

Decision Notice



Decision 045/2013 Mr Q and the Scottish Prison Service

Good Lives programme materials

Reference No: 201201758
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www.itspublicknowledge.info

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Scottish Information Commissioner

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Summary

On 1 June 2012, Mr Q asked the Scottish Prison Service (SPS) for various pieces of information about the Good Lives (Sex Offender) programme. The SPS withheld some of the information. It also notified Mr Q that it did not hold some information.

Following an investigation, the Commissioner agreed that much of the requested information was exempt from disclosure under section 30(c) of FOISA (Prejudice to effective conduct of public affairs). She also found that the SPS had correctly notified Mr Q that it did not hold some of the information he had asked for.

However, the Commissioner also found that some information had been wrongly withheld, and required the SPS to provide this information to Mr Q.

Relevant statutory provisions

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1), (4) and (6) (General entitlement); 2(1)(b) (Effect of exemptions); 17(1) (Notice that information is not held); 30(c) (Prejudice to the effective conduct of public affairs); 33(1)(b) (Commercial interests and the economy)

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 1 June 2012, Mr Q wrote to the SPS with the following request for information relating to the Good Lives programme:
 - a) I request information (to a similar degree or value) to the information provided in the CORE SOTP and Rolling STOP accreditation submission. This includes documents/booklets etc. on Theory Manual; Treatment Manual; Participant Handout Pack; Managers Manual; Psychometric Assessment Battery Manual; etc.
 - b) I also request information on the “dynamic risk factors based on Stable 2007” and how they might differ from the dynamic risk factors identified in the Core SOTP Structured Assessment of Risk and Need.



2. The SPS responded on 1 July 2012. In its response to request a), the SPS notified Mr Q that there was no “Participant Handout Pack” for the Good Lives Programme, and withheld the remaining information on the basis that it was exempt from disclosure in terms of section 30(c) of FOISA. In response to request b), the SPS provided Mr Q with information regarding the dynamic risk factors he had asked for.
3. On 21 July 2012, Mr Q wrote to the SPS requesting a review of its decision. Mr Q queried the SPS’s reliance on the exemption contained in section 30(c) of FOISA, and argued that he should be provided with all of the information he had requested. Mr Q expressed no dissatisfaction with the SPS’s response to request b), and it has not been considered further in this decision.
4. The SPS notified Mr Q of the outcome of its review on 16 August 2012. In this letter, the SPS maintained its previous decision not to disclose any of the Good Lives programme materials, arguing that the information was exempt in terms of section 30(c) of FOISA. The SPS reiterated that there was no Participant Handout Pack for the Good Lives programme.
5. On 14 September 2012, Mr Q wrote to the Commissioner, stating that he was dissatisfied with the outcome of the SPS’ 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 Q 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. The SPS is an agency of the Scottish Ministers (the Ministers) and, on 20 September 2012, in line with agreed procedures, the Ministers were notified in writing that an application had been received from Mr Q and were asked to provide the Commissioner with the information withheld from him. The Ministers responded with the information requested and the case was then allocated to an investigating officer. Subsequent references to contact with or submissions from the SPS are therefore references to contact with or submissions made by the Ministers on behalf of the SPS.
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 the exemption contained in section 30(c) of FOISA and was also asked for details of any searches it had undertaken to determine that it did not hold a Participant Handout Pack for the Good Lives programme.



9. In its response, the SPS provided submissions regarding its application of sections 17(1) and 30(c) of FOISA, and argued that the Assessment and Evaluation Manual, the Training Manual and the Treatment Manual (which the SPS also refer to as the Programme Manual) were also exempt from disclosure in terms of section 33(1)(b) of FOISA.

Commissioner's analysis and findings

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

Withheld information

11. The information withheld from Mr Q in this case is the Good Lives Assessment and Evaluation Manual, the Treatment Manual and the Training Manual. The Commissioner notes that information on psychometric testing (also requested by Mr Q) is contained within the Assessment and Evaluation Manual.

