

Decision Notice

Decision 204/2018: Mr N and the Chief Constable of the Police Service of Scotland

Movements of a named person and investigation of witness statements

Reference No: 201800825

Decision Date: 12 December 2018



Scottish Information
Commissioner

Summary

Police Scotland were asked about the movements of a named person [REDACTED]. Police Scotland refused to respond on the basis that the request was vexatious (section 14(1) of FOISA). They subsequently refused to carry out a review on the basis that the request was a repeat request (section 14(2) of FOISA).

Following an investigation, the Commissioner concluded that the request was not vexatious or repeated. Almost [REDACTED] years had passed since the first request and circumstances could have changed. He required Police Scotland to carry out a review and to respond in other terms than section 14 of FOISA.

The Commissioner also found that Police Scotland had failed to respond to the initial request within the required timescale.

Relevant statutory provisions

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) and (6) (General entitlement); 10(1) (Time for compliance); 14 (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. Mr N was found guilty of [REDACTED].
2. On [REDACTED], Mr N asked [REDACTED], the statutory predecessor of the Chief Constable of the Police Service of Scotland (Police Scotland) for a range of information [REDACTED]. Parts of this request are set out in full later in the decision.) This request was subsequently the subject of two separate investigations by the Commissioner, which led to [REDACTED] and [REDACTED].
3. In [REDACTED], the Commissioner concluded that the information withheld by [REDACTED] Police was exempt from disclosure under section 34 (Investigations by Scottish public authorities and proceedings arising out of such investigations) of FOISA and that the public interest favoured maintaining the exemption.
4. [REDACTED]
5. [REDACTED]
6. On 28 February 2018, Mr N made an information request to Police Scotland. Again, the request concerned information held by Police Scotland explaining the movements of [REDACTED].
7. Police Scotland advised Mr N, in a letter dated 4 April 2018, that they considered his request to be vexatious in terms of section 14(1) of FOISA.

8. On 10 April 2018, Mr N asked Police Scotland to review this response. He disagreed that his request was vexatious and complained that Police Scotland had been late in responding to his request.
9. On 9 May 2018, Police Scotland notified Mr N that, as it had refused his request under section 14(2) of FOISA (repeated request), it was not required to carry out a review (section 21(8)(b) of FOISA).
10. On 14 May 2018, Mr N wrote to the Commissioner. Mr N applied to the Commissioner for a decision in terms of section 47(1) of FOISA. Mr N argued that Police Scotland were not entitled to rely on section 14 of FOISA to refuse his request. He also expressed dissatisfaction with Police Scotland's failure to comply with the timescales for responding to his request.

Investigation

11. 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.
12. On 7 June 2018, Police Scotland was notified in writing that Mr N had made a valid application. The case was then allocated to an investigating officer.
13. 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 answer specific questions, including justifying their reliance on section 14(1) and/or (2) of FOISA. Police Scotland were also asked about their compliance with timescales.

Commissioner's analysis and findings

14. 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.

Timescales for compliance

15. Section 10(1) of FOISA gives Scottish public authorities a maximum of 20 working days following the date of receipt of the request to comply with a request for information. This is subject to qualifications which are not relevant in this case.
16. Mr N complained that it took Police Scotland more than 20 working days to respond to his request.
17. Mr N's information request was dated Wednesday 28 February 2018. Police Scotland stated that they received his request on Tuesday 6 March 2018. However, Mr N had sent his request by recorded delivery and he was able to evidence that Police Scotland received his request on Monday 5 March 2018.
18. As Friday 30 March 2018 (Good Friday) was a bank holiday (see the definition of "working day" in section 73 (Interpretation) of FOISA), this meant that Police Scotland had until Tuesday 3 April 2018 to issue a response.

19. The response from Police Scotland is dated Wednesday 4 April 2018 (which Police Scotland considered to be the due date). There is some confusion as to whether the response was actually posted that day or on the following day but, given that Police Scotland did not provide a response to Mr N's request for information within 20 working days, the Commissioner must find that they failed to comply with section 10(1) of FOISA.

Vexatious or repeated requests

20. Under section 14 of FOISA, a public authority is not required to comply with a request for information if:
- (i) the request is vexatious (section 14(1)); or
 - (ii) the request is identical or substantially similar to a previous request from the requester (which the authority complied with), unless there has been a reasonable period of time between the making of the request complied with and the making of the subsequent request (section 14(2)).
21. Under section 21(8)(b) of FOISA, a public authority is not obliged to comply with a requirement for review if the request the requirement for review relates to was one which it was not obliged to comply with under section 14(1) or (2).
22. Police Scotland initially refused to comply with Mr N's request on the basis that it was vexatious. At review, they told Mr N they were not obliged to carry out a review on the basis that the request was repeated.
23. During the Commissioner's investigation, Police Scotland confirmed that they considered Mr N's request to be both vexatious and repeated. The Commissioner will therefore consider whether the request was vexatious and/or repeated and whether Police Scotland were obliged to carry out a review.

