

Decision Notice

Decision 152/2017: Mr X and the Scottish Prison Service

Whether request was vexatious

Reference No: 201700527

Decision Date: 13 September 2017



Scottish Information
Commissioner

Summary

The SPS was asked for information regarding data provided to the Court of Session in the course of a petition for judicial review. The SPS declined to comply with the request as it considered the request to be vexatious.

The Commissioner agreed that the request was vexatious.

Relevant statutory provisions

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) and (6) (General entitlement); 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. The Appendix forms part of this decision.

All references to “the Commissioner” in this decision are to Margaret Keyse, who has been appointed by the Scottish Parliamentary Corporate Body to discharge the functions of the Commissioner under section 42(8) of FOISA.

Background

1. On 26 May 2016, Mr X made a request for information to the Scottish Prison Service (the SPS). The request concerned specified information provided to the Court of Session in the course of a petition for judicial review, raised previously by Mr X, concerning disciplinary proceedings raised against him. The information had been provided by the SPS in tabular form. The request read as follows:

“All and any information held by the SPS relative to the request for and compilation of the table or matrix referred to by Lady Wolffe at para [145] of her Opinion of 26 April 2016 ([2016] CSOH 61).”
2. By way of background, it should be noted that the information contained within the table was the subject of *Decision 117/2016 Mr S and the Scottish Prison Service*¹. In that decision, the Commissioner upheld the SPS’s position that, in fact, it did not hold the relevant information. Essentially, in the course of that investigation, the SPS acknowledged that the information in the table was inaccurate.
3. In his request, Mr X asked the SPS to disclose all and any information it held relative to the request for and compilation of the table or matrix referred to in the opinion of the Court. He expected the information to be contained within internal SPS documents as well as records of external communications and to include information created in response to enquiries about the veracity or integrity of the information provided to the Court.
4. The SPS responded on 24 June 2016. The SPS informed Mr X that it considered the request to be vexatious in terms of section 14(1) of FOISA, and concluded that it was not obliged to comply with it.

¹ <http://www.itspublicknowledge.info/ApplicationsandDecisions/Decisions/2016/201600265.aspx>

5. On 22 August 2016, Mr X wrote to the SPS requesting a review of its decision. Mr X did not agree that the request was vexatious.
6. The SPS notified Mr X of the outcome of its review on 19 September 2016. The SPS informed Mr X that it would not be carrying out a review in relation to his request. It explained that, under section 21(8)(b) of FOISA, it was not obliged to do so if the original request was found to be vexatious.
7. On 15 March 2017 and 23 March 2017, Mr X wrote to the Commissioner. He applied to the Commissioner for a decision in terms of section 47(1) of FOISA. Mr X stated he was dissatisfied with the SPS's conclusion that the request was vexatious.

Investigation

8. The application was accepted as valid. The Commissioner confirmed that Mr X 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.
9. On 30 March 2017, the SPS was notified in writing that Mr X had made a valid application and the case was allocated to an investigating officer.
10. 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, with particular reference to its claim that it considered Mr X's request to be vexatious.
11. The SPS responded, providing submissions to the investigating officer.
12. During the investigation, Mr X provided additional information and submissions in support of his position that his request was not vexatious. Solicitors acting on Mr X's behalf supplied further information.

Commissioner's analysis and findings

13. 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 X and the SPS. She is satisfied that no matter of relevance has been overlooked.

Section 14(1) of FOISA – vexatious request

14. In terms of section 14(1) of FOISA, a Scottish public authority is not obliged to comply with a request for information made under section 1(1) if the request is vexatious.
15. FOISA does not define the word "vexatious". The Commissioner's general interpretation, as set out in her guidance² on section 14(1), is that the following factors are relevant when considering whether a request is vexatious:
 - (i) it would impose a significant burden on the public body;
 - (ii) it does not have a serious purpose or value;

² http://www.itspublicknowledge.info/Law/FOISA-EIRsGuidance/Section14/Vexatious_or_repeated_requests.aspx

- (iii) it is designed to cause disruption or annoyance to the public authority;
 - (iv) it has the effect of harassing the public authority;
 - (v) it would otherwise, in the opinion of a reasonable person, be considered manifestly unreasonable or disproportionate.
16. This is not an exhaustive list. Depending on the circumstances, other factors may be relevant, provided the impact on the authority can be supported by evidence. The Commissioner recognises that each case must be considered on its merits, taking all the circumstances into account.
17. While the Commissioner's view is that "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 a request and its surrounding circumstances. It may be reasonable, for example, for the authority to conclude that a request represents a continuation of a pattern of behaviour it has deemed vexatious in another context.

