

# Decision Notice

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## Decision 252/2016: Mr James Duncan and the Chief Constable of the Police Service of Scotland

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### Audit trail and statistics

Reference No: 201601154

Decision Date: 23 November 2016



Scottish Information  
Commissioner

## Summary

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Police Scotland were asked for an “audit trail” relating to an earlier FOI request and for statistics showing the number of late responses to FOI requests and requests for review.

The Commissioner found that Police Scotland held more information than they had disclosed, and required them to disclose the new information. She also found that Police Scotland’s responses failed to comply with the technical requirements of FOISA. She did not require Police Scotland to take any action with respect to her findings on the technical requirements.

## Relevant statutory provisions

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Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) and (4) (General entitlement); 15 (Duty to provide advice and assistance); 19 (Content of certain notices); 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.

## Background

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1. On 12 March 2016, Mr Duncan made a request for information to the Chief Constable of the Police Service of Scotland (Police Scotland). The information requested was:
  - The “audit trail explaining why the Chief Constable has failed to comply with my request (i.e. request made on 30 January 2016) within the 20-day deadline”. (request 1)
  - “How many times since the inception of Police Scotland has the Chief Constable failed to meet his statutory requirements in (a) responding to requests within 20 days, and also (b) in responding to reviews within 20 days.” (request 2)
2. Police Scotland responded on 6 April 2016. Police Scotland stated that they had been experiencing unprecedented demand with regard to requests, which had led to delays in some cases. In responding to the question about compliance with statutory timescales for response, Police Scotland directed Mr Duncan to information which was accessible from the Commissioner’s online statistics portal<sup>1</sup>.
3. Mr Duncan stated that the response from Police Scotland did not answer his request. Police Scotland and Mr Duncan engaged in correspondence about this matter.
4. On 28 April 2016, Police Scotland issued a further response. They provided:
  - three action points relating to his request of 30 January 2016, taken from the “progress notes” on file;
  - figures showing the number of responses to requests and requests for reviews, including the number of late responses. Mr Duncan was again referred to the Commissioner’s statistics portal.

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<sup>1</sup> <http://stats.itspublicknowledge.info/>

5. On 28 April 2016, Mr Duncan emailed Police Scotland requesting a review of their decision on the basis that he did not consider that they had responded to his request.
6. Police Scotland notified Mr Duncan of the outcome of their review on 3 May 2016. They summarised the responses previously provided and supplied details of how to submit an appeal to the Commissioner if he was dissatisfied with the response.
7. On 23 June 2016, Mr Duncan applied to the Commissioner for a decision in terms of section 47(1) of FOISA. Mr Duncan raised several matters of dissatisfaction, as discussed below.

## **Investigation**

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8. The application was accepted as valid. The Commissioner confirmed that Mr Duncan made a request for information to a Scottish public authority and asked the authority to review its response to that request before applying to her for a decision. The case was allocated to an investigating officer.
9. In correspondence with Mr Duncan, the investigating officer specified the matters that could be investigated by the Commissioner, which Mr Duncan accepted.
10. Section 49(3)(a) of FOISA requires the Commissioner to give public authorities an opportunity to provide comments on an application. On 22 August 2016, Police Scotland were notified in writing that Mr Duncan had made a valid application. Police Scotland were also invited to comment on the application and answer specific questions including justifying their reliance on any exemptions in FOISA they considered applicable.
11. Police Scotland provided submissions to the investigating officer. Clarification on some points was sought, and obtained, during the investigation.

## **Commissioner's analysis and findings**

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12. In coming to a decision on this matter, the Commissioner considered all of the information which Police Scotland had provided to Mr Duncan and the relevant submissions, or parts of submissions, made to her by both Mr Duncan and Police Scotland. She is satisfied that no matter of relevance has been overlooked.

### **Scope of investigation**

13. Mr Duncan expressed dissatisfaction with many aspects of Police Scotland's handling of his request. The following aspects have been investigated:
  - Whether a complete audit trail was provided in response to request 1;
  - Whether Police Scotland had provided complete statistics, in response to request 2;
  - Whether Police Scotland's response to request 1 otherwise complied with FOISA;
  - Dissatisfaction with Police Scotland's handling of Mr Duncan's request for review; and
  - Whether Police Scotland provided advice and assistance in line with section 15 of FOISA.

