

# Decision Notice



Decision 163/2011 Mr X and the Scottish Prison Service

Policy regarding selection for the Sex Offender Treatment Programme and the Good Lives Programme

Reference No: 201100307  
Decision Date: 15 August 2011

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**Kevin Dunion**  
Scottish Information Commissioner

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



## Summary

Mr X made two related requests to the Scottish Prison Service (the SPS) for information regarding its policy concerning selection for the Sex Offender Treatment Programme and the Good Lives Programme. The SPS responded to both requests by advising Mr X that it did not hold the information he had asked for. After the SPS conducted reviews of its handling of these requests, Mr X remained dissatisfied and applied to the Commissioner for a decision.

Following an investigation, the Commissioner found that the SPS had dealt with Mr X's requests for information in accordance with Part 1 of FOISA, by issuing notices in terms of section 17 of FOISA advising him that it did not hold the information he had asked for.

## Relevant statutory provisions and other sources

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Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) and (4) (General entitlement) and 17(1) (Notice that information is not held)

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

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1. Mr X made two information requests to the Scottish Prison Service.

### Request 1

2. On 5 November 2010, Mr X requested the following information:
  - i. Existing national policy on 'extended sentence' prisoners access to identified offence related risk reduction groupwork (i.e. Critical Dates Policy).
  - ii. The department and management team or/appointment who framed the above policy, and at what official level was it sanctioned (e.g. Deputy Directory of Prisons)?
  - iii. Has the above system of work been approved by Legal Policy, and if so, at what level?



3. The SPS responded on 30 November 2010, indicating that there was no existing national policy on prisoners' access to offence related risk reduction group work. It notified Mr X in terms of section 17 of FOISA that the information he requested was not held.
4. On 1 December 2010, Mr X wrote to the SPS requesting a review of its decision. He provided a copy of a letter which he had received from SPS employees, which mentioned a policy in relation to the use of dates for prisoners' selection for the relevant prison's Sex Offender Treatment Programme. He maintained that this, and other correspondence he had received, suggested that the information he had requested did exist.
5. The SPS notified Mr X of the outcome of its review on 14 December 2010 and upheld its original decision that the requested information was not held.

## Request 2

6. On 15 December 2010, Mr X requested the following information:
  - i. Copy of the policy/local policy that is currently adhered to regarding the use of dates for prisoners' selection for the Sex Offender Treatment Programme and the Good Lives Programme which is in place in [two specified prisons].
  - ii. Copy of any Governor's and Manager's Action Notices relating to the above request.
7. The SPS responded on 18 January 2011, notifying Mr X, in terms of section 17 of FOISA, that it did not hold any of the information he had requested.
8. On 18 January 2011, Mr X wrote to the SPS requesting a review of its decision. Mr X again drew the SPS's attention to the letter which he had received from SPS staff, which mentioned a policy in relation to the use of dates for prisoners' selection for the relevant prison's Sex Offender Treatment Programme, and indicated that this was at odds with the response provided.
9. The SPS notified Mr X of the outcome of its review on 8 February 2011, again upholding its original decision that it did not hold the requested information.
10. On 11 February 2011, Mr X wrote to the Commissioner, stating that he was dissatisfied with the outcome of the SPS's reviews in respect of his requests 1 and 2, expressing his view that the policy to which his requests referred did exist, and applying to the Commissioner for a decision in terms of section 47(1) of FOISA.
11. The application was validated by establishing that Mr X had made requests for information to a Scottish public authority and had applied to the Commissioner for a decision only after asking the authority to review its responses to those requests. The case was then allocated to an investigating officer.



## 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 that an application had been received from Mr X and that an investigation into the matter had commenced. 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 had been undertaken in order to establish that no relevant information was held by the SPS.
13. The Ministers responded on behalf of the SPS, providing their comments and responding to the specific questions posed by the investigating officer.
14. Subsequently the Ministers were asked by the investigating officer to carry out further searches and to comment on the letter submitted by Mr X as referred to at paragraphs 4 and 8 above. They provided additional submissions in response to this request.
15. Subsequent references to submissions requested and received from the SPS in this decision are references to those sought and received from the Ministers' Freedom of Information Unit on behalf of the SPS.

