



Scottish Information
Commissioner

**Decision 074/2005 – Mr S and Scottish Prison
Service**

*Request for full written information about the basis upon which an
Investigating Officer will act including their role, terms of reference
and procedures to be employed in investigating a complaint.*

Applicant: Mr S
Authority: Scottish Prison Service
Case No: 200502205
Decision Date: 13 December 2005

Kevin Dunion
Scottish Information Commissioner

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Decision 074/2005 – Mr S and Scottish Prison Service

Request for full written information about the basis upon which an investigating officer will act, their role, terms of reference and procedures to be employed – withheld on the basis of section 30(c) of the Freedom of Information (Scotland) Act 2002 – substantial prejudice to the effective conduct of public affairs.

Facts

Mr S submitted an information request to the Scottish Prison Service on 19 May 2005. The information requested related to the basis on which an investigating officer dealing with a complaint of gross misconduct against a prison officer was to act, their role, terms of reference and the procedures to be employed. Information was provided to Mr S but the Scottish Prison Service withheld information contained in its Employee Code of Conduct on the basis that disclosure would prejudice the effective conduct of public affairs (section 30(c) of the Freedom of Information (Scotland) Act 2002 (FOISA). This decision was upheld by the Scottish Prison Service on review and Mr S applied to the Commissioner for a decision.

Outcome

The Commissioner found that the Scottish Prison Service had failed to comply with Part 1 of FOISA in withholding certain information from Mr S, there being insufficient grounds for withholding that information under section 30(c) of FOISA.

The Commissioner found that Scottish Prison Service had failed to comply with section 19(b) of FOISA by failing to provide Mr S with information about his rights to seek a review and apply to the Commissioner for a decision.



Appeal

Should either Mr S or the Scottish Prison Service 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 of receipt of this notice.

Background

1. On 19 May 2005, Mr S submitted a request for information to the Scottish Prison Service (SPS) under the Freedom of Information (Scotland) Act 2002 (FOISA). The information request asked for full written information about the basis on which an investigating officer from the Scottish Prison Service was to act, their role, their terms of reference and the procedures to be employed in relation to the investigation of a complaint of gross misconduct that Mr S had made against a member of Scottish Prison Service staff.
2. The Scottish Prison Service responded on 23 May 2005 but this response did not address Mr S's request for information..
3. Mr S was dissatisfied with the response from the Scottish Prison Service and so wrote to them on 26 May 2005 requesting a review.
4. Mr S was sent a letter by the Scottish Prison Service on 26 May 2005 responding to his initial request for information. The Scottish Prison Service disclosed some information to Mr S in respect of the terms of reference that the investigating officer would be working to. Mr S wrote to the Scottish Prison Service again on 13 June 2005, expressing his dissatisfaction with this response.
5. The Scottish Prison Service sent a further letter to Mr S on 24 June 2005 indicating that all the information he was seeking was contained within the Scottish Prison Service Employee Code of Conduct,(the Code) which was being withheld under section 30 (c) of FOISA as it was considered that disclosure would prejudice the effective conduct of public affairs. The Scottish Prison Service referred in particular to the adverse impact on the authority of prison officers which might result from disclosure of the Code: this would not be in the best interests of the public. It also stated that the specific information relating to the investigating officer's role was part of an ongoing investigation and therefore subject to the Data Protection Act: this information would not be released as it was personal information being gathered on an individual.



6. On 6 July 2005, Mr S applied to me for a decision as to whether the Scottish Prison Service had breached Part 1 of FOISA in withholding the relevant documents setting out the basis on which the inquiry would be carried out. The case was subsequently allocated to an investigating officer within my office.

The Investigation

7. Mr S's appeal was validated by establishing that he had made a valid information request to a Scottish public authority under FOISA and had appealed to me only after asking the Scottish Prison Service to review its response to his request. While there was a degree of confusion around the timing of a specific request for review, I am satisfied (given the Scottish Prison Service's failure at any point to advise him of his rights in this regard) that Mr S's letter of 13 June 2005 met the relevant requirements of Part 1 of FOISA and the Section 60 Code of Practice.
8. A letter was sent by my investigating officer to the Scottish Prison Service on 15 August 2005, asking for its comments on Mr S's application in terms of section 39(1) of FOISA. The Scottish Prison Service was also asked to provide my office with information to allow the investigating officer to carry out the investigation, in particular copies of the Code, any other information relevant to Mr S's request and any guidance relied on by the Service in deciding whether the information requested should be disclosed or withheld. In addition, the Service was asked to provide a detailed analysis of the application of section 30(c) to the information withheld, an analysis of its application of the public interest test and further information about how it carried out its review.
9. A response was received from the Scottish Executive Freedom of Information Unit on 2 September 2005, with copies of the information withheld from and sent to Mr S. The response stated that the Code was the only piece of information withheld from Mr S that fell within the scope of his request: given the terms of the request and of the Code, I am satisfied that this is the case and that the reference to personal information in the Scottish Prison Service's letter of 24 June 2005 was irrelevant and unnecessary.