## **Request 1 - audit trail**

14. Mr Duncan requested the audit trail relating to the way Police Scotland handled his request of 30 January 2016.
15. Mr Duncan explained that he was seeking substantially more than just a few “progress notes” on a file (as supplied in Police Scotland’s review response of 28 April 2016). He would have expected to receive a full note of how his request was processed from beginning to end on a transaction by transaction basis, including all relevant dates and times, decisions taken, and postholder(s) involved. He explained that he wanted to know precisely the substance of the delay in responding and, equally importantly, to see the evidence.

### *Police Scotland’s submissions*

16. Police Scotland explained that information requests are recorded in a Microsoft SharePoint system, which includes details under “progress summary” of the actions taken by the case officer. Police Scotland explained that this can be a few lines in some cases and several pages in others. They noted that all correspondence and materials relevant to a request are held in an electronic folder.
17. Police Scotland stated that there was no information recorded about Mr Duncan’s request of 30 January 2016 on the SharePoint system until 29 March 2016, when a comment was added highlighting the failure to respond.
18. Police Scotland submitted that they had interpreted Mr Duncan’s email of 12 March 2016 not as a separate request, but simply seeking an explanation for the delay in responding to the 30 January 2016 request. They had provided an explanation for the delay in their response of 6 April 2016.
19. Police Scotland stated that, in further correspondence from Mr Duncan, he had referred simply to the “audit trail”, as opposed to “an audit trail explaining why the Chief Constable ...”. In terms of the records maintained by Police Scotland in relation to the handling of FOI requests, they considered that the “progress summary” field of the request record was the closest equivalent to the information requested by Mr Duncan. They explained that, in relation to Mr Duncan’s request, the bulk of the “activity” (e.g. the gathering of information and seeking views regarding disclosure) took place far later than 12 March 2016, which was when he made his request.
20. Police Scotland were asked to provide details of the specific actions they took in relation to the 30 January 2016 request. Police Scotland provided a step by step explanation showing how they dealt with the request and provided a list of emails associated with this process.

### *Commissioner’s finding*

21. The Commissioner would emphasise that her remit is to assess and decide whether Police Scotland complied with FOISA in responding to Mr Duncan’s request. The Commissioner does not have the power to consider whether Police Scotland should have recorded more information than it did, in relation to the handling of Mr Duncan’s request. She can only reach a decision on whether all information covered by the request had been identified and considered, and whether it should be disclosed.

22. Having considered the terms of Mr Duncan's request and the explanation provided to the investigating officer, the Commissioner has concluded that some of the information which Police Scotland sent her on 6 and 13 October 2016 is information which is covered by request 1.
23. Section 1(1) of FOISA creates a general entitlement to information held by a Scottish public authority, subject to various qualifications set out in the rest of Part 1. The information to be given is that held by the authority at the time the request is received, as defined in section 1(4).
24. At the date of Mr Duncan's request (12 March 2016), Police Scotland had recorded several actions relating to his request of 30 January 2016 in a SharePoint record. This information clearly falls within the scope of Mr Duncan's request.
25. The Commissioner notes that the SharePoint record was later updated with actions taken after 12 March 2016. As these later entries were created after Mr Duncan made his request, she cannot consider them in this decision notice.
26. In their submission to the Commissioner of 6 October 2016, Police Scotland provided an explanation of the actions they had taken with respect to Mr Duncan's 30 January 2016 request. This explanation did not exist in recorded form when Mr Duncan made his request: it is information which was created by Police Scotland during the Commissioner's investigation.
27. The Commissioner has concluded that Police Scotland failed to identify and disclose all relevant information when they responded to Mr Duncan's request and request for review. She therefore finds that Police Scotland failed to comply fully with section 1(1) of FOISA. She requires Police Scotland to disclose the information from the SharePoint record which was recorded at the date of Mr Duncan's request, after redacting any personal data if disclosure would breach any of the data protection principles in the Data Protection Act 1998.
28. The Commissioner cannot require Police Scotland to provide Mr Duncan with the other information relating to his request (i.e. entries to the SharePoint record made after the date of his request, and the explanation provided to the Commissioner on 6 October 2016). However, she recommends that Police Scotland considers disclosing this information to Mr Duncan so that he does not need to make a separate request for it.

