

# Decision Notice



Decision 161/2012 Mr Q and the Scottish Prison Service

Procurement and access to computer/laptop facility

Reference No: 201200467

Decision Date: 4 October 2012

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**Rosemary Agnew**

Scottish Information Commissioner

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## Summary

Mr Q asked the Scottish Prison Service (the SPS) for information relating to the procurement of a laptop facility and any correspondence relating to the implementation of a policy relating to prisoners' access to such a facility. The SPS stated that it would cost too much to respond to the first request (and therefore it was not obliged to comply), while in relation to the second request it advised that it did not hold the information.

Following an investigation, the Commissioner accepted that the SPS was not obliged to comply with Mr Q's first request, as the cost of doing so would exceed the statutory limit of £600. However, in relation to the second request, the Commissioner found that the SPS did hold information falling within the scope of his request. The Commissioner did not require any action in respect of this failure, as the information was supplied to Mr Q during the investigation.

## Relevant statutory provisions

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Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1), (4) and (6) (General entitlement); 12(1)(Excessive cost of compliance); 15 (Duty to provide advice and assistance); 17(1) (Notice that information is not held)

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 5 January 2012, Mr Q wrote to the SPS requesting the following information:
  - a. All and any information contained within communications by letter or e-mail between any member of senior management team at HMP Glenochil or any SPS employee engaged in a "Business Performance" function and any other SPS manager or official concerning the procurement of a Laptop PC facility to be made available to prisoners at Glenochil, such communication having been sent since 1 June 2011.



- b. With reference to a SPCC (Scottish Prisons Complaints Commission) recommendation relating to the updating of an existing policy on prisoners' access to computers, a copy of all and any communications by letter or e-mail between [named individual] or any other SPSO employee and any SPS employee concerning the implementation of that policy since 1 November 2010, together with all and any information held by the SPS relative to the review process, apparently prompted by SPCC recommendation PH/7/2010, to include the outcome of the review in terms of the revised policy.
2. The SPS responded on 2 February 2012. It advised Mr Q that the costs of locating, retrieving and providing the information requested would exceed the upper cost limit of £600. Given the number of individuals involved, and searches which would be required as a result, the SPS refused to comply with the request on the basis that the cost of doing so would exceed the amount specified for the purposes of section 12(1) of FOISA. The SPS offered Mr Q the opportunity to narrow the scope of his request to allow it to fall under the cost threshold.
3. On 6 February 2012, Mr Q wrote to the SPS requesting a review of its decision. He did not believe the SPS to have addressed all parts of his request and did not agree with the estimated cost of compliance with his request, arguing that the costs had been inflated.
4. The SPS notified Mr Q of the outcome of its review on 5 March 2012. The SPS maintained its reliance on section 12(1) of FOISA in respect of request (a), confirming that the cost of locating, retrieving and providing the information would exceed the upper cost limit. It provided a further explanation of why it considered this to be the case.
5. In relating to request (b), the SPS advised Mr Q that it did not have access to SPSO email or mail and therefore did not hold the information he had requested.
6. On 7 March 2012, 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.
7. The application was validated by establishing that Mr Q had made requests for information to a Scottish public authority and had applied to the Commissioner for a decision only after asking the authority to review its responses to those requests. The case was then allocated to an investigating officer.

## Investigation

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8. The SPS is an agency of the Scottish Ministers (the Ministers) and, in line with agreed procedures, the Ministers were notified in writing on 4 April 2012 that an application had been received from Mr Q and that an investigation into the matter had commenced. The Ministers were also given an opportunity to provide comments on the application (as required by section 49(3)(a) of FOISA) and asked to respond to specific questions.



9. Subsequent references to submissions requested and received from the SPS in this decision are references to those sought and received from the Ministers' Freedom of Information Unit on behalf of the SPS.
10. On 4 April 2012, Mr Q provided the Commissioner with further submissions to support his grounds for dissatisfaction, contending (with reference to information he had received in response to another request) that the number of individuals engaged in business performance within the SPS was considerably smaller than the SPS had suggested.
11. On 30 April 2012, the SPS provided the Commissioner with submissions. It acknowledged that it held information falling within the scope of request (b) and accepted that section 17 of FOISA should not have been applied in the circumstances. The SPS stated that it had located the relevant information and decided that no exemption applied. This information was provided to Mr Q on 27 April 2012, Mr Q confirming receipt on 11 June 2012. He did not, however, consider the information to be pertinent to his request (which he believed concerned prisoners being permitted to have their own laptops in their possession, as opposed to simply being permitted to borrow a laptop from the SPS for a limited period).

