

Decision Notice

Decision 114/2019: Mr N and the Chief Constable of the Police Service of Scotland

Communications re NHS Ayrshire and Arran

Reference No: 201900211

Decision Date: 5 August 2019



Scottish Information
Commissioner

Summary

Police Scotland were asked for communications between named parties, between specified dates, regarding specified allegations against NHS Ayrshire and Arran's directors. They were also asked about instructions from the prosecuting authorities in relation to the case in question. Police Scotland responded that no information was held.

The Commissioner investigated and found that Police Scotland did not hold information for those dates, but had failed to address the request fully, which he now requires Police Scotland to do.

Relevant statutory provisions

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) and (4) (General entitlement); 17(1) (Notice that information is not held)

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 4 December 2018, Mr N made a request for information to the Chief Constable of the Police Service of Scotland (Police Scotland). In his request, he described allegations he had made to Police Scotland on 30 April 2013, involving NHS Ayrshire and Arran. Mr N asked for the following information:
Have Police Scotland received any instructions from the Lord Advocate, his office, or COPFS [Crown Office and Procurator Fiscal Service] in relation to this case? (Part 1)
Under FOISA, can you please provide me with all the information Police Scotland holds (emails, letters, correspondence, telephone calls) relating to all communications between the Lord Advocate, his office, COPFS and Police Scotland between the dates of 25th October 2017 and 19th October 2018. (Part 2)
2. Police Scotland responded on 7 January 2019, stating that no information was held and giving notice in terms of section 17 of FOISA.
3. On 7 January 2019, Mr N wrote to Police Scotland, requesting a review of their decision. He refused to accept that there was no information held for the period in question, given his understanding of the Police Investigations and Review Commissioner's scrutiny of a complaint regarding Police handling of this case.
4. Police Scotland notified Mr N of the outcome of their review on 4 February 2019, upholding their original decision that no information meeting the terms of the request was held.
5. On 21 February 2019, Mr N wrote to the Commissioner's office. He applied to the Commissioner for a decision in terms of section 47(1) of FOISA. Mr N stated he was dissatisfied with the outcome of Police Scotland's review because he did not accept that they held no information capable of addressing his request.

Investigation

6. The application was accepted as valid. The Commissioner confirmed that Mr N 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 22 February 2019, Police Scotland were notified in writing that Mr N had made a valid application and the case was 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. Police Scotland were invited to comment on this application and to answer specific questions on the searches they had undertaken.

Commissioner's analysis and findings

9. In coming to a decision on this matter, the Commissioner considered all of the withheld information and the relevant submissions, or parts of submissions, made to him by both Mr N and Police Scotland. He is satisfied that no matter of relevance has been overlooked.

Is information held by Police Scotland?

10. Section 1(1) of FOISA provides that a person who requests information from a Scottish public authority which holds it is entitled to be given that information by the authority. This is subject to qualifications which, by virtue of section 1(6) of FOISA, allow Scottish public authorities to withhold information or charge a fee for it. These qualifications do not apply in this case.
11. The information to be given is that held by the authority at the time the request is received, as defined in section 1(4). If no such information is held by the authority, section 17(1) of FOISA requires the authority to give the applicant notice to that effect.
12. The Commissioner's remit is to investigate and reach a determination on information held by a Scottish public authority, including whether any relevant information is held. He cannot comment on what Police Scotland ought to hold, but he can consider whether Police Scotland took adequate, proportionate steps to establish what information, if any, they held and which fell within the scope of Mr N's request.
13. The standard of proof in considering whether a Scottish public authority holds information is the civil standard of the balance of probabilities. In determining this, the Commissioner will consider the scope, quality, thoroughness and results of the searches and inquiries carried out by the public authority. He will also consider, where appropriate, any reason offered by the public authority to explain why the information is not held.

Searches

14. Police Scotland confirmed to the investigating officer that Mr N reported the allegations on 30 April 2013. Police Scotland outlined the history of the case and described the searches conducted to ascertain what information, if any, they held for the dates specified by Mr N in his request. Police Scotland also confirmed the staff who undertook the searches and supplied supporting emails showing the approach taken.
15. Police Scotland confirmed that the search covered the full time period specified and that they remained satisfied that no information was held which could address the terms of Mr N's request.

Commissioner's conclusions

16. Having taken account of the submissions from both Police Scotland (including a detailed timeline of their engagement with the case) and Mr N, as well as the terms of the request, the Commissioner is satisfied with the search methodology used by Police Scotland and that the searches themselves were reasonable, proportionate steps to identify whether or not information capable of addressing the terms of Mr N's information request was held, assuming the timescales specified in Part 2 of the request were considered to apply to the request as a whole.
17. Unfortunately, the Commissioner can find no basis for concluding that Part 1 of the request was subject to the timescale specified in Part 2, or any other timescale. Consequently, the Commissioner finds that Police Scotland failed to respond to this part of the request fully, in terms of section 1(1) of FOISA. He now requires Police Scotland to carry out a further review, including searches unrestricted by any timescale not related to the case in question as a whole, and to notify Mr N of the outcome, all in terms of section 21 of FOISA. The Commissioner would ask Police Scotland to ensure, in carrying out this exercise, that they do not apply any other unnecessarily narrow parameters to the interpretation of Part 1 of the request.
18. With regard to Part 2 of the request, however, given the searches described above, the Commissioner is satisfied that if information existed for the relevant dates it would have been located.
19. Consequently, the Commissioner is satisfied with Police Scotland's searches for Part 2. For this reason, he is also satisfied that Police Scotland were correct to give Mr N notice, under section 17(1) of FOISA, that the information was not held.

Decision

The Commissioner finds that the Chief Constable of the Police Service of Scotland (Police Scotland) partially complied with Part 1 of the Freedom of Information (Scotland) Act 2002 (FOISA) in responding to the information request made by Mr N.

The Commissioner is satisfied that Police Scotland correctly issued a notice in terms of section 17(1) of FOISA for Part 2 of the request.

However, he also finds that the first part of the request was not addressed adequately in the response or the review decision, thus contravening section 1(1) of FOISA. He requires Police Scotland to respond to this part of Mr N's request by carrying out a fresh review, in terms of section 21(4)(b) of FOISA.

Appeal

Should either Mr N or Police Scotland 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 Police Scotland fail to comply with this decision, the Commissioner has the right to certify to the Court of Session that they have failed to comply. The Court has the right to inquire into the matter and may deal with Police Scotland as if they had committed a contempt of court.

Margaret Keyse
Head of Enforcement

5 August 2019

Appendix 1: 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.

...

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.

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