

Decision Notice

Decision 054/2017: Mr X and the Chief Constable of the Police Service of Scotland

Involvement of Kenneth MacAskill in the police inquiry into the death of Barry Wallace

Reference No: 201601034

Decision Date: 18 April 2017



Scottish Information
Commissioner

Summary

Police Scotland were asked for information about the potential involvement of Kenneth MacAskill MSP in the police inquiry into the death of Barry Wallace. Police Scotland responded that they did not have to comply with the request because to do so would exceed the cost limit of £600.

The Commissioner investigated and subsequently accepted that it would cost Police Scotland more than £600, so they did not have to comply with the request.

Relevant statutory provisions

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1), (4) and (6) (General entitlement); 12(1) (Excessive cost of compliance)

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 Appendix 1 to this decision. The Appendix forms part of this decision.

Background

1. On 14 October 2014, Mr X made a request for information to the Chief Constable of the Police Service of Scotland (Police Scotland). He asked for:

All and any information held by Police Scotland ...in relation to any potential involvement of or by Mr Kenneth MacAskill in the police inquiry into the death of Mr Barry Wallace (December 1999) and the criminal investigation arising therefrom, such information having been gathered or collated at any point during the police investigation or subsequently.

2. The sequence of communications that followed is narrated fully in *Decision 166/2015*¹ so will not be repeated here. In short, Mr X was dissatisfied that Police Scotland had refused to confirm or deny whether they held any information, and he applied to the Commissioner.
3. The Commissioner's findings in that decision, relevant to this application, were that Police Scotland:
 - Were not entitled to refuse to reveal, in terms of section 18(1) of FOISA, whether they held information which, if it exists and is held, would not be covered by the exemptions in section 34(1)(a), i.e. information relating to involvement of Mr MacAskill subsequent to the police investigation
 - Were not entitled to refuse to reveal, in terms of section 18(1) of FOISA, whether they held information which, if it exists and is held, would be covered by the exemption in section 38(1)(b), insofar as it relates to the personal data of Mr MacAskill in his capacity as Cabinet Justice Secretary or as an MSP.

¹ <http://www.itspublicknowledge.info/ApplicationsandDecisions/Decisions/2015/201402888.aspx>

4. As a consequence, the Commissioner required Police Scotland to respond again to Mr X in respect of part of his request:

...to reveal to [Mr X] whether any such information exists or is held by them. If the information is held, she requires Police Scotland to provide that information to [Mr X], or to issue a refusal notice in line with the requirements of section 16 of FOISA, or to explain why (in terms of FOISA) they are not required to comply with his request. If the information is not held, she requires Police Scotland to give notice of this in line with the requirements of section 17 of FOISA.

5. Police Scotland responded on 17 December 2015. They informed Mr X that it would cost in excess of £600 to respond to his request and so, by virtue of section 12 of FOISA, they were not required to comply with his request. Police Scotland explained that there were “*in excess of 79 plus boxes concerning the criminal case in relation to your request*” and stated that to examine and read every piece of correspondence would take an estimated 632 hours and cost £9,480.
6. On 30 May 2016, Mr X applied to the Commissioner for a decision in terms of section 47(1) of FOISA. He was dissatisfied with the outcome of Police Scotland’s review of 17 December 2015 as he did not accept that the cost of complying with his request would be excessive.

Investigation

7. 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 their response to that request before applying to her for a decision.
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 answer specific questions including justifying their reliance on any provisions of FOISA they considered applicable to the information requested.
9. Police Scotland provided submissions on 11 August 2016, and again on 20 February 2017.
10. As part of the investigation, staff from the Commissioner’s office viewed a sample of the boxes of information to examine what was held in them, and how.
11. During the investigation, Police Scotland carried out additional searches, including information from the Force Executive of the legacy force Strathclyde Police (now transferred to Police Scotland) and information relating to the current Force Executive. They provided the results of these searches to the Commissioner.

Commissioner’s analysis and findings

12. In coming to a decision on this matter, the Commissioner considered all the relevant submissions, or parts of submissions, made to her by both Mr X and Police Scotland. She is satisfied that no matter of relevance has been overlooked.
13. The Commissioner’s decision looks only at whether Police Scotland were entitled to apply section 12, when responding anew to Mr X’s request. The decision does not (indeed cannot) revisit the issues decided in *Decision 166/2016*.

14. Mr X's request referred to "*any potential involvement of or by Mr Kenneth MacAskill*" in the police investigation of Barry Wallace's death. Mr X provided an example of correspondence which he thought might be held by Police Scotland.

