

Decision Notice



Decision 082/2011 Mr J and the Scottish Prison Service

Impact assessments

Reference No: 201100304
Decision Date: 10 May 2011

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Kevin Dunion
Scottish Information Commissioner

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Summary

Mr J requested from the Scottish Prison Service (the SPS) information pertaining to impact assessments referred to in a particular Action Notice. The SPS failed to respond to Mr J's request and upon review advised him that the requested information was not held as the impact assessments had not been undertaken. Mr J remained dissatisfied and applied to the Commissioner for a decision.

Following an investigation, the Commissioner found that the SPS did not hold the requested information and so it had complied with Part 1 of Freedom of Information (Scotland) Act 2002 (FOISA) by notifying Mr J in terms of section 17(1) that the information he had requested was not held. The Commissioner is also satisfied that the SPS complied with its duty to provide reasonable advice and assistance to Mr J in terms of section 15(1) of FOISA.

However, the Commissioner finds that the SPS failed to respond to Mr J's information request in line with the timescale required by section 10(1) of FOISA, and in so doing, failed to comply with Part 1 of FOISA. Since the SPS has subsequently responded to Mr J's information request, the Commissioner does not require the SPS to take any action in relation to this breach 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), 10(1) (time for compliance); 15(1) (Duty to provide advice and assistance) and 17(1) (Notice that information is not held)

Scottish Ministers' Code of Practice on the Discharge of Functions by Public Authorities under the Freedom of Information (Scotland) Act 2002 (the Section 60 Code): Part 2, paragraph 5.4¹.

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.

¹ <http://www.scotland.gov.uk/Resource/Doc/933/0109425.pdf>



Background

1. On 3 December 2010, Mr J wrote to the Scottish Prison Service (the SPS) requesting the following:
a copy of the impact assessment which was required to be carried out by 28 January 2010 and all local impact assessments carried out at SPS institutions pursuant to paragraph 6 of Governors & Managers: ACTION 5A/09.
2. The Action Notice referred to by Mr J relates to prisoners' access to personal cash and was issued in February 2009. Paragraph 6 indicates that, unless otherwise reviewed, the Action Notice will be reviewed and impact assessed by 28 January 2010 to ensure that it remains up to date. It also states that establishments should note that a local impact assessment should also be carried out as to how the Action Notice will be implemented at a local level.
3. Mr J received no response to his information request. On 11 January 2011, he wrote to the SPS, requesting a review of its handling of his request and that it provide him with the information requested without further delay.
4. The SPS notified Mr J of the outcome of its review on 8 February 2011. The SPS acknowledged that it had failed to respond his initial request and apologised for this error. It informed Mr J that no impact assessment in terms of paragraph 6 of the Action Notice had taken place. The SPS therefore notified Mr J in terms of section 17 of FOISA that did not hold the requested information.
5. On 10 February 2011, Mr J 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 J 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 the request. The case was then allocated to an investigating officer.

Investigation

7. The SPS is an agency of the Scottish Ministers (the Ministers) and, in line with agreed procedures, the Ministers were notified in writing on 9 March 2011 that an application had been received from Mr J and that an investigation into the matter had commenced.
8. 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.



9. The Ministers responded on 25 March 2011, providing their comments and responding to the specific questions posed by the investigating officer. Additional questions were raised by the investigating officer regarding the background and ownership of the Action Note and impact assessments. The Ministers responded with their comments and answers to the questions asked.
10. References in what follows to submissions from the SPS are references to submissions made by the Ministers' Freedom of Information Unit on behalf of the SPS.