### **Compliance with other requirements: request 1**

29. Mr Duncan considered that Police Scotland's response to his request for an audit trail did not comply with FOISA in other respects.
30. Police Scotland stated that they had responded to Mr Duncan's request in line with FOISA, including issuing a response within 20 working days.
31. The Commissioner has considered all the correspondence between Mr Duncan and Police Scotland and has concluded that Police Scotland failed to recognise his request of 12 March 2016 as a new request and, accordingly, failed to respond to it in line with FOISA. This meant that Police Scotland did not provide Mr Duncan with details of his right to request a review and appeal to the Commissioner, in line with section 19 of FOISA.
32. The Commissioner notes that Mr Duncan had already been made aware of his rights to seek a review in relation to his request of 30 January 2016, and had exercised them. She

therefore finds that Police Scotland failed to comply with section 19 of FOISA, but acknowledges that this did not cause Mr Duncan any detriment.

## **Request 2: statistics showing failure to respond in time**

33. In correspondence with the investigating officer, Mr Duncan confirmed that he was seeking total figures for the number of times when Police Scotland failed to issue a response to requests and requests for review within 20 working days, since 1 April 2013 (the inception of Police Scotland).
34. The investigating officer asked Police Scotland to note that the statistics published on the Commissioner's statistical portal are compiled on a quarterly basis, which did not correspond to the time period specified in Mr Duncan's request.
35. Following further discussion with the investigating officer, Police Scotland provided the Commissioner with the number of late responses to requests and reviews recorded in their SharePoint system (25 August 2016).
36. The investigating officer noted that the information disclosed by Police Scotland to Mr Duncan in response to his request was different from that provided in Police Scotland's submission of 25 August 2016. Police Scotland explained that the information provided to Mr Duncan did not include the first quarter of 2016, whilst the information provided in the 25 August 2016 submission included statistics up to 12 March 2016 (the date of Mr Duncan's request).
37. The Commissioner has considered Police Scotland's reasons for directing Mr Duncan to her statistics portal in response to this part of his request. She notes that the information published on the statistics portal covers a different time period than that requested by Mr Duncan. She has therefore concluded that Police Scotland were wrong to refer Mr Duncan to this webpage, in response to his request. She is satisfied that Police Scotland held information which would answer Mr Duncan's request.
38. By initially failing to identify and disclose all relevant information when they responded to the second part of Mr Duncan's request and his request for review, Police Scotland failed to comply fully with section 1(1) of FOISA.
39. The Commissioner now requires Police Scotland to provide Mr Duncan with the correct information identified during the investigation in relation to request 2. She notes that Police Scotland has already agreed to do this.

## **Police Scotland's handling of the request for review**

40. Mr Duncan considered that Police Scotland's review response did not comply with FOISA and he was dissatisfied with the fact that reviewer was the same person who had issued the initial response.
41. Section 21(4) of FOISA states that, on receipt of a requirement for review, an authority may do the following in respect of the information request to which it 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.

### *Police Scotland's submissions*

42. Police Scotland explained that until they received Mr Duncan's request for review of 28 April 2016, they had treated the questions and expressions of dissatisfaction in his letter of 12 March 2016 as one, related issue. They submitted that their review response of 3 May 2016 complied with section 21 of FOISA: in this letter they had confirmed that the original response was correct, and therefore their review response complied with section 21(4)(a) of FOISA. They agreed that the reviewer was the same person who issued the initial response, but noted that this is not their standard practice. In this case, the person who provided the initial response believed that the correspondence from Mr Duncan related to the review of his request of 30 January 2016 (which this person had carried out), not a new request made on 12 March 2016.

### *The Commissioner's findings*

#### Review response in line with section 21 of FOISA

43. Having considered Police Scotland's review response dated 3 May 2016, the Commissioner finds that it complies with section 21 of FOISA. Police Scotland chose to confirm a decision they had already reached, which they were permitted to do under section 21(4)(a) of FOISA. As has been noted, Police Scotland's initial decision was incorrect, which should have been picked up at review: however, in terms of compliance with the technical requirements of FOISA, the Commissioner accepts that the review response from Police Scotland complied with the requirements in section 21 of FOISA.