Section 12(1) - excessive cost of compliance

15. Section 12(1) provides that a Scottish public authority is not obliged to comply with a request for information where the estimated cost of doing so would exceed the relevant amount prescribed in the Fees Regulations. This amount is currently set at £600 (regulation 5 of the Fees Regulations). Consequently, the Commissioner has no power to order a public authority to comply with a request should she find that the cost of complying would exceed this sum.
16. According to regulation 3 of the Fees Regulations the projected costs the authority can take into account in relation to a request for information are 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 authority may not charge for the cost of determining whether it actually holds the information requested nor whether or not it should provide the information. The maximum rate a Scottish public authority can charge for staff time is £15 per hour.
17. Mr X questioned the cost calculations of Police Scotland. He questioned the accuracy of the estimated number of boxes to be searched, and challenged the assumption that every piece of correspondence would have to be read in full. He made the following points (all of which were, in the interests of natural justice, put to Police Scotland by the Commissioner):
- Police Scotland's response of 16 March 2016 (reference IM-FOI-2016-0058) stated that they held 78 boxes, rather than the "79 plus boxes" to which Police Scotland had previously referred.
 - 18 of the boxes contain metadata explaining their contents (again, Mr X was referring to a statement in Police Scotland's response of 16 March 2016). From the electronic file list and the "*metadata*" reports provided to him, Mr X believed that some boxes held information pertaining to other matters, and they could be excluded from the search.
 - Mr X raised the possibility that predictive coding software of the type used by criminal justice agencies in the disclosure process might also assist Police Scotland in locating information covered by his request at marginal cost. (Mr X referred to the case of *Pyrrho Investments Ltd and another v MWB Business Exchange Ltd and Others [2016] EWHC 256 (Ch)* in this context.)
18. Police Scotland confirmed that there were 78 boxes in which relevant information might be held. Police Scotland originally estimated that it would take a total of eight hours per box to retrieve, examine and read every piece of correspondence within each box: a total of 632 hours at a cost of £9,480.
19. For the purposes of the Commissioner's investigation, Police Scotland chose two boxes randomly and timed their search for relevant information within the boxes. It took 162 minutes or 2.7 hours to check the first box and 632 minutes or 10.5 hours to check the second box. Police Scotland then suggested a mean time of 6.6 hours for each box. Applying this average time to the full complement of boxes, Police Scotland estimated that it would take 515 hours for all 78 to be checked, with an estimated cost of £7,725.

20. Police Scotland explained that the 18 boxes containing metadata could not be excluded as the metadata supplied to Mr X was a very brief heading of the contents of the box. Each box would still be required to be manually searched and the documents read to see if they included any information covered by Mr X's request.
21. Police Scotland rejected Mr X's claim that some boxes could be excluded from the search because they held information pertaining to other matters. They argued that, as there is no reference on any indexing or electronic inventory regarding the contents of each and every box, the information in them could not automatically be excluded.
22. In relation to the software to which Mr X had referred, Police Scotland submitted that this had no relevance to the costs they would incur, in responding to his request. They commented that public authorities are not required to purchase software and digitalise documents for the purpose of responding to an information request, if that was what Mr X was suggesting. Police Scotland stressed that their recording and storage processes are sufficient for their own operational purposes.
23. Police Scotland explained that the boxes were held in an offsite storage facility maintained by an external company who charge for retrieval of information from storage. To comply with a request, they would have to retrieve the information from storage and examine it manually. Inspection on site was charged at one rate (per box), while removal to another location was charged at a higher rate.
24. Police Scotland was asked if it was possible to limit the search by excluding boxes purely in terms of how they were described or labelled (for example, by excluding boxes containing information solely about the crime scene). Police Scotland stated that there was no explicit or detailed inventory of the contents of the boxes, and confirmed that the boxes were not arranged in any chronological or other sequence.
25. Police Scotland provided the Commissioner with a list of the boxes, with a barcode number and brief description for each box. Many of the boxes had identical descriptions. Police Scotland later explained that the information in the boxes had been arranged and deposited by the murder investigation team, in accordance with that team's needs. The boxes were therefore not arranged or indexed for any other purpose, such as responding to information requests. The fields used for descriptions of the boxes were limited, in terms of the number of characters which could be entered.
26. During the Commissioner's investigation, Police Scotland commented that, if correspondence was received from Mr MacAskill, in his capacity as Justice Secretary or as an MSP, it might have been held within the files of the Force Executive of the legacy Strathclyde Police force or the current Force Executive. (The Force Executive is the senior management team of the police service.) Police Scotland maintained that they could not reasonably respond to Mr X's request without searching the 78 boxes, but they submitted that it would also be reasonable to assess whether information might be held in relation to the Force Executive.
27. Police Scotland therefore conducted searches of the electronic information retained from the Force Executive of Strathclyde Police, and of the electronic information relating to the current Force Executive. (They explained that some legacy records were copied into the new Police Scotland filing system.) Police Scotland searched the period from January 2000 until the date of Mr X's request (14 October 2014) using keywords relevant to the request. Police Scotland submitted that the costs incurred by such searches, and the cost of examining any

documents which appeared as if they might be relevant to the request, would be relevant in terms of estimating the overall cost of complying with Mr X's request.

