

Decision Notice

Decision 187/2018: Marc Ellison and the Chief Constable of the Police Service of Scotland

Investigations into “revenge porn”

Reference No: 201800475

Decision Date: 19 November 2018



Summary

Police Scotland were asked for documents sent to or from officers investigating “revenge porn” cases which referred to issues or challenges in detecting the crimes, and for copies of complaints relating to the handling of revenge porn cases.

In relation to the first part of the request, Police Scotland disclosed some information, but withheld the remainder. Police Scotland found that the cost of complying with the second part of the request would be excessive.

The Commissioner found that Police Scotland were entitled to withhold the information it held in relation to the first part of the request, and were not required to comply with the second part of the request because the cost would exceed £600. However, he also found that Police Scotland failed to comply with their duty to provide advice and assistance under section 15(1) of FOISA.

Relevant statutory provisions

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1), (4) and (6) (General entitlement); 2(1)(b) (Effect of exemptions); 12(1) (Excessive cost of compliance); 13(1) (Fees for disclosure in certain circumstances); 15 (Duty to provide advice and assistance); 30(b)(ii) (Prejudice to effective conduct of public affairs)

The Freedom of Information (Fees for Required Disclosure) (Scotland) Regulations 2004 (the Fees Regulations) regulations 3 (Projected costs); 5 (Excessive cost - prescribed amount)

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 20 December 2017, Mr Ellison made an information request to the Chief Constable of the Police Service of Scotland (Police Scotland). Referring to the definition of “revenge porn” in the Abusive Behaviour and Sexual Harm (Scotland) Act 2016, Mr Ellison asked for:
 - any documents (including but not limited to emails/reports/memos/meeting minutes) sent from/to officers who investigate “revenge porn” crime, that refer to issues or challenges in “detecting” recorded crimes. Please limit the search to between 1 July 2017 and 20 December 2017.
 - electronic copies of any complaints, made to Police Scotland between 1 July 2017 and 20 December 2017, related to the force’s handling of any “revenge porn” cases.
2. In relation to the second part of the request, Mr Ellison asked Police Scotland to redact any material that could identify the victim. He also said that, if electronic copies were not possible, he would like a summary of each complaint, e.g. date of complaint, summary of what happened, rank of officer involved, and outcome of complaint.
3. Police Scotland responded on 16 January 2018, providing some information in relation to the first part of Mr Ellison’s request. Police Scotland informed Mr Ellison that other information covered by this request had been withheld under the exemptions in section 30(b)(ii)

(Prejudice to the effective conduct of public affairs), 35(1)(a) and (b) (Law enforcement) and 39(1) (Health, safety and the environment) of FOISA.

4. Police Scotland relied on section 12(1) of FOISA (Excessive cost of compliance) in relation to the second part of his request. They told Mr Ellison that the only way they would be able to provide him with a response would be to examine each complaint in the relevant time period.
5. On 5 February 2018, Mr Ellison wrote to Police Scotland requesting a review of its decision on each part of his request. In relation to part 1, he commented that he had specifically requested information about issues and challenges around the detection of so-called “revenge porn” for the very reason that the legislation is new, and the nature of the crime makes it hard to detect. He was dissatisfied with the application of section 30(b)(ii), arguing that officers should have no expectation of privacy and it was in the public interest to know of areas the legislation did not take into account, or failings in the force. He challenged the decision to withhold information under section 35(1) of FOISA as he considered the reasons put forward by Police Scotland to be based on supposition, and questioned how disclosure could affect current/future investigations. He stated that no evidence had been provided as to how release of the information could endanger any individual or community safety (section 39(1)).
6. In relation to the second part of his request, Mr Ellison considered that Police Scotland had failed to provide detailed costs, or provided him with the opportunity to pay any fee. He stated that he should have been contacted to discuss how to narrow the scope of his request, given the duty to advise and assist under FOISA.
7. Police Scotland notified Mr Ellison of the outcome of its review on 7 March 2018. Police Scotland upheld its response for part 1 of the request, and provided some further reasoning.
8. In relation to the second part of his request, Police Scotland provided some details regarding the costs of complying with the request. They explained, for example, that there were over 3,000 complaint files which would need to be reviewed.
9. On 14 March 2018, Mr Ellison applied to the Commissioner for a decision in terms of section 47(1) of FOISA. Mr Ellison gave detailed reasons for his dissatisfaction with the outcome of Police Scotland’s review, for both parts of his request. These are considered below, but, in summary, he disputed the decision to withhold information, and challenged the “excessive costs” response.

