

# Decision Notice

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## Decision 117/2016: Mr S and the Scottish Prison Service

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### Legal representation at disciplinary hearings

Reference No: 201600265

Decision Date: 24 May 2016



Scottish Information  
Commissioner

## Summary

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On 11 December 2015, Mr S asked the Scottish Prison Service (the SPS) for information about prisoner requests for legal representation at disciplinary hearings.

The SPS told Mr S that it did not hold the information he requested. Following a review, Mr S remained dissatisfied and applied to the Commissioner for a decision.

Following an investigation, the Commissioner accepted that the SPS held no information falling within the scope of Mr S' request.

## Relevant statutory provisions

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

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. Mr S raised a petition for judicial review against the SPS/Scottish Ministers in 2015. As part of that procedure, on 29 May 2015, Mr S' solicitor submitted a Specification of Documents to the SPS which required it to provide him with a range of information, including requests:
  - (i) made for legal representation [at disciplinary hearings] from 31 May 2012
  - (ii) where legal representation has been granted [at disciplinary hearings] from 31 May 2012.
2. On 10 June 2015, the SPS supplied Mr S' solicitor with the information listed in the Specification of Documents. This included a spreadsheet which indicated that, during the time period specified, across the whole prison estate, 48 prisoners had had a request for legal representation at a disciplinary hearing denied while 10 prisoners had been granted legal representation at a disciplinary hearing, even though they had not requested it.
3. On 11 December 2015, Mr S made a request for information to the SPS. The information requested was:
  - (i) *In relation to each of the 48 requests for legal representation said to have been refused between 2 June 2012 and 27 May 2015 please provide all and any information held relative to: (a) any grounds noted by the Adjudicator as having been advanced by the prisoner in support of the request for legal representation; and (b) any grounds noted by the Adjudicator setting out the reasons for the refusal of the request.*
  - (ii) *In relation to each of the 10 cases in which legal representation was granted despite not having been requested, between 19 July 2012 and 17 January 2015, please provide all and any information held relative to: (a) the basis upon which the Adjudicator noted his or her decision to grant legal representation; (b) the name of the firm instructed by the prisoner; (c) the date on which the hearing involving the solicitor*

*took place; (d) the outcome of the Adjudication in terms of the finding recorded and any punishment awarded.*

4. The SPS responded on 14 January 2016. It explained that it had searched both its paper and electronic records and had not found any information falling within the scope of Mr S' request.
5. On 19 January 2016, Mr S wrote to the SPS requesting a review of its decision. He considered that the SPS should hold the information he had requested, because its Adjudication Guidance manual requires adjudicators to note, in the ADJ2 form, the reasons for requests for legal representation and the reasons for refusal of those requests.
6. The SPS notified Mr S of the outcome of its review on 1 February 2016. It upheld its initial response that it did not hold the information and found that the request had been handled in accordance with its procedures and legislative requirements.
7. On 10 February 2016, Mr S applied to the Commissioner for a decision in terms of section 47(1) of FOISA. Mr S stated he was dissatisfied with the outcome of the SPS's review because he considered that the SPS held information falling within the scope of his request.

## **Investigation**

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8. The application was accepted as valid. The Commissioner confirmed that Mr S made a request for information to a Scottish public authority and asked the authority to review its response to that request before applying to her for a decision.
9. Section 49(3)(a) of FOISA requires the Commissioner to give public authorities an opportunity to provide comments on an application. The SPS was invited to comment on this application and answer specific questions including justifying its reliance on any provision of FOISA it considered applicable to the information requested.

### *Requested Information*

10. In his application to the Commissioner, Mr S refers to the 58 cases where legal representation was requested or granted as taking place solely at HMP Edinburgh. In its submissions, the SPS clarified that the 58 cases contained in the spreadsheet were not specific to HMP Edinburgh, but covered the entirety of the prison estate.

## **Commissioner's analysis and findings**

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

### **Section 17 – information not held**

12. In terms of section 1(4) of FOISA, the information to be provided in response to a request under section 1(1) is that falling within the scope of the request and held by the authority at the time the request is received. This is subject to qualifications, but these are not applicable in this case. If no such information is held by the authority, section 17(1) of FOISA requires it to give the applicant notice in writing to that effect.

