

# Decision Notice

---

## Decision 233/2014: Mr T and the Scottish Prison Service

---

### Information in notes of a hearing

Reference No: 201401918

Decision Date: 5 November 2014



## Summary

---

On 9 January 2014, Mr T asked the Scottish Prison Service (SPS) for information within notes written during a hearing. The SPS informed Mr T that the information he sought was his own personal data, so he could request it under the DPA. The SPS maintained this position on review, applying the exemption in section 38(1)(a) of FOISA. Mr T contended that he should be given the information under FOISA and applied to the Commissioner for a decision.

The Commissioner found that the information was Mr T's personal data, with the result that the SPS was entitled to withhold it under section 38(1)(a) of FOISA.

## Relevant statutory provisions

---

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) and (6) (General entitlement); 2(1)(a) and 2(e)(i) (Effect of exemptions); 38(1)(a) (Personal information)

Data Protection Act 1998 (the DPA) section 1(1) (Basic interpretative provisions) (definition of "personal data")

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

---

1. On 9 January 2014, Mr T made a request for information to the SPS. He requested:  
"... all and any information contained within the notes taken by the SPS note taker at this afternoon's discussion by the ICC [Internal Complaints Committee] of my complaints."
2. The SPS responded on 13 January 2014, explaining how to obtain the information Mr T sought under a separate route, namely by way of a subject access request under the DPA.
3. On 24 February 2014, Mr T wrote to the SPS, requesting a review of its decision on two counts:
  - (i) A failure to provide the information he requested;
  - (ii) The response did not comply with formal requirements in FOISA to provide information on review mechanisms.
4. The SPS notified Mr T of the outcome of its review on 18 March 2014. It acknowledged procedural failures and apologised for these, providing details of Mr T's right to apply to the Commissioner if he was dissatisfied with the outcome of the review. The SPS confirmed that it was withholding the information under section 38(1)(a) of FOISA, on the basis that it was Mr T's own personal data.
5. On 29 July 2014, Mr T wrote to the Commissioner. He applied to the Commissioner for a decision in terms of section 47(1) of FOISA. Mr T stated he was dissatisfied with the outcome of the SPS's review because the information was not provided to him: he did not

accept that the information could all be his own personal data. He also highlighted what he considered to be failures in the SPS's original handling of his request.

## Investigation

---

6. The application was accepted as valid. The Commissioner confirmed that Mr T made a request for information to a Scottish public authority and asked the authority to review its response to that request before applying to her for a decision.
7. On 30 July 2014, the SPS was notified in writing that Mr T had made a valid application. The SPS was asked to send the Commissioner the information withheld from him. The SPS provided the information 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 answer specific questions. In particular, the investigating officer sought an explanation of why the SPS considered all the withheld information to be Mr T's personal data.

## Commissioner's analysis and findings

---

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

### Section 38(1)(a) of FOISA

10. Section 38(1)(a) of FOISA contains an absolute exemption in relation to personal data of which the applicant is the data subject. The fact that it is absolute means that it is not subject to the public interest test set out in section 2(1) of FOISA.
11. This exemption exists under FOISA because individuals have a separate right to make a request for their own personal data (commonly known as a "subject access request") under section 7 of the DPA. The DPA will therefore usually determine whether a person has a right to their own personal data, and govern the exercise of that right. Section 38(1)(a) of FOISA does not deny individuals a right to access to information about themselves, but ensures that the right is exercised under the DPA and not under FOISA.
12. Personal data are defined in section 1(1) of the DPA as data which relate to a living individual who can be identified: a) from those data, or b) from those data and other information which is in the possession of, or is likely to come into the possession of, the data controller (the full definition is set out in the Appendix).
13. The SPS's initial response to Mr T was that the information was accessible under the DPA. At review, it explained why it was withholding the information, contending it was entirely Mr T's own personal data and an exemption in section 38(1)(a) of FOISA was applied. The SPS apologised for not having explicitly cited this exemption in its earlier correspondence.
14. In his application, Mr T challenged what he believed to be a "blanket policy" of applying section 38(1)(a) to requests of this kind. He acknowledged that ICC notes might contain information to which this exemption applied, but also submitted that equally they might not.

He referred to tests applied by the Court of Appeal in the case of *Durant v Financial Services Authority* [2003] EWCA Civ 1746.

