

Decision Notice



Decision 064/2008 Mr Jon MacIntosh and the Scottish Prison Complaints Commission

Information on policies

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Summary

Mr Jon MacIntosh requested copies of two policies from the Scottish Prison Complaints Commission (the SPCC) and further information relating to these policies. In relation to one of the policies, the SPCC responded by advising Mr MacIntosh that this was not held in any recorded form. Following a review, Mr MacIntosh remained dissatisfied with this response and applied to the Commissioner for a decision.

Following an investigation, the Commissioner found that the SPCC had partially failed to deal with Mr MacIntosh's request for information in accordance with Part 1 of FOISA. The Commissioner found that the SPCC had acted in accordance with Part 1 of FOISA by correctly notifying Mr MacIntosh in terms of section 17 that it did not hold the relevant policy. However, the Commissioner found that the SPCC had failed to comply fully with the technical requirements of sections 19 and 21 of FOISA by failing to notify Mr MacIntosh of his rights of review and application to the Commissioner with respect to his information request.

The Commissioner did not require the SPCC to take any action on this occasion.

Relevant statutory provisions and other sources

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) (General entitlement); 17(1) and (2) (Notice that information is not held); 19 (Content of certain notices) and 21(4), (5) and (10) (Review by Scottish public authority)

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.

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).

Background

1. On 19 February 2008, Mr MacIntosh wrote to the SPCC requesting copies of the following policies:
 - (a) the Scottish Prison Service (SPS) policy in relation to pro-forma provision of funds to prisoners from external sources; and



(b) the policy of the SPCC not to make recommendations which could impact on prison security issues.

Mr MacIntosh also requested in relation to both policies, “any authority underpinning the policy” and, in relation to the first policy only, “any explanation that you have received per the SPS as to the operation of that policy”.

2. The SPCC responded on 12 March 2008. The SPCC advised Mr MacIntosh that it considered the information concerning the first policy (a) exempt from disclosure in terms of section 25 of FOISA because it was available from the SPS. It did, however, provide Mr MacIntosh with copies of email exchanges it had shared with the SPS which the SPCC considered would explain the operation of the policy. In relation to the second policy (b), the SPCC advised Mr MacIntosh that it did not have a written policy on this subject (and so this information was not held).
3. On 4 April 2008, Mr MacIntosh wrote to the SPCC requesting a review of its decision. His request indicated that he was dissatisfied on the basis that the SPCC had failed to provide any documentary evidence relating to its policy of not making recommendations that might impact on security issues (i.e. part (b) of the request). No dissatisfaction was expressed with the SPCC’s response to part (a) of the request concerning the SPS policy.
4. The SPCC notified Mr MacIntosh of the outcome of its review on 11 April 2008. The SPCC upheld its previous decision and advised Mr MacIntosh it considered it had complied with the requirements of FOISA in dealing with his application. In particular, the SPCC reiterated that its policy regarding making recommendations which could impact on prison security had never been formalised and that it was not held in recorded form.
5. On 23 April 2008, Mr MacIntosh wrote to the Commissioner’s Office, stating that he was dissatisfied with the outcome of the SPCC’s review and applying to the Commissioner for a decision in terms of section 47(1) of FOISA. He stated that he did not believe that the SPCC had provided sufficient information to satisfy his request. Mr MacIntosh also indicated that he was unhappy with the manner in which his request had been dealt with in terms of providing information about appeals and recourse to the Commissioner’s office.
6. As Mr MacIntosh’s request for review referred only to part (b) of the request, the dissatisfaction expressed in his application is understood to be limited to this part. Consequently, the response to part (a) of the request will not be considered any further in this decision.
7. The application was validated by establishing that Mr MacIntosh 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 that request. The case was then allocated to an investigating officer.



Investigation

8. The investigating officer wrote to the SPCC on 14 May 2008, inviting its comments on the application (as required by section 49(3)(a) of FOISA) and asking it to respond to specific questions. The SPCC was also asked to provide specific comments on its handling of Mr MacIntosh's information request.
9. The SPCC responded on 30 May 2008 addressing each of the points raised by the investigating officer.

