

# Decision Notice



Decision 094/2011 Mr E and the Scottish Prison Service

SPS policy on prisoner's legal mail; and removal and destruction of prisoner property

Reference No: 201002354  
Decision Date: 20 May 2011

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**Kevin Dunion**  
Scottish Information Commissioner

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## Summary

Mr E asked the Scottish Prison Service (the SPS) for information as to the SPS policy regarding the reading of prisoners' legal mail, and removal and destruction of prisoners' personal property without their consent. The SPS responded by providing information in response to Mr E's request that it considered addressed his request in full. Following a review, Mr E remained dissatisfied and applied to the Commissioner a decision.

During the course of the investigation, further information was released to Mr E regarding the removal and destruction of prisoners' personal property.

Following an investigation, the Commissioner found that the SPS had failed to deal with Mr E's request for information fully in accordance with Part 1 of FOISA.

The Commissioner found that the SPS had complied with Part 1 of FOISA by providing some relevant information to Mr E. However, he found that it breached Part 1 and section 1(1) of FOISA by failing to identify and supply all relevant (and non-exempt) information falling within the scope of Mr E's request.

However, the SPS provided Mr E with the additional information that was identified as falling within the scope of his request during the course of the investigation, and the Commissioner was satisfied that no further relevant information was held by the SPS. As a result, the Commissioner does not require the SPS to take any further action in relation to this breach.

## Relevant statutory provisions and other sources

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Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) and (6) (General entitlement)

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

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1. In an undated letter, Mr E wrote to the SPS requesting the precise details of the SPS policy with regards to the reading of prisoners' legal mail; and removal and destruction of prisoners' personal property without their consent.



2. The SPS responded on 11 November 2010. It provided copies of rules within the Prisons and Young Offenders Institutions (Scotland) Rules 2006 (the Rules) regarding the opening and reading of correspondence from courts and legal advisers, and regarding the storage and disposal of personal property of prisoners. The SPS also provided copies of two Governors and Managers Action Notices (the Action Notices) regarding instructions for staff involved in handling privileged communications.
3. On 15 November 2010, Mr E wrote to the SPS requesting a review of its decision. In particular, he drew the SPS's attention to the events which had led to him making his request. He argued that the statutory provisions provided to him did not provide authority to remove and destroy a prisoner's personal property without their consent in that context. Mr E therefore requested again that the SPS provide him with the precise details of SPS policy with regards to the removal and destruction of prisoner personal property without their consent.
4. Mr E also referred to provisions within the Action Notices and asked for clarification as to whether the SPS policy afforded protection to 'Legal' and 'Privileged' correspondence after it has been issued and is in the possession of a prisoner. Mr E commented that a copy of documents promulgating the policy would satisfy his request.
5. The SPS notified Mr E of the outcome of its review on 13 December 2010. It maintained that its initial response to Mr E's request was appropriate, in that it provided him with copies of the relevant documentation. It also advised Mr E that it considered his request for clarification regarding the protection afforded to 'Legal' and 'Privileged' correspondence after it has been issued, to be a new request and it would consider it as such.
6. A separate response was provided by the SPS in relation to that point, also on 13 December 2010. The SPS provided an explanation that once 'Legal' and 'Privileged' correspondence is issued, it is considered to be a prisoner's personal property. The SPS provided Mr E with a further copy of the provisions within the Rules which apply to prisoners' personal property.
7. On 20 December 2010, Mr E 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. In particular, Mr E indicated that the SPS had not provided him with the full information he requested under FOISA, and asked that the Commissioner arrange for the SPS to provide him with the precise details of the SPS policy with regard to the removal and destruction of prisoner personal property without their consent. Mr E also commented that he believed that a directive had been issued that provides mandatory instructions/guidelines for all staff involved in the removal and destruction of personal property, and this forms part of his original request.
8. Mr E was also dissatisfied that the SPS had dealt with his request for clarification as to whether the SPS policy affords protection to legal and privileged correspondence after it has been issued and in the possession of a prisoner, as a new request for information. Mr E commented that he considered that this formed part of his original request and he wanted it to be considered as such. Mr E explained that he was not satisfied that all relevant information which would address this part of his request had been provided to him.