Section 14(2) – Repeated requests

24. For section 14(2) of FOISA to apply, the Commissioner needs to consider whether:
- (i) Mr N's request of [REDACTED] was identical or substantially similar to his request of 28 February 2018 and
 - (ii) Police Scotland complied with Mr N's previous request; and, if so,
 - (iii) there has been a reasonable period of time between the submission of the previous request and the submission of the subsequent request.

Is the request identical or substantially similar to the previous request?

25. Police Scotland argued that the request of 28 February 2018 is a repeat request.
26. Mr N's requests of [REDACTED] and 28 February 2018 both concern information held by Police Scotland explaining the movements of [REDACTED].
27. Mr N's request of 28 February 2018 is in two parts. The first part reads as follows:
[REDACTED]
28. This is similar to parts (1) and (2) of the [REDACTED] request which read as follows:
[REDACTED]

29. The second part of Mr N's request of 28 February 2018 read as follows:

[REDACTED]

30. This is similar to part (7) of the [REDACTED] request which is closest to the current request, which read as follows:

[REDACTED]

31. It is clear, from a simple comparison of the [REDACTED] request and the 2018 request that the requests are not identical, but they are substantially similar.

32. In the circumstances, the Commissioner accepts that the 2018 request is substantially similar to requests made by Mr N in [REDACTED].

Was the previous request complied with?

33. It is not the case that a request is only "complied with" if information is disclosed in full. A request can be complied with by, for example, a public authority refusing to disclose the information or by notifying the requester that it does not hold the information the requester has asked for.

34. [REDACTED] Police responded to Mr N's [REDACTED] request on [REDACTED] and, in response to a request from Mr N, carried out a review in [REDACTED]. The Commissioner is therefore satisfied that the previous request was complied with, despite the fact that information was withheld under Part 2 of FOISA.

Has a reasonable period of time passed?

35. There is no definition of "a reasonable period" in FOISA. What is reasonable will depend on the circumstances of the case. In this case, almost [REDACTED] years had passed between the two requests.

36. The Commissioner has issued guidance on section 14(2) of FOISA.¹ The guidance suggests that considering the following two questions can help assess whether a reasonable period of time has elapsed:

(i) Has the information changed?

(ii) Have the circumstances changed?

37. Police Scotland consider the 2018 request to be a repeat request as it rehearses the same issues – issues which have not changed since the [REDACTED] request. Police Scotland comment that the issues will not change over time and that the request seeks evidentiary material which, by its very nature, will not be disclosed under FOISA.

38. On the other hand, Mr N considers that circumstances may have changed over the past [REDACTED] years. For example, he suggested that some of the individuals to whom a duty of confidentiality was owed may now have died.

39. [REDACTED] years is a long time and it is difficult to think of many situations where this length of time between requests would not be viewed as a reasonable period of time. The

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

Commissioner cannot accept that neither the information nor the circumstances may have changed in the intervening years.

40. The Commissioner accepts that it will be likely that evidence and statements will not have changed and that exemptions may still be applicable to that information. However, he cannot accept that there will have been no changes in the circumstances since [REDACTED] Police complied with the original request.
41. For example, the actual information held by Police Scotland may have changed. Some information may no longer be held. New information which was not held at the time of the [REDACTED] request may fall within scope of the new request as a result of relevant information being shared with Police Scotland.
42. The passage of time may also be relevant when considering the application of exemptions. The Commissioner agreed in [REDACTED] that the information was exempt from disclosure under section 34(1)(a)(i) and (b) of FOISA and that the public interest in maintaining these exemptions outweighed the public interest in disclosing the information. However, while the exemptions in section 34(1)(a)(i) and (b) of FOISA can be applied in perpetuity, the balance of the public interest may change over time and information which was once exempt from disclosure may prove not to be exempt at a later date.
43. In these circumstances, the Commissioner finds that, while Mr N's request of February 2018 was substantially similar to parts of his request of [REDACTED], a reasonable period had passed between the two. Consequently, section 14(2) of FOISA does not apply and Police Scotland were not entitled to refuse to carry out a review on the basis that it did.

Section 14(1) of FOISA - Vexatious

44. Under section 14(1) of FOISA, a Scottish public authority is not obliged to comply with a request for information if the request is vexatious.
45. The Commissioner's guidance on section 14(1) of FOISA (see paragraph 36) notes that there is no single formula or definitive set of criteria that allow a formulaic approach to be taken in determining whether a request is vexatious. Each request must be considered on the merits of the case, supported by evidence, clear evaluation and reasoning. Although this is not an exhaustive list, the following factors will be relevant to a finding that a request which may be the latest in a series of requests or other related correspondence) is vexatious:
 - (i) It would impose a significant burden on the public authority;
 - (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 to be manifestly unreasonable or disproportionate.
46. While the Commissioner's view is that the term "vexatious" must be applied to the request and not the requester, he also acknowledges that the applicant's identity, and the history of their dealings with a public authority, may be relevant in considering whether a request is vexatious.