### *Submissions from the SPS*

13. In its submissions to the Commissioner, the SPS explained that the spreadsheet which Mr S had referred to was produced as a result of analysis of its prisoner records database in response to the Specification of Documents submitted by Mr S' solicitor. The SPS stated that the result of this analysis was inaccurate because of administrative error: the information contained in the adjudication paperwork for each of the 58 disciplinary hearings in question had been wrongly transposed into the prisoner records database.
14. The SPS explained that the adjudication paperwork records any discussion about legal representation (as required by the 2012 Disciplinary Hearings Guide (the Guide), a copy of which was provided to the Commissioner). Once the disciplinary hearing is complete, the key points of the adjudication paperwork are recorded on the SPS Prisoner Records database. With regard to legal representation, the only information that is recorded on the database is whether legal representation was requested and whether it was granted. This information is recorded by way of a tick box.
15. The SPS explained that this information is recorded and has been recorded by different individuals within prisons over time. While the SPS has not investigated why these 58 mistakes were made, it suspected that the boxes were ticked in error due to a lack of understanding of the box. The SPS noted that this lack of understanding would not be unexpected, given that it is very rare that requests for legal representation are made.
16. The SPS had located the hard copy paperwork for 40 of the 58 disciplinary hearings identified on the spreadsheet given to Mr S' solicitor, and found that, in each case, the paper records did not record any information about legal representation, despite the relevant box being ticked on the SPS Prisoner Records database. The SPS explained that it had been unable to track down the remaining 18 sets of adjudication paperwork, but it argued that as it had confirmed that 40 of the records contained no information falling within the scope of Mr S' request, it considered it likely that the remaining 18 records would also hold no relevant information.
17. The SPS submitted that in 2014-2015, almost 18,500 disciplinary hearings took place across the prison estate and the figure for the previous year was more than 19,500. The SPS noted that Mr S was seeking information over a period of almost three years, which equates to at least 38,000 hearings: the 58 errors account for an error rate of less than 0.15%. Given that the SPS processes more than 30,000 individuals through prisons every year, and considering the complex nature of prisons, the SPS argued that it would be unrealistic to expect its data recording to be error free.
18. When questioned, the SPS acknowledged that there was one additional error (over and above those identified in the 58 records) that had also been found but it argued that, given the terms of the Prisons and Young Offender Institution (Scotland) Rules 2011, and the administrative and minor nature of disciplinary hearing, it was highly unlikely that there were any further mistakes in the prisoner database regarding legal representation. The SPS explained that requests for legal representation at disciplinary hearings were very rare, given the minor nature of the hearings and the need for them to be expedited quickly in accordance with Prison Rules.
19. The SPS confirmed that it had asked each prison involved in any of the 58 disciplinary hearings referred to by Mr S to conduct a search of its filing systems to establish whether they held the adjudication paperwork, as it was this paperwork which would contain the information requested by Mr S. This search returned the 40 sets of adjudication paperwork, which were searched manually to establish whether any information was recorded by the

adjudicator. The SPS confirmed that no information was found. SPS also searched through file LEG 326 which is the file most likely to record whether the SPS had arranged for its own representation at Disciplinary Hearings in response to a prisoner being granted legal representation. Again, the SPS found no information.

20. The SPS acknowledged that it had been unable to find 18 sets of adjudication paperwork, but, given the number of disciplinary hearings held in the time period specified by Mr S, it did not find this surprising. The SPS noted that the key information (the offence, the finding and the punishment) had been extracted and placed into its electronic records. The SPS maintained that it did not hold any information requested by Mr S.

#### *Submissions from Mr S*

21. Mr S submitted that, while it was inherently unlikely that legal representation had been granted to prisoners who had not requested it, the SPS had maintained this position when challenged. Mr S argued that it was unlikely that the SPS did not hold the information about the basis upon which prisoners have requested – and been refused – legal representation. Mr S referred to his own adjudication records, noting that when he requested legal representation it was recorded in the adjudication paperwork.
22. Mr S argued that the adjudication paperwork would not be the only potential source of information falling within the scope of his request. Mr S referred to the Guide that deals with the contingency of legal representation for a prisoner being granted. Mr S noted that paragraph 4.15 of the Guide provides that:

“When legal representation is agreed for a prisoner, a member of staff ... should arrange through headquarters (Legal Services Branch) for the Scottish Prison Service also to have legal representation”.

23. Mr S also noted that Annex 1 to the Guide includes a “model letter” which should be sent to the solicitor representing the prisoner. Given this, Mr S argued that he would not only have expected the adjudicator in each of the 10 cases cited (where prisoners were given legal representation) to have recorded his decision on the ADJ2 form, but that the Legal Services Branch should retain extensive records relative to the instruction by both prisoners and the SPS of solicitors in relation to Orderly Room Proceedings. Mr S argued that the review response did not indicate that any attempt had been made to interrogate these records.

#### *Commissioner's conclusions*

24. Mr S requested information based on the results of a search the SPS conducted on its prisoner records database. This search revealed that in a three year period, across the entire prison estate, 10 prisoners had been granted legal representation at a disciplinary hearing (when they had not requested it) and 48 prisoners had been denied legal representation at a disciplinary hearing. In the circumstances, and given the requirements of the 2012 Disciplinary Hearings Guide, which was referenced by both parties, the Commissioner considers that it was reasonable for Mr S to expect the SPS to hold recorded details of why legal representation had been denied or granted in the 58 cases contained in the search results.
25. However, as indicated above, the SPS has argued that these search results were false and based on inaccurate records. They attributed this to administrative error whereby the information contained on the adjudication paperwork was wrongly transposed into the prisoner records database. The SPS has cross-checked 40 sets of adjudication paperwork

with the online database and found that in each case, an error has been made, whereby the wrong “tick box” has been selected and that, in fact, no information is held.

26. The Commissioner is satisfied that in 40 of the 58 cases flagged up to Mr S, the information he has requested is not held. The Commissioner is satisfied that the SPS has cross-referenced the paperwork of these cases and has confirmed that the database wrongly recorded information about legal representation.
27. With regard to the 18 sets of adjudication paperwork that the SPS has been unable to locate, the Commissioner acknowledges that it is possible that these records might hold recorded information about prisoner requests for legal representation. However, as the records cannot be found, the Commissioner must also conclude that the SPS does not hold the information about legal representation which might have been contained in these records. The Commissioner notes that searches of the LEG 326 file (which would contain information relating to instances where prisoners were granted legal representation) also failed to locate any relevant information. On the balance of probabilities, the Commissioner accepts that the SPS does not hold any information covered by Mr S' request.
28. Section 17(1) of FOISA requires an authority to give notice to an applicant that it does not hold the information that has been requested. It does not require an authority to explain why information is not held. In the circumstances, however, the Commissioner considers that it would have been good practice for the SPS to have explained to Mr S why there was a discrepancy between the information he expected to be held and the information that was in fact held.

## Decision

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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 request made by Mr S.

## Appeal

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Should either Mr S or the SPS 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.

**Margaret Keyse**  
**Head of Enforcement**

**24 May 2016**

## Appendix 1: Relevant statutory provisions

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# 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.

...

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