

Decision Notice



Decision 088/2013 Mr X and the Scottish Prison Service

Fire loading standards and sprinkler systems at HMP Glenochil

Reference No: 201300046
Decision Date: 13 May 2013

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Rosemary Agnew
Scottish Information Commissioner

Kinburn Castle
Doubledykes Road
St Andrews KY16 9DS
Tel: 01334 464610



Summary

On 2 July 2012, Mr X asked the Scottish Prison Service (the SPS) for information relating to fire loading standards in prison cells and the sprinkler system installed at HMP Glenochil. The SPS informed Mr X that it was withholding the information under regulation 10(5)(g) of the EIRs.

Following an investigation, the Commissioner found that the SPS had failed to deal with Mr X's request for information in accordance with both Part 1 of FOISA and the EIRs, by failing initially to disclose the information requested by Mr X.

Relevant statutory provisions

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) and (4) (General entitlement); 21(1) (Review by Scottish public authority)

The Environmental Information (Scotland) Regulations 2004 (the EIRs) regulations 2(1) (definitions (a), (b), (c) and (f) of "environmental information"); 5(1) and (2)(b) (Duty to make environmental information available on request)

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

1. On 2 July 2012, Mr X wrote to the SPS requesting the following information:
 - a) *The current "fire loading" standards applicable within: (1) single/standard cells; (2) double/large cells within Abercrombie Hall at HMP Glenochil.*
 - b) *Please advise in addition as to the capacity of sprinkler systems installed within: (1) single/standard cells; (2) double/large cells within Abercrombie Hall at HMP Glenochil.*

Mr X also made one additional information request which is not the subject of this investigation and decision.



2. The SPS responded on 26 July 2012. The SPS provided answers which it considered fulfilled requests (a) and (b).
3. On 30 July 2012, Mr X wrote to the SPS requesting a review of its decision. Mr X noted that the SPS's response in relation to request (a) was merely a list of objects which may be permitted within cells and did not refer to any objective fire loading standard. In relation to request (b), Mr X noted that the SPS's response had simply described the means of activating the sprinkler system and the type of discharge, but not the capacity of the system.
4. The SPS notified Mr X of the outcome of its review on 31 August 2012. The SPS informed Mr X that it considered the requested information to be environmental information for the purposes of the EIRs. The SPS also informed Mr X that it considered the information to be excepted from disclosure in terms of regulation 10(5)(g) of the EIRs.
5. On 20 December 2012, Mr X 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. By virtue of regulation 17 of the EIRs, Part 4 of FOISA applies to the enforcement of the EIRs as it applies to the enforcement of FOISA, subject to certain specified modifications.
6. The application was validated by establishing that Mr X 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.

Investigation

7. On 10 January 2013, the SPS was notified in writing that an application had been received from Mr X and was asked to provide the Commissioner with any information withheld from him. The SPS responded with the information requested and the case was then allocated to an investigating officer.
8. The investigating officer subsequently contacted the SPS, giving it an opportunity to provide comments on the application (as required by section 49(3)(a) of FOISA) and asking it to respond to specific questions. The SPS was asked to justify its reliance on any provisions of FOISA or the EIRs it considered applicable to the information requested.
9. On 7 February 2013, the SPS wrote to Mr X disclosing information which it considered fell within the scope of his request. The information comprised extracts from a report compiled by a fire testing specialist. The SPS informed Mr X that the information demonstrated the fire loading of a typical cell at HMP Glenochil and provided information regarding the capacity of the sprinkler system.



10. The SPS subsequently responded to the investigating officer, providing its explanation of the matters raised in Mr X's application. The SPS confirmed that the information disclosed to Mr X on 7 February 2013 was all the information that it held falling within the scope of his request. Additionally, the SPS stated that it had been incorrect in dealing previously with Mr X's request under the EIRs.

Commissioner's analysis and findings

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

FOISA or EIRs?

