



Scottish Information
Commissioner

**Decision 018/2007 Mr John Spalding and the
Scottish Prison Service**

Results of a fact finding investigation

**Applicant: Mr John Spalding
Authority: Scottish Prison Service
Case No: 200502639
Decision Date: 29 January 2007**

**Kevin Dunion
Scottish Information Commissioner**

Kinburn Castle
Doubledykes Road
St Andrews
Fife
KY16 9DS



Decision 018/2007 Mr Spalding and the Scottish Prison Service

Request for the results of a fact finding investigation – information withheld by the SPS – Commissioner upheld the decision of the SPS

Relevant Statutory Provisions and Other Sources

The Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) (General entitlement); 2(1) (Effect of exemptions); 10(1) (Time for compliance) and 30(c) (Prejudice to effective conduct of public affairs).

The text of these provisions is reproduced in the Appendix to this decision. The Appendix forms part of this decision.

Facts

Mr Spalding submitted an information request to the Scottish Prison Service (SPS) for a copy of a fact-finding investigation into allegations of unacceptable behaviour.

The SPS refused Mr Spalding's request, citing section 38 of FOISA (Personal information). In its response to Mr Spalding's request for review, the SPS also cited section 30(c) (Prejudice to effective conduct of public affairs) and 35(1)(g) (Law enforcement).

The Commissioner upheld the SPS's decision to withhold the information.



Background

1. On 29 April 2005, Mr Spalding submitted an information request under section 1(1) of FOISA to his employer, the SPS. This request sought a copy of a fact-finding investigation into allegations of unacceptable behaviour made by Mr Spalding against a colleague.
2. When no response was received by 21 June 2005, Mr Spalding requested that the SPS review its handling of his request.
3. This correspondence crossed with the SPS's response, which was issued on 20 June 2005 and received by Mr Spalding on 22 June 2005. In this response, the SPS stated that it considered the requested information to be exempt under section 38 of FOISA, as it constituted personal data, the release of which would breach the first data protection principle on fair and lawful processing. The SPS also referred to information which had previously been released to Mr Spalding, and stated that this information was considered to be the only information of substance which it was able to release.
4. Mr Spalding subsequently submitted a request for review in relation to this response on 22 June 2005.
5. The SPS's response, dated 20 July 2005, concluded that its initial decision to refuse the information should be upheld. This response did, however, provide some general information gathered during the fact-finding investigation, but did not provide a copy of either the fact-finding report itself, or of individual witness statements gathered during the investigation.
6. The response indicated that the remaining information was considered to be exempt under sections 30(c) (prejudice to the effective conduct of public affairs), 35(1)(g) (law enforcement) and 38(1)(b) read in conjunction with section 38(2)(a)(i) (personal information) of FOISA (although the exemption under section 38(1)(b) was cited incorrectly in the response as section 32(2)(a)(l)).
7. Mr Spalding submitted an application for decision to my Office on 20 September 2005, and the case was allocated to an investigating officer.
8. Mr Spalding's application was validated by establishing that he had made a valid information request under FOISA to a Scottish public authority (the SPS) and had appealed to me only after asking the public authority to review its response to his request.



The Investigation

9. In his application, Mr Spalding indicated that he was concerned about the reliability and accuracy of witness testimonies gathered during the course of the investigation, and stated that he wished to obtain access to the report and associated documentation in order to assess whether such testimonies were, in fact, accurate.
10. Mr Spalding also asserted that, should it be discovered during the course of such an investigation that there was a case to answer, the officer under investigation would be entitled to access the investigation report, along with copies of all witness testimonies received. Mr Spalding indicated that he considered it inequitable that he, as the alleged victim, had no such equivalent access in relation to a case where it was considered that there was no case to answer.
11. My investigating officer contacted the SPS to give it notice that Mr Spalding had made an application and to invite its comments on the case, in terms of section 49(3)(a) of FOISA. The SPS was also asked to provide, amongst others, copies of the information which had been withheld from Mr Spalding and further details of its reasons for relying on particular exemptions.
12. The SPS's response to this correspondence supplied copies of 24 documents which fell within the scope of Mr Spalding's request. Of the 24 documents, the SPS stated that ten had either previously been made available to Mr Spalding, or had been received by the SPS from him.
13. In relation to the remaining 14 documents (which included the fact-finding report itself, along with notes from interviews held with employees), the SPS reiterated its view that the information was exempt, citing the three exemptions claimed in its response to Mr Spalding (sections 30(c), 35(1)(g) and 38(1)(b)).
14. In addition to those exemptions, the SPS also stated that some of the information gathered as part of the fact-finding investigation was considered to be exempt from release under section 38(1)(a) of FOISA (personal data of which the applicant is the data subject), for the reason that it constituted Mr Spalding's own personal data. The SPS stated, however, that this exemption was not claimed in its correspondence with Mr Spalding, for the reason that it was considered that doing so might appear to be needlessly bureaucratic.