Investigation

10. The application was accepted as valid. The Commissioner confirmed that Mr Ellison 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.
11. On 20 April 2018, Police Scotland were notified in writing that Mr Ellison had made a valid application. Police Scotland were asked to send the Commissioner the information withheld from Mr Ellison. Police Scotland provided the information and the case was allocated to an investigating officer.
12. 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, including justifying their reliance on any provisions of FOISA they considered applicable to the information requested.

Commissioner's analysis and findings

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

Section 30(b)(ii) – Prejudice to the effective conduct of public affairs

14. Police Scotland applied this exemption to two email chains covered by the first part of Mr Ellison's request.
15. In order for Police Scotland to rely upon this exemption, they must show that disclosure of the information would, or would be likely to, inhibit substantially the free and frank exchange of views for the purposes of deliberation. This exemption is subject to the public interest test in section 2(1)(b) of FOISA.
16. In applying this exemption, the chief consideration is not whether the information constitutes advice or opinion, but whether the disclosure of that information would, or would be likely to, inhibit substantially (as the case may be) the provision of the exchange of views. The inhibition in question must be substantial and therefore of real and demonstrable significance.
17. As with other exemptions importing a similar test, the Commissioner expects authorities to demonstrate a real risk or likelihood that actual inhibition will occur at some time in the near (certainly foreseeable) future, not simply that inhibition is a remote or hypothetical possibility. For inhibition to be likely, there would need to be at least a significant probability of it occurring. Each request must, of course, be considered individually.
18. The Commissioner's guidance¹ on section 30 of FOISA gives details of some of the factors which he may consider when assessing whether disclosure will cause substantial inhibition, in relation to the content of the information and the circumstances in which it was created.

Police Scotland's submissions

19. Police Scotland submitted that the withheld emails contain the free and frank views of non-senior staff from Police Scotland and the Crown Office and Procurator Fiscal's Service (COPFS) in response to a query on an "issue" identified by COPFS. The emails document their thoughts and opinions on the issue. Police Scotland explained that they regularly exchange views with external/partner agencies in relation to a specific subject matter. These are not formal consultations but the exchange of views on practical day to day issues.
20. In relation to the withheld information in this case, Police Scotland stated that it documents the thoughts and opinions of officers and staff members as regards the issues raised by COPFS as well as any conclusions drawn or actions deemed necessary. Such consultations are undertaken in confidence to discuss, and occasionally speculate about, any potential issues which may arise. Officers were offering the benefit of their experience, exchanging views on some of the difficulties they faced with regard to a subject matter which is a particularly damaging offence in terms of its impact on victims. Police Scotland stated that officers would have no reasonable expectation that these exchanges would be made public.

¹ <http://www.itspublicknowledge.info/Law/FOISA-EIRsGuidance/section30/Section30.aspx>

21. Police Scotland considered that disclosure of this information would substantially inhibit such free and frank exchanges of views for the purposes of deliberation. They commented that, if issues or challenges were identified, these should be addressed through the appropriate channels such as consultation on the legislation or post-legislative scrutiny, not by public disclosure.

Mr Ellison's submissions

22. For the most part, Mr Ellison's submissions (in his application for a decision) focused on the public interest in disclosure of the requested information, and are considered later in this decision. However, he also argued that FOI responses from Police Scotland often claim that releasing information would inhibit staff in making their candid views known, with little to back this up. He stated that officers should know that emails are subject to disclosure under FOISA.
23. Mr Ellison challenged the view that issues relating to the "revenge porn" legislation ought to be addressed only through the channels identified by the Police. He stated that it was for this very reason that FOISA was enacted: to ensure accountability and transparency within our public authorities.

The Commissioner's view

The Commissioner accepts that the exemption in section 30(b)(ii) of FOISA is engaged with regard to the emails in question. He is satisfied that non-senior police officers and COPFS staff were exchanging views informally in regard to a potential issue arising after the introduction of new legislation. In these circumstances, the Commissioner accepts that disclosure of the communications would be likely to result in police officers and COPFS staff being more guarded and less candid in future correspondence of this nature. He accepts that this would reduce the value of future exchanges of views between Police Scotland and COPFS on practical day to day issues.

24. Having concluded that the exemption in 30(b)(ii) of FOISA applies to the withheld information, the Commissioner must go on to consider the application of the public interest test in section 2(1)(b). The information can only be withheld if the public interest in maintaining the exemption outweighs the public interest in its disclosure.

