

Decision Notice



Decision 204/2013 Mr N and the Scottish Prison Service

Whether request was vexatious

Reference No: 201300580

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www.itspublicknowledge.info

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Summary

On 29 November 2012, Mr N asked the Scottish Prison Service (SPS) for information concerning employment, production and performance in relation to the Timber Production Workshed at HMP Glenochil.

Following a review, the SPS informed Mr N that under section 14(2) of FOISA it was not required to comply with his request because it was substantially similar to a previous request it complied with on 9 August 2012.

During the investigation, the SPS informed the Commissioner that it no longer wished to apply section 14(2), but instead considered Mr N's request to be vexatious under section 14(1).

The Commissioner did not accept the SPS's position regarding section 14(1), and required it to provide a response to Mr N otherwise than under section 14(1) of FOISA.

Relevant statutory provisions

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) and (6) (General entitlement) and 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. Both appendices form part of this decision.

Background

1. To understand fully the circumstances of this application, it is necessary to understand the course of events leading up to the point where the SPS informed the Commissioner that it wished to rely on section 14(1) of FOISA (because in its view the request made to them by Mr N on 29 November 2012 was vexatious).
2. Mr N made two requests to the SPS: the first on 18 June 2012, followed by this one on 29 November 2012. These are set out in Appendix 2 to this decision.



3. Mr N made an application to the Commissioner on 12 September 2012 because he was dissatisfied with the SPS's handling of his first request. The SPS had responded to his request but had failed to respond to his request for a review. This failure was the basis of the application to the Commissioner.
4. On 1 November 2012, during the Commissioner's investigation, the SPS responded to Mr N's review request, upholding its original decision: it did not hold some of the information, provided some information and in respect of each of the points 3, 4 and 5 of his request applied section 12 of FOISA (Excessive costs). The review response also advised Mr N to narrow the scope of his request in order to try to bring the costs below the cost threshold. The review response did not offer any advice or assistance on how this might be done.
5. Mr N withdrew his application to the Commissioner and the case was closed with no further action.
6. On 29 November 2012, Mr N made his further request to the SPS. This was one of a number of requests sent to individual prisons. The SPS responded to the majority of this request on 19 December 2012, explaining that information relating to part of the request would be sent out by 21 December 2012.
7. On 20 December 2012, dissatisfied with the response, Mr N requested the SPS to review its decision.
8. On 4 January 2013, Mr N wrote again to the SPS, highlighting that he had not received the information the authority had expected to provide by 21 December 2012. He regarded this as a refusal to provide that information, and requested a review in respect of that part of his request.
9. On 24 January 2013, the SPS notified Mr N of the outcome of its review, informing him that it considered his request to be substantially similar to his request of 18 June 2013, to which it had replied on 9 August 2012. In the circumstances, it considered the request of 29 November 2012 to be a repeated request which fell within the scope of section 14(2) of FOISA: consequently, it was not required to respond to the request.
10. On 22 February 2013, Mr N 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.
11. The application (the subject of this decision) was validated by establishing that Mr N made a request for information to a Scottish public authority and 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.
12. On 3 June 2013, during the Commissioner's investigation, the SPS withdrew its reliance on section 14(2), stating instead that it considered the request to be vexatious under section 14(1).



Investigation

13. The SPS is an agency of the Scottish Ministers (the Ministers) and, in line with agreed procedures, the Ministers were notified in writing (on 15 March 2013) that an application had been received from Mr N and that an investigation into the matter had commenced.
14. The Ministers were also given an opportunity to provide comments on the application (as required by section 49(3)(a) of FOISA) and asked to respond to specific questions focusing on the review outcome of 24 January 2013. The Ministers responded (on behalf of the SPS) on 9 April 2013.
15. In subsequent correspondence, the SPS informed the Commissioner that it considered Mr N's request of 29 November 2012 to be vexatious in terms of section 14(1) of FOISA. It provided further submissions in support of this position, confirming that it no longer sought to rely on section 14(2) of FOISA.
16. Mr N was given the opportunity to comment on the submissions received from the SPS.

Commissioner's analysis and findings

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

Section 14(1) – Vexatious or repeated requests

18. Under section 14(1) of FOISA, a Scottish public authority is not obliged to comply with a request for information if the request is vexatious.
19. FOISA does not define the word “vexatious”. In her guidance¹, the Commissioner considers the following factors to be relevant in reaching the conclusion that a request (which may be the latest in a series of requests or other related correspondence) is vexatious:
 - It would impose a significant burden on the public authority
 - It does not have a serious purpose or value
 - It is designed to cause disruption or annoyance to the public authority
 - It has the effect of harassing the public authority
 - It would otherwise, in the opinion of a reasonable person, be considered manifestly unreasonable or disproportionate.