Commissioner's analysis and findings

10. In coming to a decision on this matter, the Commissioner has considered all of the information and the submissions that have been presented to him by both the applicant and the SPCC and is satisfied that no matter of relevance has been overlooked.

Consideration of section 17 (Notice that information is not held)

11. The second part of Mr MacIntosh's request was for a copy of an SPCC policy that it will not comment on matters that could impact on prison security issues.
12. Section 17(1) of FOISA requires that, where an authority receives a request for information that it does not hold, it must give an applicant notice in writing that the information is not held.
13. In its response of 12 March 2008, the SPCC advised Mr MacIntosh that it did not have a written policy on this matter. It explained that it does, in fact, have such a policy, but that it has never been codified.
14. In order to determine whether the SPCC was correct to advise Mr MacIntosh that it does not hold the requested information, the Commissioner must establish whether the SPCC holds (or held at the time of Mr MacIntosh's request) information which would address his request.
15. In its submissions, the SPCC explained that it is a very small organisation with only three members of staff. It has also explained that it has never been considered necessary to formalise the policy in writing as the policy is clearly understood by its staff. The policy is not held in any recorded format which could have been copied to Mr MacIntosh and, consequently, there are no searches which could have been undertaken to find it. The SPCC also pointed out that it had previously explained the policy in separate correspondence with Mr MacIntosh.



16. Having considered the SPCC's submissions on this point and its explanation of why it does not hold the information in question, the Commissioner is satisfied that the information is not held by the SPCC (and was not held by it at the time of Mr MacIntosh's request). The Commissioner has therefore concluded that the SPCC was correct in informing Mr MacIntosh that it was unable to supply the information in question.

Technical breaches of FOISA

17. In his application to the Commissioner, Mr MacIntosh noted that the response to his initial request did not advise him of his right to request a review. Furthermore, he pointed out that the subsequent response to his request for review did not advise him of his right to apply to the Commissioner for a decision.
18. In its submissions to the Commissioner's Office, the SPCC has acknowledged that it did not advise Mr MacIntosh of his right to request a review of the original decision or his right to make an application to the Commissioner for a decision.
19. The SPCC submitted that it considered it had provided Mr MacIntosh with all the information it held in relation to his request. The SPCC went on to state its assumption that "the review section of FOISA is applicable when there is at least a possibility, no matter how remote, that all of the information requested was not provided but may nonetheless be available. This was simply not the case with Mr MacIntosh's request". The SPCC also considered that by providing Mr MacIntosh with all the information it held in relation to his request, there was no original decision to review.
20. The Commissioner does not accept the SPCC's position regarding this aspect of its handling of Mr MacIntosh's request, in particular, its assertion that "there was no original decision to review". Section 19 of FOISA requires that when notifying an applicant (in terms of sections 16 or 17 of FOISA) that the information requested is considered exempt information or is not held, the notice should provide details of:
- (a) the authority's procedure for dealing with complaints about the handling of requests for information;
 - (b) the right to request a review in terms of section 20 of FOISA; and
 - (c) the right to make an application for a decision by the Scottish Information Commissioner under section 47(1) of FOISA.
21. In this case, the SPCC's letter of 12 March 2008 to Mr MacIntosh was clearly a response to a request for information and clearly stated that some information was not held by it and some was considered exempt in terms of section 25 of FOISA. Accordingly, the response should have contained the particulars detailed in paragraph 20 above. In failing to do so, the Commissioner finds that the SPCC failed to comply with the requirements of section 19 of FOISA.



