at the time it received Mr H's request, the SPS held any information which would fall within the scope of that request.
18. In its submissions to the Commissioner, the SPS explained that general matters which may result in disciplinary proceedings being raised against prisoners are contained in the Prisons and Young Offenders Institutions (Scotland) Rules 2006 (the PYOIRs), in particular, Part 11 (R113) and Schedule 1. The SPS also explained that general matters relating to the conduct of its employees are covered by Scottish Prison Service Employee Code of Conduct (the Code of Conduct).
19. The SPS also explained that it had undertaken searches of its intranet sites, relevant policy areas of SPS headquarters and local sources at a named prison establishment to ascertain whether it held any information that would fall within the scope of Mr H's request, but had not identified any information that would address the specific questions posed in his information request.
20. The Commissioner notes that the very precise types of conduct mentioned in Mr H's requests are not detailed within the PYOIRs or the Code of Conduct which instead address general matters which may constitute breaches of discipline or misconduct respectively.
21. Having considered the terms of Mr H's requests and the submissions provided by the SPS, the Commissioner's view is that the SPS did not hold any information that would address Mr H's requests. The Commissioner therefore accepts that the SPS was correct to respond to Mr H's requests in terms of section 17 of FOISA.



22. In reaching this conclusion, the Commissioner is mindful of the interpretation of “information” contained in section 73 of FOISA which defines “information” (subject to certain conditions that are not relevant in this case) as meaning information *recorded* in any form. In this case, the Commissioner agrees with the SPS that Mr H has essentially posed hypothetical questions rather than requesting specific recorded information. The Commissioner has concluded that the SPS could not be expected to hold any recorded information which would address the very specific questions posed by Mr H.

## 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 the information request made by Mr H.

## Appeal

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Should either Mr H or the SPS 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**  
**26 May 2010**



## Appendix 1

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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.

...

##### 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.

...

##### 73 Interpretation

In this Act, unless the context requires a different interpretation –

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“information” (subject to sections 50(9) and 64(2) means information recorded in any form;

...



## Appendix 2

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### **Mr H's information requests**

1. Is a prisoner's request for information communicated orally by a prisoner to his/her personal officer considered by the SPS to be unlawful? Where applicable, please advise the policy, rule, regulation directive or statutory provision.  
  
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4. If the prisoner, without any mens rea receives such data in good faith, is he found to have breached a policy, rule, regulation, directive or statutory provision? Where applicable, please advise the policy, rule, regulation directive or statutory provision.
5. If the prison officer has unlawfully provided the prisoner with such personal data that is not allowed in his/her possession, can you please confirm if the employee has breached the SPS code of conduct and contract of employment terms and conditions or any other policy, rule, regulation, directive or statutory provision. If so, please advise terms of reference.