¹ <http://www.itspublicknowledge.info/uploadedfiles/BriefingSection14VexatiousorRepeatedRequests.pdf>



The Commissioner recognises that (depending on the circumstances) other factors may be relevant.

SPS's submissions

20. While the Commissioner's view is that the term "vexatious" must be applied to the request and not the requester, she acknowledges that the applicant's identity, and the history of their dealings with a public authority, may be relevant in considering the nature and effect of the request and surrounding circumstances.
21. In this case, it is evident from the SPS's submissions that it attaches considerable importance to the context, particularly the background of complaints by Mr N relating to pay, his earlier request for information, the five requests submitted to other prisons at that time and the ongoing consideration of the complaints by the Scottish Public Services Ombudsman (the SPSO).
22. The Commissioner acknowledges that the request of 29 November 2012 seeks substantially similar information to that already requested on 18 June 2012. In particular, she notes that the request of 29 November 2012 is virtually identical to point 5 of the earlier request. Both asked for the same information from HMP Glenochil for time periods that were the same in length, the only difference being the specific dates for which it was requested.
23. The Commissioner recognises that requests in similar terms were also submitted to five other prisons at the same time. Additionally, she acknowledges (as does Mr N) that all of these requests were made in the context of Mr N's complaints to the SPS about prisoners' pay, which remained under consideration by the SPSO.
24. In the circumstances, the Commissioner accepts that it was reasonable for the SPS to take this context into consideration in dealing with Mr N's request. It does not, of course, necessarily follow from the context that the applicant's request was vexatious: the context was merely one consideration to be taken into account.
25. The SPS argued that the request of 29 November 2012;
 - had the aim of imposing an excessive burden on it
 - had the effect of harassing the authority
 - was designed to cause it disruption or annoyance
 - lacked serious purpose or value, and
 - in the opinion of a reasonable person, would be considered to be manifestly unreasonable or disproportionate.

The SPS's arguments in relation to these factors are summarised below.



Significant burden

26. The SPS relied on the explanations given in its responses to Mr N's request of 18 June 2012 as to why it considered his request of 29 November 2012 to impose a significant cost burden. The SPS explained that, in effect, Mr N had asked for substantially similar information which he had already been told would exceed the costs threshold because of the nature of the work that would have to be undertaken to locate, retrieve and provide it to him. Details of the estimated cost to the SPS of carrying out this work were provided to Mr N.
27. The SPS submitted that it was necessary to consider the request of 29 November 2012 in context, in particular that it had already dealt with a previous request (18 June 2012) and had responded to the same request (dated 29 November 2012) in relation to five other prisons within the estate (i.e. as an authority it had already dealt with and responded on five other requests the same as this one).
28. The SPS accepted that it was for the authority to identify repeated requests but contended that the uniqueness of its structure and geographical spread was a contributing factor, and one which Mr N was able to exploit in making his request of 29 November 2012.
29. The SPS submitted that very significant resources, far exceeding the provisions of section 12, had already been applied to the requests for information of this type in its provision of six initial responses and one review response. It believed Mr N's submission of six separate requests to be a deliberate attempt to "circumvent" the application of section 12 of FOISA, noting that he had not asked the Commissioner to consider the authority's earlier application of that provision (in relation to the single request of 18 June 2012).

Harassment

30. The SPS argued that Mr N's decision to submit his request of 29 November 2012 to each of the six establishments had the effect of harassing the authority. The basis for this line of argument was that significant public resources had to be used in the six establishments, dealing with what was essentially the same request as Mr N had made on 18 June 2012.

Disruption or annoyance

31. The SPS noted that Mr N's requests followed (and related to) complaints he had made, which had been investigated and responded to. It provided copies of relevant correspondence. The SPS believed it clear that Mr N was unhappy with the responses to his complaints regarding the matter of wages and was seeking to disrupt and annoy it by submitting the requests.
32. If Mr N was dissatisfied with the responses to his complaints, the SPS explained, he has recourse to the SPSO. The SPS further explained, again with reference to relevant correspondence, that Mr N had already referred this matter to the SPSO and it was currently under investigation. It argued that Mr N was using FOISA to prolong a matter which was already the subject of ongoing investigation by the appropriate authority, and the resulting duplication of effort was an inappropriate use of scarce public resources.



Lacking serious purpose or value

33. The SPS believed it clear from the evidence provided that Mr N was seeking the information for the purposes of a complaint currently under investigation by the SPSO. The SPS did not believe it was for Mr N to “second guess” or source information on behalf of the SPSO, which had statutory powers to obtain information considered appropriate to their investigations. In any case, the SPS contended, the information sought by Mr N could not change or alter the full responses given to Mr N in response to his complaints.

Manifestly unreasonable or disproportionate

34. For the reasons already set out, the SPS considered that responding to Mr N's request would be manifestly unreasonable. It believed Mr N's use of the rights afforded by FOISA to be irresponsible in this case, arguing that public confidence in the legislation required its responsible use by applicants.

