

# Decision Notice

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## **Decision 166/2017: Mr Keith Banks and the Chief Constable of the Police Service of Scotland**

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### **Standard Operating Procedures (investigations/assessments)**

Reference No: 201700990

Decision Date: 3 October 2017



## Summary

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Police Scotland were asked for their Standard Operating Procedures for any investigations and assessments “necessary for any policing purposes”. Police Scotland gave a weblink to legislation, but changed their position on review, giving notice that they did not hold information capable of answering the request.

The Commissioner asked Police Scotland to conduct further searches and was then satisfied that Police Scotland did not hold the information requested.

## Relevant statutory provisions

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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.

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

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1. On 22 March 2017, Mr Banks made a request for information to the Chief Constable of the Police Service of Scotland (Police Scotland). The information requested was:  
*... copies of current Police Scotland SPOs (Standard Operating Procedures), in terms of (a) police investigations, and (b) police assessments, for any matters that can be deemed necessary for any policing purposes.*
2. Police Scotland responded on 19 April 2017, citing section 25 of FOISA (Information otherwise accessible) and providing Mr Banks with a weblink to an online copy of the Police and Fire Reform (Scotland) Act 2012 (the 2012 Act). They advised that this legislation provides the statutory basis for policing in Scotland.
3. On 19 April 2017, Mr Banks wrote to Police Scotland, requesting a review of their decision. He stated he was dissatisfied because the information at the weblink did not answer his request.
4. Police Scotland notified Mr Banks of the outcome of their review on 18 May 2017. They changed their decision, substituting a notice under section 17(1) of FOISA, as they did not believe they held information capable of addressing Mr Banks' request.
5. On 1 June 2017, Mr Banks wrote to the Commissioner. He applied to the Commissioner for a decision in terms of section 47(1) of FOISA. Mr Banks stated he was dissatisfied with the outcome of Police Scotland's review because the request had not been fulfilled. He explained why he understood there to be information held which would be capable of drawing a distinction between a police investigation and a police assessment.

## Investigation

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6. The application was accepted as valid. The Commissioner confirmed that Mr Banks 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.
7. On 16 June 2017, Police Scotland were notified in writing that Mr Banks had made a valid application. Police Scotland were asked to send the Commissioner the information withheld from Mr Banks. Police Scotland provided the information 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 answer specific questions, with reference to their interpretation of the request and any steps taken to identify and locate the information requested.

## Commissioner's analysis and findings

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9. In coming to a decision on this matter, the Commissioner considered all of the relevant submissions, or parts of submissions, made to her by both Mr Banks and Police Scotland. She is satisfied that no matter of relevance has been overlooked.
10. Mr Banks submitted that Police Scotland had not disclosed all of the relevant information he believed they ought to hold.
11. Mr Banks supplied press cuttings in support of his application, as he believed these illustrated the use by Police Scotland of the terms "assessment" and "investigation" as meaning different things. Consequently, he expected there to be a definition of each term.

### Has all relevant information been identified?

12. In terms of section 1(4) of FOISA, the information to be provided in response to a request under section 1(1) is that falling within the scope of the request and held by the authority at the time the request is received, subject to qualifications which are not applicable in this case.
13. Under section 17(1) of FOISA, where an authority receives a request for information it does not hold, it must give the applicant notice in writing to that effect.
14. 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 of probabilities lies, the Commissioner considers the scope, quality, thoroughness and results of the searches carried out by the public authority. She also considers, where appropriate, any reason offered by the public authority to explain why it does not hold the information. While it may be relevant as part of this exercise to explore expectations about what information the authority should hold, ultimately the Commissioner's role is to determine what relevant recorded information is (or was, at the time the request was received) actually held by the public authority.
15. The investigating officer asked Police Scotland for details and evidence of the searches conducted for information falling within the scope of Mr Banks' request.
16. Initially, in response to Mr Banks' information request and requirement for review, Police Scotland searched the guidance section of their intranet for documents specifically referring

“policing purposes”. They submitted that any documents identified simply made reference to the phrase and did not describe in any detail what these purposes were or when a particular course of action or decision could be said to fall within the definition of “policing purposes”.

