

# Decision Notice 085/2020

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## Whether request vexatious

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**Applicant: The Applicant**

**Public authority: Scottish Prison Service**

**Case Ref: 201901392**



Scottish Information  
Commissioner

## Summary

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The SPS was asked for information obtained from any third party relating to implementation of equality duties in relation to adjustments in sentence planning and accommodation.

The SPS refused the request on the basis that it was vexatious.

The Commissioner investigated and found that SPS was not obliged to comply with the request on the basis that it was vexatious.

## Relevant statutory provisions

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Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) (General entitlement); 14(1) (Vexatious or repeated requests)

The full text of each of the statutory provisions cited above is reproduced in Appendix 1 to this decision. The Appendix forms part of this decision.

## Background

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1. On 31 December 2018, the Applicant made a request for information to the Scottish Prison Service (the SPS). He requested:

“All information sought and obtained by SPS from any third party (including but not limited to Scottish and UK government agencies and bodies including [Equality and Human Rights Commission] and [Her Majesty’s Prison Service] together with [Autistic Spectrum Disorders (ASD)] expert bodies such as the National Autistic Society, Scottish Autism and the Scottish Autism Services Network) - together with internal consideration thereof relating to:

  - a) Implementation of SPS General Duty under section 149 of the Equality Act 2010; and
  - b) Equality outcomes arising from SPS Specific Duties under the [Equality Act 2010 (Specific Duties) (Scotland) Regulations 2012] both generally and specifically in relation to the provision of adjustments for individuals with an ASD for (i) sentence planning and management including progression to National Top End and Open Estate and rehabilitative programmes: and (ii) accommodation, including guidance for provision of medical markers that has not been provided in accordance with any of the foregoing items in the request for information.”
2. On 2 March 2019, the Applicant sought a review on the basis that the SPS had failed to respond to his request.
3. The SPS initially failed to respond to the request for review.
4. Following an application to the Commissioner, the SPS provided its review response on 6 August 2019. The SPS apologised for its failure to respond, but stated that it considered his request to be vexatious as the content and subject matter within the request was consistent with requests already made and considered as vexatious. The SPS stated that the request was designed to cause disruption or annoyance to the public authority and has the effect, in light of the related correspondence, of harassing the public authority.

5. On 19 August 2019, the Applicant wrote to the Commissioner. The Applicant applied to the Commissioner for a decision in terms of section 47(1) of FOISA. The Applicant stated he was dissatisfied with the outcome of the SPS's review. The Applicant considered that the SPS was applying the term vexatious to him rather than his request.

## Investigation

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6. The application was accepted as valid. The Commissioner confirmed that the Applicant made a request for information to a Scottish public authority and asked the authority to review its response to that request before applying to him for a decision.
7. On 24 September 2019, the SPS was notified in writing that the Applicant had made a valid application and the case was allocated to an investigating officer.
8. Section 49(3)(a) of FOISA requires the Commissioner to give public authorities an opportunity to provide comments on an application. The SPS was invited to comment on this application and to answer specific questions, focusing on its reliance on section 14(1) of FOISA.

## Commissioner's analysis and findings

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9. In coming to a decision on this matter, the Commissioner considered all of the relevant submissions, or parts of submissions, made to him by both the Applicant and the SPS. He is satisfied that no matter of relevance has been overlooked.

### Section 14(1) of FOISA – vexatious request

10. In terms of section 14(1) of FOISA, a Scottish public authority is not obliged to comply with a request for information made under section 1(1) if the request is vexatious.
11. FOISA does not define the word "vexatious". The Commissioner's general interpretation, as set out in the guidance<sup>1</sup> on section 14(1), is that the following factors are relevant when considering whether a request is vexatious:
  - (i) it would impose a significant burden on the public body;
  - (ii) it does not have a serious purpose or value;
  - (iii) it is designed to cause disruption or annoyance to the public authority;
  - (iv) it has the effect of harassing the public authority;
  - (v) it would otherwise, in the opinion of a reasonable person, be considered manifestly unreasonable or disproportionate.
12. This is not an exhaustive list. Depending on the circumstances, other factors may be relevant, provided the impact on the authority can be supported by evidence. The Commissioner recognises that each case must be considered on its merits, taking all the circumstances into account.