The SPS's submissions

18. The SPS acknowledged that the term "vexatious" must be applied to a request, and not the requester. However, it also endorsed the Commissioner's view that an applicant's identity and history of dealings with an authority may be relevant in considering whether a request is vexatious. In this case, the SPS considered Mr X's history and dealings with it in relation to the subject of the request to be relevant.
19. The SPS acknowledged that Mr X's request might not appear, on the face of it, to be vexatious, but went on to argue that the vexatious nature of the request could only be assessed when considered within its context.
20. The SPS argued that the request had the effect of harassing it and explained why it considered this to be the case. The SPS referred to disciplinary proceedings Mr X had been subjected to in 2014, describing the process as common across prisons and the resulting punishments as being of a minor nature. At that time, his solicitors wrote to the SPS making a number of requests for information.
21. The SPS went on to explain that Mr X subsequently lodged a petition for judicial review of matters relating to the disciplinary hearings. Mr X later obtained an Order from the Court of Session for recovery of documents. This resulted in the provision of information which included the table referred to in the request under consideration here. It noted that the records in question existed, notwithstanding subsequent conclusions as to their accuracy, and required to be provided to comply with the Court's Order: Mr X had not chosen to challenge its compliance with the Order.
22. The SPS stated that, since the Court hearing, Mr X had sought to misrepresent matters as they arose in the Court, continuing to challenge the provision of the table in response to his specification of documents. The SPS noted that its position (that it did not hold certain information supporting that in the table) had been upheld by the Commissioner in *Decision 117/2016*: it believed this evidenced its own transparency when challenged.
23. The SPS referred to a Psychological Risk Assessment (PRA) carried out on Mr X and listed a number of problematic personality traits which had been identified. The SPS submitted that, in light of these, it did not consider he would accept that his pattern of behaviour was vexatious, or that his behaviour had the effect of harassing the authority.

24. The SPS also considered the request was vexatious as it sought to identify and intimidate individuals. In its view, Mr X's request was intended to be interpersonally exploitative. In summary, the SPS considered that the request had the effect of harassing it for the following reasons:
- The correspondence from Mr X in relation to the disciplinary hearings was voluminous and had been ongoing since August 2014
 - A significant volume of information had been provided previously
 - The request sought to extend the dialogue with the SPS
 - The matter had been decided by the Court in favour of the SPS and therefore matters had been concluded
 - As a result of Mr X's pattern of behaviour, he had become pre-occupied with the details of the matter to the extent that the major point of the activity (his previous legal challenge) had been lost, and
 - The SPS considered the effect of the request served no other purpose than to harass it.
25. The SPS submitted that Mr X had already established that the information to which his request referred was inaccurate, but that he had failed to accept the reasons given for that.
26. The SPS rejected Mr X's view that there had been any misconduct or incompetence on its part in relation to the information provided previously. It considered this suggestion to be a direct and personal attack on those individuals involved in defending his legal challenge and stated there was no justification for this. It noted that Mr X had not made a complaint to the relevant professional bodies.
27. The SPS also addressed the point raised in Mr X's application to the Commissioner, where he stated that SPS officials had been ordained to appear in Court. (This is contained in Mr X's submissions below.) The SPS argued that this was a deliberate attempt to mislead the Commissioner, and provided no justification for the assertion that individuals might be attempting to conceal matters. The SPS stated that the decision to ordain SPS staff to appear in Court (in a separate case) had been overturned by the House of Lords. The SPS pointed out that this aspect of that particular appeal had not been opposed by Mr X's representatives, and did not believe the issue had any relevance to the present case.
28. The SPS accepted that the information presented to the Court of Session (as a result of the specification of documents) was inaccurate. However, it submitted that (given the circumstances under which it had to be provided) it was not possible to conduct an analysis of the accuracy of the information at the time. The SPS also stated that, had Mr X considered the matter fundamental to his case, he could have sought further information in advance of the hearing or appealed the decision of the Court.
29. The SPS also noted that, in his six previous applications to the Commissioner, Mr X had made the application within two months of receiving a review response. In the present case, the application was made just before the expiry of the six month period allowed under section 47 of FOISA. The SPS argued that, had the intention of Mr X to be other than to harass the SPS, he would have submitted the application within a considerably shorter timescale.