28. Police Scotland submitted that each search took a small amount of time to set up and 5-10 minutes to copy the results. The average time to access and read any potentially relevant document was estimated by Police Scotland to be five minutes.
29. Police Scotland also confirmed, in terms of their records management, that there was no hard copy information stored in respect of the legacy Force Executive.

Commissioner's conclusions

30. As part of the investigation, the Commissioner's staff visited the storage depot where the 78 boxes are kept, and arranged for access to 14 boxes. The boxes were identified from the list provided by Police Scotland, and were chosen to represent a range of content, as far as could be established from the very limited index.
31. From this visit, the Commissioner concluded that Police Scotland had greatly over-estimated the time required to assess whether the information in each box required to be examined in detail or could reasonably be excluded after a quick view. Some of the boxes contained a list of contents, which described the individual documents, making it possible to identify any documents with possible relevance. Some of the boxes contained collections of documents which, after an initial look, could reasonably be excluded from further examination.
32. Police Scotland's high estimate may have been based on the assumption that the contents of each box would have to be read in full and that no information could be excluded from this process. The Commissioner does not believe such detailed scrutiny is reasonably required in this instance (for reasons explained above).
33. Even though the Commissioner's conclusion is that Police Scotland overestimated the time required, the Commissioner is satisfied on the balance of probabilities that Police Scotland could not comply with Mr X's request within the £600 cost limit. This takes into account the non-specific nature of the information requested, the boxes examined by the Commissioner's staff, the results of the Force Executive searches, the costs of retrieving the boxes and the staff time costs likely to be incurred in examining them.
34. In accepting Police Scotland's submission that the cost of identifying and retrieving the information would be more than £600, the Commissioner has taken the following into consideration.
 - (i) The Commissioner accepts Police Scotland's view that there is a reasonable chance that relevant information (if held) may have been stored somewhere within the 78 boxes. The boxes hold information relating to the investigation referred to in Mr X's request. It is therefore reasonable for Police Scotland to conclude that it would be necessary to assess whether the contents of the boxes hold information that falls within Mr X's request.
 - (ii) In order to carry out this assessment, the Commissioner accepts that the 78 boxes would have to be examined individually. There is no way to understand sufficiently the contents of each box (as far as the Commissioner can discern, after her enquiries and after examining a random sample of the boxes) without opening the box and either examining the index of contents within it or (where no index is included) examining the documents. There is no detailed external index of the boxes or their contents which would reasonably avoid the necessity for each box to be retrieved and opened.

- (iii) The boxes are kept in a commercial storage facility and retrieving them incurs a cost to Police Scotland. Even at the minimum rate (viewing on site only), the cost was still over £150. On top of this is the cost of the staff time required to establish whether the information in each box requires further examination or can reasonably be excluded straight away. Given the time her staff took to carry out this exercise, the Commissioner finds it would be reasonable to calculate costs based on an average time of 25 or 30 minutes per box.
 - (iv) Police Scotland's response to Mr X did not take account of the possible cost of examining other sources of information, such as information in the Force Executive systems. The Commissioner accepts that Force Executive information should be included in a reasonable and proportionate search for information covered by Mr X's request, given that the information relates to Kenny MacAskill in his role as an MSP or Justice Secretary: it would be reasonable to expect such information to have been seen, noted or retained by senior officers.
 - (v) The searches of the Force Executive information demonstrated that at least some of the documents listed in the search results would have to be individually examined to establish whether the contents were covered by the request. The Commissioner accepts that an estimate of costs for examining such documents must be added to the total estimated cost of complying with Mr X's request.
35. Taking account of all the above circumstances, the Commissioner is satisfied, on the balance of probabilities, that the cost of complying with Mr X's request would exceed £600 and, in line with section 12(1) of FOISA, that Police Scotland were not obliged to comply with the request.

Decision

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

The Commissioner finds that Police Scotland were not obliged to comply with the request on the grounds of excessive cost (section 12(1) of FOISA).

Appeal

Should either Mr X or the Chief Constable of the Police Service of Scotland (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.

Rosemary Agnew
Scottish Information Commissioner

18 April 2017

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.

...

- (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.

...

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.

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