## 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 submissions made to her by both Mr Q and the SPS and is satisfied that no matter of relevance has been overlooked.

### *Request (a)*

13. Mr Q believed that the SPS had inflated the cost of handling his request. He queried the SPS's statement that his request required it to "trawl" for information, as he believed his request to have strict parameters. Mr Q also stated that the SPS had failed to provide him with adequate advice and assistance.

### **Section 12(1) of FOISA**

14. Section 12(1) provides that a Scottish public authority is not obliged to comply with a request for information where the cost of doing so (on a reasonable estimate) would exceed the relevant amount prescribed in the Fees Regulations. This amount is currently set at £600 in terms of regulation 5 of the Fees Regulations. The Commissioner has no power to require the release of information should she find that the cost of responding to a request for information exceeds this amount.



15. The projected costs the public authority can take into account in relation to a request for information are, according to regulation 3 of the Fees Regulations, the total costs, whether direct or indirect, which the authority reasonably estimates it is likely to 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 requested or (ii) whether or not it should provide the information. The maximum rate a Scottish public authority can charge for staff time is set at £15 per hour.
16. The SPS submitted, as an example, that between 1 June 2011 and 31 December 2011 the HMP Glenochil Business Improvement Manager had sent or received 148 email messages with “laptop” in the subject heading. The SPS explained that these would need to be reviewed to consider redaction and release. The SPS estimated that each email would require approximately five minutes to review, a total of 12.3 hours and therefore (at the rate of £15 per hour) a cost of £185.
17. As well as the Business Improvement Manager’s emails, the SPS highlighted that Mr Q’s request sought communications in respect of the procurement of a laptop facility involving senior managers at HMP Glenochil, numbering 11, and any other SPS managers or officials. The SPS identified a further 11+ staff members significantly involved in the process and, therefore, the SPS estimated an averaged calculation of the cost to be  $20 \times £185 = £3,700$ . The SPS stated that this did not include letters and other files which would also need to be located and retrieved to determine whether they fell within the scope of the request.
18. In response to Mr Q’s assertion that his request did not represent a “trawl”, the SPS stated that the terms of his request, specifically the reference to “all and any information” from “any SPS employee engaged in a ‘Business Performance’ function” was much more extensive than he suggested. It considered that to respond to the request would require a “trawl” of many potential sources, given the full range of officials referred to in his request. The SPS argued that Mr Q did not solely request information from those undertaking a “Business Performance” function and his wider request could encompass considerably more than the two employees suggested by Mr Q. The SPS highlighted that Mr Q was unlikely to be fully aware of which staff would have been engaged on laptop procurement issues.
19. The SPS also provided the Commissioner with further context surrounding the subject matter of Mr Q’s request, explaining that policy and IT staff had been involved in the procurement process, as well as an external company and the National Offender Management Service. It considered that to identify all the information held would involve all those involved in the process.
20. Having considered the SPS’s submissions and the terms of Mr Q’s request, the Commissioner is satisfied that it was reasonable for the SPS to interpret the request as encompassing not simply those designated with a “Business Performance” function or those with “Business Performance” in their job title. In all the circumstances, the interpretation applied to the request appears reasonable.



21. Having considered the estimates and supporting explanations provided by the SPS, the Commissioner is satisfied that it was entitled to refuse to comply with the request (a) by virtue of section 12(1) of FOISA.

### **Section 15 of FOISA**

22. Section 15(1) of FOISA requires a Scottish public authority, so far as it is reasonable to expect it to so, to provide advice and assistance to a person who has made, or proposes to make, a request for information to it.
23. Examples of such advice and assistance given in the Scottish Ministers' Code of Practice on the discharge of functions by Scottish public authorities under FOISA and the Environmental Information (Scotland) Regulations 2004 include, in cases where section 12(1) applies, "consider[ing] what information could be provided below the cost limit, and suggest[ing] how the applicant may wish to narrow the scope of their request accordingly" (see paragraph 1.9).
24. Within its submissions to the Commissioner, the SPS advised that, within its response of 2 February 2012, it had suggested that Mr Q reduce the scope of the request and further suggested ways in which this could be done. The Commissioner notes that, within this letter, the SPS suggested that he narrow the scope of his request and that he focus on a particular individual or to specify a time period for his request. Mr Q chose not to do so.
25. In the circumstances, the Commissioner is satisfied that the SPS fulfilled its requirements under section 15 of FOISA, so far as it was reasonable to expect it to do so in the circumstances.

