

# Decision Notice



Decision 144/2008 Mr Q and the Scottish Prison Service

Prisoner access to IT facilities

Reference No: 200800426

Decision Date: 20 November 2008

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**Kevin Dunion**

Scottish Information Commissioner

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## Summary

Mr Q requested from the Scottish Prison Service (SPS) a wide range of documents relating to or discussing the issue of prisoner access to IT facilities. The SPS responded by providing Mr Q with some of the information he had requested, but it withheld the remaining information on the grounds that it was exempt from disclosure in terms of section 29 of FOISA (which applies to information that relates to the formulation of Scottish Administration policy). Following a review, Mr Q remained dissatisfied and applied to the Commissioner for a decision.

During the investigation, the SPS withdrew its application of section 29 of FOISA and instead claimed, in terms of section 12(1) of FOISA that it was not obliged to respond to the request because the projected costs of doing so would exceed £600. The Commissioner found that section 12 of FOISA did apply in this case, and so the SPS was not obliged to deal with the outstanding parts of Mr Q's request for information. He found that the SPS had not breached of Part 1 of FOISA by refusing to provide the remaining information sought, albeit on different grounds from those ultimately considered in this decision.

However, the Commissioner did find that the SPS had breached Part 1 of FOISA by failing to respond to Mr Q's request within the timescale required by section 10(1) of FOISA. He did not require the SPS to take any action with respect to this particular failure in response to this decision.

## Relevant statutory provisions and other sources

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Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) and (6) (General entitlement); 10(1) (Time for compliance) and 12(1) (Excessive cost of compliance)

The Freedom of Information (Fees for Required Disclosure) (Scotland) Regulations 2004 (the Fees Regulations) regulations 3 (Projected costs) and 5 (Excessive cost – prescribed amount)

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 28 December 2007, Mr Q wrote to the Scottish Prison Service (SPS) requesting the following information:
  - a. The SPS's Chief Executive's response (dated 2 December 2002) to a recommendation issued by the then Scottish Prison Complaints Commissioner on 10 October 2002.
  - b. Any communication within the SPS (dated from 2 December 2002 onwards) that concerned the canvassing or expression of views within the SPS as to the basis upon which computers or IT facilities may be made available to prisoners, such communications to include electronic and written communications and notes of telephone conversations, etc.
  - c. Records (including agendas, minutes, attendance lists, etc.) of any meetings or events involving SPS personnel during the course of which views were canvassed or expressed in relation to issues of prison access to computer or IT facilities, since 2 December 2002.
  - d. Any reports, discussion papers, etc. considered within the SPS in relation to prisoner access to computers or IT facilities since 2 December 2002.
2. The SPS responded on 31 January 2008. The SPS provided Mr Q with the information he asked for in part (a) of his request but refused to provide him with the information he requested in parts (b), (c) and (d) of his request on the basis that it was exempt from disclosure in terms of section 29 of FOISA. The SPS's refusal notice did not specify which exemption in section 29 had been judged to apply, but the Commissioner understands it was the exemption in section 29(1)(a) of FOISA, which applies to information that relates to the formulation or development of Scottish Administration policy. The SPS advised Mr Q that it was currently reviewing its policy on IT access for prisoners in custody.
3. On 1 February 2008, Mr Q wrote to the SPS requesting a review of its decision in relation to parts (b), (c) and (d) of his request. In particular, Mr Q argued that the SPS did not fully explain why the internal communications that it is withholding should be considered as the formulation of Scottish Administration policy. Mr Q also noted that the SPS had breached the timescales set out in FOISA, as it had not responded to his initial request within 20 working days.



4. The SPS notified Mr Q of the outcome of its review on 25 February 2008. The SPS acknowledged that its response to his initial request was late, and apologised for what, according to the SPS, had been an administrative oversight. The SPS concluded that the exemption (again unspecified) in section 29 had been applied correctly and provided information on how the information it was withholding related to the formulation of government policy.
5. On 20 March 2008, Mr Q 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 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