Commissioner's analysis and findings

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

Section 17(1) – information not held

12. Section 17(1) of FOISA states that, where a Scottish public authority receives a request for information which it does not hold, it must, in accordance with section 17(1) of FOISA, give the applicant notice in writing that it does not hold the information.
13. In his application for decision, Mr J commented that the Action Note is not discretionary, but mandatory. He maintained that, in the absence of any specific explanation, it seems unlikely that (a) the review and impact assessment to be carried out at local level was not conducted and that (b) none of the SPS establishments throughout Scotland carried out the required local impact assessment.
14. During the investigation, the SPS was asked to confirm whether any impact assessment (either national or local) was undertaken, and if not, to explain why and in particular whether a decision not to do so had been taken at a national level.
15. The Ministers' responses to these questions confirmed that no impact assessments had been undertaken and that no decision had been taken at national level that no impact assessments were required.
16. The investigating officer questioned the Ministers further as to the background to the Action Notice referred to in Mr J's request and, in particular, whether it had been reviewed; whether any timetable had been established for review; who was responsible for the document and/or undertaking the impact assessments; and why the assessments had not taken place.
17. The Ministers' responses to these questions confirmed that responsibility for the Action Notice rested with the Assistant Director of Prisons, and responsibility for local impact assessments rested with Governors. The fact that no impact assessments had been undertaken was explained as the result of a combination of factors including staff changes, the number required to be undertaken, resources available and competing priorities.



18. The Ministers also provided comments on the searches they had undertaken to locate any information in scope of Mr J's request, which had resulted in no information being identified.
19. While Mr J has maintained that information he has requested *should be held*, because the impact assessments referred to in the Action Notice *should have taken place*, the Commissioner's remit extends to the consideration of whether the SPS actually holds the information he has requested. The Commissioner cannot comment on whether a public authority should have acted in accordance with particular commitments (and thereby generated information relating to those actions).
20. The Commissioner can only take steps to establish whether particular actions have been taken by an authority in order to inform his conclusions as to whether information relating to those actions is held. In this case, the Commissioner is satisfied that (notwithstanding Mr J's belief that they should have taken place) the relevant impact assessments have not taken place, and so no information about such assessments is held by the SPS.
21. Having considered the submissions received from the Ministers and the searches that have been completed, the Commissioner is satisfied that the SPS does not (and did not at the time it received Mr J's request) hold any information falling within the scope of Mr J's request.
22. He therefore concludes that the SPS complied with Part 1 of FOSIA by notifying Mr J in terms of section 17 that it did not hold the information he had requested.

Section 10 of FOISA - (Time for compliance)

23. Section 10(1) of FOISA gives Scottish public authorities a maximum of 20 working days from receipt of a request, or subsequent clarification of that request, to comply with a request for information, subject to certain exceptions which are not relevant in this case.
24. Mr J request was dated 3 December 2010 and no response was provided.
25. In its submissions, the SPS indicated that it had treated Mr J's request as a "business as usual" request and that the Prison Governor had met with Mr J to discuss and respond to his request. The SPS stated that it had understood that Mr J was satisfied with the response provided on this informal basis, and did not require a formal response under FOISA. It noted that, as was Mr J's right, he had sought a review following its failure to provide a formal response and that it accepted at that stage that it had erred in its belief that no formal response was required, and an apology was offered at that stage.
26. The Commissioner notes the SPS's comments about the apparent misunderstanding in this instance. Nonetheless, he must find that the SPS failed to respond to Mr J's request for information within the 20 working days allowed under section 10(1) of FOISA and thereby failed to comply with Part 1 of FOISA.

Section 15 – duty to provide advice and assistance



27. Mr J expressed dissatisfaction that the SPS had failed to provide him with advice and assistance, in terms of section 15 of FOISA, in respect of explaining why the impact assessments described in paragraph 6 of the Action Notice had not been undertaken. Mr J considered that, had a decision been taken at national level not to undertake the impact assessments, this should have been explained to him in pursuit of the duty in section 15.
28. Section 15 of FOISA requires a Scottish public authority, so far as it is reasonable to expect it do so, to provide advice and assistance to a person proposes to make, or has made, a request for information to it. One type of advice and assistance will be to supply contextual information that assists a requestor in understanding the reasons why a particular decision has been reached with respect to their request.
29. The SPS maintained that it had complied with section 15 of FOISA. It noted that its searches had not identified any recorded reasons for the impact assessments not having taken place and so no further information could have been provided to Mr J. As noted above, the submissions from the Ministers confirmed that no decision had been taken not to conduct the impact assessments.
30. In the light of all of the above, the Commissioner does not consider that the Ministers failed in their duty to provide reasonable advice and assistance to Mr J. Had an active decision been taken not to undertake the impact assessments, or had the reasons for the impact assessments not having taken place been readily apparent, or recorded, then he agrees that it would have been helpful to advise Mr J of this to assist his understanding of why the requested information was not held. In this case, however, he is satisfied that there was no decision and no explanation readily available. He considers it reasonable that the SPS to explain simply that the impact assessments had not taken place.
31. The Commissioner therefore concludes that the SPS did not fail to comply with section 15 of FOISA when responding to Mr J's request for review.

