

# Decision Notice



Decision 172/2012 Mr H and the Scottish Prison Service

Operating Standards

Reference No: 201201198

Decision Date: 19 October 2012

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**Rosemary Agnew**

Scottish Information Commissioner

Kinburn Castle  
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## Summary

Mr H asked the Scottish Prison Service (SPS) for a copy of the SPS Operating Standards. The SPS advised Mr H that it did not hold this information. However, during the investigation, the SPS identified and disclosed information falling within scope of Mr H's request.

The Commissioner found that the SPS had breached Part 1 of FOISA by failing to provide the information it held and by failing to provide reasonable advice and assistance to Mr H. As these matters were addressed during the investigation, the Commissioner did not require the SPS to take further action.

## Relevant statutory provisions

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Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) and (4) (General entitlement); 15(1) (Duty to provide advice and assistance); 17(1) (Notice that information is not held); 21(1) and (4) (Review by Scottish public authority)

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. On 19 April 2012, Mr H asked the SPS for a copy of its "Operating Standards".
2. The SPS responded on 11 May 2012. It advised Mr H that it did not hold the requested information because the SPS Operating Standards were decommissioned in 2008 and the information destroyed, in accordance with its standard records management practice.
3. On 14 May 2012, Mr H wrote to the SPS requesting a review of its response. He drew its attention to information he had previously received which indicated that the Operating Standards were now known as "standards of assurance".
4. The SPS notified Mr H of the outcome of its review on 6 June 2012. It upheld its previous decision without amendment and advised Mr H that the "standards of assurance" were not "SPS Operating Standards".



5. On 14 June 2012, Mr H 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.
6. The application was validated by establishing that Mr H 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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7. The SPS is an agency of the Scottish Ministers (the Ministers) and, in line with agreed procedures, the Ministers were notified in writing that an application had been received from Mr H and invited to comment on the application. 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 (FOI) Unit on behalf of the SPS.
8. The investigating officer contacted the SPS on 28 June 2012, 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 provide details of the searches it had undertaken to determine whether it held any information falling within the scope of the request. The SPS was asked whether the Operating Standards had been replaced by any other information, and attention was drawn to the fact that job advertisements for the SPS had recently made reference to the Operating Standards.
9. The SPS responded to the investigating officer's questions and provided a copy of a Governors and Managers Action (GMA) Note which documented that the SPS Operating Standards were decommissioned in November 2008. The SPS explained that the Operating Standards had been replaced by a set of standards of assurance found in the "Prison Resource Library" (PRL), a single repository for key prisons information and policies. The SPS later retrieved a document which correlated the former Operating Standards with the relevant PRL reference.
10. The SPS disclosed a copy of the PRL to Mr H on 19 July 2012 and agreed that the investigating officer could disclose the GMA and correlation list to Mr H.
11. The relevant submissions received from both the SPS and Mr H will be considered fully in the Commissioner's analysis and findings below.



## Commissioner's analysis and findings

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

### Interpretation of request and information under consideration

13. Mr H's request dated 19 April 2012 sought a copy of the SPS "Operating Standards"; however, the SPS advised Mr H that the Operating Standards had been decommissioned and so no information was held.
14. The SPS explained that the Operating Standards were a discrete set of standards contained in a single document. However, these standards were old and did not reflect the standards by which a modern prison service should be assessed. They had been subsumed or replaced with a set of "fit for purpose" standards of assurance which were now used to audit compliance and assess assurance. The new standards of assurance fulfil a similar function to the Operating Standards and are contained in the PRL (described in paragraph 9 above).
15. The SPS commented that the term "Operating Standards" is a colloquial term which continues to be used by the SPS to describe the standards of assurance now in place.
16. The SPS commented that the term "Operating Standards" was understood by many to refer to a single document of standards (i.e. the Operating Standards which had been decommissioned), and Mr H's request had been interpreted as a request for this particular document. The SPS advised that it had undertaken a search for this document and had established that it was not held, and had given notice of this to Mr H, as required by section 17(1) of FOISA.
17. The SPS considered that its narrow interpretation of the request was reasonable, given the context provided by previous correspondence with Mr H. The SPS accepted that, taking a wider interpretation of the request, the term "Operating Standards" could also describe the set of standards by which the organisation was currently assessed.

### The Commissioner's view

18. In considering Mr H's request, it is clear to the Commissioner that Mr H was seeking information about the set of standards under which the SPS currently operates. The fact that his request for review referred to the standards of assurance which had replaced the previous operating standards should have made this completely clear.