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7. The SPS is an Executive Agency of the Scottish Ministers and a letter was sent to the Ministers' Freedom of Information Unit on 2 April 2008, in line with agreed procedures, giving notice that an application had been received from Mr Q and that an investigation into the matter had commenced. The Ministers were asked to provide the Commissioner with any information withheld from the applicant. (Subsequent references to submissions etc. being received from the SPS are therefore references to submissions etc. made by the Ministers' Freedom of Information Unit on behalf of the SPS.)
8. In its response, the SPS advised the Commissioner that it was now withdrawing its reliance on section 29 of FOISA, and was instead applying section 12(1) of FOISA to the requested information as complying with the request would exceed the cost limit of £600 set out in the Freedom of Information (Fees for Required Disclosure) Regulations 2004 (Fees Regulations). Within this response, the SPS also provided a breakdown of the costs it had estimated it would incur if it complied with Mr Q's request. The SPS indicated that, since 2 December 2002, it had initiated thirteen projects on the subject of prisoner access to IT facilities. It provided details of the number of staff involved in each project, and indicated that each would need to undertake searches to identify the information sought by Mr Q. The SPS estimated that locating the information Mr Q had requested, and then redacting exempt information would cost £3900.
9. The SPS's response included a proposal for settlement, whereby it offered to provide Mr Q with copies of several documents that it felt would be helpful to him. The SPS advised the Commissioner that it was currently developing its Corporate IT Strategy and that it expected this document to be publicly available within the next 12 weeks.



10. On receipt of this response, the case was allocated to an investigating officer. The investigating officer subsequently contacted Mr Q, asking him if he wanted to accept the settlement offer proposed by the SPS. Mr Q rejected the offer of settlement and requested that the Commissioner continue to investigate his case. Mr Q also commented on the SPS's application of section 12(1) of FOISA.
11. The investigating officer subsequently wrote to the SPS, advising it that Mr Q had rejected its offer of settlement and that a full investigation of the case would be required. During the investigation, the SPS was given the opportunity to provide comments on the application (as required by section 49(3)(a) of FOISA) and was asked to respond to specific questions concerning its calculation of the projected cost of responding to Mr Q's requests. The SPS responded with its comments and the additional information requested by the investigating officer. The SPS's submissions are detailed where relevant below.

## **Commissioner's analysis and findings**

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

### **Section 12(1) Excessive cost of compliance**

13. In refusing to comply with Mr Q's information requests, the SPS cited section 12 of FOISA (Excessive cost of compliance). Section 12(1) provides that public authorities are not obliged to comply with requests for information where the cost of complying with that request would exceed the amount prescribed in the Fees Regulations. This amount is currently set at £600 in terms of regulation 5 of the Fees Regulations.
14. Consequently, the Commissioner has no power to require the release of information should he find that the cost of responding to a request for information exceeds this amount.
15. The projected costs that the public authority can take into account in relation to the request for information are, according to regulation 3 of the Fees Regulations, the total costs, whether direct or indirect, which the public authority reasonably estimates it will incur in locating, retrieving and providing the information requested in accordance with Part 1 of FOISA. The public authority may not charge for the cost of determining (i) whether it actually holds the information or (ii) whether or not it should provide the information. The maximum hourly rate a public authority can charge for staff time is £15 an hour.



16. Section 12(2) of FOISA allows that the Fees Regulations *may provide* that the costs of two or more separate requests can be aggregated for the purposes of section 12(1). However, no provision allowing the aggregation of requests made by one person is present within the Fees Regulations. This means that each information request should be considered separately for the purposes of establishing whether the prescribed limit of £600 will be met. This includes situations such as that arising in this case where four distinct information requests are made within the same communication.
17. As noted above, the SPS identified thirteen separate projects that related to the topic of prisoner access to IT facilities, and argued that in order to be sure that requests (b), (c) and (d) were fully addressed; it would require each staff member involved in any of these projects to search their own records for relevant information.
18. The SPS calculated that between 130 and 220 staff members (earning at least £15 per hour) were involved in these projects and that it would take an hour for each individual to locate and retrieve relevant information, and a further hour for them to carry out the physical redaction of exempt information. The SPS submitted that it had calculated its costs on the basis of the lowest estimate of staff numbers (130) and, in doing so, had found that compliance with Mr Q'SS requests would cost £3900 which clearly exceeded the £600 cost limit set out in the Fees Regulations. The SPS added that the costs it had cited did not account for the full costs it would incur and that it had not included the cost of providing the information, e.g. photocopying. It claimed, therefore, that its estimate of costs was conservative.
19. During the investigation, the Commissioner noted that the cost calculations put forward by the SPS might be excessive if there was significant overlap between membership of the various project groups. If there was significant overlap, the number of individuals required to undertake searches might be substantially less than proposed. For this reason, the SPS was asked to supply the names and job titles of every staff member who was involved in any of the thirteen IT projects. Although the SPS initially disagreed that such a list was necessary for the purposes of this investigation, the list was provided following discussions with the investigating officer.
20. The SPS was also asked why it was necessary for each project member to search their own files to locate the information requested by Mr Q, and whether the SPS held a central repository of the information generated by these projects, or if there was a project lead that would have access to key documents. The SPS advised that while some of the projects did have project leads, others did not, and even where project leads did exist, there is no guarantee that they would have access to all of the relevant information, given the broad scope of the three requests. The SPS acknowledged that a lot of the information relating to the thirteen IT projects would be held in central electronic or paper files, but it argued that some information may only be held by the individuals involved in the projects, and that individual computer workstations, email archives and paper document files will need to be searched to ensure that it has identified all of the information encompassed by Mr Q's requests.