Section 17(1) – Information not held

12. In terms of section 1(4) of FOISA, the information to be provided in response to a request made under section 1(1) is, subject to limited provisions which are not relevant here, that held at the time the request is received.
13. Where a Scottish public authority receives a request for information that it does not hold, it must, in line with section 17(1) of FOISA, notify the applicant that it does not hold the information.
14. In order to determine whether the SPS dealt with Mr Q's request correctly, the Commissioner must be satisfied as to whether, at the time it received Mr Q's request, it held any information covered by his request for the Participant Handout Pack for the Good Lives programme.
15. In its submissions, the SPS explained that the person who carried out the review of Mr Q's request was the individual with policy responsibility for the Good Lives programme. The SPS argued that it was not necessary to undertake any searches to establish whether a Participant Handout Pack was held, as the reviewer was the person responsible for the programme and, as such, was the person who would have been responsible for producing such a pack, if this had happened. The SPS noted that it is possible that a pack may be developed in the future, but the Good Lives programme had only recently commenced, and no need for a participant pack had been identified.
16. The Commissioner has considered the submissions provided by the SPS and is satisfied that the SPS was correct to notify Mr Q that it does not hold a Participant Handout Pack for the Good Lives programme.



Section 30(c) – Prejudice to effective conduct of public affairs

17. Section 30(c) of FOISA exempts information if its disclosure "would otherwise prejudice substantially, or be likely to prejudice substantially, the effective conduct of public affairs". The use of the word "otherwise" distinguishes the harm required from that envisaged by the exemptions in section 30(a) and (b). This is a broad exemption and the Commissioner expects any public authority citing it to show what specific harm would (or would be likely to) be caused to the conduct of public affairs by release of the information, and how that harm would be expected to follow from release.
18. Section 30(c) applies where the harm caused, or likely to be caused, by disclosure is at the level of substantial prejudice. There is no definition in FOISA of what is deemed to be substantial prejudice, but the Commissioner considers the harm in question would require to be of real and demonstrable significance. The authority must also be able to satisfy the Commissioner that the harm would, or would be likely to, occur and therefore needs to establish a real risk or likelihood of actual harm occurring as a consequence of disclosure at some time in the near (certainly the foreseeable) future, not simply that the harm is a remote possibility.
19. The SPS has maintained that all of the withheld information is exempt from disclosure in terms of section 30(c) of FOISA, on the basis that its release could lead to an increase in risk to the public through further offending by serious sexual offenders. The SPS explained that the Assessment and Evaluation Manual is used to measure the participants' progress in the Good Lives Programme, and that it contains the key answers that facilitators are looking for when determining whether a participant has sufficiently "learned and changed" following participation in the programme. The SPS argued that, if this document was disclosed, it would enable a participant to rehearse and manipulate their participation in the programme, thus invalidating the programme and the ensuing risk assessments.
20. The SPS argued that the Training Manual is exempt from disclosure under section 30(c) of FOISA for the same reasons given above, but, in addition, the Training Manual is provided for only those individuals who are suitably qualified or experienced in delivering sex offender treatment programmes. There is a risk that other individuals obtaining such information might consider themselves to be equipped to deliver sex offender treatment programmes when this is clearly not the case. The SPS stated that only trainers who have the competence, knowledge and skills in this area can train others.
21. The SPS submitted that the Treatment Manual is also exempt from disclosure for the same reasons as those specified for the Assessment and Evaluation Manual and the Training Manual. In addition, the SPS argued that all three documents are "works in progress" and not yet complete, as learning from the programmes will feed into the development of these documents. The SPS noted that all three documents are also likely to change following application for accreditation of the programme.
22. In his application to the Commissioner, Mr Q disputed the SPS's assertions that disclosure of the withheld information would invalidate the Good Lives programme and that such invalidation would prejudice substantially the effective conduct of public affairs.