Review procedure followed by the SPS

32. Mr J also commented on the conduct of the SPS's review in relation to his request. He noted that, within the SPS, reviews are generally conducted by the Chief Executive, but in this case, the review was undertaken by a different member of staff, who would normally be responsible for dealing with a request when it was first received.
33. Mr J commented that it appeared that the initial failure to respond may have been the responsibility of that individual and, in the circumstances, this person may not have been the most appropriate person to conduct the review.
34. FOISA is not prescriptive about the manner in which public authorities conduct reviews. Section 21(1) simply states that on receipt of a requirement for review a public authority should (barring other considerations that are not relevant in the circumstances of this case) comply with that requirement promptly and in any event by not later than the twentieth working day after its receipt.



35. Section 21(4) of FOISA states that, on receipt of a requirement for review, an authority may do the following in respect of the information request to which it relates:
- confirm a decision complained of, with or without such modifications as it considers appropriate;
 - substitute for any such decision a different decision; or
 - reach a decision, where the complaint is that no decision had been reached.
36. Given that the SPS had failed to provide a response to Mr J's initial request, the only appropriate review outcome was for it to reach a decision where none has been reached before, in line with section 21(4)(c) of FOISA.
37. Paragraph 5.4 of the revised Section 60 Code states that any review of an authority's original decision in regard to a request for information should generally be handled by staff who were not involved in the original decision. The Commissioner regards this to be good practice which ensures that the review process is carried out impartially and fairly by an independent person within the public authority.
38. The Commissioner has considered Mr J's comments, but notes that since no decision had been taken by the SPS by the time when his request for review was submitted, this was not a case where a previous decision taken by another person was to be independently reviewed.
39. He also notes the SPS's explanation of the circumstances surrounding this case. This maintained that the failure to respond was a result of a misunderstanding by which the SPS considered that the meeting between Mr J and the Prison Governor had allowed his response to be addressed without the need for any response being issued. The SPS has indicated that that, as the person responding to the request for review had not been involved in the initial business as usual response, they were considered an appropriate person to undertake the review.
40. In the light of the above, the Commissioner is satisfied that the SPS' response to Mr J's request for review was in line with the requirements of section 21 of FOISA. He is also satisfied that there was no breach of good practice as described in paragraph 5.4 of the Section 60 Code as a result of the review being conducted by the member of staff concerned in the circumstances of this case.

DECISION

The Commissioner finds that the 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 J.

Decision 082/2011
Mr J
and the Scottish Prison Service



The Commissioner finds that the SPS did not hold the requested information and so it acted in accordance with Part 1 of FOISA by notifying him in terms of section 17(1) that the information he had requested was not held. The Commissioner is also satisfied that the SPS did not fail to provide reasonable advice and assistance to Mr J in terms of section 15(1) of FOISA.

However, the Commissioner finds that the SPS failed to respond to Mr J's information in line with the timescale required by section 10(1) of FOISA, and in so doing, it failed to comply with Part 1 of FOISA. Since the SPS has subsequently responded to Mr J's information request, the Commissioner does not require the SPS to take any action in relation to this breach in response to this decision.

Appeal

Should either Mr J 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
10 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.

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.
- ...



Scottish Ministers' code of practice on the discharge of functions by public authorities under the Freedom of Information (Scotland) Act 2002

5.4 The review process.

.....

.... The review should, where practicable, be handled by staff who were not involved in the original decision (however, see 5.5 below). It is important that the review procedure enables the matter to be considered afresh.