15. Mr T highlighted what he understood to be the nature of ICC meetings. He submitted that hearings of this type considered individual complaints by individual prisoners, but in the context of policies, procedures and actions by prison staff. He cited the SPS Staff Guidance manual in relation to the questions to be asked in investigating prisoner complaints. He concluded that the focus of the complaints procedure was the problems raised by the complaint, not the individual making it, with the result that much of the information in notes of ICC meetings would relate to problem situations rather than individuals. He noted that complaints discussed at this particular meeting concerned a number of general policy issues, which he described: he submitted that none of these subjects could be said to amount to biographical or personally sensitive information.
16. The SPS did not accept Mr T's characterisation of ICC notes as relating to "problem situations". The notes, it explained, were a contemporaneous record of the prisoner's discussions with the ICC chairperson. The role of the ICC, it submitted, was to hold a hearing into the complaint and then (where appropriate) make recommendations. The "problem situations" referred to by Mr T could not be established or identified until after the conclusion of the hearing and subsequent consideration of the complaint by the ICC.
17. As a contemporaneous record of discussion at the hearing, the SPS considered the notes to relate to a living individual (Mr T). Mr T was exercising his right to refer **his complaints** (SPS's emphasis) to the ICC and these complaints were all that was considered there. He was identifiable from the notes, by information unique to him.
18. The Commissioner has considered the information withheld from Mr T carefully. She agrees with his submissions, to the extent that the focus of her attention must be the actual information in these ICC notes, not ICC notes as a class. The context, in particular the role of the ICC hearing, is relevant, but not to the exclusion of the content. In this case, whether applying the tests in the *Durant* decision or a broader definition of what amounts to personal data, the Commissioner is satisfied that the SPS was correct in concluding that the information requested by Mr T was his personal data.
19. The Commissioner accepts that the withheld information is a record of discussion between Mr T and the ICC chairperson, relating to concerns specific to Mr T. Further consideration of these concerns might have led to the identification of issues of wider concern, but she does not believe it would be reasonable to characterise the record of the discussion as relating to such wider issues. This information is about Mr T, as an identifiable living individual. Even applying the relatively restrictive tests created by the *Durant* decision, it is biographical in relation to Mr T and focuses on him. On any reasonable interpretation, it relates to him.
20. The Commissioner agrees with Mr T that not all information recorded at an ICC hearing will necessarily fall within the definition of personal data. He has acknowledged that such information may do. In this particular case, the Commissioner has concluded that it does.
21. Having considered the withheld information, therefore, the Commissioner is satisfied that the SPS was entitled to withhold the information requested by Mr T under section 38(1)(a) of FOISA.

## Other matters

22. In his application to the Commissioner, Mr T raised his concern that the initial response to his request (dated 13 January 2014) failed to cite an exemption under FOISA, but withheld the information he had requested. He also complained that his rights of review and appeal were not set out in the refusal notice.
23. In its response of 13 January 2014, the SPS explained that the information was available under the DPA, with details of how Mr T could obtain it under that legislation. The Commissioner accepts that it did not refer to any applicable exemption in FOISA, or provide Mr T with any information on his rights under FOISA.
24. Mr T sought a review and the SPS responded on 18 March 2014. In this response, it identified section 38(1)(a) of FOISA as the applicable exemption and gave Mr T details of his right to apply to the Commissioner if he was dissatisfied with the outcome of the review. In doing so, the review confirmed the original decision to withhold the information, with modifications, in accordance with section 21(4)(a) of FOISA. In other words it fulfilled its intended purpose and Mr T was then able to apply to the Commissioner, as he did on 25 July 2014.
25. Where a requester has received notice of the outcome of a review in relation to their information request, the role of an application to the Commissioner (under section 47(1) of FOISA) is to address their dissatisfaction with that outcome. The matters raised by Mr T, as described in paragraph 22 above, relate to his dissatisfaction with the outcome of the original request and not that of the review. These matters were addressed by the SPS in the review and the Commissioner does not, in the circumstances, consider it to be within her remit to revisit them now.

## Decision

---

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

## Appeal

---

Should either Mr T or the 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**

**5 November 2014**

## 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.

#### 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 –

- (a) the provision does not confer absolute exemption; and

...

- (2) For the purposes of paragraph (a) of subsection 1, the following provisions of Part 2 (and no others) are to be regarded as conferring absolute exemption –

...

- (e) in subsection (1) of section 38 –

- (i) paragraphs (a), (c) and (d); and

...

#### 38 Personal information

- (1) Information is exempt information if it constitutes-

- (a) personal data of which the applicant is the data subject;

...

## Data Protection Act 1998

### 1 Basic interpretative provisions

(1) In this Act, unless the context otherwise requires –

...

“personal data” means data which relate to a living individual who can be identified –

(a) from those data, or

(b) from those data and other information which is in the possession of, or is likely to come into the possession of, the data controller,

and includes any expression of opinion about the individual and any indication of the intentions of the data controller or any other person in respect of the individual;

...

**Scottish Information Commissioner**

Kinburn Castle  
Doubledykes Road  
St Andrews, Fife  
KY16 9DS

t 01334 464610

f 01334 464611

[enquiries@itspublicknowledge.info](mailto:enquiries@itspublicknowledge.info)

**[www.itspublicknowledge.info](http://www.itspublicknowledge.info)**