

Decision Notice



Decision 052/2014 Mr K and the Scottish Prison Service

Application of Prison Rules, policies and procedures

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Summary

On 18 April 2013, Mr K asked the Scottish Prison Service (the SPS) for information relating to implementation of Rule 52 of the Prison Rules (in relation to the delivery of newspapers to prisoners). Mr K also asked for information on the issuing of consumables to prisoners in HMP Edinburgh. The SPS responded by providing information.

Following an investigation, the Commissioner found that the SPS was correct to notify Mr K that it did not hold some information. She also found that the SPS failed to provide Mr K with other information it held falling within the scope of his request, but as this had been given to Mr K, the Commissioner did not require the SPS to take any further action.

Relevant statutory provisions

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) and (4) (General entitlement); 10(1) (Time for compliance).

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 18 April 2013, Mr K wrote to the SPS requesting the following information:
 - a) which SPS and contracted out establishments give effect, as of today's date, to Rule 52 of the Prison Rules 2011, by issuing to prisoners newspapers delivered to the prison "... at the expense of a person outwith the prison";
 - b) All and any information held by the SPS relative to the processes by which those establishments identified as complying with Rule 52 manage the arrangements concerned;
 - c) All and any information held by the SPS disclosing policy, guidance or procedure relative to the local policy on the issuing of "consumables" to prisoners at HMP Edinburgh, as of Monday, 15 April 2013.



2. The SPS responded on 20 May 2013, explaining that the Prison Rules applied to all establishments, whether SPS or private prisons. It explained that Rule 52 was interpreted in different ways in different establishments. In responding to the third part of Mr K's request, the SPS provided him with part of a pro-forma request sheet used by HMP Edinburgh. The SPS explained that items received were only accepted from individuals named on the pro-forma and providing photographic identification with proof of address (except underwear and socks, which required identification of the provider but not a pro-forma).
3. On 23 May 2013, Mr K wrote to the SPS requesting a review of its decision. He expressed dissatisfaction with:
 - (i) The time taken to respond to his request.
 - (ii) Failure of the SPS to provide full information in response to parts a) and b) of his request, or cite any relevant exemption(s).
 - (iii) Failure of the SPS to provide a copy of the policy relating to underwear and socks, or to cite any relevant exemption(s) for withholding this.
4. The SPS responded on 10 June 2013, apologising for its failure to respond to Mr K's request on time. It notified Mr K that it held no information which would address part a) of his request in relation to contracted out prisons (while explaining that private prisons were obliged to comply with the Prisons and Young Offenders Institutions (Scotland) Rules 2011 (the Prison Rules)). With regard to prisons under its control, the SPS provided Mr K with a list setting out which prison(s) gave effect to Rule 52 and the procedure in place at each.
5. In relation to part c) of Mr K's request, the SPS considered the pro-forma it had provided contained all the necessary information.
6. On 4 September 2013, Mr K 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.
7. The application was validated by establishing that Mr K made a request for information to a Scottish public authority and 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

8. The investigating officer contacted the SPS on 27 September 2013, giving it an opportunity to provide comments on the application (as required by section 49(3)(a) of FOISA) and asking it to respond to specific questions. The SPS was asked to detail the steps taken to identify and locate information it held relevant to Mr K's request, and to comment on points raised by Mr K in his application.



9. A response was received from the SPS on 5 November 2013. Further submissions were sought and obtained from both Mr K and the SPS during the investigation.
10. The SPS was asked to carry out further searches, as a result of which it located additional information, which it gave to Mr K.

Commissioner's analysis and findings

11. In coming to a decision on this matter, the Commissioner considered the relevant submissions, or parts of submissions, made to her by both Mr K and the SPS. She is satisfied that no matter of relevance has been overlooked.

