

Decision Notice



Decision 031/2009 Mr L and the Scottish Prison Service

Policy relating to Asperger's syndrome

Reference No: 200801402
Decision Date: 18 March 2009

www.itspublicknowledge.info

Kevin Dunion
Scottish Information Commissioner

Kinburn Castle
Doubledykes Road
St Andrews KY16 9DS
Tel: 01334 464610



Summary

Mr L requested from the Scottish Prison Service (SPS) any information it held relating to an offence intervention programme for adults with Asperger's syndrome (AS). The SPS did not respond to the initial request. In response to Mr L's request for review, it argued that it did hold some information falling within the scope of the request, but that it considered it exempt from disclosure in terms of sections 25, 30(b)(ii), 36 and 38 of FOISA. Following this review, Mr L remained dissatisfied and applied to the Commissioner for a decision.

Following an investigation, the Commissioner found that the SPS had been entitled to withhold the information from Mr L under the exemption in section 38(1)(a) of FOISA on the basis that the information was his own personal data. As a result, he did not require the SPS to take any action.

Relevant statutory provisions and other sources

Freedom of Information (Scotland) Act 2002 (FOISA): sections 1(1), (4) and (6) (General entitlement); 2(1)(a) and (2)(e)(i) (Effect of exemptions) and 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 the Appendix to this decision. The Appendix forms part of this decision.

Background

1. On 9 June 2008, Mr L wrote to the Scottish Prison Service (SPS) requesting the following information:

Copies of any correspondence relating to the development/delivery of an offence intervention programme for adults with Asperger's syndrome (AS), or relating to the possibility of [his] transfer to an AS-specific facility which could provide such programmes.

2. The SPS did not respond to this request and, on 8 July 2008, Mr L wrote to the SPS requesting a review of its failure to comply with required timescales and that it provide a response.



3. The SPS notified Mr L of the outcome of its review on 18 August 2008, and apologised for its failure to respond to Mr L's original request within the required timescale. It provided Mr L with some documents, but it withheld others, arguing that they were exempt from disclosure in terms of sections 30(b)(ii), 36 and 38 of FOISA. The SPS also noted that it had not provided copies of correspondence where Mr L had been the author, the principal addressee or a copy recipient on the basis that such documents were otherwise accessible to him and so section 25 (Information otherwise accessible) of FOISA was applicable. However, the SPS indicated that if Mr L did not have access to these documents, it would provide copies to him on request.
4. On 26 September 2008, Mr L 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.
5. The application was validated by establishing that Mr L 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

6. The SPS is an Executive Agency of the Scottish Ministers and a letter was sent to the Ministers' Freedom of Information Unit on 15 October 2008, in line with agreed procedures, giving notice that an application had been received from Mr L 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.)
7. The SPS responded with the information requested and indicated that it was withholding the information in terms of section 30(b) and 36 of FOISA. The case was then allocated to an investigating officer.
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. In particular, the SPS was asked to detail the searches it had undertaken in response to the request and to justify its reliance on any provisions of FOISA it considered applicable to the information requested.
9. The investigating officer also contacted Mr L and invited his comments on the public interest as it applied to the exemptions contained in section 36 and 30(b) of FOISA. Mr L responded to this letter and provided his views on the public interest as it applied to the information he was seeking.



