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Jenny Marra MSP
Convener
Public Audit and Post-Legislative Scrutiny
Committee
Scottish Parliament
EH99 1SP

By email

18 January 2018

Dear Convener

FOLLOW UP TO COMMITTEE SESSION ON 21 DECEMBER 2017

Further to my letter of 12 January 2018, I am writing to provide further information on the issues raised in relation to severance payments to the SPA Chief Executive. Given comments made since sending my letter, I am also providing further details of the engagement that I have had with the Chief Constable since the events described in the letter.

In June 2017, we became aware that the SPA Board was developing proposals to change the reporting line of the Director of Forensics to be direct to the SPA Board rather than through the SPA Chief Executive. My understanding is that, as forensics represented the largest part of the directly managed staff of the SPA, the Board took the view that this represented a significant change to the Chief Executive role, which would become redundant.

In early July, SG officials asked to be kept in touch with developments on the Chief Executive's exit arrangements. On 26 July, Scottish Government officials were given a copy of a draft business case for restructuring the CEO role. This outlined the approach and provided indicative costs, including for an exit payment to Mr Foley under the existing, approved SPA Voluntary Redundancy/Voluntary Early Retirement scheme which applies to SPA and Police Scotland staff. There was a clear view from SPA's HR advisers that Mr Foley would be eligible for early retirement under this scheme.

Because the exit was proposed under the existing VR/VER scheme, the Scottish Government had no formal role in providing views on the specific terms of the early retirement package. Indeed, the main aim in sharing the information was to involve officials in the approval of a role description for a new interim Chief Officer position, as the Scottish Government did have a formal role in approving a salary scale for that post.

However, it was clear from the information submitted to us that SPA proposed to include an element of pay in lieu of notice (PILON). As Mr Foley's proposed leaving date was earlier than his contracted period of notice, SPA had decided that he was eligible for PILON. In early August, SG officials queried with SPA's HR advisers whether the period of notice could begin at the point a VER offer was made and accepted i.e. late August or thereabouts, thereby significantly reducing the PILON payment.

The Deputy Director for Police Division contacted the SPA Deputy Chair by phone on 17 August. During that call the PILON issue was discussed and the Deputy Chair stated she had received clear HR advice on this point. Their position was that they had essentially no discretion about the size of the offer given the conditions attached to it and had therefore proceeded to make an offer.

Whilst respecting that the decision was for SPA to make, the Deputy Director of Police Division emailed the SPA Deputy Chair on 23 August to highlight an expectation that the PILON element would be subject to a great deal of scrutiny. The relevant text, which forms part of a wider exchange about the terms of a draft announcement, is as follows:

The pay in lieu of notice point remains the one that looks to me like it will potentially be subject to a lot of scrutiny. Nicola will know this is a point we queried with the HR function and that we were given assurances the approach was based on clear HR analysis/advice. It will be for SPA to explain that and I would simply state a view that you would be wise to think carefully about how you express the HR advice as to why the notice period can't start on 1 September. It may be worth thinking about what the answer would be to that specific question.

In November, I became aware of Audit Scotland's concerns in relation to the PILON element as the draft Audit Report on the 2016-17 SPA accounts was being finalised. Whilst not questioning the principle of SPA's approach, Audit Scotland questioned (as Scottish Government had) whether half of the PILON payment (i.e. £28,333) could have been avoided.

As a result, I wrote to the Chair of the SPA on 21 November to highlight that the concerns raised by Audit Scotland reflected those that we had brought to SPA's attention in August, and asked for the payment to be reviewed. SPA subsequently wrote to Audit Scotland explaining their approach, and also copying that to me with a covering letter. It is clear from this letter that the SPA continued to believe that the approach it had taken could be justified.

Following the Committee's session on 21 December, I immediately wrote to the Chair of the SPA to ask that they consider pausing any outstanding exit payments to Mr Foley to allow for further consideration of the options available. SPA subsequently confirmed that they had paused payment of the PILON element and were undertaking an assessment of options. I understand the SPA has now written to the Committee to confirm the outcome of their assessment.

I hope this meets the Committee's request for further insight into the exchanges between Scottish Government and SPA on Mr Foley's exit arrangements. The Committee also asked whether a settlement agreement was considered at any point. I can confirm that this was considered by SPA, but not taken forward.