Parts (a) and (b)

12. Section 1(1) of FOISA requires a Scottish public authority which holds information to provide that information when requested to do so by any applicant. In terms of section 1(4), the information to be provided is that falling within scope of the request and held by the authority at the time the request is received, subject to qualifications which are not applicable in this case. This is not necessarily the same as information the authority *should* hold.
13. Mr K submitted that the SPS was wrong to state it did not hold the information he sought in relation to contracted-out prisons. Since the SPS accepted that any private facility must comply with the Prison Rules, and each privately run prison had its own SPS "controller", he argued, the SPS was in possession of the information requested. He contended this would be the case even if the information might have been produced by a private contractor and then reported or presented to the SPS.
14. The SPS explained that the contract between it and the private prison operators required the private prisons to report on specified performance measures, which attracted financial penalties if they were not complied with. This did not include whether or how they complied with rule 52. The SPS stated that the private prisons were required to comply with rule 52, but it had no cause to ask them to report on how they did so. In the absence of a contractual need, there was no expectation that the information would be held (by the SPS).
15. The Commissioner was provided with copies of the contracts for both HMP Kilmarnock and HMP Addiewell (the two private prisons operating in Scotland), along with copies of relative reports provided to the SPS by the contractors. Having reviewed these contracts, the Commissioner is satisfied that they contain no requirement to report to the SPS on compliance with rule 52. Even if the contracts were to be interpreted as requiring certification of compliance with the Prison Rules more generally, she accepts that this does not in fact happen.



16. The SPS also described the searches it carried out for any information it held on compliance with rule 52 by contracted-out prisons. The Commissioner accepts that these were adequate and proportionate in the circumstances.
17. Having considered the submissions received from the SPS and Mr K, the Commissioner is satisfied, on the balance of probabilities, that the SPS held no information which would address parts a) and b) of Mr K's request, insofar as these related to contracted-out prisons.
18. In relation to these parts of the request, the Commissioner cannot comment on whether the information provided by the SPS at review stage should have been provided earlier. For the purposes of FOISA, it is enough that it was provided as a result of the review carried out by the authority.

Part (c)

19. The requirements of FOISA in relation to information an authority is required to provide in response to a request are described in paragraph 12 above.
20. The SPS submitted that it was unclear what Mr K meant by "consumables". The SPS acknowledged that it should have sought clarification from Mr K about this, but failed to do so.
21. The SPS referred to the arrangements for items permitted in use by prisoners, considered by the Commissioner in *Decision 002/2014 Mr X and the Scottish Prison Service*¹. The SPS indicated that on occasion items could be accepted without a completed pro-forma or prior authorisation, for example, socks and underwear. Such decisions were, the SPS submitted, discretionary and circumstance-specific. In the context of the applicant's concerns in relation to newspapers, the SPS considered a reasonable interpretation of part c) of the request was that Mr K was seeking information on policy in relation to items allowed in prison without a pro-forma (or prior authorisation).
22. On that basis, and bearing in mind that management and content of articles allowed in use is a discretionary matter for Governors, and policy and practice may vary between prisons, the SPS explained that a search was conducted of all public sector prisons. This search covered any information concerning policy and practice on items allowed in use without a pro-forma or pre-authorisation. Following this search, the SPS concluded that, except for HMP Shotts, it held no relevant recorded information falling within scope of part c) of Mr K's request. The information relating to HMP Shotts was disclosed to Mr K.
23. The SPS also confirmed that searches carried out on the SPS Sharepoint site and by its contract management staff identified no relevant information.
24. During the investigation, Mr K informed the Commissioner that he intended the term "consumables" to cover things that would be used up and thrown away, such as paper, envelopes, ball point pens and carbon paper. This would appear to the Commissioner to be a reasonable starting point, in the absence of clarification from the requester. Mr K also

¹ <http://www.itspublicknowledge.info/ApplicationsandDecisions/Decisions/2014/201301427.aspx>



considered the term to cover something which is not recorded on a prisoner's property card, such as underwear, edible items and newspapers.

