



PUBLIC PETITION NO.

PE01538

Name of petitioner

Dr Richard Burton on behalf of Accountability Scotland

Petition title

Transparency in SPSO investigations

Petition summary

Calling on the Scottish Parliament to urge the Scottish Government to amend the *Scottish Public Services Ombudsman Act (2002)* to ensure that complainants are shown all correspondence between SPSO and the bodies complained about before the investigation is concluded (including emails) and that they are also made aware of the content of any verbal communications.

Action taken to resolve issues of concern before submitting the petition

1. Members of Accountability Scotland have vainly tried to see correspondence between SPSO and BUJ (Body under Jurisdiction) and have questioned why its disclosure was denied..
2. We have discussed administrative justice and the SPSO with various MSPs, specifically raising this particular issue with the Local Government and Regeneration Committee. They then asked Jim Martin, when they quizzed him on his Annual Report, why he is reluctant to reveal to complainants the correspondence between investigators and BUJs.

Petition background information

(“SPSO” is used here for both the ombudsman and his staff, as appropriate.)

A document written by the ombudsman Jim Martin himself together with Richard Thomas and Richard Kirkham ('External Evaluation of the Local Government Ombudsman in England', April 2013) includes the following statement:

Informing both parties to an ombudsman investigation of the respective arguments ensures that both sides have had the opportunity to understand the viewpoint of the other. More importantly, this measure allows parties to rebut the arguments of the other side.

This statement summarizes quite well our views on this issue, except that evidence should be revealed also, as well as arguments.

Despite the above quotation, the SPSO does not accept the above basic principles in regard to Scotland and will not allow complainants to see the correspondence between SPSO and BUJs, at least until after judgment has been passed.

In support of this position the SPSO cites the *Scottish Public Services Ombudsman Act 2002*, specifically item 12 (1). Here is the relevant part of the Act:

12 Investigation procedure

(1) An investigation under section 2 must be conducted in private.

However, it is far from clear that “in private” means that information should not be shared with complainants. Indeed we do not believe that the legislators could have intended this. There is therefore a **simple solution** to the problem—a brief amendment to the Act. This would be to the effect that complainants should be allowed to see all exchanges between SPSO and the relevant BUJs (redacted as necessary).

The SPSO’s position on this issue is not in fact as straightforward as has so far been stated; other statements made by the SPSO are inconsistent and confusing. Details are given below, but first we say why we think this issue is important.

The need for transparency in SPSO investigations

Justice, and adequate and effective investigation, require that the SPSO investigator has the true and full facts of the case and, for the satisfaction of complainants, they must believe this to be so.

A complainant needs to know whether his or her case has been correctly presented by the SPSO and whether the responses of the BUJ are complete and honest. Given the imperfections of human nature, BUJs must often be biased in what they say. Moreover, the individuals handling complaints within the BUJ (perhaps in more senior positions) may not be the people accused of maladministration.

We do in any case know from experience that the SPSO can inadvertently misrepresent details of the accusation and we also know from experience that BUJs can provide false evidence (whether this comes from the Chief Executive presenting second-hand evidence or from lower levels in the organization).

It is for good reasons that secrecy would not be tolerated in a law court.

The confusing picture presented by the SPSO

The SPSO does not consistently cite the SPSO Act as above and sometimes even contradicts their interpretation of it. We illustrate with quotations.

(a) Jim Martin has given a completely different reason for not revealing correspondence between his investigators and BUJs. Thus the following is a written response to a question put to him by the Local Government and Regeneration Committee, when quizzing him on his annual reports.

Question – Why is the SPSO reluctant to reveal to complainants the correspondence between investigators and BUJs?

Response – When we receive a request for information, it is our current practice to release everything we can that has not already been shared with the complainant as part of the investigation process. Sometimes, we hold information which we cannot release.

The response may look like an answer, albeit only partial. Here there is no suggestion of any legal restriction on revealing correspondence. There is no hint as to what kind of information cannot be released.

(b) Part of an email to the Chief Executive, Glasgow City Council conflicts with the SPSO’s interpretation of “in private” (11 September 2012. SPSO reference: 201104526). This relates to a complaint against the Council.

“Note that information provided to the SPSO will normally be shared with the complainant during the course of our consideration of the complaint. It may also be released following a subject access request under the Data Protection Act 1998. Therefore, please advise me if you have any objections to the release of the information you provide.

Yours sincerely
xxxxxxxxxxx

Complaints Reviewer”

This contradicts the assertion that correspondence cannot be shared with a complainant. Indeed, the information alluded to was not released following the subject’s access request under the Data Protection Act 1998, despite his correspondence with the Information Commissioner and SPSO.

(c) The following is a footnote to SPSO emails:

Investigations by the Scottish Public Services Ombudsman are to be carried out in private, in terms of the Scottish Public Services Ombudsman Act 2002. Accordingly, this correspondence must not be made publicly available. This does not affect the rights of recipients to seek legal advice in relation to this complaint. Where appropriate, recipients are also reminded of their obligations under the Data Protection Act 1998 in relation to the processing of personal and sensitive personal data.

This suggests that “in private” refers to availability of information to the public generally and not availability to the complainant. It would be unreasonable to classify complainants as ‘the public’ in this context (as opposed to ‘particular members of the public’).

(d) The SPSO wrote the following to a complainant wishing to see correspondence:

Section 19(1) of the SPSOA states that ‘Information obtained by the Ombudsman or any of the Ombudsman’s advisers in connection with any matter in respect of which a complaint or a request has been made must not be disclosed except for any of the purposes specified in subsection (2) or as permitted by subsection (3)’.

Amongst those purposes are “any consideration of the complaint or request (including any statement under section 11) and any investigation of the matter (including any report of such an investigation),”

The appeal to Section 19(1) thus appears to be spurious.

(e) Professor Brown, as former SPSO, was willing to pass correspondence between her office and BUJs to complainants. The present SPSO has been asked “Was this improper, or has there been a change in the legislation?” The SPSO replied that there has been no change.

Why transparency in this regard should benefit the SPSO and why the SPSO should welcome clarification of this issue.

1. Complainant surveys in past years (by Craigforth) revealed that much of the considerable complainant dissatisfaction with the SPSO was due to a belief that the SPSO was not impartial. The SPSO should surely welcome improvements in public trust.

2. In response to a request to see correspondence between SPSO and a particular BUJ, the SPSO first took this to be treatable as an FOI request. Then, realizing that this would make the information available to the general public (which, incidentally, the complainant would not have minded) related it to Data Protection. It was not explained why the complainant should not be allowed to see his own personal ‘data’, supplied by himself. The SPSO should surely welcome clarification and the resulting saving of time.

Unique web address

<http://www.scottish.parliament.uk/GettingInvolved/Petitions/PE01538>

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