More generally, I welcome the commitment of the SPA Chair to learn lessons on the issues identified by Audit Scotland. As you are aware, through the consultation on *A Severance Policy for Scotland*, Scottish Government is also considering how an exit payment cap, claw back or changes to severance scheme terms might apply across the wider devolved public sector. No decisions have been taken, but advice to Ministers will certainly reflect on the issues raised by the Public Audit and Post-legislative Scrutiny Committee in order to determine the right approach to severance arrangements across the wider public sector in Scotland.

Relevant correspondence between Scottish Government and the SPA on this issue is attached in the Annex.

Separately, I am aware of commentary over recent days regarding contact with the Chief Constable in November 2017 and in particular how this relates to the events I set out in my letter to the Committee of 12 January.

My letter focused on engagement between the Scottish Government and SPA around decision-making on the Chief Constable's leave. My contact with the Chief Constable had no bearing on that issue.

I contacted the Chief Constable on 16 November to advise him of the appointment of the new Chair of the Scottish Police Authority. Shortly after this, the Chief Constable contacted me to advise that he would be in Edinburgh on 30 November and asked whether I would be available for a meeting. Arrangements were made for us to meet in St Andrew's House that day. We agreed at the outset of the meeting that it should be an informal discussion, and as such no minute was taken. At the meeting, the Chief Constable made clear that he wished to resume his full responsibilities as soon as possible. He set out his views on the investigation of the conduct complaints, including on the progress and timescale of the PIRC investigation. I indicated that I was keen to see the investigation progress as quickly as possible, while fully recognising the independence of the PIRC.

I have had no further engagement with the Chief Constable since the meeting.

I hope the Committee finds this information helpful. I am happy to provide additional information if that would be of assistance.

Yours sincerely,



PAUL JOHNSTON

FOLLOW UP TO COMMITTEE SESSION ON 21 DECEMBER 2016

Annex - Correspondence

Director-General Education, Communities and Justice
Paul Johnston



T: 0131 244 2814
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Andrew Flanagan
Chair
Scottish Police Authority
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Glasgow
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By email: andrew.flanagan@spa.pnn.police.uk

21 November 2017

Dear Andrew

SEVERANCE PAYMENT TO SPA CEO

I am writing in my capacity as Principal Accountable officer for the Justice portfolio, in relation to the severance payment agreed for the current Chief Executive of SPA, John Foley. I am writing to you as I understand the Board took the decisions in relation to this matter, given that John Foley is the Accountable Officer for SPA.

I have now had sight of the draft Audit Report on the 2016-17 SPA accounts which makes critical reference to this payment.

The clear conclusion that AS have reached is that the level of severance payment that has been agreed is not justified by the circumstances. I understand that the majority of the payment relates to the terms of the existing, approved VR/VER scheme for SPA and Police Scotland staff, but that a significant discretionary element has been added for Pay in Lieu of Notice (PILON).

You may be aware that Scottish Government colleagues queried the proposed approach in relation to PILON when the restructuring which gave rise to John Foley's early retirement was being discussed this Summer. In particular, colleagues could not understand why the period of notice could not commence at that point, thereby reducing the PILON payment. They were given assurances at the time that the approach was based on Police Scotland HR advice that no alternative approach was possible. It is now clear that Audit Scotland do not accept the explanation that has been provided, which confirms the concerns Scottish Government expressed at the time.

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My understanding is that it is normal practice that the notice period starts on the date of acceptance of the VR/VER package offered, which in this case I understand to be late August. The only time that PILON should be paid in these circumstances is if: a) the employer wants the staff member to leave with immediate effect upon the date of signing up to the VR/VER package; or b) it is agreed that the individual leaves before the end of the notice period, in which case the balance of the notice period may be paid as PILON.

By way of context, I should highlight that the Public Audit and Post Legislative Scrutiny Committee is taking a close interest in severance payments made to senior officials in publicly-funded bodies. Given their interest in matters relating to SPA in the recent past, I would expect them to take a close interest in this particular severance agreement. The presence of an adverse comment from auditors would, I believe, make the position difficult, if not impossible, to defend. As Portfolio Accountable Officer, I should make clear that, as it stands, I personally would not be able to defend the decisions made in relation to this matter.

Given this position, I believe it is essential that the PILON element of the severance payment is immediately reviewed and a methodology applied that is aligned to the requirements of the SPFM, in the manner which Audit Scotland would expect.

You will be aware that the Audit Report also questions the approach taken by the Scottish Police Authority to relocation payments made to a deputy chief constable. I understand that the associated tax and national insurance costs were also incurred by SPA. Given the concerns highlighted by Audit Scotland, I would find it helpful to understand what steps the SPA Board has taken to review these payments and to determine if further action is required.