15. The SPS did point out, however, that its correspondence to Mr Spalding of 20 July 2005, indicated that it would be happy to release those parts of the report which contain Mr Spalding's own personal data in response to a request under the Data Protection Act 1998 (DPA). The SPS also informed Mr Spalding, however, that such a release would not contain any information which was new to Mr Spalding.
16. Finally, the SPS made a reference to the exemption contained in section 39(1) (information is exempt information if its disclosure would, or would be likely to, endanger the physical or mental health or the safety of an individual). However, it is unclear whether the SPS actually intended to rely on this exemption. In any event, I have not found it necessary to seek additional submissions from the SPS in relation to this exemption or make any further reference to the exemption in this decision.

The Commissioner's Analysis and Findings

The information to be considered

17. The SPS has stated in its submissions that there were 24 separate documents created during the fact-finding investigation which therefore fall within the scope of Mr Spalding's information request. These documents were numbered as items 5-28 on the inventory of documents which accompanied the SPS's submission to my Office.
18. Of those documents, the SPS stated that 10 (items 6, 12-14, 19, and 24-28) had either previously been released to Mr Spalding, or had been submitted to the SPS by him.
19. During the investigation, my investigating officer sought to confirm with Mr Spalding whether he was satisfied that this information had been previously accessed, and whether his application should therefore focus on the remaining 14 documents which had not been provided.
20. In response to this correspondence, Mr Spalding stated that he had not received copies of those documents listed under items 26-28 of the SPS's inventory of documents, and that he was seeking access to those documents under his appeal. In addition, he also confirmed that he was seeking access to the additional 14 documents which the SPS stated had been withheld.
21. My investigating officer contacted the SPS to confirm whether it would be willing to facilitate the release of the documents listed under items 26-28 of the inventory to Mr Spalding. This information was subsequently released.



22. As a result, this case focussed on the 14 documents to which Mr Spalding had not received access. These documents were those listed under items 5, 7-11, 15-18 and 20-23 of the SPS's inventory.

Consideration of the exemptions

23. As noted above, the SPS relied on a number of exemptions to withhold information from Mr Spalding.

Section 30(c) – Prejudice to the effective conduct of public affairs

24. Section 30(c) of FOISA exempts information if its disclosure would prejudice substantially, or be likely to prejudice substantially, the effective conduct of public affairs. Section 30(c) is a qualified exemption, which means that where information falls within the scope of the exemption, an authority is obliged to go on to consider the public interest test required by section 2(1)(b) of FOISA, and only withhold the information if, in all the circumstances of the case, the public interest in disclosing the information is outweighed by the public interest in maintaining the exemption.
25. In its submissions, the SPS argued that release of the information could have an adverse effect on future investigations, and that disclosure would therefore be likely to prejudice substantially the effective conduct of public affairs. The SPS stated that this was the case as the release of this information would seriously deter witnesses from giving full and frank testimony in future cases.
26. The SPS also expressed concern that individuals might feel pressured to provide their consent to the release of a statement if this became common practice. Witnesses, argued the SPS, should not be subject to concerns over whether their testimony may one day be made public, or whether they may be pressurised to give their consent to the publicising of their testimony.
27. With regard to the public interest, the SPS stated that it believed it to be in the public interest for such statements to be gathered as fully and frankly as possible, in order to ensure that the investigation process is efficient and effective.
28. The SPS therefore believed that the public interest in maintaining the exemption outweighed that in disclosing the information.
29. However, Mr Spalding submitted that equivalent information has been made available previously by the SPS, without the adverse effects predicted in its correspondence with him. Mr Spalding stated that, in his experience, it was common for those who are subject to an investigation where a complaint is upheld to receive not only a copy of the report, but also copies of all witness statements. Mr Spalding made reference to such an occurrence within his own workplace, and stated that the relevant staff and witnesses have subsequently worked alongside one another without any difficulty.