Submissions from the Scottish Prison Service

10. In its submissions to my office the Scottish Prison Service has stated that the information withheld was considered to be exempt from disclosure under section 30 (c) of FOISA, being information the disclosure of which under FOISA would prejudice substantially, or be likely to prejudice substantially, the effective conduct of public affairs.
11. In justifying its use of the exemption the Scottish Prison Service has stated that in its view the information could and would be used by prisoners to manipulate, bully and condition staff. This in turn would result in a loss of confidence both in the Code and in Scottish Prison Service managers, which would have the potential to impact on morale and service delivery. The Scottish Prison Service goes on to state that staff awareness of prisoners having access to the Code would undermine their confidence and make them constantly wary of any requests or approaches from prisoners. This would then clearly get in the way of the role that staff must carry out and potentially make them withdraw from the relationships that have built up with prisoners, which the Service relies on to maintain good order and challenge offending behaviour.
12. The Scottish Prison Service goes on to say that it would argue against releasing the entire Code. It accepts that it might seem that releases of some passages of the Code would not in their own terms be damaging. However the very fact that a part of the Code had been released would unsettle staff (principally prison officers, who have the greatest face-to-face contact with prisoners), making them feel uneasy or concerned. Regardless of how release of some information in the Code was presented to prisoners and whatever assurances management offered to staff that a limited release would not harm them, their perception would be that prisoners could still use this against them in some way. The Scottish Prison Service (supported by Trade Union representations) has identified some examples of how this material could be used, including institutional collusion to victimise staff and conditioning staff by making repeated minor allegations against other staff. The Service goes on to state that it considers there to be a substantial risk that detailed knowledge of the Code would provide prisoners with this sort of mindset with an arsenal of allegations to cite falsely against staff.
13. The Scottish Prison Service has stated that it considers there to be a very real risk of prisoners using the material contained in the Code to destabilise their relationships with staff, to attempt to manipulate prison officers and as a psychological weapon in talking to prison officers.



14. Section 30(c) is a qualified exemption in that it is subject to the public interest test. The Scottish Prison Service has argued that the public interest in not disclosing the material is in fact stronger than that in release. The role of the prison officer is very much about maintaining the balance of power within prisons to ensure that the legal authority vested in prison officers is appropriately delivered. Prisoners will use whatever means are available to gain the upper hand and blur the authority prison officers must hold. The nature of the environment lends itself to conditioning and manipulation of staff. Within any organisation, the method by which standards of behaviour are addressed is always central to the employee/employer relationship. The Scottish Prison Service considers that this is very much the case within the Scottish Prison Service and therefore, the integrity of the Code is a vital element in maintaining stability within the organisation. Integrity would be deemed to have been compromised by the issuing of the Code to prisoners and so would not be in the public interest.

Submissions from Mr S

15. Mr S has submitted that the Scottish Prison Service investigation required to incorporate a sufficient degree of procedural fairness to satisfy the requirements of public confidence in the system. Procedural fairness in this case required that he be made fully aware of the contents of the Code. He would otherwise be disadvantaged in deciding how to approach the investigation and consider the actions of those conducting it against applicable Scottish Prison Service standards. By way of illustration of actual prejudice caused to him by the failure of the Service to comply with his request, he cited two examples of apparent procedural shortcomings he was unable to judge against those standards.
16. Aside from the particular concerns Mr S raised about procedural fairness, he asserted that there was a real public interest in ensuring the highest standards of conduct of public officials such as prison officers. Publication of the Code must be in the public interest as it would contribute to public confidence in the standard of conduct expected of Scottish Prison Service employees.



The Commissioner's findings and analysis

17. Section 30(c) of FOISA exempts information if its disclosure under this Act – would prejudice substantially, or be likely to prejudice substantially, the effective conduct of public affairs. This is a qualified exemption and therefore consideration has to be given to the application of the public interest test.
18. The information that has been withheld from Mr S is the Scottish Prison Service Employee Code of Conduct (the Code). This document details the type of actions that would be taken should an employee commit an offence in the course of their work which would constitute misconduct or gross misconduct.
19. In his appeal to my office Mr S indicated that he had asked the Scottish Prison Service to disclose to him the full written information about the basis on which the investigating officer would act, their role, their terms of reference and the procedures to be employed. On reading through the Code I am satisfied that the information which Mr S is seeking is contained in this document, read with the terms of reference provided to him already. This document sets out the basis of appointment and role of, and the procedures to be followed by, an officer carrying out an investigation into an alleged incident of gross misconduct on the part of a Scottish Prison Service employee.
20. The Code contains the framework for dealing with employee conduct issues within the Scottish Prison Service and details the various processes and procedures that would be followed if an employee were to be investigated for committing an offence during the course of their work. The information that Mr S is seeking forms a relatively small part of the Code.
21. In determining whether release of the information that Mr S has requested should be required I must consider the terms of the exemption claimed under section 30(c) of FOISA. This exemption relates to information the release of which would (or would be likely to) prejudice substantially the effective conduct of public affairs. The Scottish Executive's internal briefing on section 30(c) states that in order for information to be caught within the scope of this exemption substantial prejudice must go further than just having identified the possibility of prejudice. It requires (a) that there be actual prejudice and (b) that that prejudice is material or significant. This is consistent with my own guidance on the substantial prejudice test.