21. The Commissioner also pointed out to the SPS that Mr Q's letter of 28 December 2007 had included four distinct information requests (including the three outstanding requests) and he noted that the SPS's calculations appeared to have aggregated the costs of responding to all of these requests. The SPS was advised that the Commissioner was likely to consider the costs of each of these requests separately to establish whether the prescribed limit of £600 was met in each case.
22. The SPS argued that, as each of the three requests are all on the same subject (prisoner access to IT facilities) the same records would have to be searched in order to comply with each request. The SPS submitted that it was following the approach taken by the Commissioner in *Decision 098/2007 Ms Sandra MacGregor and the Common Services Agency for the Scottish Health Service*. In Decision 098/2007, the applicant had submitted four requests on similar subjects which would have required the same files to be searched in order to fulfill each request. In this case, the Commissioner found that there were two possible approaches available to him; he could require the public authority to search through all of the files once (looking for the information relevant to all four requests) which would breach the £600 cost limit; or he could require the public authority to conduct four separate searches in response to each request, which would lead to a quadrupling of the cited costs, again exceeding the £600 cost ceiling. In the circumstances of that case, the Commissioner found that it was reasonable to treat all four requests as one question (or parts of the same question) and to estimate costs for searching through all of the files once (looking for information relevant to the four requests).
23. The SPS submitted that it has adopted the Commissioner's approach in Decision 098/2007 in this case, and that it has estimated the cost of searching through all of the relevant files once, for the information sought by Mr Q in his requests (b), (c) and (d). The SPS argued that it is the cost of complying with all three of Mr Q's requests that it has estimated at £3900.
24. The SPS also referred to the specific wording of each of Mr Q's three requests in its submissions. It argued that requests (c) and (d) could arguably be viewed as simply repeating elements of request (b). The SPS argued that even if you accept that all three requests are distinct, the terms of each request are broad and would still require each project member to search their individual files to ensure that no relevant information was overlooked.
25. The Commissioner has considered the approach taken by the SPS in this case, and he has concluded that, while the circumstances of this case differ from that in Decision 098/2007, the approach he advocated in that decision and which has been followed by the SPS in this case, is appropriate. In particular, he accepts that the searches that would be necessary to locate the information sought by any one of these requests (and so the cost of undertaking those searches) would be essentially be the same searches as that would address all three. He also accepts that the information that each request is seeking is overlapping. The Commissioner therefore accepts that it is reasonable for the SPS to propose searching through all of its relevant files once for information relating to the three separate requests.



26. However, in determining whether the SPS has estimated reasonable costs in this case, the Commissioner must consider whether the searches it has proposed to locate information falling within the scope of Mr Q's requests are proportionate, and whether the time it has estimated for carrying out those searches is reasonable.
27. In request (b) Mr Q sought:
- Copies of any communication within the SPS (dated from 2 December 2002 onwards) that concerned the canvassing or expression of views within the SPS as to the basis upon which computers or IT facilities may be made available to prisoners, such communications to include electronic and written communications and notes of telephone conversations, etc.*
28. The Commissioner considers the wording of request (b) to be particularly broad, in that it is seeking any communication (including electronic and written communications and notes of telephone conversations, etc) the SPS holds relating to prisoner access to IT facilities. As indicated above, in trying to identify all of the information which falls within the scope of this request, the SPS has named thirteen IT-related projects that have taken place since 2 December 2002 and which are likely to have included discussions of the issues surrounding prisoner access to computing facilities. The Commissioner has reviewed the names and job titles of SPS staff involved in these thirteen projects and he notes that participants in these projects represent the whole prison estate, including both SPS headquarters and prison-based staff.
29. Consequently, the Commissioner considers that the searches proposed by the SPS (in relation to request (b)) are reasonable and necessary to retrieve all relevant information. It is clear to the Commissioner that any of the staff who attended the projects could have discussed the issues raised by the project with other SPS staff (by phone, email or memo) and that the only way the SPS can be sure of identifying all relevant information would be for each project participant to search their own files.
30. In request (c) Mr Q sought:
- Copies of records (including agendas, minutes, attendance lists, etc.) of any meetings or events involving SPS personnel during the course of which views were canvassed or expressed in relation to issues of prison access to computer or IT facilities, since 2 December 2002.*
31. Once again, the SPS has argued that in order to locate and retrieve all of the information falling under the scope of its request, all of its staff members who participated in the thirteen IT projects, would be required to search their own files for relevant information.





