

Decision Notice

Decision 135/2019: The Applicant and the Scottish Prison Service

Whether request vexatious

Reference No: 201900187

Decision Date: 19 September 2019



Scottish Information
Commissioner

Summary

The SPS received a seven part request relating to prisoners with Autistic Spectrum Disorder.

The SPS initially considered the request to be vexatious in full. However, during the investigation, the SPS stated that it no longer considered part 7 of the request to be vexatious.

The Commissioner accepted that parts 1 to 6 were vexatious. However, he required the SPS to respond otherwise than in terms of section 14(1) to part 7 of the request.

Relevant statutory provisions

Freedom of Information (Scotland) Act 2002 (FOISA) section 1(1) (General entitlement); 14(1) (Vexatious or repeated requests); 21(8)(b) (Review by Scottish public authority)

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 22 November 2018, the Applicant made a request for information to the Scottish Prison Service (the SPS). The information requested covered seven requests relating to Autistic Spectrum Disorders (ASD). In summary, he requested:
 - (i) the SPS policy on dealing with prisoners with an ASD and sentence management; evidence of consideration to the impact of those policies; specific adjustments made by the SPS for prisoners with ASD; evidence of compliance with Scottish Government's Strategy for Autism and Delivery Plan for the United Nations Convention on the Rights of Persons with Disabilities; and evidence of measures taken to ensure compliance with the Scottish Government's strategy and delivery plan (parts one to six); and
 - (ii) the numbers of prisoners identified (or who "screen positive") as having an ASD broken down by establishment (part seven).
2. The SPS responded on 20 December 2018, informing the Applicant that it considered his request to be vexatious, on the basis that it had the effect of harassing the SPS due to the similar and repetitive nature of the request. The SPS also informed the Applicant that no information was held with regard to numbers of prisoners with an ASD.
3. On 31 December 2018, the Applicant wrote to the SPS requesting a review of its decision. He argued that the request was not "similar or repetitive" to previous requests. He set out in detail his interest in the information sought. He also considered SPS's response to part seven of his request to be "inaccurate".
4. The SPS notified the Applicant on 23 January 2019 that, under section 21(8)(b) of FOISA, it was not obliged to comply with the review request as it considered the request to be vexatious.

5. On 30 January 2019, the Applicant wrote to the Commissioner. The Applicant applied to the Commissioner for a decision in terms of section 47(1) of FOISA as he did not consider the request to be vexatious.

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 him for a decision.
7. On 8 February 2019, the SPS was notified in writing that the Applicant had made a valid application. The case was then 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 to answer specific questions, focusing on its reliance on section 14(1) of FOISA.
9. During the investigation, the SPS confirmed that it no longer sought to rely on section 14(1) in response to part seven of the Applicant's request.

Commissioner's analysis and findings

10. In coming to a decision on this matter, the Commissioner considered all of the relevant submissions, or parts of submissions, made to him by both the Applicant and the SPS. He is satisfied that no matter of relevance has been overlooked.

Section 14(1) of FOISA – vexatious request

11. 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.
12. FOISA does not define the word "vexatious". The Commissioner's general interpretation, as set out in the guidance¹ 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;
 - (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.
13. 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.

¹ http://www.itspublicknowledge.info/Law/FOISA-EIRsGuidance/Section14/Vexatious_or_repeated_requests.aspx

14. While the Commissioner's view is that "vexatious" must be applied to the request and not the requester, he acknowledges that an 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.
15. On the face of it, the Applicant's request may not appear to be vexatious. It seeks information with regard to a topic which is clearly a matter of personal significance to the Applicant. 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 and litigation between the SPS and the Applicant. That context may reveal the request to be disproportionate in its nature and impact.
16. The Commissioner appreciates that the matters raised by the Applicant are important to him and his consideration of his circumstances. However, a request which has value and serious purpose can still be vexatious if it has the effect of harassing the public authority.
17. "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*² 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 has the effect of harassing the authority and/or its staff, and whether or not the requester intended it to harass.

Submissions

18. The Applicant stated that section 14(1) should not apply as the information he seeks was not "similar and repetitive". He disagreed with the SPS's position that responses previously provided to him were comprehensive and were unlikely to change significantly over time. The Applicant also stated that the information was requested to determine whether the SPS was complying with its statutory duties.
19. The SPS acknowledged that the request may not appear to be vexatious; however, they considered the vexatious nature of the request could only be assessed when considered in the context of the prolonged, ongoing nature of correspondence and legal challenges leading up to and beyond Commissioner's *Decision 197/2012*³. That decision was in reference to a legal challenge which is still ongoing and remains with the Courts. The SPS provided considerable submissions in the lead up to that decision and the submissions provided regarding this case focus on the history and dealings with the Applicant since November 2012.
20. The SPS provided detailed submissions regarding ongoing correspondence, legal challenges and complaints over a significant period of years. It submitted that the Applicant had made over 75 requests since the Commissioner's *Decision 197/2012* and at least 30 of those had been in regard to ASDs. Responses had been provided to all of these requests and none had previously been found to be vexatious. The SPS explained that the recognition of a diagnosis for the Applicant was not relevant to their decision to treat the request as

² <http://www.informationtribunal.gov.uk/DBFiles/Decision/i690/20120301%20Decision%20EA20110224.pdf>

³ <http://www.itspublicknowledge.info/ApplicationsandDecisions/Decisions/2012/201201456.aspx>

vexatious. The SPS submitted that, regardless of any diagnosis, the SPS will seek to support prisoners insofar as is reasonable and their approach to management of all those in custody is to work in a supportive and collaborative way with various professionals to ensure offenders are provided with appropriate opportunity and care as necessary.

