

Decision Notice 178/2021

Information Sharing Agreement with the Scottish Prison Service

Applicant: The Applicant

**Public authority: Chief Constable of the Police Service of
Scotland**

Case Ref: 202100691



Scottish Information
Commissioner

Summary

Police Scotland were asked for the most recent date of the Information Sharing Agreement with the Scottish Prison Service that facilitated the sharing of staff information. Police Scotland notified the Applicant, under section 17(1) of FOISA, that they did not hold the requested information. The Commissioner investigated and found that Police Scotland had complied FOISA in responding to the request.

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 14 April 2021, the Applicant made a request for information to the Chief Constable of the Police Service of Scotland (Police Scotland). The information requested was:

The date of the most recent Information Sharing Agreement (ISA) and/or Appropriate Policy Document (APD) for the sharing of information between the Data Controller Police Scotland (The Chief Constable of The Police Service of Scotland Data Protection Reference Z3611656) and the SPS (Scottish Ministers Data Protection Reference Z4857137) that covers the information shared on SPS staff (i.e. employees) e.g. allegations of criminality, background checks, information on prosecutions etc.
2. Police Scotland failed to respond to this request.
3. On 20 May 2021, the Applicant wrote to Police Scotland requesting a review of their decision on the basis that she was dissatisfied with their failure to respond to her request.
4. Police Scotland notified the Applicant of the outcome of their review on 31 May 2021. They apologised for the delay in responding to the request, and gave the Applicant notice, under section 17(1) of FOISA, that they did not hold the information she had requested. Police Scotland explained that there was no Information Sharing Agreement (ISA) between Police Scotland and the Scottish Prison Service (the SPS) which covers information sharing in relation to SPS employees.
5. On 2 June 2021, the Applicant wrote to the Commissioner, applying for a decision in terms of section 47(1) of FOISA. The Applicant did not accept that Police Scotland did not hold information about the relevant ISA and explained why.

Investigation

6. The application was accepted as valid. The Commissioner confirmed that the Applicant 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 23 June 2021, Police Scotland were notified in writing that the Applicant 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 about their reliance on section 17(1) of FOISA.

Commissioner's analysis and findings

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

Information held by Police Scotland

10. The Commissioner's investigation is primarily to ascertain whether Police Scotland holds information falling within the scope of the Applicant's request.
11. 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, 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. The qualifications contained in section 1(6) are not applicable in this case.
12. The information to be given is that held by the authority at the time the request is received, as defined in section 1(4). This is not necessarily to be equated with information an applicant believes the authority should hold. If no such information is held by the authority, section 17(1) of FOISA requires it to give the applicant notice in writing to that effect.
13. The Applicant explained that she had been provided with a copy of an ISA between the SPS and Police Scotland by her Trade Union representative. She explained that this document was last updated in July 2015, and in her opinion, it did not comply with current data protection legislation. She argued that, as this document exists, that Police Scotland must hold a copy of it too.
14. In addition, the Applicant explained that she had agreed that a third party, who was known to her, would contact the SPS and make the same information request that she had made to Police Scotland. The Applicant provided the Commissioner with the response that the third party had obtained from the SPS, which stated that, "...the sharing of information regarding SPS employees is covered by the same Information Sharing Agreement, as detailed in RFI 1 [referring to prisoners]. The policy documents for sharing information on SPS staff members as detailed above is currently under review." The ISA that the SPS referred to in this response was updated in July 2015.
15. In their submissions, Police Scotland provided information on the searches they had carried out to identify relevant information. They explained that their Information Assurance Team (who maintain a register of ISAs) and their Prison Intelligence Team were both asked to conduct searches.
16. The Information Assurance Team reported that no information was held. They explained that, while they do hold a number of Police Scotland / SPS agreements, they do not hold anything that discusses the release of information shared on SPS staff. Police Scotland reviewed all of the Partnership Agreements that the Information Assurance Team had published, and they also searched the policy support legacy site for documents that had been published and archived, but no relevant information was found.

17. Police Scotland's Prison Intelligence Team reported that an ISA has existed between Police Scotland and the SPS since 2015, however it was currently under review. They explained that there is no ISA in place that specifically covers the sharing of information of SPS employees (with Police Scotland).
18. Police Scotland submitted that, based on these replies, they gave the Applicant notice, under section 17(1) of FOISA, that they did not hold an ISA that covered the sharing of SPS employee information.
19. During the investigation, Police Scotland reviewed the 2015 ISA that their Prison Intelligence Team had referred to, and which the Applicant appeared to have obtained separately from the SPS. Police Scotland argued that the 2015 ISA does not explicitly include or exclude employee information. Police Scotland acknowledged that the SPS have indicated that sharing employee information is covered by this 2015 ISA, but, while they could not rebut the SPS's comments in terms of what actual practice is, they reiterated that staff are not explicitly mentioned in the 2015 ISA.
20. Police Scotland explained that they have previously told the Applicant that ISAs are not mandatory and do not exist for all information sharing between Police Scotland and other organisations. The existence or otherwise of an agreement is not in itself evidence that all sharing between the parties is lawful. Each instance of sharing must only be lawful in terms of the Data Protection Act and the UK General Data Protection Regulation and the existence of an ISA is only to streamline processes.

The Commissioner's findings

21. The standard proof to determine whether a Scottish public authority holds information is the civil standard of the balance of probabilities. In determining where the balance lies, the Commissioner considers, where appropriate, any reason offered by the public authority to explain why it does not hold the information. Ultimately, the Commissioner's role is to determine what relevant information is actually held by the public authority (or was, at the time it received the request).
22. In this case, the Applicant wanted to know the date of the most recent ISA that facilitated the sharing of SPS employee information with Police Scotland. Police Scotland gave the Applicant notice, under section 17(1) of FOISA, that no such ISA was held. In her application to the Commissioner, the Applicant referred to a 2015 ISA held by the SPS, which the SPS claimed covered the sharing of staff information. Police Scotland later confirmed that they did hold a copy of the 2015 ISA, but they maintained that this document did not include the sharing of staff information (although they acknowledged that neither did it exclude the sharing of such information).
23. The key issue for the Commissioner to determine is whether Police Scotland does hold an ISA that facilitates the sharing of SPS employee information. The Commissioner has considered the submissions made by Police Scotland and the searches they have undertaken and he is satisfied that the only ISA that could apply to SPS staff information is the 2015 ISA, which the Applicant alluded to.
24. The Commissioner asked Police Scotland to provide him with a copy of the 2015 ISA. He has reviewed its content carefully to determine whether or not it could apply to the sharing of staff information. The Commissioner notes that this ISA makes no reference, at all, to the sharing of employee or staff information, but instead refers to the sharing of prisoners' personal information.

25. Like Police Scotland, the Commissioner acknowledges that the SPS have stated that the 2015 ISA does pertain to the sharing of SPS employee information, and that the SPS may, in practice, use the 2015 ISA to facilitate such information sharing. However, he cannot see anything within the text of the 2015 ISA that specifically includes staff in the information sharing agreement. FOISA is concerned with recorded information, and there is no recorded information within the 2015 ISA that indicates it can be used for the sharing of SPS staff information.
26. In the circumstances, the Commissioner is satisfied, on the balance of probabilities, that Police Scotland do not hold the requested information, and that they were right to give the Applicant notice, under section 17(1) of FOISA, that the information is not held.

Decision

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

Appeal

Should either the Applicant 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.

Margaret Keyse
Head of Enforcement

4 November 2021

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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