

Decision Notice

Decision 111/2017: Mr S and the Chief Constable of the Police Service of Scotland

Investigation into postal ballot tallies

Reference No: 201601836

Decision Date: 17 July 2017



Scottish Information
Commissioner

Summary

Police Scotland were asked about their investigation into allegations about illegalities during the postal ballot tallies in the 2014 Scottish Independence Referendum.

The Commissioner found that Police Scotland had failed to identify and locate all the information they held which fell within the scope of the requests. She required Police Scotland to conduct further searches to satisfy her that they had located and retrieved all the relevant information that they held.

The Commissioner required Police Scotland to carry out more searches and provide Mr S with a new review of its responses to his requests.

Relevant statutory provisions

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) and (6) (General entitlement); 2(1)(b) (Effect of exemptions); 21(4) 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.

All references in this decision to "the Commissioner" are to Margaret Keyse, who has been appointed by the Scottish Parliamentary Corporate Body to discharge the functions of the Commissioner under section 42(8) of FOISA.

Background

1. Between 29 September 2015 and 30 August 2016, Mr S made a number of requests for information to the Chief Constable of the Police Service of Scotland (Police Scotland). Mr S was seeking information about Police Scotland's year-long investigation into alleged postal ballot illegalities during the Scottish Independence Referendum. The responses from Police Scotland were unclear and sometimes contradictory, and Mr S sought clarification from Police Scotland on several occasions as well as asking Police Scotland to review their responses to several of his requests.
2. On 5 October 2016, Mr S applied to the Commissioner for a decision in terms of section 47(1) of FOISA. Mr S summarised all of his requests for information and he detailed his dissatisfaction with the review outcomes provided by Police Scotland. Mr S stated that he was dissatisfied that Police Scotland had not disclosed any information in response to his information requests and he asserted that disclosure was in the public interest.
3. On receipt of Mr S' application, the Commissioner reviewed the correspondence between Mr S and Police Scotland and she considered that, of the six separate information requests made by Mr S, there were two that she could accept as valid. Details of these two requests are below.

Request one

4. Mr S wrote to Police Scotland on 8 December 2015. His information request read as follows:

(i) *I am requesting copies of all correspondence/paperwork/communications sent to or from any employee current or past of Police Scotland or any of its branches in connection with the investigation into postal ballot tallies during the independence referendum of 2014.*

(ii) *Requesting copies of all correspondence/paperwork/communications in relation the above mentioned investigation.*

Please ensure in both cases [(i) and (ii)] that the search for correspondence/paperwork/communications includes: email correspondence (including attachments), memos, reports, briefing documents or the equivalent, letters, telephone records and any notes made during and after telephone calls.

Correspondence includes any other type of correspondence frequently used by the department, including text messages and private emails, correspondence/audio that is stored on cloud services such as Dropbox, any tender or contract documents.

(iii) *Why [has] no action criminal or otherwise been taken whatsoever after the investigation?*

(iv) *What was the reasoning behind the decision that there was no evidence of criminality?*

(v) *How many people were spoken to in connection with the investigation?*

(vi) *What has the cost to the taxpayer been of the investigation?*

(vii) *What lessons if any have been learnt in connection with the investigation?*

5. Police Scotland responded to this request on 11 January 2016. Police Scotland provided some information in response to requests (iii), (iv) and (v), but notified Mr S that they did not hold information regarding requests (vi) and (vii) and that information falling within the scope of requests (i) and (ii) was being withheld under section 34(1) of FOISA.

6. On 13 January 2016, Mr S wrote to Police Scotland requesting a review of their decision to withhold information from him. Mr S argued that it was in the public interest for the information to be disclosed.

In his request for review, Mr S specifically focused on the information that was being withheld from him by Police Scotland. In light of this, the Commissioner can only consider how Police Scotland handled requests (i), (ii), (iii) and (iv) of Mr S' email of 8 December 2015. She cannot consider request (v) where information was provided, or requests (vi) and (vii) where Police Scotland gave Mr S notice that they did not hold this information.

7. Police Scotland notified Mr S of the outcome of their review on 28 January 2016. In their review outcome, Police Scotland amended some of the points in their initial response and they maintained that they were correct to withhold information under section 34(1) of FOISA.

Accepting a late application

8. Section 47(4)(a) of FOISA specifies that an application to the Commissioner under section 47(1) must be made within six months of the applicant receiving the outcome of an authority's review. However, section 47(5) of FOISA states that the Commissioner may

consider an application made outwith this period if, in the opinion of the Commissioner, it is appropriate to do so.