#### Same person conducted the review

44. FOISA is not prescriptive about the manner in which public authorities should conduct reviews. Section 21(1) simply states that on receipt of a requirement for review, a public authority should (barring other considerations that are not relevant in the circumstances of this case) comply with that requirement promptly and in any event by not later than the twentieth working day after its receipt.
45. Paragraph 10.3.4 of the Scottish Ministers' Code of Practice on the discharge of functions by Scottish Public Authorities under FOISA and the Environmental Information (Scotland) Regulations 2004<sup>2</sup> (the Section 60 Code) states that "it is good practice for the reviewer to be a person who did not respond to or advise on the original request (where possible or practicable)". This ensures that the review process is carried out impartially and fairly by an independent person within the public authority.
46. As noted, it is normal practice for Police Scotland to ensure that reviews are not entrusted to the person who issued the original response. The Commissioner accepts that the reasons why this did not happen in relation to Mr Duncan's request for review relate to the specific circumstances of his case and the complexities of his correspondence.

### **Advice and assistance**

47. Mr Duncan considered Police Scotland's handling of his request amounted to a failure to comply with section 15 of FOISA.
48. Police Scotland submitted that they had intended, throughout their correspondence with Mr Duncan, to provide him with access to information relevant to his request. They had

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<sup>2</sup> <http://www.gov.scot/About/Information/FOI/Section60Code/s60codeofpractice>

provided both an explanation of why the original request had been delayed and information regarding Police Scotland's compliance with FOISA.

49. The Commissioner will not reiterate the decisions she has already reached on other aspects of Mr Duncan's request. She has concluded that Mr Duncan's email of 12 March 2016 contained both a request for review of the response to his request of 30 January 2016 and a separate new request which Police Scotland failed to identify. This failure led to confusion on Police Scotland's part as to the information requested by Mr Duncan. It is understood that Police Scotland have taken note of the handling of this request for the purposes of improving their responses to such requests.
50. Having considered all of the correspondence about what would seem a straightforward request, the Commissioner accepts that Police Scotland tried to engage with Mr Duncan throughout this process, directing to him to information available on websites and providing him with information they considered relevant. Police Scotland may have failed to identify and provide the specific information requested by Mr Duncan, but having considered the correspondence in relation to this request, the Commissioner cannot identify any further advice and assistance Police Scotland could have provided to Mr Duncan.
51. The Commissioner has concluded that Police Scotland provided Mr Duncan with reasonable advice and assistance in relation to his request, and therefore complied with section 15 of FOISA.

## Decision

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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 Duncan.

The Commissioner finds that:

- i. Police Scotland failed to provide Mr Duncan with all the information covered by his request, and so failed to comply with section 1(1) of FOISA.
- ii. Police Scotland's response to request 1 did not comply with the requirements of section 19(a) of FOISA, by failing to give details of Mr Duncan's rights.
- iii. Police Scotland complied with section 21 of FOISA, in relation to its review response of 3 May 2016.
- iv. Police Scotland complied with section 15 of FOISA by providing reasonable advice and assistance to Mr Duncan.

The Commissioner requires Police Scotland to disclose the information which was covered by Mr Duncan's request and which they failed to provide, by **Friday, 6 January 2017**.



## **Appeal**

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Should either Mr Duncan 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**

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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.

**Margaret Keyse**  
**Head of Enforcement**

**23 November 2016**

### 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.

...

#### 15 Duty to provide advice and assistance

- (1) A Scottish public authority must, so far as it is reasonable to expect it to do so, provide advice and assistance to a person who proposes to make, or has made, a request for information to it.
- (2) A Scottish public authority which, in relation to the provision of advice or assistance in any case, conforms with the code of practice issued under section 60 is, as respects that case, to be taken to comply with the duty imposed by subsection (1).

#### 19 Content of certain notices

A notice under section 9(1) or 16(1), (4) or (5) (including a refusal notice given by virtue of section 18(1)) or 17(1) must contain particulars-

- (a) of the procedure provided by the authority for dealing with complaints about the handling by it of requests for information; and
- (b) about the rights of application to the authority and the Commissioner conferred by sections 20(1) and 47(1).

#### 21 Review by Scottish public authority

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- (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.

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