The public interest test

25. Police Scotland acknowledged that disclosure would serve the public interest with regard to public awareness and allow public debate of the issues and challenges identified with regard to a relatively new offence which is particularly damaging in terms of its impact on the victims. Disclosure would allow insight into the extent Police Scotland and COPFS were discussing those challenges.
26. However, Police Scotland argued that, in this instance, the public interest is better served in ensuring that the police can freely liaise with partner agencies to discuss mutual matters of concern and to resolve any issues. They submitted that disclosure of the views of non-senior officers and COPFS staff views is contrary to the interests of the individuals who engaged in what (they argued) would reasonably have been anticipated as a private exchange of views as regards an area of the law. They also argued that the free and frank exchange of views is essential to the provision of an efficient, effective and well informed police service and that difficulty in detecting offences and prosecuting cases is a matter which must necessarily be discussed frankly, but not publicly. Police Scotland, therefore, considered that the public

interest in the disclosure of the information was outweighed by the harm that would be caused by disclosure.

Mr Ellison's submissions

27. In his application to the Commissioner, Mr Ellison noted that the correspondence from Police Scotland acknowledged there were "issues" with the approach to combatting "revenge porn" crime. He considered that there was a strong public interest case in finding out what these were, and whether the force was underprepared, or underestimated the nature of detecting the crime once the new legislation came into effect in July 2017. He stated that it is a matter of public record that the police only make detections in about a third of "revenge porn" cases.

The Commissioner's finding

28. The Commissioner recognises that there will always be a public interest in transparency and accountability and in scrutinising the decisions and decision-making processes followed by public authorities. The matter under consideration in this case is clearly of public importance. Disclosure would allow the public an insight into the approach taken by Police Scotland in relation to identifying, discussing and potentially mitigating any issues arising following the introduction of new legislation and categories of criminal behaviour. Given the nature of the crime in question and its impact on victims, it is arguable that disclosure would be in the public interest, to ensure that any issues with the legislation are identified, acknowledged and remedied.
29. Against this, the Commissioner recognises that there is a public interest in ensuring that Police Scotland and COPFS can work together and are able to share candid opinions and views. The Commissioner has already concluded that disclosure of the information would be likely to substantially inhibit officers and COPFS staff from expressing opinions and views and from highlighting issues in similar situations. He considers that this inhibition would hamper the future ability of Police Scotland and COPFS to openly identify issues and discuss potential solutions, which would be contrary to the public interest. Although it is clearly in the public interest for any issues relating to the new legislation to be identified and addressed, the Commissioner does not accept that it is equally clear that the appropriate way of doing so is to disclose details of the discussions into the public domain.
30. Consequently, having weighed up the public interest for and against disclosure, the Commissioner finds that the public interest in disclosure of the information is outweighed by that in favour of maintaining the exemption in section 30(b)(ii) of FOISA.
31. Accordingly, the Commissioner has concluded that Police Scotland was entitled to withhold the information in this case in terms of section 30(b)(ii) of FOISA. As the Commissioner accepts that section 30(b)(ii) applies, he does not consider it necessary to consider the exemptions at section 35(1)(a) and (b) in reference to the same information.

Section 12 - Excessive costs of compliance

32. With regard to the second part of Mr Ellison's request, Police Scotland relied on section 12(1) of FOISA. This provides that a Scottish public authority is not obliged to comply with a request for information where the estimated cost of doing so would exceed the relevant amount prescribed in the Fees Regulations. This amount is currently set at £600 (regulation 5 of the Fees Regulations). Consequently, the Commissioner has no power to require the disclosure of information should he find that the cost of responding to a request for that information would exceed that sum.

33. The projected costs the authority can take into account in relation to a request for information are, according to regulation 3 of the Fees Regulations, the total costs, whether direct or indirect, which the authority reasonably estimates it is likely to incur in locating, retrieving and providing the information requested in accordance with Part 1 of FOISA.
34. The authority may not charge for the cost of determining:
 - (i) whether it actually holds the information requested or
 - (ii) whether or not it should provide the information.
35. The maximum rate a Scottish public authority can charge for staff time is £15 per hour.
36. In his application to the Commissioner, Mr Ellison stated that Police Scotland should have provided him with an estimate of the cost of compliance. Their failure to do so meant he was unable to estimate how much to reduce the time period covered by his request to bring it within the £600 limit. Mr Ellison also stated that he assumed the system used by Police Scotland would allow for keyword searches (which had been undertaken in reference to another request), and wondered why a similar keyword search of the 3,000 records relating to his current request could not be undertaken.
37. Mr Ellison also stated that Police Scotland should have provided the BBC (for whom he works) with the chance to consider whether to pay a fee for the information.
38. In their submissions to the Commissioner, Police Scotland submitted that complaints against the police are recorded in terms of various categories but these are general in nature. As any of these complaints could have stemmed from the handling of a “revenge porn” allegation, it would be necessary to examine the background to each complaint in order to ascertain if it was relevant to Mr Ellison’s request.
39. Police Scotland provided a breakdown of the costs which, they estimated, they would incur in determining which complaints could have stemmed from the handling of a “revenge porn” allegation. Police Scotland submitted that between July and December 2017 they received a total of 3,109 complaints containing 4,034 allegations. They estimated that it would take five minutes to examine each complaint, equivalent to 15,545 minutes or 259 hours. Carried out by an administrator at an approximate hourly rate of £12, the estimated total cost of compliance was £3,108.
40. Police Scotland were asked about the possibility of keyword searches and were asked to address Mr Ellison’s suggestion that, if there were only a limited number of “revenge porn” cases, senior officers would be aware of them and the information would be readily located within cost.
41. Police Scotland provided the Commissioner with an overview of their Centurion system. They explained that complaints are recorded in terms of various categories which are general in nature and do not provide the level of detail sought by Mr Ellison. Police Scotland stated that they have no business requirement or need to record complaints against the police in terms of the type of criminal allegation (if any) from which they stem.
42. The Commissioner asked Police Scotland to undertake a sample search exercise using the keywords identified by Mr Ellison. This exercise identified only one incident relevant to his request. The Commissioner accepts that the police practice of recording complaints under different categories, and using different terminology to that specified by Mr Ellison, would be likely to mean cases not being identified through keyword searches in this case.