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<sup>1</sup> [http://www.itspublicknowledge.info/Law/FOISA-EIRsGuidance/Section14/Vexatious\\_or\\_repeated\\_requests.aspx](http://www.itspublicknowledge.info/Law/FOISA-EIRsGuidance/Section14/Vexatious_or_repeated_requests.aspx)

13. While the Commissioner's view is that "vexatious" must be applied to the request and not the requester, he acknowledges that an applicant's identity, and the history of their dealings with a public authority, may be relevant in considering the nature and effect of a request and its surrounding circumstances. It may be reasonable, for example, for the authority to conclude that a request represents a continuation of a pattern of behaviour it has deemed to be vexatious in another context.
14. On the face of it, the Applicant's request may not appear to be vexatious. It seeks information about a topic which is clearly a matter of personal significance to the Applicant. The Commissioner is aware, however, that the vexatious nature of a request may only emerge after considering the request in context (for example, a history of previous or ongoing correspondence and litigation between the SPS and the Applicant). That context may reveal the request to be disproportionate in its nature and impact.
15. The Commissioner appreciates that the matters raised by the Applicant are important to him and his consideration of his circumstances. However, a request which has value and serious purpose can still be vexatious if it has the effect of harassing the public authority.
16. "Harassing", is not defined in FOISA or the Commissioner's own guidance. The First Tier Tribunal (information Rights) ruling EQ/2011/0224 *Roger Conway and the Information Commissioner*<sup>2</sup> under the equivalent provision in the (UK) Freedom of Information Act 2000 was of the view that "harassing" should be given its ordinary meaning, that is, to disturb persistently, bother continually, pester or persecute. In the Commissioner's view, the question is whether (viewed from the perspective of a reasonable person) the request has the effect of harassing the authority and/or its staff, and whether or not the requester intended it to harass.

#### *Submissions*

17. The Applicant stated specific personal reasons why he considered his request had significant value as relates to his condition and sentence. For those reasons he considered his request to be genuine, reasonable and made in good faith.
18. The Applicant referred to previous litigation with the SPS, where, he said, the SPS had stated it was compliant with its statutory duties and undertook to ensure compliance where it was not. He considered that if the SPS were in compliance with its statutory duties it would have all the information readily to hand. He also stated that he considered that the SPS was applying the term "vexatious" to him rather than his request.
19. The SPS explained that this request was made in the course of another request which resulted in *Decision 135/2019*<sup>3</sup>. The information requested relates directly to information sought in the previous request and, in the SPS's view, cannot fall to be distinguished from that request.
20. The SPS stated that, due to the nature of the request and its subject matter, the SPS considers the request to be vexatious, further illustrating the pattern of behaviour having the effect of harassing the SPS. Therefore, it sought to rely upon the substantive submissions made with regard to *Decision 135/2019*.
21. The SPS acknowledged that the request may not appear to be vexatious; however, it considered the vexatious nature of the request could only be assessed when considered in

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<sup>2</sup> <http://www.informationtribunal.gov.uk/DBFiles/Decision/i690/20120301%20Decision%20EA20110224.pdf>

<sup>3</sup> <http://www.itspubliknowledge.info/uploadedFiles/Decision135-2019.pdf>

the context of the prolonged, ongoing nature of correspondence and legal challenges leading up to and beyond Commissioner's *Decision 197/2012*<sup>4</sup>. The SPS provided considerable submissions in the lead up to that decision and the submissions provided regarding this case focus on the history and dealings with the Applicant since November 2012.

22. The SPS provided detailed submissions regarding ongoing correspondence, legal challenges and complaints over a significant period of years. It submitted that the Applicant had made over 75 requests since the Commissioner's *Decision 197/2012* and at least 30 of those had been in regard to ASDs. Responses had been provided to all of these requests and none had previously been found to be vexatious. The SPS explained that the recognition of a diagnosis for the Applicant was not relevant to its decision to treat the request as vexatious. The SPS submitted that, regardless of any diagnosis, the SPS will seek to support prisoners insofar as is reasonable and their approach to management of all those in custody is to work in a supportive and collaborative way with various professionals to ensure offenders are provided with appropriate opportunity and care as necessary.
23. The SPS stated that the key reason it considered this request to be vexatious was a legal challenge brought by the Applicant in relation to the subject matter of the request. As part of the Court's judgment of December 2017, which was provided to the Commissioner as part of the submissions, it was found that complaints about his treatment under the Equality Act 2010 and the Public Sector Equality Duty (PSED) were irrelevant and incompetent. A number of the findings of the judgment were raised in support of the SPS's reliance on section 14(1). At the conclusion of this legal challenge, the Courts concluded that the action should be dismissed. An appeal was lodged by the Applicant in January 2018.
24. During the process of the court appeal, the Applicant continued to write to the SPS seeking further information on this topic prior to the outcome of the Sheriff Principal's determination. The Applicant's appeal was subsequently dismissed by the Court (the Applicant advises the Commissioner he abandoned the appeal as he could not meet the costs of caution). Subsequent to the dismissal, the Applicant submitted further letters for information which the SPS informed him had been settled by the judgment of the Sheriff Court.
25. The SPS considered that, in light of the legal challenge and its outcome, the Applicant was seeking unreasonable steps by the authority and attempting to give greater weight to a diagnosis as a way to mitigate offending behaviour. It considered that the Applicant's requests were seeking to continue dialogue that it considered had been settled by the court and which, therefore, in light of the circumstances of the challenge and outcome, had the effect of harassing the authority.
26. During the course of the investigation, the Applicant was provided with a summary of the submissions made by the SPS and with an opportunity to provide any further comment or evidence he considered relevant to the investigation.
27. The Applicant reiterated issues previously raised and signposted the investigating officer to a further legal challenge (Petition for Judicial Review) which has now been made. In addition, he did not agree with some of the statements made by the SPS within its submissions in relation to the support provided to prisoners.
28. He also submitted that as it was difficult (in his view) to obtain anything other than the most basic information from SPS unless submitted in writing, accordingly the number of requests