Mr N's submissions

35. Mr N commented that his understanding of advice he had received from the SPS was that he should narrow the scope of his request by requesting the information from individual establishments to bring it within the cost limit. He stated that he considered it manifestly unreasonable for the SPS to tell him where to find the information, but then refuse to provide it when he followed their guidance.
36. Mr N agreed that his reason for seeking the information was in relation to a complaint regarding the application of the SPS's Prisoner Wage Earning Policy. He was also seeking to establish the differences (if any) between pay for similar work in different prisons, which was the subject of a complaint to the SPSO. Therefore, he believed there was a serious purpose or value to his request.
37. Mr N disagreed with the SPS's contention that sending the same request to HMP Glenochil and five other prisons within its estate had the effect of harassing the authority. He explained that an examination of his requests would confirm that each of these requests sought information relating to the timber assembly workshed at that establishment. In other words, he was seeking to carry out an “apples for apples” comparison.

The Commissioner's conclusions

38. The Commissioner has considered all the submissions she has received carefully and commented on them under the same headings as the SPS used in its submissions, for ease of reference.



Significant burden

39. In her briefing, the Commissioner explains that a request will impose a significant burden on a public authority where dealing with it would require a disproportionate amount of time, and the diversion of an unreasonable proportion of its financial and human resources, away from other statutory functions. However, if the expense involved in dealing with the request is the only consideration involved, the authority should consider the application of the excessive cost provisions in section 12 of FOISA.
40. The Commissioner has found in previous cases that the cumulative effect of a request, considered with others, can amount to a significant burden, and that a significant number of requests made at the same time can have a cumulative effect. Whether the Commissioner is persuaded that such an impact is present in any particular case will depend on the evidence provided by the authority.
41. The SPS's submissions are predicated on the collective cost to the authority of responding to six separate requests asking for the information by prison, rather than collectively at a corporate level, as Mr N did before. The submission that this request was vexatious stems from the SPS's argument that Mr N knew that section 12 would apply because of his previous request, but was deliberately trying to circumvent this by taking advantage of the dispersed structure of the SPS.
42. Mr N's assertion was that he was following the SPS's own guidance in making a number of separate requests to individual prisons. The SPS did not specifically refute this.
43. The first observation the Commissioner would make is the SPS is a single authority. She acknowledges that it covers a number of prisons, but the duties under FOISA are corporate and it is a matter for the SPS to organise its services accordingly.
44. The issue in this case is whether, on the balance of probability, the request was vexatious because of intent to exploit the SPS structure to avoid the cost threshold.
45. The SPS's response to Mr N's request of 18 June 2012 is relevant in this context. In that response, the SPS advised Mr N to reduce the scope of his request, but gave no indication of how he might do that. SPS has submitted no further details in respect of the current application that indicates whether any, and if so what, advice has been given to Mr N explaining how he might reduce the scope of his request to bring it within the cost limit.
46. The Commissioner acknowledges that, on the basis of the evidence she has seen, there is no clear and unambiguous advice to Mr N to make individual requests. However, she also acknowledges the converse: that there is no clear, unambiguous advice that breaking the request down by prison would not reduce the cost burden to below the threshold because they would be considered collectively. It is not unreasonable for Mr N to have concluded that a way to reduce the cost burden would be to split the "corporate" request into what, to a reasonable person, could be considered to be narrower requests.



47. To deny an applicant information on the basis that a request is vexatious is, in effect, denying that applicant a right set out in legislation. There are circumstances where this is appropriate, but this is a serious step and so must be fully justified. In all the circumstances of this case, whilst the Commissioner accepts it is a possibility that there was intent to circumvent the cost threshold, she is not satisfied that the SPS has demonstrated on the balance of probability that this was the case. In the absence of clear advice and assistance from them, Mr N's actions were not unreasonable. In the circumstances, the Commissioner is not persuaded that his actions imposed a significant burden on the authority.

Harassment

48. In relation to the current request and harassment, the Commissioner finds that the arguments advanced by the SPS are general in nature and lacking in evidence specific to the factors the SPS appears to consider relevant. She cannot accept that a request has the effect of harassing the authority simply because the subject matter has already demanded significant public resources. Equally, a request relating to matters dealt with by the authority as complaints and now subject to investigation by the SPSO may be designed to cause disruption and annoyance, but the Commissioner cannot accept that it will have that purpose by definition, in the absence of further supporting evidence.