17. Police Scotland noted that the phrase was in common use in policing but was, to some extent, defined in the 2012 Act – as Mr Banks was informed in Police Scotland’s review outcome. They also noted that Mr Banks had a long-standing issue with regard to whether particular actions were “necessary for a policing purpose”.
18. During the investigation, it became apparent that Mr Banks’ concerns in the context of the present request related more to the distinction between an “investigation” and an “assessment” conducted for policing purposes. The Commissioner acknowledges that Mr Banks might have made this clearer in his request, which is ambiguous. It is not immediately apparent what the request means, and it would have helped if Police Scotland had exercised their powers under section 1(3) of FOISA and sought clarification from the outset.
19. On the other hand, in the absence of such clarification, the request does appear to focus as much on “investigations” and “assessments” as on “policing purposes” and Commissioner would have considered it appropriate to search against these terms as well. In not doing so – and, it would appear, in making assumptions based on previous contact rather than on the terms of the request – the Commissioner is not satisfied that Police Scotland complied fully with section 1(1) of FOISA in scoping the searches required to handle the request.
20. During the investigation, Police Scotland conducted further searches, against the terms “investigation” and “assessment”, identifying around 1,200 “hits” for each term. It continued to query the relevance of these terms (in isolation from “policing purposes” – see above) and also, while not claiming that the section 12(1) cost limit applied, emphasised the challenges of checking all the “hits” for a definition.
21. In any event, Police Scotland stated that they were not aware of a special definition of either term in use by the force. They noted that these were phrases in common use, both generally and in policing.

#### *The Commissioner’s conclusions*

22. As stated in many previous decisions, the Commissioner’s remit extends only to consideration of whether a Scottish public authority actually holds the requested information and whether it has complied with Part 1 of FOISA in responding to a request. The Commissioner cannot comment on whether Police Scotland ought to hold additional information, for example definitions.
23. The Commissioner is satisfied that Police Scotland have now conducted adequate, proportionate searches, in the circumstances, for information falling within the scope of Mr Banks’ request. The searches have not been helped by the ambiguity of the request, and undoubtedly it would have helped if Police Scotland had sought clarification and not made assumptions based on previous contact.
24. That said, it is clear that “policing purposes”, for Police Scotland’s purposes, are founded in the statutory framework established by the 2012 Act. There is no reasonable expectation that further definition of the term should be found elsewhere in Police Scotland’s procedures or guidance, and that would appear to be borne out by Police Scotland’s searches. “Investigation” and “assessment” are English words in general usage and there would appear to be no reason why a special definition of either should be expected for policing purposes. Mr Banks’ submissions relate to the use of the words in contact with the media, where it

would not be expected that either word would be used in any unusual technical sense. In the circumstances, it would be reasonable to conclude that Police Scotland's SPOs would not be likely to cast any further light on the concerns articulated by Mr Banks during the investigation.

25. The Commissioner therefore finds that Police Scotland were correct to give notice (in terms of section 17(1) of FOISA) that they did not hold any information falling within the scope of his request, although their searches should have been based on a broader interpretation of that request.

## **Decision**

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The Commissioner finds that the Chief Constable of the Police Service of Scotland failed to comply fully with Part 1 of the Freedom of Information (Scotland) Act 2002 (FOISA) in responding to the information request made by Mr Banks. In failing to carry out searches which addressed the scope of Mr Banks' request fully, Police Scotland failed to comply fully with section 1(1) of FOISA. By the end of the investigation, however, the Commissioner was satisfied that adequate searches had been carried out and that no relevant information was held.

## **Appeal**

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Should either Mr Banks 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**  
**Acting Scottish Information Commissioner**

**3 October 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.

...

(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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