Police Scotland's submissions

47. In its response to the 2018 request, Police Scotland told Mr N the request formed part of a series of requests submitted between [REDACTED] and March 2018 where Police Scotland and [REDACTED] Police had repeatedly explained their position in relation to the public disclosure of the information which was the subject of his requests. Therefore, Police Scotland advised that they considered the request to be vexatious on the grounds that it has the effect of harassing the Service and that section 14(1) applied.
48. In its review response, Police Scotland stated that, as the original response had been refused on the grounds of section 14(2) of FOISA, it was therefore not obliged to carry out a formal review of the response.
49. As noted above, Police Scotland sought to rely on both section 14(1) and (2) in relation to Mr N request. They stated that, while time had passed, Mr N continues to rehearse the same issues. The issues have not changed and will not change. The request relates to evidence which would rightly be the provenance of the Crown and Courts. [REDACTED] This information is considered confidential and would only be disclosed during legal proceedings as a result of the investigation or any other due process.

Submissions from Mr N

50. In his submissions to the Commissioner, Mr N considered that Police Scotland appeared to be relying on section 14(1) because the request was "repeated" and that it had not claimed that the request was intended to or had the effect of harassing the authority.
51. Mr N stated that circumstances had clearly changed in the [REDACTED] year period since his first request and that it was commonplace for Police Scotland to continue to make public appeals for information about "cold cases" on the basis that circumstances and personal loyalties change over time.

The Commissioner's conclusions

52. The Commissioner recognises that Mr N's request does not appear, on the face of it, to be vexatious. However, he is aware that the vexatious nature of a request might only emerge after considering the context of previous or ongoing correspondence between the applicant and the authority. While the Commissioner can take into account the context of a requester's history of correspondence with an authority, he must be satisfied that the specific request under consideration was vexatious.
53. Police Scotland considered this request to be vexatious as they had made it clear to Mr N, in correspondence since the original request, that, "evidentiary material" cannot and should not be released into the public domain. They argued that Mr N's request was vexatious as it considered it to have the effect of harassing the Service.
54. The submissions from Police Scotland were short. Police Scotland did not provide the Commissioner with further information about its correspondence with Mr N which would have allowed him to consider this argument. In any event, this consideration appears to be based on a broad consideration of Mr N's correspondence, rather than focussing on requests under FOISA. The Commissioner cannot accept, in the circumstances, that to ask for information twice in [REDACTED] years is evidence of harassment.
55. There were other, alternative, avenues available to Police Scotland in responding to this case. If Police Scotland considered that the information had not changed since the original request in [REDACTED], then it may consider that the exemptions applied to that request

may still be appropriate. However, given the passage of time in this case, it is also possible that information has changed, that its sensitivity has changed or that some information may no longer be held by the authority. This cannot be known until the information has been reviewed.

56. Therefore, in all circumstances of this case, the Commissioner is not satisfied, on the basis of the arguments put forward by Police Scotland, that Mr N's request was vexatious or repeated. He therefore finds that section 21(8)(b) of FOISA does not apply and that Police Scotland were obliged to comply with Mr N's requirement for review.
57. He therefore requires Police Scotland to carry out a review of Mr N's request in terms of section 21(4) of FOISA and to respond to Mr N otherwise than in terms of section 14.

Decision

The Commissioner finds that the Chief Constable of the Police Service of Scotland (Police Scotland) failed to comply with Part 1 of the Freedom of Information (Scotland) Act 2002 (FOISA) in responding to the information request made by Mr N. He finds that section 21(8) of FOISA does not apply and that Police Scotland were obliged to carry out a review.

The Commissioner therefore requires Police Scotland to carry out a review in line with section 21(4) of FOISA and to respond to Mr N in terms other than section 14(1) or (2) of FOISA, by 26 January 2019.

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

Daren Fitzhenry
Scottish Information Commissioner

12 December 2018

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.

...

10 Time for compliance

- (1) Subject to subsections (2) and (3), a Scottish public authority receiving a request which requires it to comply with section 1(1) must comply promptly; and in any event by not later than the twentieth working day after-

(a) in a case other than that mentioned in paragraph (b), the receipt by the authority of the request; or

(b) in a case where section 1(3) applies, the receipt by it of the further information.

...

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.

- (2) Where a Scottish public authority has complied with a request from a person for information, it is not obliged to comply with a subsequent request from that person which is identical or substantially similar unless there has been a reasonable period of time between the making of the request complied with and the making of the subsequent request.

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.

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