10. When the SPS subsequently responded to the questions raised by the investigating officer, it withdrew its previous reliance on the exemptions contained in section 30(b) and 36 of FOISA and noted that it was now solely relying on section 38(1)(a) of FOISA to withhold information from Mr L, on the basis that it constituted his own personal data.
11. On receipt of this response from the SPS, the investigating officer contacted Mr L and advised him that the SPS was now only applying the exemption in section 38(1)(a) of FOISA to the withheld information. Mr L was also advised that, having reviewed the information, the investigating officer considered it likely that the Commissioner would uphold the exemption, as the information withheld did appear to be his own personal data.
12. In response, Mr L acknowledged that much of the information he had requested would be his own personal data, but he argued that the SPS would hold additional information on AS that does not relate directly to him, but would fall within the scope of his request. In particular, Mr L indicated that he expected there to be correspondence between the SPS and third parties which might discuss offence intervention programmes for prisoners with AS. Mr L also confirmed that he had made a subject access request under the terms of the Data Protection Act 1998 (DPA) for his own personal data on 23 October 2008.
13. In further correspondence, the investigating officer asked the SPS for detailed evidence of the searches it had undertaken, seeking copies of any correspondence it held that was between itself and the third parties named by Mr L.
14. The SPS responded to these queries and provided the investigating officer with copies of correspondence exchanged between itself and the third parties named by Mr L.

Commissioner's analysis and findings

15. 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 L and the SPS and is satisfied that no matter of relevance has been overlooked.

Scope of the request



16. The SPS has withheld two documents from Mr L in terms of section 38(1)(a) of FOISA. The Commissioner notes that in the outcome of its review on 18 August 2008, the SPS advised Mr L that it was also withholding other correspondence from him in terms of section 25 of FOISA, on the basis that these documents were otherwise accessible to him as he was either the sender, the primary recipient or the co-recipient. However, in its review the SPS also advised Mr L that it was willing to provide him with copies of this correspondence, if he required it to do so.
17. Mr L did not raise this matter in his application to the Commissioner, and during the investigation he has expressed no dissatisfaction with the application of section 25(1) by the SPS. On this basis (and taking into account the fact that the SPS has stated that it is willing to provide copies of any correspondence it is withholding in terms of section 25 to Mr L) the Commissioner will not consider, in this decision, any documents withheld by the SPS on the grounds of section 25 of FOISA.
18. During the investigation, the SPS also provided the Commissioner with copies of correspondence exchanged between itself and third parties named by Mr L. Mr L had indicated that he expected the SPS to hold such correspondence and it was his view that this correspondence was likely to fall within the scope of his request and that it would not constitute his own personal data. The Commissioner has carefully considered the correspondence supplied by the SPS and it is his view that these documents do not fall within the scope of Mr L's request and cannot be considered in this investigation. The Commissioner has reached this view as the correspondence post-dates Mr L's request and so is outwith the scope of his request. (In terms of section 1(4) of FOISA, the information which an applicant is entitled to be given is that held by a public authority at the time the request is received.)
19. Consequently, this investigation will only consider the two documents withheld by the SPS in terms of section 38(1)(a) of FOISA.

Section 38(1)(a) – Personal information of the applicant

20. Section 38(1)(a) of FOISA contains an absolute exemption in relation to personal data of which the applicant is the data subject. This means that it is not subject to the public interest test set out in section 2(1) of FOISA.
21. This exemption exists under FOISA because individuals have a separate right make a request for their own personal information (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 information about themselves. Therefore, the effect of the exemption in section 38(1)(a) of FOISA is not to deny individuals a right of access to information about themselves, but to ensure that the right is exercised under the DPA and not under FOISA.
22. "Personal data" is defined in section 1(1) of the DPA, which is reproduced in the Appendix.



23. The Commissioner has reviewed the two withheld documents and he is satisfied that both comprise the personal data of Mr L. The data within the two documents focusses on Mr L and is biographical of him in a significant sense, and consequently it relates to him. Therefore, it is the Commissioner's view that the information is absolutely exempt from disclosure under FOISA as it is the personal data of Mr L.
24. Should Mr L wish to pursue access to these documents, the Commissioner would advise him to do so via the complaints process provided for under the DPA.

DECISION

The Commissioner finds that, in withholding information which was exempt under section 38(1)(a) of FOISA, the Scottish Prison Service complied with Part 1 of the Freedom of Information (Scotland) Act 2002 (FOISA) in responding to the information request made by Mr L.

Appeal

Should either Mr L 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
18 March 2009



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 –

- (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

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;

...