## Commissioner's analysis and findings

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

### Section 17(1) of FOISA

17. Mr X, in his application to the Commissioner of 11 February 2011 (made in respect of both request 1 and request 2), stated that he was seeking a copy of the policy mentioned in the letter of 11 December 2009 as referred to at paragraphs 4 and 8 above.
18. 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. In this instance, the SPS notified Mr X in response to both of his requests that it did not hold the requested information.
19. In order to determine whether the SPS dealt with Mr X's requests correctly, the Commissioner must be satisfied as to whether, at the time it received Mr X's requests, the SPS held any information which would fall within the scope of those requests.



20. In its submissions, the SPS stated that there was no policy held on the prioritisation of prisoners for its sex offender treatment programmes, albeit that the lack of such a policy was subject to a current legal challenge. The SPS explained that Governors and Managers Action Notices (GMAs) were a vehicle for communication of new, or amending of existing, policies and were subject to deletion or supersession in accordance with the SPS Records Management Policy, but that in the majority of cases GMAs are held.
21. The SPS submitted that it had conducted searches to ascertain whether any information which it did hold would fall within the scope of Mr X's requests. These searches, the SPS explained, included searches of the SPS Prison Resource Library and consultation with the individuals responsible for policy in relation to sex offender programmes to see if they held any relevant information. The SPS stated that no relevant information was found even after a further quality assurance check was carried out on receipt of notification of Mr X's appeal.
22. The Commissioner notes that the investigating officer also asked the SPS to double check whether any relevant information may have been recorded in any format (even if it was not a formal policy, for example anything that may have been recorded in communications between relevant staff).
23. The investigating officer also asked the SPS to explain the wording contained in the aforementioned letter sent to Mr X on 11 December 2009, which read, "... *the policy that is currently adhered to regarding the use of dates for prisoners' selection was agreed by the [specified prison] SOTP management team... and by relevant senior managers at HQ.*"
24. The SPS submitted, in response to the above questions, that how it prioritises prisoners for the SOTP is not set out in a policy, but rather a matter for the lead psychologist for the programme and is a process which weighs the risk that each individual prisoner presents, his release date, demand for the programme and availability of the programme. Furthermore, the SPS stated that it had spoken with the senior psychologist at the prison concerned and submitted that the senior psychologist would definitely know if such a policy existed, pointing out that the senior psychologist had in fact raised the matter of the absence of such a policy with SPS Headquarters.
25. In further submissions, the SPS informed the Commissioner that discussions were ongoing between the senior psychologist and the SPS management to determine if such a standard policy could be created. The SPS reiterated that, at the time of making these submissions, no such written policy was held by it and each case was considered on its individual circumstances and merits. The SPS stated that it was often the case that a decision in an individual case, or the actual practice, was termed as the policy relevant to that case.
26. The Commissioner has taken into account Mr X's view that the letter sent to him indicates that such a policy exists and existed at the time of his information requests. He can accept that the use of the word "policy" in that letter could create the impression that recorded information would be held which would set out such a policy. However, he also recognises that "policy" is a term which can be used in different contexts, and could be used simply to refer to practice followed, rather than a formalised or recorded policy setting out that practice.



27. Given the potential for the term policy to carry different meanings, the Commissioner is not persuaded that this letter constitutes evidence confirming the existence of recorded information that would set out a policy on the relevant subject.
28. Having considered the submissions received from both the SPS and Mr X, the Commissioner is satisfied in the circumstances as to the adequacy of the steps taken by the SPS to determine whether, at the time Mr X's requests were received, it held any information falling within the scope of the requests. On balance of probabilities, he accepts that no such recorded information was held at the time when the SPS received Mr X's information requests.
29. The Commissioner is therefore satisfied that the SPS was correct to give Mr X notice in terms of section 17(1) of FOISA that it did not hold the information.

## DECISION

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

## Appeal

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Should either Mr X 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**  
**15 August 2011**



## 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.
- ...
- (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.
- ...

##### 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.
- ...