32. The Commissioner has considered the wording of request (c) and he is of the view that its request for “all records (including agendas, minutes, attendance lists, etc.)” relating to the issue of prisoner access to IT facilities is so broad that compliance would require each project participant to search their own files. It is clear that Mr Q has tried to suggest the kind of documents he expects to retrieve in response to this request by listing agendas, minutes, attendance lists, etc. However, it is the Commissioner’s view that an email or discussion paper or phone note would also fall within the definition of ‘any record’ and his use of the word “etcetera” indicates that the examples he listed were not to be considered comprehensive but were just an indication of the types of information that might be provided to him.
33. Again, the Commissioner accepts that it is reasonable for the SPS to argue that it could not be sure of identifying all of the information falling within the scope of this request, unless each participant in all of the thirteen IT projects conducted searches of their personal files.
34. In request (d) Mr Q sought:
- Copies of any reports, discussion papers, etc. considered within the SPS in relation to prisoner access to computers or IT facilities since 2 December 2002.*
35. While this request is more clearly stated than either request (b) or (c), the Commissioner notes that Mr Q has again used the word “etcetera” in his request, which has the impact of widening the scope of the request to include other, unspecified types of documents as well as reports or discussion papers (whose definition may also be questionable). While the Commissioner considers that most of the information sought by Mr Q in request (d) is likely to be held in central file stores, he cannot rule out the possibility that other relevant material may be held by members of the thirteen IT projects, and that requiring project participants to search through their own files is the only way the SPS could be sure of identifying all relevant material.
36. In the circumstances, the Commissioner is satisfied that the SPS, in addition to searching its central file stores, would also be required to ask all project members to search their own files for relevant material that falls within the scope of Mr Q’s requests.

#### **Are the costs reasonable?**

37. In calculating the costs for complying with all three of Mr Q’s requests, the SPS estimated that between 130 and 220 staff members had been involved in the thirteen IT projects and it had based the costs of information location and retrieval on the lowest estimate of attendees (130). On receipt of the names and job titles of the project participants, the Commissioner cross-checked the membership of the thirteen projects and he estimated that there were approximately 106 SPS staff members involved in these projects, slightly lower than the staff numbers estimated by the SPS.



38. In its calculations, the SPS had estimated that it would take each project participant one hour to locate all of the relevant information they held, and an additional hour to redact any exempt information. The SPS maintain that all project members earn at least £15 per hour. Applying the preceding calculations to the 106 staff members identified by the Commissioner as being involved in the thirteen IT Projects, it would cost the SPS some £3180 to comply with Mr Q's requests, which is less than the costs originally cited by the SPS but is still well in excess of the £600 cost ceiling set out in the Fees Regulations.
39. However, while the Commissioner accepts that some individuals were members of multiple IT projects and are likely to have more information to retrieve (and possibly redact) he does not accept that it would take every project participant an hour to retrieve all relevant information nor a further hour to redact exempt information. The Commissioner acknowledges that the time taken to retrieve and redact information will vary between individuals, but he considers that it is more likely to take between 15 and 30 minutes for each participant to locate and retrieve relevant information and a similar amount of time to make any necessary redactions. However, the Commissioner notes that even if the time for information retrieval was reduced to 15 minutes and the time taken for information redaction was 15 minutes, it would still cost the SPS some £795 to comply with Mr Q's three requests, which still exceeds the £600 cost ceiling set out in the Fees Regulations.
40. In light of this, the Commissioner finds that the SPS was correct to apply section 12(1) to the information requests submitted by Mr Q. It was therefore under no obligation to comply with these requests when they were first received.

