



Scottish Information
Commissioner

**Decision 147/2007 Mr Stuart Nicolson of the
Scottish Daily Mail and the Scottish Prison Service**

*Request for copies of correspondence relating to a named person
exchanged between the Scottish Prison Service (SPS) and the UK
and US Governments.*

**Applicant: Mr Stuart Nicolson of the Scottish Daily Mail
Authority: Scottish Prison Service
Case No: 200700297
Decision Date: 22 August 2007**

**Kevin Dunion
Scottish Information Commissioner**

Kinburn Castle
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Decision 147/2007 Mr Stuart Nicolson of the Scottish Daily Mail and the Scottish Prison Service

Request for copies of correspondence relating to a named person exchanged between the Scottish Prison Service (SPS) and the UK Government and the SPS and the US Government – Commissioner found that information requested was not held but identified technical breaches of Part 1 of FOISA.

Relevant Statutory Provisions and Other Sources

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) (General entitlement); 10(1) (Time for compliance); 17(1) (Notice that information is not held); 20(1) (Review by Scottish public authority).

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

Facts

Mr Stuart Nicolson, the Scottish Political Editor of the Scottish Daily Mail, requested copies of all correspondence relating to a named person that was exchanged between the Scottish Prison Service (SPS) and the UK Government and the SPS and the US Authorities. The SPS responded by informing Mr Nicolson that it considered the sought information to be exempt from disclosure in terms of section 32, 35 and 38 of the Freedom of Information (Scotland) Act 2002 (FOISA). Mr Nicolson was not satisfied with this response and asked the SPS to review its decision. The SPS carried out a review and upheld its original decision to withhold the information. Mr Nicolson remained dissatisfied and applied to the Commissioner for a decision.

In the course of the investigation, the SPS submitted that it did not, in fact, hold any information falling under the scope of Mr Nicolson's request. The Commissioner subsequently found that the SPS had breached several procedural requirements of FOISA in responding to Mr Nicolson's request for information. However, the Commissioner was satisfied that the SPS did not hold the information sought by Mr Nicolson. The Commissioner required the SPS to review its procedures for handling information requests in the light of the failings identified in this decision.



Background

1. On 6 July 2006, Mr Nicolson emailed the SPS requesting copies of all correspondence it held in relation to Abdelbaset Ali Mohamed Al Megrahi, the individual convicted of murder following the Lockerbie bombing (who will be referred to as “the prisoner” in what follows).
2. On 15 August 2006, the SPS responded to Mr Nicolson informing him that it was unable to provide him with the information requested as the projected costs of doing so exceeded the £600 prescribed limit set out in the Freedom of Information (Fees for Required Disclosure) (Scotland) Regulations 2004. Mr Nicolson was advised to contact the SPS if he wished to refine his information request, thus bringing it within the £600 cost ceiling.
3. On 16 August 2006, Mr Nicolson contacted the SPS requesting the following information:

“copies of all correspondence relating to [the prisoner] between the SPS and the UK Government and between the SPS and the US authorities”
4. The SPS emailed Mr Nicolson on 4 October 2006, apologising for the delay and providing him with a response to his information request. In this response it submitted that the information Mr Nicolson sought was exempt from disclosure in terms of section 32, section 35 and section 38 of FOISA. However, I note that this refusal notice contained no reference to the SPS’s consideration of the public interest
5. On 10 October 2006, Mr Nicolson wrote to the SPS requesting a review of its decision. In particular, Mr Nicolson disagreed with the SPS’s application of the exemption in section 32 (International relations). He also pointed out that FOISA requires a public authority to consider the competing public interests both for and against disclosure and that where these competing interests are evenly balanced, the presumption should always be in favour of disclosure. Mr Nicolson asserted that the public interest in the indictment, conviction and imprisonment of the prisoner is high and therefore the competing interests must be considered to be at least evenly balanced.
6. The SPS wrote to Mr Nicolson on 22 February 2007, apologising for the delay and notifying him of the outcome of a review of his request. The SPS upheld its original decision that the exemptions contained in sections 32, 35 and 38 of FOISA applied, and provided some clarification on the reasons for the application of these exemptions. However, the SPS again failed to state why it had concluded that the public interest in maintaining the exemptions in sections 32 and 35 outweighed the public interest in the disclosure of the information.



7. On 27 February 2007, Mr Nicolson wrote to my office, stating that he was dissatisfied with the outcome of the SPS's review and applying to me for a decision in terms of section 47(1) of FOISA.
8. The application was validated by establishing that Mr Nicolson had made a request for information to a Scottish public authority and had applied to me for a decision only after asking the authority to review its response to that request.
9. On 9 March 2007, a letter was sent to Mr Nicolson advising him that a full investigation into his case would now take place.
10. On 9 March 2007, a letter was also sent to the SPS giving notice that an application had been received and that an investigation into the matter had begun, and inviting comments from the SPS as required under section 49(3)(a) of FOISA. The SPS was asked to supply my Office with, amongst other items, copies of all the information withheld from the applicant, along with details of all exemptions applied to the withheld information. The case was then allocated to an investigating officer.

The Investigation

11. The SPS responded in full on 30 March 2007.

Submissions from the SPS

12. In its response, the SPS withdrew its earlier reliance on the exemptions contained in section 32, section 35 and section 38 of FOISA and instead gave notice in terms of section 17(1) of FOISA that it did not hold the information sought by Mr Nicolson.
13. The SPS submitted that on being notified of Mr Nicolson's application to the Commissioner, it had conducted a thorough review of all the correspondence it held in relation to the prisoner. The results of this review established that the SPS did not actually hold any correspondence relating to the prisoner between the SPS and either of the UK or US administrations.
14. The SPS accepted that its earlier handling of Mr Nicolson's request had been inaccurate. The SPS submitted that it had misapplied the exemptions in section 32, 35 and 38 of FOISA when responding to Mr Nicolson's information request.