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<sup>4</sup> <http://www.itspublicknowledge.info/ApplicationsandDecisions/Decisions/2012/201201456.aspx>

received would reasonably be disproportionately high compared in comparison with other authorities.

29. The Applicant submitted that the SPS knowingly applied section 14(1) of FOISA with the purpose or intention of evading responsibility and accountability for unlawful acts.

#### *Consideration of request contents and comparison*

30. The SPS adopted and relied on submissions made in relation to *Decision 135/2019*. The SPS highlighted that the current request was made in the course of the requests considered within *Decision 135/2019* and therefore fails to be distinguished from the others.
31. The SPS considered whether a different view could be reached for this request, but concluded that it could not. The SPS stated that this request further illustrated the pattern of behaviour which has the effect of harassing the authority.
32. This case follows on directly from *Decision 135/2019* as it was submitted as part of the review request leading to that decision. The investigating officer for this case undertook a comparison exercise of the original request and the subsequent request submitted as part of the review request in order to consider whether it formed a part of the pattern of behaviour as suggested by the SPS or whether a different conclusion could be reached.
33. The focus of the request is on the SPS's duties under section 149 of the Equality Act 2010 (the public sector equality duty – PSED), equality outcomes arising from that duty and the provision of adjustments for sentence planning, management and accommodation. On consideration of the previous requests, part of the requests included a question on sentence management and section 149 of the Equality Act and PSED:
- use of PSED in decision making
  - SPS awareness of the duty under the PSED
  - evidence SPS give due weight to equality needs
  - evidence of regard to PSED in relation to other bodies
  - specific adjustments for ASD prisoners regarding sentence management
34. The SPS's adherence to the PSED and the Equality Act 2010 were also part of litigation brought by the Applicant and challenged in court. As stated in *Decision 135/2019* and the SPS submissions to the Commissioner, this request appears to be seeking a continuation of the same issue and seeks information previously sought in similar questions to which section 14(1) has been applied. The Commissioner has considered in detail the submissions and arguments presented to him in this case. The Commissioner considered it appropriate to take into account the effect of the request on the public authority, in light of historical factors.
35. The Commissioner considered whether the request had the effect of harassing the SPS when considered from the perspective of a reasonable person, even if the Applicant did not intend to cause inconvenience or stress to the SPS. The Commissioner is required to take into account the extent to which a request is likely to cause a disproportionate or unjustified level of disruption, irritation or stress, even when, on the face of it, the request may not appear to be vexatious.
36. In this case, the Commissioner noted the long term and ongoing correspondence and legal processes in the Applicant's interactions with the SPS on this specific topic.

37. The Commissioner is aware of the nature of the requests from the Applicant and the reasons expressed by the Applicant as to why the information has been requested but it is apparent that the Applicant's persistence on this issue is likely to cause considerable disturbance, stress and distraction from the SPS core duties.
38. The Commissioner is satisfied that the evidence provided for this case demonstrates that the Applicant is seeking a continuance of correspondence and legal proceedings on the same subject matter going back to at least 2012.
39. Therefore, the Commissioner accepts that it would be reasonable in the circumstances for the SPS to conclude that the information request was being used by the Applicant primarily to pursue previously contested issues and finds that, under section 14(1) of FOISA, the SPS was not obliged to comply with the Applicant's request on the basis that it was vexatious.

## **Decision**

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The Commissioner finds that Scottish Prison Service complied with Part 1 of the Freedom of Information (Scotland) Act 2002 in responding to the information request made by the Applicant.

## **Appeal**

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Should either the Applicant or SPS wish to appeal against this decision, they have the right to 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**

**14 July 2020**

## Appendix 1: Relevant statutory provisions

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### 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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#### 14 Vexatious or repeated requests

- (1) Section 1(1) does not oblige a Scottish public authority to comply with a request for information if the request is vexatious.

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