#### **Comments on the SPS' handling of Mr Q'SS requests**

41. In this case, the SPS only chose to rely upon section 12(1) of FOISA when the Commissioner contacted it and advised that Mr Q had appealed against its previous decision to withhold the requested information in terms of section 29 of FOISA. Mr Q has indicated to the Commissioner that he was unhappy that the SPS sought to apply section 12(1) at so late a stage, pointing out that it had had ample opportunity to consider the cost of compliance in the earlier stages of his information request.
42. The Commissioner acknowledges that public authorities may raise new exemptions or other provisions in Part 1 of FOISA or withdraw previously cited exemptions during in investigation by his Office. However, he is concerned that the SPS did not recognise or raise the matter of the cost of compliance of Mr Q's request in its earlier correspondence with him. As has been noted in this decision, Mr Q's requests were formulated in very wide terms and had the SPS applied section 12(1) at the beginning, it could then have contacted Mr Q and advised him that compliance with his requests would exceed the £600 set out in the Fees Regulations, and advise him to consider narrowing the scope of his requests in order bring the cost of their compliance to less that £600.



43. The Commissioner is disappointed to note that Mr Q was disadvantaged in this case by the late application of section 12(1) of FOISA, and he would recommend that the SPS take steps to ensure that it recognises future requests where this provision may apply at its response or review stages. Should Mr Q choose to submit new requests which are more narrowly focused, the Commissioner would expect the SPS to advise and assist Mr Q with this in pursuit of its duties under section 15 of FOISA.

### **Technical breaches of FOISA**

44. Section 10(1) of FOISA gives Scottish public authorities a maximum of 20 working days from the receipt of the request to comply with the request for information.
45. Mr Q submitted his request for information on 28 December 2007 and a reply was not supplied by the SPS until 31 January 2008, which was one day overdue. Accordingly, the Commissioner concludes that the Council did not comply with section 10(1) of FOISA in making this response to Mr Q.
46. The SPS acknowledged in its correspondence with Mr Q that it had responded outwith the timescale set in section 10(1), and the Commissioner has noted that this was a minor breach, which did not significantly delay Mr Q's pursuit of his rights under FOISA. In the circumstances, the Commissioner does not require the SPS to take any action in relation to this particular breach in response to this decision.

## **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 section 12(1) of FOISA applies to parts (b), (c), and (d) of the request submitted by Mr Q, and so the SPS was under no obligation to comply with these. The Commissioner therefore finds that the SPS did not breach of Part 1 of FOISA by refusing to provide the information sought by these parts.

However, the Commissioner finds that the SPS failed to comply with Part 1 of FOISA in dealing with Mr Q's information requests, by failing to respond to the requests within the relevant timescale laid down by section 10(1) of FOISA.

For the reasons set out in paragraph 46 above, the Commissioner does not require it to take any action to be taken in response to this decision.



## **Appeal**

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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 Investigations**  
**20 November 2008**



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

##### 10 Time for compliance

- (1) Subject to subsections (2) and (3), a Scottish public authority receiving a request which requires it to comply with section 1(1) must comply promptly; and in any event by not later than the twentieth working day after-
  - (a) in a case other than that mentioned in paragraph (b), the receipt by the authority of the request; or
  - (b) in a case where section 1(3) applies, the receipt by it of the further information.

##### 12 Excessive cost of compliance

- (1) Section 1(1) does not oblige a Scottish public authority to comply with a request for information if the authority estimates that the cost of complying with the request would exceed such amount as may be prescribed in regulations made by the Scottish Ministers; and different amounts may be so prescribed in relation to different cases.

#### Freedom of Information (Fees for Required Disclosure) (Scotland) Regulations 2004

##### 3 Projected costs

- (1) In these Regulations, "projected costs" in relation to a request for information means the total costs, whether direct or indirect, which a Scottish public authority reasonably estimates in accordance with this regulation that it is likely to incur in locating, retrieving and providing such information in accordance with the Act.
- (2) In estimating projected costs-
  - (a) no account shall be taken of costs incurred in determining-



- (i) whether the authority holds the information specified in the request; or
  - (ii) whether the person seeking the information is entitled to receive the requested information or, if not so entitled, should nevertheless be provided with it or should be refused it; and
- (b) any estimate of the cost of staff time in locating, retrieving or providing the information shall not exceed £15 per hour per member of staff.

## **5 Excessive cost - prescribed amount**

The amount prescribed for the purposes of section 12(1) of the Act (excessive cost of compliance) is £600.