19. The Commissioner notes that the SPS advised Mr H (6 June 2012) that the standards of assurance were not the “SPS Operating Standards”. However, in its submission to the Commissioner, the SPS acknowledged that the term “Operating Standards” is still used, colloquially, to describe the standards of assurance which are now used. It was therefore unreasonable for the SPS to interpret Mr H’s request narrowly as a request for information about standards which had been superseded, without considering whether he might be seeking the information about the standards which had replaced them.
20. The Commissioner also notes that, during the investigation, the SPS discovered it held information about the superseded operating standards which it had previously claimed not to hold (see paragraph 9 above).
21. In considering all the facts in this case the Commissioner has concluded that the SPS was incorrect to advise Mr H, in line with section 17(1) of FOISA, that it did not hold the information he sought. As the SPS did not provide Mr H with the PRL and correlation list until after the investigation commenced, it also failed to comply with section 1(1) of FOISA.

#### **Section 15 – duty to provide advice and assistance**

22. Having concluded that the SPS took an overly narrow interpretation of Mr H’s request, the Commissioner will consider whether this narrow interpretation led the SPS to fail to provide the advice and assistance required by FOISA.
23. Section 15 of FOISA requires a Scottish public authority to provide advice and assistance to a person who proposes to make, or has made, a request for information to it, so far as it is reasonable to expect it do so. An example of the advice and assistance that might be required would be to supply contextual information to assist a requester in understanding the reasons why a particular decision has been reached with respect to their request.
24. In its submissions, the SPS provided this type of contextual information to help explain the way in which it had dealt with Mr H’s request. The Commissioner considers that the SPS could have provided a similarly helpful response to Mr H.
25. Having reached the view that the SPS took an overly narrow interpretation of Mr H’s request and did not advise him what information had replaced the Operating Standards and was still referred to, colloquially, as the Operating Standards, the Commissioner has concluded that the SPS did not provide appropriate advice and assistance to Mr H in line with section 15(1) of FOISA.

#### **Review procedure followed by the SPS**

26. In his application, Mr H commented that the SPS had not conducted a review in line with the requirements of FOISA as the review was not undertaken by someone from the SPS Headquarters, which would have ensured a completely independent review process.



27. FOISA is not prescriptive about the manner in which public authorities conduct reviews. Section 21(1) simply states that on receipt of a requirement for review a public authority should (barring other considerations that are not relevant in the circumstances of this case) comply with that requirement promptly and in any event by not later than the twentieth working day after its receipt.
28. Section 21(4) of FOISA states that, on receipt of a requirement for review, an authority may do the following in respect of the information request to which it relates:
  - a. confirm a decision complained of, with or without such modifications as it considers appropriate;
  - b. substitute for any such decision a different decision; or
  - c. reach a decision, where the complaint is that no decision had been reached.
29. Paragraph 5.4 of the Scottish Ministers' Code of Practice on the discharge of functions by Scottish public authorities under FOISA and the Environmental Information (Scotland) Regulations 2004<sup>1</sup> (the Section 60 Code) states that any review of an authority's original decision in regard to a request for information should generally be handled by staff who were not involved in the original decision. The Commissioner regards this to be good practice which ensures that the review process is carried out impartially and fairly by an independent person within the public authority.
30. In its submissions, the SPS commented that the review was conducted by an individual not involved in the original decision; its practice in all prisons is that a member of staff from that prison conducts a review. The SPS considered that its review was carried out in accordance with the Section 60 Code.
31. The Commissioner is satisfied that the SPS's review of its response to Mr H's request met the requirements of section 21 of FOISA and was in line with good practice as described in paragraph 5.4 of the Section 60 Code.

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<sup>1</sup> <http://www.scotland.gov.uk/Resource/Doc/933/0109425.pdf>



## DECISION

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

The Commissioner finds that the SPS incorrectly notified Mr H, in line with section 17(1) of FOISA, that it did not hold the information requested, and also failed to provide appropriate advice and assistance in line with section 15 of FOISA. As the SPS did not disclose the information falling within scope when responding to the request or request for review, it also failed to comply with section 1(1).

Given that the SPS disclosed the relevant information during the investigation, the Commissioner does not require the SPS to take any action in response to these failures.

## Appeal

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Should either Mr H 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**  
**19 October 2012**





## 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.
- ...
- (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.
- ...

##### 15 Duty to provide advice and assistance

- (1) A Scottish public authority must, so far as it is reasonable to expect it to do so, provide advice and assistance to a person who proposes to make, or has made, a request for information to it.
- ...

##### 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 the receipt by it of the requirement.

...

- (4) The authority may, as respects the request for information to which the requirement relates –
- (a) confirm a decision complained of, with or without such modification as it considers appropriate;
  - (b) substitute for any such decision a different decision; or
  - (c) reach a decision, where the complaint is that no decision has been reached.

...