22. The SPCC's letter to Mr MacIntosh dated 11 April 2008 (in response to his request for a review) did not advise him of his right to make an application to the Commissioner in terms of section 47(1) of FOISA, or of the subsequent right of appeal on a point of law against a decision by the Commissioner to the Court of Session.
23. Section 21 of FOISA describes how a Scottish public authority is required to comply with a request for a review of its decision. Section 21(4) states "The authority may, as respects the request for information to which the requirement relates –
 - (a) confirm a decision complained of, with or without such modifications as it considers appropriate;
 - (b) substitute for any such decision a different decision; or
 - (c) reach a decision, where the complaint is that no decision had been reached.
24. Section 21(5) of FOISA requires an authority to give the applicant notice in writing of what it has done under subsection (4) and a statement of its reasons for so doing.
25. Section 21(10) of FOISA provides that a notice under subsection (5) must contain particulars about the rights of application to the Commissioner conferred by section 47(1) of FOISA, and the subsequent right of appeal to the Court of Session provided by section 56.
26. Whilst the SPCC's letter to Mr MacIntosh dated 11 April 2008 did confirm its previous position, it did not advise Mr MacIntosh of his right to apply to the Commissioner for a decision, or of the right of appeal against the Commissioner's decision to the Court of Session. The Commissioner therefore find that the SPCC failed to comply with the requirements of section 21(10) of FOISA.
27. The Commissioner finds the SPCC's explanation of its handling of these aspects of Mr MacIntosh's request unsatisfactory. The Commissioner would urge the SPCC to take cognisance of paragraphs 20 to 26 above and ensure that it complies with the requirements of sections 19 and 21 of FOISA in future. However, the Commissioner does not require the SPCC to take any further action in this regard at this point.

Review procedure followed by the SPCC

28. Paragraph 66 of the 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.
29. The Commissioner has noted that the SPCC's responses to Mr MacIntosh's initial request and request for review were carried out by the same member of staff.



30. In this case, the SPCC has submitted that it is a very small organisation with only three members of staff, one of whom is only recently in post and it would have been inappropriate for a different member of staff to conduct the review. The Commissioner accepts that the SPCC is a small organisation which makes it more difficult for reviews to be carried out by different staff. Nonetheless, it is important that a review process is conducted and can be seen to have taken place, such that there is a record of the matter of complaint having been considered afresh. The Commissioner therefore recommends that the SPCC considers how this can best be done allowing for the limitations of staff resource.

Decision

The Commissioner finds that the Scottish Prison Complaints Commission (the SPCC) partially complied with Part 1 of the Freedom of Information (Scotland) Act 2002 (FOISA) in responding to the information request made by Mr MacIntosh.

The Commissioner finds that by correctly advising Mr MacIntosh that it did not hold the SPCC policy which had been requested, the SPCC complied with Part 1 of FOISA, and particularly section 17(1).

In failing to respond appropriately to Mr MacIntosh's requests, the Commissioner finds that the SPCC breached the technical requirements of sections 19 and 21(10) of FOISA.

The Commissioner does not require the SPCC to take any action in response to these failures at this point.

Appeal

Should either Mr MacIntosh or the SPCC 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.

Kevin Dunion
Scottish Information Commissioner
16 June 2008



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.

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.

- (2) Subsection (1) is subject to section 19.

...

19 Content of certain notices

A notice under section 9(1) or 16(1), (4) or (5) (including a refusal notice given by virtue of section 18(1)) or 17(1) must contain particulars-

- (a) of the procedure provided by the authority for dealing with complaints about the handling by it of requests for information; and
- (b) about the rights of application to the authority and the Commissioner conferred by sections 20(1) and 47(1).



21 Review by Scottish public authority

...

- (4) The authority may, as respects the request for information to which the requirement relates-
- (a) confirm a decision complained of, with or without such modifications as it considers appropriate;
 - (b) substitute for any such decision a different decision; or
 - (c) reach a decision, where the complaint is that no decision had been reached.
- (5) Within the time allowed by subsection (1) for complying with the requirement for review, the authority must give the applicant notice in writing of what it has done under subsection (4) and a statement of its reasons for so doing.

...

- (10) A notice under subsection (5) or (9) must contain particulars about the rights of application to the Commissioner and of appeal conferred by sections 47(1) and 56.