23. Mr Q argued that information is essential to facilitate informed consent, and that consent is vital to any treatment, no matter its nature. Mr Q submitted that it is recognised that informed consent should be to the level of understanding of the individual to ensure that that person knows what the treatment entails, and that this enables the treatment to be most effective. In such a state, the participant and therapist are agreed on the goals and the means to achieve them. Mr Q argued that greater participation empowers the individual to take responsibility for his motivation and promotes better effort to ensure the treatment succeeds.
24. Mr Q noted that he had recently attended a Core Sex Offenders Treatment Programme (SOTP). Having obtained the accreditation document for that programme, he was better able to understand what the treatment goals were and how to achieve them. Mr Q argued that a similar situation exists now with regard to the Good Lives programme and that, having been given information from some of the manuals, he is able to understand his own goals, responsibilities and accountabilities, and is also aware of the course providers' responsibilities. Mr Q has argued that he needs as much information about the Good Lives programme as possible to ensure that he gives and gets the best out of the available treatment.
25. Mr Q felt that the SPS's initial response to his request had not fully addressed his concerns regarding psychometric testing (his concerns arise from his hypothesis that psychometric testing is of dubious value and so wants to see what tests will be used in order to check whether his hypothesis is correct or not). He argued that the SPS had not explained why prior knowledge of the specific content of the tests and their objectives would invalidate the tests.
26. Having carefully considered the withheld information and the arguments laid before her by both the SPS and Mr Q, the Commissioner is satisfied that much of the information requested by Mr Q could enable sex offenders to "skew" their answers to questions posed to them throughout the course. She accepts that this could seriously hamper the ability of the trainers in determining whether or not learning has occurred, or whether the participant is simply saying what they believe to be the answer with the best chance of getting them a low risk assessment. The Commissioner considers that if the SPS cannot trust the programme to help them assess risk and the likelihood of re-offending, then essentially the Good Lives programme will be invalidated and will no longer be fit for purpose.
27. Furthermore, the Commissioner accepts that if an offender managed to "dupe" the trainers running the Good Lives programme by giving rehearsed answers, then it would be likely to result in an increased risk to the public through further offending by serious sexual offenders. If the Good Lives programme was invalidated and sex offenders were released without an accurate assessment of their likelihood of reoffending, the Commissioner considers that this would, or would be likely to, prejudice the effective conduct of public affairs.
28. The Commissioner notes Mr Q's concerns regarding the SPS's apparent lack of explanation as to why disclosure of the psychometric tests would enable participants to skew their answers. However, the Commissioner notes that the SPS explained to Mr Q that the measures included in the Assessment and Evaluation Manual are standardised for use with the sex offender treatment programmes and should not be released into the public domain, as prior knowledge of the specific content of tests and their objectives would invalidate them. The Commissioner considers this to be a reasonable explanation.



29. Additionally, in its submission to the Commissioner, the SPS argued that if Mr Q is trying to seek evidence of the efficacy or reliability of psychometric testing, access to the manuals is not a legitimate or reasonable approach. Instead, he should refer to independent literature on such matters. The SPS submitted that, in its view, psychometric testing is instrumental and, even if Mr Q's hypothesis was substantiated, these are matters for the SPS to consider and address. Again, the Commissioner considers the SPS's views on this matter to be reasonable.
30. However, while the Commissioner is satisfied that the exemption contained in section 30(c) of FOISA applies to much of the withheld information, she notes that pages 9-13 of the Assessment and Evaluation Manual does not appear to be information to which the exemption is applicable. These five pages contain consent forms to be read and signed by each course participant as they progress through the programme. The Commissioner does not accept that significant harm could be caused by disclosure of this information.
31. The Commissioner upholds the application of section 30(c) of FOISA to all of the withheld information with the exception of pages 9-13 of the Assessment and Evaluation Manual.

Public interest test

32. The exemption in section 30(c) is subject to the public interest test in section 2(1)(b) of FOISA, and so the Commissioner must consider whether, in all the circumstances of the case, the public interest in disclosing the information found to fall under that exemption outweighs that in maintaining the exemption. If it does, the Commissioner must require the SPS to disclose the information.
33. With regard to the public interest test, the SPS acknowledged that disclosure of the withheld information would increase public understanding in the delivery of programmes and the assessment of those convicted of serious sexual offending. However, against this, the SPS argued that disclosure would enable individuals to manipulate the outcome of their participation in sex offending programmes, undermining the assessment of the risk they posed, which would consequently put public safety at risk. On balance, the SPS concluded that disclosure would not be in the public interest.



34. The SPS also referred to submissions it had made in relation to *Decision 169/2010 Mr N and the Scottish Prison Service*¹, and the conclusions reached by the Commissioner in that decision. In that case, the Commissioner accepted that the successful operation of sex offender treatment programmes plays a significant part in reducing crimes of this nature, by making it less likely that a high risk offender will be wrongly assessed as posing a low risk of re-offending and therefore be considered for release. The Commissioner shared the SPS's view that in order for the risk of re-offending and potential response to treatment to be properly assessed, it is essential that offenders are not given access to information which would allow them to manipulate the results of the assessment or participation in the programme. The Commissioner had concluded (in *Decision 169/2010*) that while there may be a countervailing public interest in increasing public understanding in this field, it was outweighed by the strong public interest identified in maintaining the exemption.
35. Mr Q has argued that it is in both his and the general public's interest that he is provided with as much information about the Good Lives programme as possible, so that he can get the best out of the treatment available to him. Mr Q maintained that disclosure of the withheld information could in no way be said to substantially prejudice the effective conduct of public affairs. Mr Q disagreed with the SPS's view that disclosure would invalidate the Good Lives programme and would not be in the public interest, arguing instead that denying an individual access to the withheld information would invalidate the programme for that individual, and that having an individual not properly treated is not in the public interest.
36. The Commissioner has considered all of the submissions made by both parties. She has also considered the submissions and the arguments presented in relation to *Decision 169/2010*, and while she acknowledges that the arguments in that case were presented in support of a different exemption, and the Commissioner's conclusions related to different information, she accepts that the arguments and conclusions from that case are relevant to the case currently under consideration.
37. The Commissioner notes the public interest arguments raised by Mr Q, but she does not find them to be persuasive. The Commissioner considers that disclosure of any information that could lead to a serious sex offender "duping" the training programme designed to assess the likelihood of re-offending could not be in the public interest, and she finds that all of the information falling under the exemption in section 30(c) of FOISA should be withheld, as there is an overwhelming public interest in maintaining the exemption.