Disruption or annoyance

49. The basis of the SPS's reasoning here was that Mr N was seeking to disrupt and annoy the authority because he was unhappy with the responses to his corporate complaints regarding wages. These complaints had already been investigated and responded to by the SPS and were the subject of on-going investigation by the SPSO. The submissions were supported by copies of relevant correspondence.
50. The Commissioner accepts that, on the face of it, this could appear disruptive and could be annoying to the SPS, but does not accept that the arguments as presented justify making the request vexatious. The Commissioner is aware that the SPSO has the powers to obtain the necessary information to conduct an investigation, but it is not unreasonable for a complainant to ingather information themselves to support their complaint. The issue in this case, again, hinges on the matter of intent. The SPS offered no context or argument to demonstrate that this was a pattern of behaviour adopted in other circumstances; behaviour that would demonstrate that Mr N was, or could have reasonably been aware of, the impact of his actions; behaviour which could amount to more than simply obtaining information to support his complaint.

Lacking serious purpose or value

51. As to whether the request had serious purpose or value, the Commissioner has considered the arguments from both parties. The Commissioner can understand why the authority might question the point of Mr N seeking the information in this way when the SPSO could always obtain that information itself. However, having considered Mr N's reasons for doing so, she finds it difficult to characterise the request as so lacking in purpose or value as to be considered vexatious.



Manifestly unreasonable or disproportionate

52. The Commissioner notes the collective arguments put forward by the SPS, but in the circumstances of the case, and having rejected all of the other arguments, the Commissioner cannot accept that Mr N's request was manifestly unreasonable or disproportionate.
53. The Commissioner therefore finds that the SPS was wrong to conclude that Mr N's request of 29 November 2012 was vexatious. There may have been a degree of frustration on the authority's part in finding that the five parallel requests to other prisons had been responded to, but it did not follow (at least, not on the arguments presented by the SPS) that the remaining request engaged the provisions of section 14(1) of FOISA.

DECISION

The Commissioner finds that the Scottish Prison Service (the SPS) failed to comply with Part 1 (and in particular section 1(1)) of the Freedom of Information (Scotland) Act 2002 (FOISA) in responding to the information request made by Mr N. The Commissioner finds that the SPS was wrong to deem Mr N's request vexatious (and consequently refuse to deal with the request) in terms of section 14(1) of FOISA.

The Commissioner therefore requires the SPS to provide a response to Mr N's request, in accordance with Part 1 of FOISA (otherwise than in line with section 14(1)), by 1 November 2013.



Appeal

Should either Mr N 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.

Rosemary Agnew
Scottish Information Commissioner
16 September 2013



Appendix 1

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.

....

- (6) This section is subject to sections 2, 9, 12 and 14.

14 Vexatious or repeated requests

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

...



Appendix 2

Summary of request of 18 June 2012

1. Guidance provided by the Scottish Government and/or SPS to Governors and senior managers regarding their duty of care to ensure that they do not place subordinates in peril of legal or professional risk as a result of any advice or action requested or required by such Governors and/or senior management (or failing this specifically, such advice and/or guidance which comes closest to this).
2. Provide a list of prisons which currently operate timber assembly workshops or have operated such sheds within the past two years if no longer in operation.
3. For each of these establishments, please provide:
 - a) the number of prisoners employed in the timber assembly shed
 - b) the base wage paid for each prisoner employed, and
 - c) bonuses paid to each prisoner on a weekly basis over the period 19/06/11 – 18/06/12 (or as appropriate the final 12 months of production of a workshop that is no longer in operation). In accordance with section 38 of FOISA, the name and SPIN number of each prisoner employed in the workshop can be redacted.
4. For each of these establishments, please provide:
 - a) breakdown of production by:
 - (i) type of article produced (please specify – e.g. 6 place garden table/seat set)
 - (ii) number of each article type produced
 - (iii) number of each article type rejected by (a) quality control (b) client
 - b) budget and actual performance for the workshop, including average cost of production for each item accepted by the client. On a weekly basis over the period 19/06/11 to 18/06/12 (or as appropriate the last 12 months of production of a workshop that is no longer in operation).
5. In addition, with respect to HMP Glenochil, please provide the following additional information:
 - a) the information requested at item 3 above; and
 - b) the information requested at item 4 above in respect of the period 1/11/09 – 31/10/10.

Summary of request of 29 Nov 2012

1. Employment
 - a) The number of prisoners employed in the workshop [timber productions workshop, Glenochil]
 - b) The base wage paid for each prisoner employed in the workshop, and,
 - c) Bonuses paid to each prisoner in the workshop all on a two-weekly basis over the periods (i) 1 November 2009 to 31 October 2010 and (ii) 1 November 2011 to 31 October 2012.
2. Production
A breakdown of production in the workshop for the periods set out at 1 (i) and (ii) above by:
 - a) Type of article produced
 - b) Number of each type of article produced
 - c) Number of each type of article rejected by quality control and/or client; and
 - d) The information contained in all reports relating to quality and production levels.
3. Financial Performance
The budget and actual production for the workshop, including average cost of production of each type of article produced and accepted by clients for the periods set out at 1 (i) and (ii) above.