I am copying this letter to Nicola Marchant, Deputy Chair, David Hume as Chair of the SPA Audit Committee, and Kenneth Hogg, interim Chief Officer.

Yours sincerely,



PAUL JOHNSTON

Mr Paul Johnston
Director-General Education, Communities and Justice
Scottish Government
St Andrews House
Regent Road
Edinburgh EH1 3DG

24 November 2017

Our ref: AF/081/17/CW

Dear Paul

SCOTTISH POLICE AUTHORITY CHIEF EXECUTIVE OFFICER REDUNDANCY

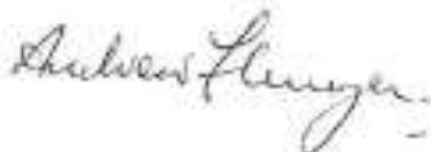
Thank you for your letter of 21 November about the agreement reached with the SPA Chief Executive in respect of his redundancy.

Like you I am concerned about the description and conclusions about this matter contained in Audit Scotland's draft 2016/17 Audit Report, which are also repeated in their draft Section 22 Report. My concerns, and those of the Board, arise because we do not believe that the drafts accurately represent either the process used by the SPA or the outcomes achieved, including in securing the best available value for money. I attach a letter which Nicola Marchant, Chair of SPA's People Committee, has sent today to Audit Scotland explaining our reasons for this view. I hope this explanation also gives you the information and assurance you need in your position as Portfolio Accountable Officer.

Following receipt of your letter we have also explored the range of alternative options available to us at this point in time, notwithstanding the fact that we believe we have already chosen and executed the best available option. All of the those options would be likely to result in increased financial cost to the public purse and risk to the organisation, arising largely from the fact that the SPA would be seeking to modify a legally binding contract with the potential consequences which flow from that.

I would welcome your assistance in seeking a satisfactory resolution of this matter, and I am copying this letter to the recipients of yours.

Yours sincerely



Chair,
Scottish Police Authority

Steven Boyle
Audit Scotland
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South Suite
The Athenaeum Building
8 Nelson Mandela Place
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G2 1BT

Mark Roberts
Audit Scotland
4th Floor
102 West Port
Edinburgh
EH3 9DN

24 November 2017

Dear Steven and Mark

SCOTTISH POLICE AUTHORITY 2016/17 DRAFT AUDIT REPORT AND DRAFT SECTION 22 REPORT: SPA CHIEF EXECUTIVE REDUNDANCY

I am writing to you as Chair of the Scottish Police Authority (SPA) People Committee, and on behalf of the SPA Board. I am grateful for the opportunity to comment on matters of factual accuracy in the draft 2016/17 Draft Audit Report and in the draft 2016/17 draft Section 22 Report, and I am writing to request that the draft text about the SPA Chief Executive's redundancy arrangements be reconsidered. If it was helpful both the SPA Chair and I would be happy to discuss the matter further with you in advance of Tuesday 28 November, when both documents are due to be presented to the Board. We believe that the description of this matter in paragraphs 19 to 21 of the draft Section 22 Report, and in paragraph 102 and elsewhere in the draft Audit Report does not accurately describe the process, judgements made or outcomes achieved in respect of this issue. In summary, the option taken by the SPA in this case was the only option available which would have met the business imperatives and deliver value for money.

When making decisions on this matter the Board took into account the relevant business imperatives and the requirements to ensure regularity and propriety of any

public expenditure in this area along with the need to secure value for money. The business imperatives were to:

- change as quickly as possible the reporting relationship between Forensic Services and the Board, responding to recommendations from a June 2017 HMICS thematic review of Forensic Services and a previous 2016 HMICS Public Advice Note;
- secure business continuity despite the consequential redundancy of the Chief Executive Officer (CEO) role by recruiting an Interim Chief Officer before the CEO left the organisation;
- ensure that the CEO as Accountable Officer remained in post long enough to complete and present to the Board the annual report and accounts, and then leave the organisation immediately thereafter to enable the Accountable Officer responsibilities to transfer to a newly appointed Interim Chief Officer.

These imperatives were discussed with stakeholders at the time, including Audit Scotland with respect to a reasonable time to change over Accountable Officer. A business case for change, including the redundancy of the CEO role, was presented to the SPA Board on 7 June, where it was supported. The proposed package circulated to the Board for their approval was in line with the Voluntary Retirement/Voluntary Early Retirement policy approved by the Scottish Government annually, and our Standard Operating Procedure specified that Pay in Lieu of Notice (PILON) could be used in exceptional circumstances.