### *Request (b)*

26. As stated above, the SPS acknowledged during the course of the investigation that it was initially incorrect in its application of section 17 of FOISA to this request. Information was identified and provided to Mr Q during the course of the investigation. The Commissioner concludes, therefore, that the SPS was incorrect in its application of 17 of FOISA at the time it responded to Mr Q's request.
27. With respect to the information supplied during the course of the investigation, Mr Q argued that it did not satisfy the terms of his request, stating that the information supplied did not concern the policy in question, namely prisoners' access to computers "in possession" (see paragraph 11 above) as opposed to policy concerning the SPS providing prisoners with limited access to its computers.
28. Mr Q explained that the background to this request related to a set of formal recommendations made by the SPCC circa September 2010, which concerned clarification and formulation of SPS policy relative to prisoners being permitted to have their own laptops "in possession". Mr Q advised that these recommendations arose from a complaint made by him.



29. The investigating officer sought an explanation from the SPS as to the manner in which it interpreted his request for information. The SPS stated that it considered Mr Q's request to be seeking communications between the SPS and the SPSO concerning the SPCC recommendation in complaint number PH/7/2010 (Mr Q's most recent complaint on the question of computer access, which related to access to SPS facilities rather than prisoners having laptops "in possession").
30. The SPS explained that it set out its position in relation to the recommendations in complaint PH/7/2010 in an e-mail to the SPSO on 15 November 2010. The SPS stated that a copy of this email was requested by and provided to Mr Q on 18 November 2010. It did not consider any other information to fall within the scope of request (b).
31. A copy of this email was provided to the investigating officer. The SPS also explained that Mr Q had pursued the matter extensively over the years and had already been supplied with information held in relation to the issue.
32. To support its position, the SPS advised that it had two policies concerning access to computer facilities, relating respectively to the purchase by a prisoner of a personal laptop and the provision of an SPS procured laptop for a temporary purpose/period. The SPS stated that Mr Q's most recent complaint surrounded the latter.
33. Given the SPS's explanation of its understanding of the situation, and having considered the terms of request (b) and correspondence relating to complaint PH/7/2010, the Commissioner considers the SPS' interpretation of Mr Q's request to have been reasonable in the circumstances. Whatever Mr Q may have intended, there is nothing in his communications with the SPS on request (b) to suggest that he was concerned about policy on the purchase by prisoners of personal laptops, as opposed to policy on access to SPS laptops (to which complaint PH/7/2010 appears to relate). There is no suggestion that the SPS holds additional information in respect of complaint PH/7/2010.
34. In all the circumstances, therefore, the Commissioner is satisfied that (despite incorrectly applying section 17 of FOISA at the outset) the SPS complied with Part 1 of FOISA in dealing with Mr Q's request (b) during the investigation.



## **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 requests made by Mr Q.

The Commissioner finds that section 12(1) of FOISA permitted the SPS to refuse to comply with Mr Q's request (a).

However, by initially relying on section 17 of FOISA in response to request (b), the SPS failed to comply with Part 1 (and in particular section 1(1)) of FOISA. Given that information was identified and provided to Mr Q during the course of the investigation in respect of request (b), the Commissioner does not require the SPS to take any action in respect of this failure in response to Mr Q's application. In reaching this conclusion, the Commissioner is satisfied that the SPS's interpretation of request (b) (in providing information to Mr Q) was reasonable in all the circumstances of the case.

## **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.

**Margaret Keyse**  
**Head of Enforcement**  
**4 October 2012**



## 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.
- ...
- (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.

##### 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.
- ...

##### 15 Duty to provide advice and assistance

- (1) A Scottish public authority must, so far as it is reasonable to expect it to do so, provide advice and assistance to a person who proposes to make, or has made, a request for information to it.
- (2) A Scottish public authority which, in relation to the provision of advice or assistance in any case, conforms with the code of practice issued under section 60 is, as respects that case, to be taken to comply with the duty imposed by subsection (1).



## 17 Notice that information is not held

- (1) Where-
  - (a) a Scottish public authority receives a request which would require it either-
    - (i) to comply with section 1(1); or
    - (ii) to determine any question arising by virtue of paragraph (a) or (b) of section 2(1),if it held the information to which the request relates; but
  - (b) the authority does not hold that information,it must, within the time allowed by or by virtue of section 10 for complying with the request, give the applicant notice in writing that it does not hold it.

...

## 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.