The Commissioner's Analysis and Findings

15. In coming to a decision on this matter, I have considered all of the information and the submissions that have been presented to me by both Mr Nicolson and the SPS and I am satisfied that no matter of relevance has been overlooked.

Whether the information requested by Mr Nicolson was held by the SPS

16. Mr Nicolson requested copies of all correspondence exchanged between the SPS and the UK or US governments in relation to the prisoner.
17. In its submissions to my Office, the SPS gave notice in terms of section 17(1) of FOISA that it did not, in fact, hold the information sought by Mr Nicolson. The SPS maintained that it had incorrectly identified material as being within the scope of the request and had therefore, misapplied the exemptions in section 32, 35 and 38 of FOISA. The SPS apologised for its initial handling of Mr Nicolson's request.
18. In support of its submission that no relevant information was actually held, the SPS provided me with details of the searches it had undertaken in order to determine whether it held the requested information. The SPS submitted that it had manually searched through 16 relevant paper files in order to locate any correspondence exchanged between itself and either the US or UK authorities (in relation to the prisoner) and it was unable to identify any material of relevance in any of the files.
19. Additionally, the SPS informed me that it held no electronic records that were relevant to the request, and that searches of its email systems had failed to identify any documents falling within the scope of Mr Nicolson's request.
20. In response to a question raised by the investigating officer, the SPS also advised me that it is not normal practice for the SPS to communicate or liaise directly with either the UK or US governments.
21. After considering the submissions the SPS has provided, I am satisfied that the SPS does not hold any information that would fall within the scope of Mr Nicolson's information request.
22. In these circumstances, the appropriate response to Mr Nicolson's request would have been to issue a notice in terms of section 17 of FOISA to advise him that no relevant information was held. Instead, the SPS issued a refusal notice under the terms of section 16 of FOISA claiming that relevant information was held, but this was exempt from disclosure under the terms of exemptions contained in Part 2 of FOISA. The SPS failed to identify and rectify this error when reviewing its handling of the request.



23. I therefore find that the SPS failed to comply with the requirements of section 17 when responding to Mr Nicolson's request for information.
24. The SPS has provided no further explanation of how this oversight occurred, and while I am satisfied that the SPS do not hold the information sought by Mr Nicolson, I find it worrying that neither its initial response nor its review identified this fact.

Timescales for responses

25. I also wish to note two further technical failings that I have identified in the SPS's handling of Mr Nicolson's request for information.
26. Firstly, section 10(1) of FOISA obliges Scottish public authorities to respond to information requests promptly and no later than the 20th working days following their receipt. Where clarification is sought, as in this case, this period starts from the date of the receipt of the clarification. As noted above, the SPS did not respond to Mr Nicolson's clarified request of 16 August 2006 until 4 October 2006, some 35 working days following its receipt.
27. In this respect, I find that the time taken by the SPS to respond to Mr Nicolson's request was significantly in breach of section 10(1) of FOISA.
28. Secondly, section 21(1) of FOISA obliges Scottish public authorities to respond to a request for review, again promptly, and no later than the 20th working day after its receipt. As noted above, Mr Nicolson submitted his request for review on 10 October 2006, and did not receive a response from the SPS until 22 February 2007, some 96 working days following the receipt of his request for review.
29. I therefore find that the SPS's response to Mr Nicolson's request for review was significantly in breach of section 21(1) of FOISA.

Steps required in response to this decision

30. In this case, I have been disappointed to note that the SPS has breached a number of technical provisions of FOISA. Although it actually held no information that was relevant to the request made by Mr Nicolson, it caused him considerable inconvenience by failing to reply within the timescales required by FOISA. When it did respond, the SPS provided responses which were highly misleading, giving the impression that information was held when actually it was not.
31. Had the SPS correctly identified that no relevant information was held when first receiving Mr Nicolson's request, it is likely that this matter would have been closed some time ago, possibly without the need for any investigation and decision from my office. As a result, I am particularly concerned by the procedural failings that have been identified above.



32. In light of this, I require that the SPS review its internal procedures for handling information requests to identify how the failings identified in this case occurred and might be avoided in future. I require the SPS to advise me of the outcome of this review and any changes to its procedures made as a result within 6 months of the receipt of this decision.

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 requested by Mr Nicolson was not held by the SPS.

However, I have found that the SPS acted in breach of Part 1 of FOISA by failing to notify Mr Nicolson in terms of section 17 that it did not hold any information that fell within the scope of his request.

I also find that the SPS did not deal with Mr Nicolson's request for information in accordance with the requirements of Part 1 of FOISA in that the SPS failed to:

- a) respond to Mr Nicolson's information request within the timescale required by section 10(1); and
- b) respond to Mr Nicolson's request for review within the timescale required by section 21(1).

I require the SPS to review its procedures for handling information requests and report back to me on this review within 6 months of the receipt of this decision, as set out in paragraph 32 above.



Appeal

Should either Mr Nicolson 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 of receipt of this decision notice.

Kevin Dunion
Scottish Information Commissioner
22 August 2007



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.

...

- (3) If the authority –
- (a) requires further information in order to identify and locate the requested information; and
 - (b) has told the applicant so (specifying what the requirement for further information is),

then provided that the requirement is reasonable, the authority is not obliged to give the requested information until it has the further information.

10. Time for compliance

- (1) Subject to subsections (2) and (3), a Scottish public authority receiving a request which requires it to comply with section 1(1) must comply promptly; and in any event by not later than the twentieth working day after-
- (a) in a case other than that mentioned in paragraph (b), the receipt by the authority of the request; or
 - (b) in a case where section 1(3) applies, the receipt by it of the further information.

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.

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.