12. As noted above, in its response to Mr X's requirement for review, the SPS informed him that it was dealing with the request under the EIRs. The SPS did not provide any explanation of why it considered the information to be environmental information. The SPS advised Mr X that it considered the information to be excepted from disclosure under regulation 10(5)(g) of the EIRs, on the basis that its disclosure would be likely to prejudice substantially the protection of the environment to which the information related.
13. Also as noted above, in its submissions to the Commissioner, the SPS stated that it now considered the request had been incorrectly dealt with under the EIRs. The SPS did not provide any reasons to substantiate its amended position. Nonetheless, the Commissioner will consider whether the information does indeed comprise environmental information.
14. In this case, the information concerns establishing the fire load of prison cells and details of the capacity of a sprinkler suppression system. As the requested information concerns the potential for fire, the influence of ventilation and the presence (or otherwise) of water, it relates to the state of the elements of the environment. The information also concerns factors affecting the elements of the environment (heat energy and pollution discharged by a fire), measures (policies and plans) designed to protect the elements of the environment, and the state of human health and safety inasmuch as they may be affected by the state of the elements of the environment. As such, the Commissioner is satisfied that the information is environmental information as defined in parts (a), (b), (c) and (f) of the definition in regulation 2(1) of the EIRs.
15. Having concluded that the information is environmental information for the purposes of the EIRs, the Commissioner finds that the SPS correctly dealt with Mr X's request as one seeking environmental information under the EIRs.



Section 39(2) of FOISA – environmental information

16. Section 39(2) of FOISA allows Scottish public authorities to exempt information from disclosure under FOISA if it is environmental information which the authority is obliged to make available to the public in accordance with the EIRs.
17. In this case, the SPS stated in its review response of 31 August 2012, that it was dealing with the request under the EIRs. However, the SPS did not inform Mr X that it was applying the exemption in section 39(2). As noted above, in its submissions to the Commissioner, the SPS stated that it no longer considered the information to be environmental.
18. The Commissioner concludes that the exemption in section 39(2) of FOISA *could* have been applied to this information. If this exemption had been applied by the SPS, this conclusion would have prompted the Commissioner to consider only in terms of the EIRs whether the information had otherwise been properly withheld.
19. As the SPS has chosen not to apply the exemption in section 39(2) of FOISA, the Commissioner has gone on to consider the SPS's handling of the request in terms of both FOISA and the EIRs.

Has all relevant information been identified and retrieved by the SPS?

20. Section 1(1) of FOISA provides that a person who requests information from a Scottish public authority which holds it is entitled to be given that information by the authority. This is subject to certain qualifying provisions which do not apply here. The information to be given is that held by the authority at the time the request is received, as defined in section 1(4). If the authority does not hold any information covered by the request, it is required to give the applicant notice in writing to that effect, under section 17(1) of FOISA.
21. As noted above, the SPS disclosed information to Mr X on 7 February 2013. In its submissions to the Commissioner, the SPS stated that this was all of the information that it held which fell within the scope of Mr X's request.
22. In its submissions, the SPS explained that it had considered the contents of the fire testing specialist's report further and had concluded that the parts of it which fell within the scope of Mr X's request should be disclosed. The SPS stated that this was the only information it held that fell within the scope of the request.
23. The SPS explained that, given the very technical nature of the information sought by Mr X, there were only a limited number of its staff who were able to undertake an effective search for the requested information. The SPS explained that searches had been undertaken by relevant staff; these searches confirmed that the only relevant information held by the SPS was that contained within the fire testing specialist's report that had been disclosed to Mr X.
24. Having considered the SPS's submissions, the Commissioner is satisfied that the SPS has conducted adequate, proportionate searches and has identified and disclosed all the relevant information that it holds to Mr X.



25. The SPS did not provide any submissions justifying its decision to initially withhold the requested information from Mr X. Accordingly, the Commissioner must conclude that by failing initially to disclose the information requested by Mr X, the SPS failed to comply with section 1(1) of FOISA.
26. Similarly, in terms of the EIRs, the Commissioner finds that the SPS breached the EIRs, and particularly regulation 5(1), by initially withholding the information requested by Mr X.