30. In considering whether it is appropriate to release information under FOISA, however, I must consider whether it is appropriate for that information to be released into the public domain, as opposed to released only to individuals who have been directly involved in, or affected by, the circumstances which led to the collection of the information. Information which is appropriate for release under FOISA will generally be available to all who seek it, regardless of their motive for doing so, or their involvement or non-involvement in a particular case.
31. As a result, the fact that it was Mr Spalding who made the allegations upon which the investigation was based is not a determining factor in the consideration of whether the information should be released to him under FOISA. Rather I have considered more generally whether the specific information requested fulfils the criteria required for the application of the exemption in question and, if I find that this is the case, I must conclude that the authority acted in accordance with FOISA in its handling of that request.
32. It is my view that, in this case, the release of the information into the public domain which relates specifically to the substance and content of this investigation would have a detrimental impact on the quality and reliability of evidence gathered in future SPS investigations. This would in turn damage the SPS's ability to conduct such investigations appropriately, therefore damaging its ability to identify, challenge and resolve inappropriate behaviour amongst its staff. As a result, I concur with the SPS that release would be likely to substantially prejudice the effective conduct of its public affairs.
33. Having reviewed the submissions made by both the SPS and Mr Spalding, and having considered in detail the information withheld from Mr Spalding in relation to this case, I am of the view that the exemption contained under section 30(c) of FOISA does apply to the documents withheld from Mr Spalding.
34. Mr Spalding has argued that information gathered during the course of an investigation has been revealed to parties previously by the SPS in other cases. However, as noted above, it must be stressed that this can have no bearing on my consideration of this case. The type of disclosure described by Mr Spalding would essentially be a limited disclosure to key parties, carried out solely for the purpose of furthering or concluding an ongoing investigation. This type of disclosure is markedly different from that which would be required were the requested information to be made generally available under FOISA to all who request it.
35. I will now consider the public interest test required by section 2(1)(b) of FOISA in relation to the documents which I have found to be exempt in terms of section 30(c).



36. While I acknowledge that there are general public interest arguments in favour of release to be made in terms of ensuring that such investigations are carried out in a fair and impartial manner, I am of the opinion that any such considerations are, in this case, significantly outweighed by those in ensuring that the integrity of such investigations can be maintained. I am of the view that there is a significant public interest in ensuring that such investigations can be conducted comprehensively and candidly in future.
37. It should also be noted that, while Mr Spalding understandably holds a personal interest with regard to accessing the information in question, such personal interest considerations do not, in this case, raise matters which affect the assessment of the general public interest in relation to this particular case. As a result, I conclude that the public interest in the release of the information is outweighed by that in maintaining the exemption.

Conclusion on exemptions

38. Given that I have upheld the use of the exemption contained in section 30(c) to all of the information withheld from Mr Spalding, I am not required to go on to consider whether the information is exempt in terms of section 35(1)(g) or section 38(1)(a) or (b).

The SPS's handling of the information request

39. I will conclude by briefly commenting on certain aspects of the SPS's handling of Mr Spalding's request.
40. As noted earlier, the SPS failed to respond to Mr Spalding's initial request within 20 working days. Indeed, the SPS's response to Mr Spalding's initial request was not issued until 20 June 2005, 34 working days after the receipt of Mr Spalding's request. This delay represents a substantial breach of the 20 working day timescale required by section 10(1) of FOISA.
41. The SPS has, however, fully acknowledged this failure in its communications with my Office, and has stated that this failure arose as a result of a level of confusion within the SPS with regard to how to respond to the request. The SPS states that it is aware that this does not excuse the mistake and that SPS staff were subsequently made fully aware of the requirements of FOISA through a staff notice and detailed guidance. The SPS also stated that key staff within the prison in question received additional dedicated training on their responsibilities under FOISA.
42. The SPS therefore asserted that the extreme delay in this case was an exceptional, one-off mistake, and that staff are in general adhering to the statutory timescales.



43. Nevertheless, it is clear that, by failing to respond to Mr Spalding's request within 20 working days, the SPS failed in its obligations under section 10(1) of FOISA. I consider, however, that the SPS subsequently took adequate steps to address this failure and, as a result, I do not require it to take any remedial action.

Decision

I find that the Scottish Prison Service (SPS) acted in accordance with Part 1 of the Freedom of Information (Scotland) Act 2002 (FOISA) in concluding that the information withheld from Mr Spalding was exempt from release under section 30(c) of FOISA. I am satisfied that the public interest lies in maintaining this exemption.

I also find that the SPS failed to comply with Part 1 of FOISA in taking more than 20 working days to respond to Mr Spalding's initial request. In doing this, the SPS failed to comply with section 10(1) of FOISA. However, for the reasons set out above, I do not require the SPS to take any remedial steps in relation to this failure.

Appeal

Should either the SPS or Mr Spalding 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.

Kevin Dunion
Scottish Information Commissioner
29 January 2007



Appendix

Relevant Statutory Provisions

The 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.

2 Effect of exemptions

- (1) To information which is exempt information by virtue of any provision of Part 2, section 1 applies only to the extent that –
 - (a) the provision does not confer absolute exemption; and
 - (b) in all the circumstances of the case, the public interest in disclosing the information is not outweighed by that in maintaining the exemption.

10 Time for compliance

- (1) ...a Scottish public authority receiving a request which requires it to section 1(1) must comply promptly; and in any event by not later than the twentieth working day after –
 - (a) ...the receipt by the authority of the request;

30 Prejudice to effective conduct of public affairs

Information is exempt information if its disclosure under this Act –

...

- (c) would otherwise prejudice substantially, or be likely to prejudice substantially, the effective conduct of public affairs