9. The application was validated by establishing that Mr E 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

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10. The SPS is an agency of the Scottish Ministers (the Ministers) and, in line with agreed procedures, the Ministers were notified in writing (on 26 January 2011) that an application had been received from Mr E and that an investigation into the matter had commenced. The Ministers were also given an opportunity to provide comments on the application (as required by section 49(3)(a) of FOISA) and asked to respond to specific questions.
11. Subsequent references to submissions requested and received from the SPS in this decision are references to those sought and received from the Ministers' Freedom of Information Unit on behalf of the SPS.
12. The SPS was asked in particular to explain the nature of the searches that it had carried out to determine whether information was held which would address Mr E's request and why it considered that the searches it carried out would have been likely to retrieve any information covered by Mr E's request. It was also asked to comment on Mr E's reference to a particular directive that he believed had been issued and would fall within the scope of his request.
13. A response was received from the SPS on 16 February 2011. The SPS informed the Commissioner that no directive of the type Mr E believed had been issued had been issued.
14. However, it informed the Commissioner that it had (during the course of the investigation) provided Mr E with a further document which provides guidance to prison staff on the disposal/destruction of prisoners' property. It noted that this document had previously been considered to be outwith the scope of Mr E's request, but, in line with its duty under section 15 of FOISA, and in an effort to demonstrate openness and transparency, the SPS decided to provide a copy of it to Mr E.
15. The SPS also provided responses to the other questions raised by the investigating officer regarding the searches it carried out to determine whether relevant information was held.
16. During the investigation, Mr E confirmed that he has received the additional document supplied to him by the Ministers, but indicated that he still considered that the information supplied to him had not provided the precise details of the policy of concern to him.
17. He also indicated that the copy of one of the Action Notices disclosed by the SPS in response to his request appeared to be incomplete. This was because he had identified a reference to paragraph 12 of this document, but he had only received content up to paragraph number 8.



18. In further correspondence with the SPS, the investigating officer requested an explanation of its position with respect to the apparently incomplete document. The SPS's response indicated that the document disclosed to Mr E was not an incomplete copy and the reference to paragraph 12 was a typographical error (carried over from a previous notice).
19. In further correspondence, the SPS was notified that the Commissioner considered that Mr E's request, in his request for review, for clarification as to whether the SPS policy affords protection to legal and privileged correspondence after it has been issued and in the possession of a prisoner, was not seeking additional information which (if held as part of a policy) would fall within the scope of his original request. Comments were sought from the SPS as to why it had dealt with this matter as a new request. The SPS was also asked to explain the nature of the searches that it had carried out to determine whether information was held which would address this part of Mr E's request.
20. The SPS's response on these points explained that had dealt with the request for clarification as a new request as it considered that this particular information was not sought in the initial request, but only at the review stage. It referred back to its previous submissions to explain the searches undertaken to locate relevant information
21. All submissions received from the SPS and Mr E, in so far as relevant, will be considered in the Commissioner's analysis and findings below.

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

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22. In coming to a decision on this matter, the Commissioner has considered all of the submissions made to him by both Mr E and the SPS and is satisfied that no matter of relevance has been overlooked.

### **Handling of the request for clarification in Mr E's request for review**

23. As mentioned above, the SPS considered the part of Mr E's request for review that sought clarification as to whether SPS policy affords protection to legal and privileged correspondence after it has been issued and is in the possession of a prisoner, as a new request for information, and responded to it as such. It did so having considered that such clarification did not form part of Mr E's original request.
24. Mr E has expressed dissatisfaction with this approach, and indicated that the clarification he sought was information falling within the terms of his original request.



25. The Commissioner has considered the terms of Mr E's request for review, together with the context and subject matter of his original information request. He notes that the clarification requested by Mr E related to the policy concerning the reading and handling of prisoners' legal and privileged mail in particular circumstances (after it had entered the possession of the prisoner). Mr E also indicated that the clarification could be provided by the provision of the relevant policy.
26. As a consequence, the Commissioner considers that by seeking clarification in these terms, Mr E was indicating that he expected there to be further information setting out SPS policy in relation to the handling and reading of prisoners' legal mail, beyond that already supplied to him. To the extent that any additional information providing the clarification requested by Mr E existed and formed part of any SPS policy regarding such matters, the Commissioner considers it would fall within the scope of Mr E's original request, which sought (in general terms) details of the SPS policy regarding the handling of prisoners' legal mail.
27. In the light of the above, the Commissioner considers that Mr E's request for clarification was seeking additional information falling within the scope of the first part of his request, which had not been supplied in the SPS's response. The Commissioner also considers that it was reasonable for Mr E to expect that his original request would be interpreted more widely to cover not just the SPS policy regarding what happens to a prisoner's legal mail up until it is issued, but also the policy that is in place for a prisoner's legal mail after it has been issued and is in the possession of the prisoner.
28. The Commissioner therefore finds that the SPS was wrong to deal with this aspect of Mr E's request for review as a new information request. The Commissioner is of the view that this request for clarification forms part of the matters which gave rise to Mr E's dissatisfaction set out in his request for review and he consequently considers that a response to this point should have formed part of the SPS' response to Mr E's request for review.
29. However, the Commissioner acknowledges that the SPS provided a response to this request for clarification on the same day as it responded to Mr E's request for review. While not treated as such, the effect of its response was that of reviewing the matter raised, and so the SPS's handling of this part of his request for review has not disadvantaged Mr E. In that response, the Ministers' response supplied again the provisions within the Rules, which apply to prisoners' personal property. In so doing, they indicated that no further policy was held beyond that supplied to Mr E within the response to his original request.
30. The Commissioner will consider whether the SPS holds any additional information that would fall within the scope of Mr E's information request in what follows.