I considered which of the options available would both achieve the business imperatives and offer value for money. Two options were available: the first where normal consultation process would be followed as per HR guidance; and the second where an accelerated consultation process would be agreed with the impacted individual. It should be noted that in such cases the impacted individual can insist on due process being followed and any deviation from agreed processes can, and has in other cases, led to grievances. In each option the first step was to advise the impacted individuals and trade unions of the content of the business case. The first date on which that process could commence was 25 July 2017. The first option would not have met the business imperatives outlined above and would have delivered poorer value than the second option followed. In the first option, notification of the individual(s) and unions on 25 July would have been followed by the standard consultation processes which would have lasted, in total, between 12.5 and 14.5 weeks. Following our normal processes would have probably have led to notice being served on the impacted individual on 27 October 2017, and the change of reporting relationship for Forensic Services would have been brought into effect on 28 October. The accounts were anticipated to be signed on 31 October, and allowing for the CEO's 6 month contractual notice period he would either have left the organisation on 31 March 2018, or have left earlier having been paid PILON, or have remained in ongoing employment by the SPA having exercised his right to enter the pool of staff seeking redeployment and to await an equivalent role to become available. Advertisement for an Interim Chief Officer would have commenced on 27 October meaning that they were unlikely to be in post until December at the earliest.

The second option, which was the route followed, met the business imperatives and delivered better value. Following notification on 25 July 2017, an accelerated consultation process was used with the full cooperation of the impacted individual and the SPA, and the consultation process was completed in 4 weeks. This accelerated process could not have been carried out without the cooperation of the individual. A contractual exit agreement comprising Voluntary Early Retirement and PILON was agreed on 18 August 2017, which enabled an advert for an Interim Chief Officer to issue in the week commencing 28 August 2017 which resulted in the successful candidate taking up post on 13 November 2017, and in the Forensic Services reporting relationship to change on 1 September 2017. In the event the accounts were not signed on 31 October and are currently scheduled for signature on 28 November 2017. Thereafter, this option now enables the CEO to exit the organisation on 30 November 2017.

Because of the one month extension in signing the accounts Option 2 will cost approximately £6,500 more than Option 1. The cost would otherwise have been equivalent. But critically Option 1 would not have met the business imperatives as described. Option 2 both meets these imperatives and delivers better value for money overall.

I hope that this helps to clarify the position and am happy to provide further detail if that would be helpful.

I am copying this letter to the Auditor General.

Yours sincerely



Nicola Marchant
Chair of SPA People Committee



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Letter sent by email

Susan Deacon
Chair
Scottish Police Authority
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21 December 2017

Dear Susan

At the Public Audit and Post-Legislative Scrutiny Committee this morning, a number of significant concerns were expressed about payments associated with the exit of the former Chief Executive of the Authority, John Foley. These follow on from issues raised by Audit Scotland in their Section 22 report on the SPA Annual report and Accounts for 2016-17. You will also be aware that I have previously expressed concerns about elements of the package in my role as Accountable Officer for the Justice Portfolio.

While decisions on this matter are for SPA to make, given the scale of the concerns that are being raised, I believe it is essential that SPA reviews whether any payments that have not yet been made in relation to the exit package should be paused to allow for further examination of the points raised by Parliament and Audit Scotland. This would also allow for further reflection on the options available.

I would be grateful for early confirmation of the action you have taken in response to this letter.

I am copying this letter to Kenneth Hogg, Interim Chief Officer.

Yours sincerely,

PAUL JOHNSTON



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AUTHORITY

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Mr Paul Johnston
Director-General Education, Communities and Justice
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22 December 2017

Our ref: SD/022/17/CW

Dear Paul

Thank you for your letter of 21 December about proposed payments associated with the exit of the former Chief Executive of the Scottish Police Authority, John Foley, and concerns about these payments expressed yesterday by the Parliament's Public Audit and Post-Legislative Scrutiny Committee.

The Committee's concerns reflected comments made by the Auditor General on the use of payments in lieu of contractual notice in this case. A payment of £56,666.50 in lieu of notice was due to be paid to Mr Foley today, along with an early retirement payment of £43,470. Yesterday I instructed the payment in lieu of notice to be paused to enable a review of this payment in the light of the Committee's concerns and to reflect further on the options available. I have received confirmation that the payment was not made, as requested. I will consider further this matter before reaching a decision on how to proceed.

Yours sincerely



Chair,
Scottish Police Authority