25. Mr K also considered that written instructions or guidance should be held by the SPS in relation to items of property that can be posted into prisoners in HMP Edinburgh without the need for a completed pro-forma (which he understood to be established practice). He also made it clear that part c) related to local policy HMP Edinburgh only. The Commissioner acknowledges this last point: this should have been evident to the SPS from the terms of the request, without any clarification, and it is not entirely clear to her why it carried out a search involving other establishments.
26. The SPS was informed of Mr K's understanding of the term "consumables" and his view that other information regarding written instructions or guidance should be held by the SPS. The SPS was asked to carry out further searches to determine if it held any relevant information. Following these searches, further information (relating to HMP Edinburgh) was identified and disclosed to Mr K.
27. Having considered the submissions from both the SPS and Mr K, the Commissioner is satisfied that adequate, proportionate searches were carried out by the SPS during the investigation. On the balance of probabilities, she is satisfied that by the end of the investigation, the SPS had identified, located and disclosed to Mr K all relevant information it held and which fell within the scope of part c) of his request.
28. From the submissions received, the Commissioner cannot conclude that the SPS carried out adequate searches for the information when responding to Mr K. In failing to do so, the SPS failed to Deal with the request in accordance with section 1(1) of FOISA.
29. The Commissioner is concerned that although the SPS was unclear about what Mr K meant by the term "consumables", it did not seek clarification from him as to his intended meaning, as it was entitled to do under section 1(3) of FOISA. Given its interpretation of the request and the consequent scope of its earlier searches for the information, she must also question whether it understood the scope of the request fully before dealing with it. A full, prompt and appropriate response to the request might have been facilitated if it had done both things.

Section 10 – time for compliance

30. In his application, Mr K expressed dissatisfaction with the time taken by the SPS to respond to his request for information.
31. Section 10(1) of FOISA gives Scottish public authorities a maximum of 20 working days following the date of receipt of the request to comply with a request for information, subject to exceptions which are not relevant in this case.
32. In his application, Mr K explained that his request of 18 April 2013 was delivered to the SPS the same day. In response to Mr K's requirement for review, the SPS acknowledged that its response to his request was three days late and apologised for this.



33. In all the circumstances, noting this acknowledgement, the Commissioner must find that the SPS failed to comply with section 10(1) of FOISA in responding to Mr K's request.
34. In its submissions to the Commissioner, the SPS commented that it was unclear as to how and when the request was sent, or when it was received. It noted that it was addressed to a specific individual and not opened and identified as an information request until 20 May 2013, when that individual returned after a period of absence.
35. The SPS submitted that a request from a member of the public would not be assessed as having been received by the authority until the addressee opened the correspondence and identified it. It suggested the Commissioner should be cautious about conferring more favourable circumstances on prisoners than on members of the public.
36. The Commissioner does not agree with these arguments. It should be clear from a number of previous decisions, most recently *Decision 256/2013 Mr G and the Scottish Prison Service*², that the Commissioner regards receipt by the authority as just that; the point at which the request passes into the custody of the authority. Requests are made to Scottish public authorities, not to particular individuals within those authorities to whom they are addressed. It should make no difference to this position whether the requester is a prisoner, a member of the public or anyone else.
37. The Commissioner is already pursuing issues relating to the receipt and identification of information requests with the SPS as questions of good practice. In the circumstances, and given that Mr K received a response shortly after the expiry of the 20 working days, she does not consider any particular action to be required in relation to this particular failure to comply with section 10(1), in response to Mr K's application.

² <http://www.itspublicknowledge.info/ApplicationsandDecisions/Decisions/2013/201300835.aspx>



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 K.

The Commissioner finds that the SPS complied with Part 1 in relation to parts a) and b) of the request, insofar as these related to contracted-out prisons.

In failing to identify, locate and provide all the relevant information it held which would address part c) of Mr K's request, the Scottish Prison Service failed to comply with section 1(1) of FOISA. The Commissioner accepts that any relevant information held by the SPS was identified, located and provided during the investigation.

The Commissioner also finds that the Scottish Prison Service failed to comply with section 10(1) of FOISA in responding to Mr K's request.

In the circumstances, the Commissioner does not require the SPS to take any action in respect of either failure, in response to Mr K's application.

Appeal

Should either Mr K or the Scottish Prison Service wish to appeal against this decision, they have the right to 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.

Rosemary Agnew
Scottish Information Commissioner
3 March 2014



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.

...

10 Time for compliance

- (1) Subject to subsections (2) and (3), a Scottish public authority receiving a request which requires it to comply with section 1(1) must comply promptly; and in any event by not later than the twentieth working day after-
- (a) in a case other than that mentioned in paragraph (b), the receipt by the authority of the request; or
- (b) in a case where section 1(3) applies, the receipt by it of the further information.

...