9. In this case, Mr S received Police Scotland's review outcome on 13 January 2016, but he did not make an application to the Commissioner until 5 October 2016.
10. The Commissioner considers that Police Scotland's responses to Mr S throughout his attempts to obtain information about the postal ballot investigation were uniformly poor and sometimes contradictory. Police Scotland's failure to provide accurate and consistent responses caused considerable confusion to Mr S and wasted a significant amount of his time. He was compelled to make numerous requests for information and clarification because of the confusion caused by the poor quality responses from Police Scotland.
11. In the circumstances, the Commissioner considered that it was appropriate to accept the late application.

Request two

12. Mr S also made the following request to Police Scotland on 8 August 2016, in relation to an earlier response he had received:
 - (i) *Were all the three who had a dual role as witnesses and also the subject of the investigation actually cautioned? And if so, can you tell me what was said.*
 - (ii) *If there was no caution, why is that?*
 - (iii) *Did the investigators in each case advise those subject of the investigation, the nature of any offence(s) of which he/she was suspected?*
 - (iv) *Did each of the three agree to a request to be interviewed and were they each told they were providing statements as subjects of the investigation?*
 - (v) *Where were the interviews conducted?*
 - (vi) *How were the interviews in each case recorded?*
 - (vii) *Were the three offered the chance for legal representation, and did they take that offer up? In which case, who many did and how many didn't?*
 - (viii) *In each case did the investigators allow those that were subject of the investigation the opportunity to answer the allegations against them and give their own account?*
 - (ix) *Were each of the three people notified that they were no longer subjects of the investigation at the end?*
13. Police Scotland responded to this request on 30 August 2016. They notified Mr S that they considered this particular request to be vexatious, in terms of section 14(1) of FOISA, as it duplicated questions posed in an earlier information request, which they had also deemed to be vexatious, and so the same arguments applied.
14. On 30 August 2016, Mr S wrote to Police Scotland requesting a review of their decision not to comply with his request.
15. Police Scotland notified Mr S of the outcome of their review on 12 September 2016. They indicated that they were no longer relying on section 14(1) of FOISA, and they confirmed that they were withholding information under sections 34(1)(b) and 38(1)(b) of FOISA

(respectively, the exemption for information held for the purposes of an investigation, and the exemption for personal information).

Investigation

16. Mr S' application for a decision from the Commissioner was accepted as valid, in relation to both requests detailed above. The Commissioner confirmed that Mr S made requests for information to a Scottish public authority and asked the authority to review its response to those requests before applying to her for a decision.
17. On 14 November 2016, Police Scotland were notified in writing that Mr S had made a valid application. Police Scotland were asked to send the Commissioner the information withheld from Mr S. Police Scotland provided some information and the case was allocated to an investigating officer.
18. 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.

Commissioner's analysis and findings

19. 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 her by both Mr S and Police Scotland. She is satisfied that no matter of relevance has been overlooked.

Did Police Scotland identify all relevant information?

20. As in any case where an application is made to the Commissioner, she must satisfy herself that adequate steps have been taken by the authority to identify and locate all of the information that it holds which falls within the scope of the request. What is adequate in any given case will depend on the circumstances of the request.
21. In this case, Police Scotland provided the Commissioner with 14 documents which they were withholding from Mr S under sections 34(1) and 38(1)(b) of FOISA. During the investigation, Police Scotland disclosed parts of two of these (documents 3 and 4) to Mr S.
22. The content of the 14 documents strongly suggested to the Commissioner that Police Scotland would hold additional information falling within the scope of Mr S' request. Police Scotland were then asked if they held any information concerning specific individuals referred to in the documents. They were also asked to provide details of the searches they had conducted and to explain how they determined what information fell within the scope of the request.
23. Police Scotland stated that providing a response to the Commissioner's questions had proved to be more complex than might be expected, due to the retirement of two senior members of staff who were involved in the postal ballot investigation. Colleagues of these staff members had been consulted, but it appeared that some emails had not been retained within the enquiry file and could not now be retrieved.
24. Police Scotland provided arguments in support of the exemptions they had applied. They contended that three of the documents they had provided to the Commissioner (three witness statements) did not, in fact, relate to the postal ballot investigation and were not

covered by the terms of Mr S' request. They apologised for any confusion caused. At this point, Police Scotland did not locate any additional information falling within the scope of the request.