21. The SPS stated that the key reason they considered this request to be vexatious was an additional legal challenge (in addition to the ongoing case) brought by the Applicant in relation to the subject matter of the request. As part of the Court's Judgement of December 2017, which was provided to the Commissioner as part of the submissions, it was found that complaints about his treatment under the Equality Act 2010 and the Public Sector Duty were irrelevant and incompetent. A number of the findings of the Judgement were raised in support of the SPS's reliance on section 14(1). At the conclusion of this legal challenge, the Courts concluded that the action should be dismissed. An appeal was lodged by the Applicant in January 2018.
22. During the process of the court appeal, the Applicant continued to write to the SPS seeking further information on this topic prior to the outcome of the Sheriff Principal's determination. The Applicant's appeal was subsequently dismissed by the Court. Subsequent to the dismissal, the Applicant submitted further letters for information which the SPS informed him had been settled by the Judgement of the Sheriff Court.
23. The SPS considered that, in light of the legal challenge and its outcome, the Applicant was seeking unreasonable steps by the authority and attempting to give greater weight to a diagnosis as a way to mitigate offending behaviour. It considered that the Applicant's requests were seeking to continue dialogue that it considered had been settled by the Court Judgement and which, therefore, in light of the circumstances of the challenge and outcome, had the effect of harassing the authority.

The Commissioner's findings

24. The Commissioner has considered, in detail, the submissions and arguments presented to him in this case. The Commissioner considered it appropriate to take into account the effect of the request on the public authority, in light of historical and ongoing factors.
25. The Commissioner considered whether the request had the effect of harassing the SPS when considered from the perspective of a reasonable person, even if the Applicant did not intend to cause inconvenience or stress to the SPS. The Commissioner 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, even when, on the face of it, the request may not appear to be vexatious.
26. In this case, the Commissioner noted the long term and ongoing correspondences and legal processes in the Applicant's interactions with the SPS on this specific topic. The Commissioner is aware of the reasons expressed by the Applicant as to why he requested this information, but it is apparent that the persistence with which the Applicant is pursuing this issue is likely to cause considerable disturbance, stress and distraction from the SPS's core duties.
27. The Commissioner is satisfied that the supporting evidence provided by the SPS demonstrates that the request made by the Applicant was part of a course of continuing correspondence and legal challenges about the same subject matter and this could only be interpreted as being intended to extend dialogue on a topic the Courts had already ruled upon.

28. Therefore, the Commissioner accepts that it was reasonable in the circumstances to conclude that, in part, the information request was being used by the Applicant primarily to continue to pursue the SPS in relation to previously contested concerns.
29. Having considered the terms of the request, subject matter, history and context, the Commissioner accepts that the Applicant's request had the effect of harassing the SPS and finds that the SPS was not obliged to comply with parts one to six of the Applicant's request on the basis that those parts of the request were vexatious.

Part 7 of the request

30. As stated above, during the investigation, the SPS reviewed part seven of this request and decided that it no longer wished to rely on section 14(1) of FOISA. The SPS submitted that it now wished to rely on section 17 (Information not held) in response to this part of the request.
31. In light of the change of position, the Commissioner must conclude that the SPS was not entitled to refuse to comply with this part of the request on the basis that section 14(1) of FOISA applied. He therefore requires the SPS to conduct a review in respect of this part of the request, and to respond to the Applicant otherwise than in terms of section 14(1) of FOISA.

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 the Applicant.

The Commissioner finds that the SPS were correct to consider parts one to six of the Applicant's request as vexatious.

However, as the SPS withdrew its reliance on section 14(1) in relation to part seven of this request, the Commissioner finds that the SPS was not entitled to refuse to comply with this part of the request on the basis that it was vexatious. In doing so, it failed to comply with section 1(1) of FOISA.

The Commissioner therefore requires the SPS to carry out a review, in terms of section 21 of FOISA and respond otherwise than in terms of section 14(1) of FOISA in response to part seven of this request, by 3 November 2019.

Appeal

Should either the Applicant or 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.

Enforcement

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

Margaret Keyse
Head of Enforcement

19 September 2019

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.

...

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.

...

21 Review by Scottish public authority

...

- (8) Subsection (1) does not oblige a Scottish public authority to comply with a requirement for review if-

...

- (b) the request for information to which the requirement for review relates was one with which, by virtue of section 14, the authority was not obliged to comply.

...

Scottish Information Commissioner

Kinburn Castle
Doubledykes Road
St Andrews, Fife
KY16 9DS

t 01334 464610

f 01334 464611

enquiries@itspublicknowledge.info

www.itspublicknowledge.info