

Decision Notice

Decision 246/2016: The applicant and Her Majesty's Chief Inspector of Prisons for Scotland

Prison inspection reports and annual reports

Reference No: 201601847

Decision Date: 15 November 2016



Scottish Information
Commissioner

Summary

Her Majesty's Chief Inspector of Prisons for Scotland (HMIPS) was asked for the five most recent annual reports and inspection reports for each Scottish prison. HMIPS withheld the information, arguing that the information could be accessed from the prison library.

As part of her deliberations, the Commissioner considered whether the information could be reasonably obtained by the applicant from the prison library and she concluded that it could not.

The Commissioner found that HMIPS failed to comply with FOISA and she required it to disclose the reports.

Relevant statutory provisions

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) and (6) (General entitlement); 2(1)(a) and (2)(a) (Effect of exemptions); 25(1) (Information otherwise accessible)

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 23 August 2016, the applicant made a request for information to HMIPS, asking for the five most recent annual reports and inspection reports for each Scottish prison.
2. HMIPS responded on 25 August 2016, stating that the information should be reasonably accessible to the applicant in the prison library, and was exempt from disclosure under section 25(1) of FOISA.
3. On 27 August 2016, the applicant wrote to HMIPS requesting a review of its decision on the basis that the information was not held in the prison library and, due to their particular circumstances, accessing the prison library itself was an issue.
4. HMIPS notified the applicant of the outcome of its review on 14 September 2016. HMIPS acknowledged that the information was not available in the prison library at the time the applicant made their request, but stated that it had since provided the information to the prison library and they would be able to access it there.
5. On 4 October 2016, the applicant applied to the Commissioner for a decision in terms of section 47(1) of FOISA. The applicant was dissatisfied with the outcome of HMIPS' review because the information was not available in the prison library at the time of their request and their access to the prison library is restricted.

Investigation

6. The application was accepted as valid. The Commissioner confirmed that the applicant 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 19 October 2016, HMIPS was notified in writing that the applicant had made a valid application 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. HMIPS was invited to comment on this application and answer specific questions including justifying its reliance on any provisions of FOISA it considered applicable to the information requested.

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 the applicant and HMIPS. She is satisfied that no matter of relevance has been overlooked.

Section 25(1) of FOISA - Information otherwise accessible

10. Under section 25(1) of FOISA, information which a requester can reasonably obtain, otherwise than by requesting it under section 1(1) of FOISA, is exempt information. The exemption in section 25 is absolute, in that it is not subject to the public interest test in section 2(1)(b) of FOISA.
11. In their application to the Commissioner, the applicant provided a detailed explanation of why they have difficulty accessing information held in the prison library.
12. As noted above, HMIPS was provided with a copy of the application and was asked to comment on the points the applicant had raised. In its submission to the Commissioner, HMIPS acknowledged the applicant's concerns, but did not appear to give them much consideration. HMIPS reiterated its view that it had made the information available to the applicant by lodging it in the prison library.
13. HMIPS referred to The Prisons and Young Offenders Institutions (Scotland) Rules 2011 Rule 88(2) which states:

The Governor must make arrangements for lending library services for the use of prisoners which take into account, so far as reasonably practicable, the prisoner's educational, informational and recreational interests.

14. HMIPS argued that, based on the above legislation, it was confident that the applicant could access the reports from the library under the normal procedures. HMIPS maintained that section 25(1) of FOISA applied to the information covered by the applicant's request.
15. In previous decisions, the Commissioner has made clear that when authorities consider applying section 25(1) of FOISA, they must take into account the requester's own particular circumstances before concluding that information is reasonably obtainable to them. The Commissioner's briefing¹ on section 25(1) of FOISA states:

This is one of the few exemptions in FOISA where the identity of the requester is relevant. This is because the exemption applies to information which the requester (i.e. the person making the request) can reasonably obtain.

¹ <http://www.itspublicknowledge.info/Law/FOISA-EIRsGuidance/section25/Section25.aspx>

16. In this case, the applicant claimed that they had not been able to access the prison library for six weeks, and submitted that (for a number of reasons) there were regular periods of time in which their movements within the prison were restricted. HMIPS does not appear to have taken any steps to disprove the claims made by the applicant, nor has it provided the Commissioner with any evidence to show that the applicant's submissions are erroneous or false.
17. The Commissioner has no reason to doubt the applicant's claim that they cannot rely on having regular access to the prison library. If the applicant cannot access the prison library for up to six weeks at a time, the Commissioner takes the view that the information they have requested is not reasonably obtainable to them in that way.
18. The Commissioner finds that HMIPS was not entitled to apply the exemption in section 25(1) to the information requested by the applicant and that, in doing so, it failed to deal with the request in accordance with section 1(1) of FOISA and failed to comply with part 1 of FOISA.

Decision

The Commissioner finds that Her Majesty's Inspector of Prisons for Scotland (HMIPS) failed to comply with Part 1 of the Freedom of Information (Scotland) Act 2002 (FOISA) in responding to the information request made by the applicant.

The Commissioner finds that HMIPS was not entitled to apply section 25(1) of FOISA to the information described by the applicant in their request. As HMIPS failed to disclose information covered by the request, it failed to comply with section 1(1) of FOISA.

The Commissioner therefore requires HMIPS to provide the applicant with the information they requested by **30 December 2016**.

Appeal

Should either the applicant or HMIPS 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.

Enforcement

If HMIPS fails to comply with this decision, the Commissioner has the right to certify to the Court of Session that HMIPS has failed to comply. The Court has the right to inquire into the matter and may deal with HMIPS as if it had committed a contempt of court.

Margaret Keyse
Head of Enforcement

15 November 2016

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 –

(a) section 25;

...

25 Information otherwise accessible

(1) Information which the applicant can reasonably obtain other than by requesting it under section 1(1) is exempt information.

...

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