### **Section 1(1) of FOISA – General entitlement**

31. Section 1(1) of FOISA creates a general entitlement to access information held by a Scottish public authority (subject to the application of any exemptions in Part 2 of FOISA, and any other relevant provisions in Part 1).



32. In order to comply with section 1(1), an authority must therefore take steps to identify all information falling within the scope of a request, and provide it to the applicant, unless it is exempt from disclosure under Part 2 of FOISA, or otherwise subject to one or more of the provisions set out in Part 1 of FOISA.
33. Mr E considers that the SPS holds further information which would address his request and he has asked the Commissioner to provide him with the requested information (i.e. to order the SPS to disclose such information to Mr E).
34. The key question to be addressed by the Commissioner in this case is therefore whether the SPS's response to Mr E's information request identified and supplied all relevant information in relation to its policy regarding the reading of prisoners' legal mail (including once that legal mail has been issued to the prisoner), and its policy regarding the removal and destruction of prisoner personal property without their consent.
35. The test he must apply in considering whether any further information is held beyond that already supplied is not one of certainty, but rather on the balance of probabilities. When drawing conclusions in a case such as this, the Commissioner considers whether the searches undertaken by the public authority were adequate and sufficient to identify any relevant information; and whether they considered all likely sources of any information.

*Part 1) – Prisoners' legal mail*

36. When first responding to this part of Mr E's information request, the SPS supplied sections 57 and 58 of the Rules, which relate to the opening and reading of mail from and to the courts and legal advisers. It also supplied the Notices, which set out instructions for staff involved in handling privileged communications.
37. In response to Mr E's request for clarification as to whether SPS policy affords protection to legal and privileged correspondence after it has been issued and in the possession of a prisoner, the SPS indicated that once a prisoner has been issued with legal or privileged mail, this is considered personal property. It supplied copies of rules 51 and 52 which relate to the storage and disposal of prisoners' property, and personal property of prisoners in rooms or cells. These rules had also been supplied to Mr E (in response to the part of his request relating to personal property) when the SPS first responded to Mr E's information request.
38. The SPS has submitted that it provided all information that it holds, which is of relevance to this part of Mr E's request, both in its response to the original request and also in its response of 13 December 2010.
39. Mr E does not consider that this information fully addresses his request and he has asked that the Commissioner arrange for the SPS to provide him with the requested information.
40. The SPS considers that it has provided all information that it holds, which is of relevance to this part of Mr E's request, both in its response to the original request and also in its response of 13 December 2010.



41. The SPS provided an explanation of the searches that it carried out to determine if any relevant information was held. The SPS advised that it conducted a search of its SharePoint site (which is the Prison Resource library). This site, the SPS submitted, contains the vast majority of up to date guidance and policy documents for staff on the management of prisoners. The SPS also carried out searches of information held within its headquarters, through contact with policy leads to establish whether any further information fell within the scope of Mr E's request.
42. The SPS has advised that no further searches (aside from those mentioned above) were conducted as they were not considered necessary to identify relevant information in this case. The SPS submitted that all relevant policy and guidance documents regarding the management of prisoners should be available on the SPS SharePoint site.

### *Conclusion*

43. Having considered the information that has been disclosed to Mr E by way of particular sections from the Rules and the relevant Action Notices, the Commissioner notes that these do contain information as to the SPS policy on the protection afforded to legal and privileged correspondence before and after it has been issued to a prisoner.
44. In considering the searches that the SPS carried out in order to determine what, if any, relevant information was held which would fall within the scope of this part of Mr E's request, the Commissioner is satisfied that the SPS carried out adequate searches, in areas where relevant information would be likely to be held, for relevant information which would address this part of Mr E's request.
45. The Commissioner is satisfied on the balance of probabilities that Mr E has been provided with all relevant information held by the SPS which would address this part of his request. He is therefore satisfied that the SPS complied with Part 1 of FOISA when responding to this part of Mr E's request.

### *Part 2) – removal and destruction of prisoners' property*

46. In response to this part of Mr E's request, the Ministers supplied copies of rules 51 and 52 of the Rules, which relate to the storage and disposal of prisoners' property, and personal property of prisoners in rooms or cells.
47. Mr E is dissatisfied with the extent of the information the SPS has provided, and he has commented in particular that the rules supplied do not provide authority to remove and destroy a prisoner's personal property without their consent. He has re-iterated that he asked the SPS to provide him with the precise details of SPS policy with regard to the removal and destruction of a prisoner's personal property without their consent.
48. Mr E also indicated that he believes that a directive has been issued that provides mandatory instructions/guidelines for all staff involved in the removal and destruction of a prisoner's personal property, and this falls within the scope of his request.