Compliance with timescales

27. In his application to the Commissioner, Mr X expressed dissatisfaction with the time taken by the SPS to respond to his requirement for review and considered that the SPS had not responded timeously in terms of FOISA. Mr X stated that the letter issued by the SPS was undated and had been issued on 31 August 2012.
28. Section 21(1) of FOISA gives Scottish public authorities a maximum of 20 working days following the date of receipt to comply with a requirement for review, subject to certain exceptions which are not relevant in this case. In respect of environmental information, the same timescale is laid down by regulation 16(4) of the EIRs.
29. In this case, Mr X's requirement for review was received by the SPS on 30 July 2012. Therefore, the SPS was required to respond to Mr X no later than 28 August 2013 (this period included the summer bank holiday on 6 August 2012 which was not classed as a "working day" for the purposes of FOISA or the EIRs).
30. The SPS explained that its response had been issued to Mr X on 28 August 2013. The SPS provided the Commissioner with an extract from its FOI Register at the establishment from where the response was issued, confirming that the response had been issued on 28 August 2012.
31. Having considered the information provided by the SPS to support its contention that the response to Mr X's requirement for review was issued timeously, the Commissioner accepts, on the balance of probabilities, that the SPS complied with the timescales laid down in section 21(1) of FOISA and regulation 16(4) of the EIRs in responding to Mr X's requirement for review.



DECISION

The Commissioner finds that, in respect of the matters raised in the application, the Scottish Prison Service (the SPS) partially failed to comply with Part 1 of the Freedom of Information (Scotland) Act 2002 (FOISA) and the Environmental Information (Scotland) Regulations 2004 (the EIRs) in responding to the information request made by Mr X.

The Commissioner finds that the SPS dealt with Mr X's requirement for review within the timescale laid down in section 21(1) of FOISA and regulation 16(4) of the EIRs.

The Commissioner finds that, by failing initially to disclose the information sought by Mr X, the SPS failed to comply with section 1(1) of FOISA and regulation 5(1) of the EIRs.

As the information has now been provided to Mr X, the Commissioner does not require the SPS to take any action in relation to these failures.

Appeal

Should either Mr X 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.

Margaret Keyse
Head of Enforcement
13 May 2013



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.
- ...
- (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.
- ...

21 Review by Scottish public authority

- (1) Subject to subsection (2), a Scottish public authority receiving a requirement for review must (unless that requirement is withdrawn or is as mentioned in subsection (8)) comply promptly; and in any event by not later than the twentieth working day after receipt by it of the requirement.
- ...

The Environmental Information (Scotland) Regulations 2004

2 Interpretation

- (1) In these Regulations –
- ...
- "environmental information" has the same meaning as in Article 2(1) of the Directive, namely any information in written, visual, aural, electronic or any other material form on –
- (a) the state of the elements of the environment, such as air and atmosphere, water, soil, land, landscape and natural sites including wetlands, coastal and marine areas, biological diversity and its components, including genetically modified organisms, and the interaction among these elements;



- (b) factors, such as substances, energy, noise, radiation or waste, including radioactive waste, emissions, discharges and other releases into the environment, affecting or likely to affect the elements of the environment referred to in paragraph (a);
- (c) measures (including administrative measures), such as policies, legislation, plans, programmes, environmental agreements, and activities affecting or likely to affect the elements and factors referred to in paragraphs (a) and (b) as well as measures or activities designed to protect those elements;
- ...
- (f) the state of human health and safety, including the contamination of the food chain, where relevant, conditions of human life, cultural sites and built structures inasmuch as they are or may be affected by the state of the elements of the environment referred to in paragraph (a) or, through those elements, by any of the matters referred to in paragraphs (b) and (c);
- ...

5 Duty to make available environmental information on request

- (1) Subject to paragraph (2), a Scottish public authority that holds environmental information shall make it available when requested to do so by any applicant.
- (2) The duty under paragraph (1)-
 - ...
 - (b) is subject to regulations 6 to 12.
- ...