25. The Commissioner was not satisfied with the response provided by Police Scotland and questioned them further on some points in their submission.
26. In particular, the Commissioner disputed Police Scotland's assertion that the three witness statements were not covered by Mr S' request. The Commissioner acknowledged that these statements relate to events at a separate locus (referred to in this decision as "the second locus"), but the witness statements concern allegations of illegal tallies being taken at a postal vote count during the independence referendum.
27. The Commissioner asked Police Scotland to undertake more searches for any additional information that might fall within the scope of Mr S' requests. Police Scotland were questioned further on the content of the withheld information, as several of the documents referenced other information that had not been provided to the Commissioner. The content of the three witness statements regarding the second locus seemed to suggest that other individuals would also have been spoken to by the Police, and the Commissioner asked them to conduct searches for this information.
28. Police Scotland reiterated that they did not consider the information relating to the second locus to be within the scope of Mr S' request for information. They argued that as Mr S had referred to "*the* investigation into postal ballot tallies" and had referred to a named public figure in his review request, it was clear he was only interested in information relating to the investigation into allegations regarding that person.
29. The Commissioner notes that Police Scotland have argued that these three witness statements were not connected to the allegations against a named public figure. They have also disputed that they formed part of an investigation, suggesting instead that "the reality is that following some initial enquiry, the taking of statements included, no crime was identified".
30. Despite Police Scotland's reluctance to accept that the three witness statements are relevant to Mr S' request for information, the Commissioner is satisfied that the information contained in these documents does fall within the scope of Mr S' requests. Mr S asked for information about "the investigation" into postal ballot tallies during the Independence Referendum of 2014, but did not limit his request to information about specific individuals or a particular locus. Mr S did not know (and could not be expected to know) how Police Scotland structured their investigation, whether it comprised more than one strand, or whether they carried out more than one investigation into allegations concerning postal vote tallies.
31. The Commissioner therefore takes the view that the three witness statements in question fall within the scope of his requests. Police Scotland conceded that "for expediency in bringing this appeal to conclusion" the information relating to the incident at the second locus was covered by the scope of Mr S' request. They withheld this information under sections 34(1)(b) and 38(1)(b) of FOISA.
32. Police Scotland stated that they held no further information regarding the three witness statements relating to the incident at the second locus. Although some initial enquiries had been undertaken, including the taking of statements, no crime was identified. Had criminality been suspected or identified as a result of these initial enquiries then further records may have been created as enquiries progressed, but that was not the case, and no other information was held.

33. Police Scotland specifically stated that they did not hold any statements from two other individuals mentioned in the three witness statements from the second locus, nor was there any indication that these individuals were “spoken to”.
34. Police Scotland maintained that they did not hold any additional information falling within the scope of Mr S’ requests. They had consulted with the officers involved in the enquiry and no further information had been identified. Police Scotland submitted that they had searched their Command and Control system in an attempt to ascertain what prompted the taking of the statements, for example whether this was as a result of a 101 call, but no information was held. They also contacted one of the senior members of staff who was now retired, and asked whether they remembered what prompted the taking of the three witness statements relating to the second locus, but the individual concerned was unable to recall the source of the allegations.
35. The Commissioner was not satisfied with the explanations provided by Police Scotland and she asked further questions about the information falling within the scope of the request and the information they held. The Commissioner referred to a specific document which again indicated that Police Scotland were likely to hold more information. Police Scotland were again asked to search for information regarding the allegations about the named public figure and other individuals, and the allegations regarding the second locus, including witness statements and any record of the initial allegation about illegal tallies being taken of postal votes.
36. In response (27 February 2017), Police Scotland confirmed that, apart from the three witness statements already identified and provided to the Commissioner, they did not hold any more information about the second locus. They did not hold any record of the initial allegation relating to the second locus, and the senior member of staff involved in the investigation (who has since retired) could not recall the source of the allegation that led to three witness statements being taken. Police Scotland explained that they had spoken to every officer known to have had involvement in the two postal ballot enquiries and they reiterated that, other than the statements and emails already provided, they held no further information of relevance to the information request.
37. The Commissioner remained dissatisfied with the explanations provided by Police Scotland and she asked them a series of questions based on the specific content of the information they were withholding from Mr S, which suggested that other information would be held.
38. In response (25 April 2017), Police Scotland reiterated that there was no criminal investigation into the allegations referred to: while a complaint had been received and some initial enquiry carried out, it was established at an early stage that no crime had been committed.
39. Police Scotland then provided the Commissioner with two further documents: a fourth witness statement regarding the second locus, and a record of the initial allegation that led to the enquiries at the second locus. Police Scotland had previously confirmed that it did not hold this information. Police Scotland apologised that these documents had been located at such a late stage in the Commissioner’s investigation. They withheld this information under the exemptions previously relied on (sections 34(1) and 38(1)(b) of FOISA). Police Scotland did not explain why these documents had not been identified earlier, or how they had been located now.