49. As mentioned above, the SPS has advised that no directive has been issued that provides mandatory instructions for all staff involved in the removal and destruction of a prisoner's personal property.
50. The searches carried out by the SPS in order to determine whether it held any information falling within the scope of this part of Mr E's request are the same as those set out under consideration of Part 1) above.
51. The SPS advised that, having carried out searches of information held within its headquarters, it identified a document (a Governors and Managers Advice notice) providing guidance to prison staff on the disposal/destruction of prisoner property. The SPS originally considered this information to be outwith the scope of Mr E's request, but disclosed it to him during the course of the investigation, in pursuit, of its duty under section 15 of FOISA to provide advice and assistance.
52. The SPS has advised that no further searches (aside from those mentioned above) were conducted as they were not considered necessary to identify relevant information in this case. The SPS submit that all relevant policy and guidance documents regarding the management of prisoners should be available on the SPS SharePoint site.
53. It is the SPS' view that, as the information held by it in reference to Mr E's request has been released to him, there is no further information, guidance or assistance that can be offered to him above and beyond the full release of the information held.

#### *Conclusion*

54. Having considered the information that has been disclosed to Mr E in response to the second part of his request, together with the submissions from the SPS, the Commissioner accepts that the information provided to Mr E by way of the relevant rules governing the storage or disposal of the personal property of prisoners does address his request.
55. However, having read the information contained in the Governors and Managers Advice notice that was disclosed to Mr E during the course of the investigation, the Commissioner considers that, contrary to the view of the SPS, this does come within the scope of Mr E's request. The Commissioner takes this view as the information in the note clearly covers the circumstances where prisoner personal property may be removed and disposed of.
56. Having considered the searches that the SPS carried out in order to determine whether it held information which would address Mr E's request, the Commissioner accepts that, by the end of the investigation, the searches undertaken by the SPS were adequate and that they considered likely areas where relevant information would be held, and located all relevant information. On balance of probabilities, he is therefore satisfied that no further information falling within the scope of Mr E's request (and in particular no directive fitting the description of the document Mr E believes to be held) is held by the SPS.



57. The Commissioner is disappointed that, although the SPS identified the Governors and Managers Advice notice during its initial searches, it did not recognise this as coming within the scope of Mr E's request and so did not provide it to him
58. The Commissioner therefore does not accept the submission from the SPS that it provided all relevant information falling within the scope of the second part of Mr E's request in its response to his request. As a consequence the Commissioner finds that the SPS has breached section 1(1) of FOISA, as it did not disclose all relevant (non-exempt) information falling within the scope of the second part of Mr E's request to him at the time of his request and requirement for review.
59. The Commissioner recognises that the SPS rectified the breach identified above by disclosing the additional Governors and Managers Advice notice to Mr E during the course of the investigation. He therefore does not require the SPS to take any further action in relation to this breach in response to this decision.

#### **Incomplete information**

60. In correspondence with the investigating officer, Mr E commented that one of the documents disclosed to him (a Governors and Managers Action notice) in response to his request was incomplete as reference was made in the note to paragraph 12 and there was no paragraph 12 in the copy provided to him. Mr E also commented that part of paragraph 8 had been deleted.
61. The SPS advised that it had not provided Mr E with an incomplete copy of the document concerned. The SPS explained that the reference to paragraph 12 had been carried over from a previous notice and was a typographical error. The SPS also explained that this same typographical error had been copied into a later notice (a copy of which Mr E also has). The SPS indicated that it had provided Mr E with a full version of the document.
62. The SPS has provided the Commissioner with copies of these two documents and the Commissioner is satisfied that reference to paragraph 12 is a typographical error. The Commissioner is also satisfied that Mr E has received a full copy of the document concerned.



## DECISION

The Commissioner finds that the Scottish Prison Service failed to comply fully with Part 1 of the Freedom of Information (Scotland) Act 2002 (FOISA) in responding to the information request made by Mr E.

The Commissioner finds that the SPS acted in accordance with Part 1 of FOISA by supplying some relevant information to Mr E in response to his information request.

However, he has found that the SPS breached the requirements of Part 1 and section 1(1) of FOISA by failing to identify and supply all relevant (and non-exempt) information that fell within the scope of Mr E's request.

Given that the provided Mr E with the additional advice notice during the course of the investigation, and the Commissioner is satisfied that no further information is held which would fall within the scope of Mr E's information request, the Commissioner does not require the Scottish Prison Service to take any action in response to this failure.

## Appeal

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Should either Mr E 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 after the date of intimation of this decision notice.

**Margaret Keyse**  
**Head of Enforcement**  
**20 May 2011**



## Appendix

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### 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.

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(6) This section is subject to sections 2, 9, 12 and 14.