Section 33(1)(b) – Commercial interests and the economy

38. As indicated earlier, the Commissioner has concluded that all of the withheld information except for pages 9-13 of the Assessment and Evaluation Manual is exempt from disclosure in terms of section 30(c) of FOISA. The Commissioner will now go on to consider the application of the exemption in section 33(1)(b) to pages 9-13 of the Evaluation and Assessment Manual.

¹ <http://www.itspublicknowledge.info/applicationsanddecisions/Decisions/2010/201000525.asp>



39. Section 33(1)(b) of FOISA provides that information is exempt information if its disclosure under FOISA would, or would be likely to, prejudice substantially the commercial interests of any person (including a Scottish public authority). This is a qualified exemption and is therefore subject to the public interest test in section 2(1)(b) of FOISA.
40. There are certain elements which an authority needs to demonstrate are present when relying on this exemption. In particular, it needs to indicate:
 - a) whose commercial interests would (or would be likely to) be harmed by disclosure,
 - b) the nature of those commercial interests and
 - c) how those interests would (or would be likely to) be prejudiced substantially by disclosure.
41. The prejudice must be substantial, in other words of real and demonstrable significance.
42. In its submissions, the SPS noted that it had financed the development of the Good Lives Programme, and argued that disclosure of the Assessment and Evaluation Manual would allow other programme developers access to the programme, thus undermining the SPS's commercial interests.
43. The SPS did not provide any detail on the nature of the commercial interests in question or on how those interests would, or would be likely to be, substantially prejudiced by disclosure of the information in the Assessment and Evaluation Manual. Given the lack of detail provided by the SPS in relation to this point, the Commissioner is not persuaded that the exemption in section 33(1)(b) applies in this case. The SPS has failed to explain why the exemption applies to pages 9-13 of the "Evaluation and Assessment Manual" and to demonstrate the harm to its commercial interests that would be caused by disclosure.
44. In the circumstances, the Commissioner finds that the exemption in section 33(1)(b) does not apply to pages 9-13 of the Evaluation and Assessment Manual. As the exemption does not, the Commissioner is not required to go on to consider the public interest test in relation to this information. She therefore requires the SPS to release pages 9-13 of the Evaluation and Assessment Manual to Mr Q.



DECISION

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

The Commissioner finds that by correctly withholding some information under section 30(c) of FOISA and by giving Mr Q notice, in terms of section 17(1) of FOISA that some information was not held, the SPS complied with Part 1.

However, by misapplying the exemptions contained in sections 30(c) and 33(1)(b) of FOISA to some information the SPS failed to comply completely with Part 1.

The Commissioner therefore requires the SPS to disclose pages 9-13 of the Assessment and Evaluation Manual to Mr Q, by 30 April 2013.

Appeal

Should either Mr Q 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
14 March 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.
- ...
- (6) This section is subject to sections 2, 9, 12 and 14.

2 Effect of exemptions

- (1) To information which is exempt information by virtue of any provision of Part 2, section 1 applies only to the extent that –
- ...
- (b) in all the circumstances of the case, the public interest in disclosing the information is not outweighed by that in maintaining the exemption.
- ...

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.

...

30 Prejudice to effective conduct of public affairs

Information is exempt information if its disclosure under this Act-

...

(c) would otherwise prejudice substantially, or be likely to prejudice substantially, the effective conduct of public affairs.

33 Commercial interests and the economy

(1) Information is exempt information if-

...

(b) its disclosure under this Act would, or would be likely to, prejudice substantially the commercial interests of any person (including, without prejudice to that generality, a Scottish public authority).

...