22. From the information that the Scottish Prison Service has submitted I accept it is concerned about the welfare of its staff and the likely impact that release of this information would have on them. Having considered the arguments that have been put forward by the Service I accept that the Code does contain sensitive information which should not be disclosed to the public, including information carrying with it a real risk that release might lead to conditioning or manipulation of staff. I accept that this would be prejudicial to the effective conduct of public affairs.
23. I am not satisfied however that the Scottish Prison Service has put forward sufficient arguments to satisfy me that the release of the information Mr S is seeking would or would be likely to prejudice substantially the effective conduct of public affairs. As I have indicated previously the information which Mr S is seeking forms a relatively small part of the overall Code, to be found in sections 6 (paragraphs 6.3 to 6.9 inclusive only), 11 (paragraph 11.2 first two bullet points only), 15 and 16. The information relates purely to procedural matters and in my view does not contain any information which would give any significant advantage to prisoners over prison officers or other prison employees who are covered by the Code. Accordingly, I am not satisfied that the exemption in section 30(c) applies.
24. The application of the exemption in section 30(c) is subject to the public interest test. Having determined in this case that the exemption does not apply I am not required to consider the public interest test: I will, however, do so for the sake of completeness. The public interest test has been described as something which is of serious concern and benefit to the public, not merely something of individual interest. It is not something which is of interest to the public but something which is in the interest of the public.
25. In considering the application of the public interest test I have considered;
 - Whether disclosure would enhance scrutiny of decision making processes and thereby improve accountability and participation;
 - Whether disclosure would ensure fairness in relation to applications or complaints, reveal malpractice or enable the correction of misleading claims.
26. Having taken into consideration the submissions from the Scottish Prison Service and Mr S and having applied the public interest test, I am satisfied that the public interest in releasing the information contained in sections 6 (paragraphs 6.3 to 6.9 inclusive only), 11 (paragraph 11.2 first two bullet points only), 15 and 16 (paragraphs 16.1 and 16.2 only) would outweigh that in maintaining the exemption in section 30(c).



27. During the investigation of Mr S's case I have noted that the Scottish Prison Service did not respond to Mr S's initial application for information within 20 working days. I also note that despite Mr S submitting a request for review to the Scottish Prison Service (prematurely, but followed up at the appropriate time) no formal response has been made to this by the SPS. At no point was information given to Mr S regarding his right to request a review or his right of appeal to me if he was dissatisfied with the response from the SPS. This is contrary to the requirements of section 19(b) of FOISA.
28. In their submissions to my office the Scottish Prison Service has indicated that it acknowledges that the case was not handled in a satisfactory manner. The Service goes on to say that there were a number of procedural deficiencies in handling the case and that it apologises for these. It also states that it is content that the guidance available on its website covers the essential details of the process for handling requests and of the advice that has to be given to prisoners. Finally, the Service states that it is in the process of revising its FOI guidance and is planning update seminars for staff on FOI.

Decision

I find that the Scottish Prison Service have failed to comply with Part 1 of the Freedom of Information (Scotland) Act 2002 (FOISA) in withholding from Mr S certain information contained in the Scottish Prison Service Employee Code of Conduct., there being insufficient grounds for withholding that information under section 30(c) of FOISA.

I therefore require the Scottish Prison Service to release the following information from the Scottish Prison Service Employee Code of Conduct to Mr S:

Sections 6 (paragraphs 6.3 to 6.9 inclusive only), 11 (paragraph 11.2 first two bullet points only), 15 and 16 (paragraphs 16.1 and 16.2 only).

I am obliged to give the Scottish Prison Service at least 42 calendar days in which to supply Mr S with the information set out above. In this case I require the Scottish Prison Service to give Mr S the information within 45 calendar days of the receipt of this notice.



I find that the Scottish Prison Service failed to comply with section 19(b) of FOISA in that it did not advise Mr S either of his right to seek a review from the Service following its response to his application, or of his right to refer the matter to the Scottish Information Commissioner. Given that Mr S was not in fact prejudiced in the exercise of these rights, I do not require any remedial action to be taken in respect of this breach.

Kevin Dunion
Scottish Information Commissioner
13 December 2005