Mr X' submissions

30. In his review request to the SPS, Mr X argued that the context of the judicial review proceedings referred to in his request was not directly relevant to the issue of the SPS's reliance on the provisions of section 14(1) of FOISA. He submitted that information was provided to his representatives and to the Court, which the authority relied upon in Court; information which was inaccurate and misleading.
31. In Mr X's view, the circumstances in which the Court, and his legal representatives, were provided with inaccurate and misleading information were such that they should be drawn to the attention of the appropriate regulatory authorities. He submitted that it would be for those regulatory authorities to investigate the circumstances and determine the action to be taken. He stated that he required the evidence sought in his request in order to pursue this matter.
32. In relation to the PRA referenced by the SPS, Mr X stated that this was of no relevance to the application of section 14 of FOISA. He stated that the registrant who compiled the PRA did not act in accordance with SPS guidance, provided no evidence in support of his assertions and simply reiterated an article which he had obtained from an online publisher relating to vexatious litigants.
33. In his application to the Commissioner, Mr X reiterated his view that issues of professional misconduct or incompetence might have arisen which would justify referring individuals to the appropriate professional regulatory body.
34. Mr X suggested that the individuals replying (to the Commissioner) on behalf of the SPS might have been implicated in the process of providing the inaccurate and misleading information to his representatives and the Court. He contended that employees of the SPS could have personal reasons to be concerned about the disclosure of information suggesting incompetence or misconduct.
35. Mr X also referred to previous proceedings brought by him in the Court of Session, in which SPS officials were ordained to appear in person to hear the Court declare the Scottish Ministers held in contempt of court.
36. In his submissions to the Commissioner, Mr X argued that the significance of the information produced by the SPS could only be evaluated in the context of the arguments counsel sought to advance on his behalf and the extent to which these were frustrated by the provision of inaccurate information. He stated that the information provided by the SPS was instrumental in undermining his case.
37. Mr X noted that his petition to the Court had raised issues concerning legal aid and legal representation in prison disciplinary matters. He further asserted that, as the information provided in the table was false and inaccurate, so the conclusion (of the court) regarding the significance of the information was invalid.
38. Rather than having the effect of harassing the authority, Mr X submitted, the request had the effect of holding it to account. Mr X stated that the focus of the present request was to establish how inaccurate information came to be presented to the court and why those acting for the authority did not take even rudimentary steps to establish the veracity of the information.
39. He noted also that the SPS had not claimed that his request was "repeated" and had appeared to appreciate that its focus was distinct from that of his previous request and application (which led to *Decision 117/2016*).

40. Mr X set out the sequence of events, since the information provided by the SPS in tabular form had been requested by his solicitors. In his view, this made clear the issues of professional competence concerning the information presented and the repeated failures of those working for the SPS and the Scottish Government Legal Directorate (SGLD) to respond appropriately to concerns raised by his representatives.
41. In Mr X's view, the claim (by the SPS) that his request and application represented a direct and personal attack on individuals involved in the provision of false and inaccurate information was absurd. He considered this to be more of an indicator of guilt on the part of those responding to his request than any reflection on his motivation in pursuing the issue.
42. Mr X stated that he had no interest whatsoever in any such individual on a personal level. He reiterated that his request and application were intended solely to inform decisions as to the appropriate basis upon which to pursue a professional conduct complaint via the Scottish Legal Complaints Commission (SLCC), using mechanisms designed to protect the public by assuring appropriate standards of conduct. Mr X submitted that the provision of the information would help ensure that any complaint pursued would be evidence based and would focus on the issues of actual conduct, whether in relation to competence or professionalism.
43. Mr X submitted that the concerns raised in his application were objectively justified. He stated that solicitors and counsel attempted over many months to discover the true factual position in relation to the information contained in the table, but to no avail. Mr X contended that months of prevarication and obfuscation on the part of SPS and SGLD personnel ensured that the true factual position could not be placed before the court prior to the case being determined on an unsound factual basis.
44. Mr X concluded that the history and background to his request which he had set out were relevant. In all the circumstances, he contended that the reliance on section 14(1) of FOISA by the SPS was not justified. He considered it amounted to a further attempt to obfuscate and obstruct a legitimate process of professional accountability.

The Commissioner's findings

45. Mr X's request may not appear, on the face of it, to be vexatious. It is politely and rationally written concerning a matter of personal significance to him. The Commissioner is aware, however, that the vexatious nature of a request may only emerge after considering the request in context; for example, a history of previous or ongoing correspondence with the applicant. That context may reveal the request to be disproportionate in its nature and impact.
46. The Commissioner appreciates that the matters raised by Mr X are important to him. However, a request which has value and serious purpose can still be vexatious if it has the effect of harassing, or distressing, the public authority and/or its staff or individuals connected to the authority.
47. "Harassing" is not defined in FOISA or the Commissioner's own guidance. The First Tier Tribunal (Information Rights) ruling EA/2011/0224 *Roger Conway and the Information Commissioner*³ was of the view that "harassing" should be given its ordinary meaning, that is, to disturb persistently, bother continually, pester or persecute. In the Commissioner's view, the question is whether (viewed from the perspective of a reasonable person) the request

³ <http://www.informationtribunal.gov.uk/DBFiles/Decision/i690/20120301%20Decision%20EA20110224.pdf>

has the effect of harassing the authority and/or its staff, and not whether the requester intended it to harass.