The Commissioner's views on the adequacy of Police Scotland's searches

40. The Commissioner questioned Police Scotland repeatedly throughout her investigation as to whether they held additional information falling within the scope of Mr S' information requests. In response, Police Scotland repeatedly stated that no additional information was held, even when it was drawn to their attention that the content of some of the withheld information strongly suggested that they did hold further information.
41. Police Scotland told the Commissioner that they had conducted thorough searches of their systems, and had questioned all relevant officers connected with the two enquiries. They maintained, for most of the investigation, that they did not hold any further information. However, Police Scotland then went on to discover a further two documents which fell under the scope of Mr S' request for information. In the light of this discovery, the Commissioner has significant doubts about whether the searches undertaken by Police Scotland in this case were as thorough as they claimed.
42. It is not clear to the Commissioner why these two documents were not discovered by Police Scotland during earlier searches for relevant information: Police Scotland provided no explanation for this when they supplied the documents. The possibility that this information existed was flagged up by the Commissioner on 18 January 2017, several months before the information was eventually identified by Police Scotland.
43. The Commissioner does not know why information was not located and/or provided to her. However, the fact remains that information which clearly falls within the scope of the Mr S' information request was not identified until many months into her investigation. It is also a fact that Police Scotland repeatedly claimed that there was no record of the initial allegation into the enquiry at the second locus, and that no further information (including witness statements) was held about the enquiry there. It is now clear that was not the case.
44. The Commissioner cannot reveal the content of the information provided to her office, but she takes the view that it indicates that Police Scotland may well hold additional information which falls within the scope of Mr S' request for information and which remains unidentified so far.
45. In the circumstances, the Commissioner is not satisfied with the searches conducted by Police Scotland and, on the evidence provided to her, is unable to accept that the searches have established that all relevant information has been identified. She has therefore concluded, on balance of probabilities, that Police Scotland holds more information than has been located and provided to her.
46. This being so, the Commissioner is unable to reach a view on Police Scotland's application of exemptions to the information it has identified and withheld from Mr S.
47. Police Scotland is relying on the exemptions contained in section 34(1)(a) and (b) and section 38(1)(b) of FOISA to withhold information from Mr S. Section 34(1)(a) and (b) of FOISA are subject to the public interest test in section 2(1)(b), which means that even if the Commissioner finds that the exemptions are engaged, she must go on to consider whether the public interest in disclosure outweighs the public interest in maintaining the exemption. If other relevant information is held by Police Scotland, it is possible that the content of that information could affect the balance of the public interest test. As a result, the Commissioner cannot reach a view on whether Police Scotland was entitled to rely on section 34(1)(a) and (b) until she is satisfied that she has viewed all the information covered by Mr William's request.

Actions to be taken by Police Scotland

48. The Commissioner requires Police Scotland to undertake further searches for information falling within the scope of Mr S' request for information. She requires Police Scotland to ensure that the searches are thorough and detailed. She will separately provide details of the specific questions which must be addressed by Police Scotland.
49. The Commissioner also requires Police Scotland to provide Mr S with a new review of their responses to his information requests dated 8 December 2015 (parts 1 to 4) and 8 August 2016 (all parts of the request). The review outcome must comply with section 21(4) of FOISA. If Police Scotland identifies additional information covered by Mr S' request, this information must be disclosed, or an explanation given of why the information is exempt from disclosure under FOISA. If information is withheld, the review outcome must also detail the number and type of documents being withheld from Mr S (e.g. 1 email, 2 witness statements, 3 incident log entries, etc.). The Commissioner requires this action to be taken because of the confusing and contradictory nature of the responses which Police Scotland has previously provided to Mr S, which have not made clear what information is being withheld.

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 (in particular, section 1(1)) in responding to the information request made by Mr S.

The Commissioner has not been provided with sufficient evidence to be satisfied that Police Scotland have conducted adequate searches to identify and locate all the information they hold which falls within the scope of Mr S' request.

The Commissioner therefore requires Police Scotland to carry out another review of their response to Mr S' request, as specified in the final paragraph of the decision notice. This review outcome must be provided to Mr S by **31 August 2017**.

Appeal

Should either Mr S or the Chief Constable of the Police Service of 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 the Chief Constable of the Police Service of Scotland (Police Scotland) fails to comply with this decision, the Commissioner has the right to certify to the Court of Session that Police Scotland 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
Acting Scottish Information Commissioner

17 July 2017

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.

2 Effect of exemptions

- (1) To information which is exempt information by virtue of any provision of Part 2, section 1 applies only to the extent that -

...

- (b) in all the circumstances of the case, the public interest in disclosing the information is not outweighed by that in maintaining the exemption.

...

21 Review by Scottish public authority

...

- (4) The authority may, as respects the request for information to which the requirement relates-
- (a) confirm a decision complained of, with or without such modifications as it considers appropriate;
 - (b) substitute for any such decision a different decision; or
 - (c) reach a decision, where the complaint is that no decision had been reached.

Scottish Information Commissioner

Kinburn Castle
Doubledykes Road
St Andrews, Fife
KY16 9DS

t 01334 464610

f 01334 464611

enquiries@itspublicknowledge.info

www.itspublicknowledge.info