48. The Commissioner has considered, in detail, the submissions and arguments presented to her by both parties.
49. The Commissioner has noted the SPS's comments concerning the fact that Mr X's application to her was not submitted until close to the expiry of the six month period permitted under section 47(4) of FOISA. However, in the Commissioner's view, this is not a relevant consideration. There is nothing in FOISA that would allow the Commissioner to differentiate between applications received at different points in time; indeed she considers it would create a dangerous precedent to do so. Accordingly, she has taken no account of this in her deliberations on the matter under consideration.
50. The Commissioner notes also that Mr X disputes the validity of the PRA carried out on him. As such, the Commissioner has also discounted this from consideration in her decision.
51. The Commissioner has also discounted Mr X's reference to two SPS employees having been ordained to appear in the Court of Session in 2005. The Commissioner has considered all the submissions she has received on this point and does not agree that this has any relevance to this case.
52. The Commissioner would stress that it is not her role, in making a decision on Mr X's application, to consider the merits of the decision reached in the judicial review raised by him. Similarly, she will not consider, or promulgate a view on, whether the outcome of the judicial review might have been different had different information been provided to the court in relation to the matters that are of concern to Mr X in this case.
53. That said, the judicial review is part of a course of conduct which forms the context in which Mr X made the request under consideration here. That course of conduct goes back to disciplinary processes which it would appear reasonable to regard as minor, in both the nature of the charges and the impact of the disposals. In that context, Mr X's subsequent actions would appear – on the face of it – to be disproportionate. That is not to excuse genuine incompetence or misconduct in the course of handling such matters, but the Commissioner does consider it relevant to bear in mind that most individuals experiencing disciplinary or similar consequences at this level would not resort to prolonged judicial and regulatory processes of the kind pursued by Mr X.
54. The Commissioner also considers it appropriate in this case to take into account the effect of the request on the public authority, notwithstanding the intentions of the requester.
55. The Commissioner must consider whether the request has the effect of harassing an authority when considered from the perspective of a reasonable person, even if the requester did not intend to cause inconvenience or stress to the authority or to individuals. In the Commissioner's view, she is required to take into account the extent to which a request is likely to cause a disproportionate or unjustified level of disruption, irritation or stress.
56. In this case, the Commissioner notes some of the language used in Mr X's correspondence with the SPS and in his application to the Commissioner. This makes clear his determination to pursue complaints against individuals whom he considers have acted inappropriately or incompetently.
57. In his application to the Commissioner, Mr X alludes to individuals acting on behalf of the SPS in relation to the request under consideration who may have personal reasons to be

concerned about the disclosure of relevant information. In all the circumstances of this case as presented to her, it is not immediately apparent why they should be so concerned, or why (for that matter) Mr X should require disclosure the information in question – to himself, never mind the public at large – to pursue the purposes he has identified.

58. On the other hand, it is apparent that the persistence with which Mr X is pursuing the issue is likely, bearing in mind the underlying context of matters pursued to extreme lengths, to cause considerable disturbance and stress to those concerned. The Commissioner accepts that public employees should be held accountable, but this needs to be pursued within frameworks allowing for the fair treatment of anyone whose conduct is called into question.
59. In the Commissioner's view, Mr X can pursue any complaints he considers to be justified with bodies such as the SLCC or Scottish Public Services Ombudsman, without recourse to the information sought in this request. It does not require the public exposure of anyone, certainly not before any accusations are duly investigated. Similarly, if Mr X considers the outcome of his judicial review was incorrect as a result of the information provided to his solicitors and the court, it is open to him and his advisers to explore further legal remedies.
60. As indicated above, the Commissioner notes fully the backdrop against which Mr X made the present request. Taking into account all the circumstances of the case and Mr X stated intentions, she is satisfied that the request can reasonably be considered disproportionate and, in its effects, harassment of the authority and individuals connected with it. Consequently, she considers the request was an improper use of FOISA and should be considered vexatious for the purposes of section 14(1).

Decision

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

Appeal

Should either Mr X or the Scottish Prison Service 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
Acting Scottish Information Commissioner

13 September 2017

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 if the request is vexatious.

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