43. Police Scotland did not consider responding to a request on the basis of officers' "recollections" to be appropriate. It was also noted that Mr Ellison had not defined what he meant by a "senior officer" but that Police Scotland could confirm complaints were predominantly dealt with at Inspector or Sergeant level, dependant on circumstances. Given the number of officers across Scotland who would require to be consulted with regard to 'recollections', over 3,500, it considered the exercise would be wholly impractical, aside from the fact that recollections were not an accurate means to generate the type of statistical information being requested.
44. Taking account of all the circumstances, the Commissioner is satisfied that the only way of retrieving the information which would answer the second part of Mr Ellison's request would be to examine each complaint. Because of the way Police Scotland records information about complaints, it would not be possible to use keyword searches to identify relevant records. The Commissioner finds that Police Scotland have provided a reasonable estimate of the cost of compliance with Mr Ellison's request, and were entitled to rely on section 12(1). This means they were under no obligation to comply with part 2 of the request.
45. In his application to the Commissioner, Mr Ellison complained that, in relying on section 12(1) of FOISA, Police Scotland had assumed that the BBC would not pay the cost of providing the information. However, while public authorities can choose to issue a fees notice where the cost of complying with a request exceeds £600, they are under no obligation to do so (see section 13 of FOISA).

Section 15 – Duty to provide advice and assistance

46. In his application to the Commissioner, Mr Ellison referred to the duty to provide advice and assistance to requesters (section 15 of FOISA) and complained that Police Scotland was "not being fully open in how it could assist with this request". He explained why he needed a cost breakdown in order to assess how to narrow his request and bring the cost of compliance down.
47. The Commissioner finds that, although they advised him that he should narrow the scope of his request to reduce costs in their initial response and review response, Police Scotland did not provide a sufficient breakdown of costs to allow Mr Ellison to work out how to (and whether to) reduce the scope of his request and bring it within the £600 threshold. The Commissioner finds this to be a breach of section 15(1) of FOISA.
48. As this decision notice contains the cost breakdown which Police Scotland provided to the Commissioner, he does not require Police Scotland to provide this information to Mr Ellison.

Decision

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

The Commissioner is satisfied that the information covered by the first part of Mr Ellison's request is exempt from disclosure.

He is also satisfied that complying with the second part of Mr Ellison's request would cost more than £600, meaning that Police Scotland were not required to comply with that part of the request. However, in failing to give Mr Ellison advice and assistance about how to narrow the scope of the request, Police Scotland failed to comply with section 15(1) of FOISA.

Appeal

Should either Mr Ellison 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

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

19 November 2018

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.

...

- (6) This section is subject to sections 2, 9, 12 and 14.

2 Effect of exemptions

- (1) To information which is exempt information by virtue of any provision of Part 2, section 1 applies only to the extent that –

...

- (b) in all the circumstances of the case, the public interest in disclosing the information is not outweighed by that in maintaining the exemption.

...

12 Excessive cost of compliance

- (1) Section 1(1) does not oblige a Scottish public authority to comply with a request for information if the authority estimates that the cost of complying with the request would exceed such amount as may be prescribed in regulations made by the Scottish Ministers; and different amounts may be so prescribed in relation to different cases.

...

13 Fees for disclosure in certain circumstances

- (1) A Scottish public authority may charge for the communication of any information -
- (a) which by virtue of section 12(1) or (2) it is not obliged to communicate; and
 - (b) which it is not otherwise required by law to communicate,
- such fee as may be determined by it in accordance with regulations made by the Scottish Ministers.

...

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.

...

30 Prejudice to effective conduct of public affairs

Information is exempt information if its disclosure under this Act-

...

- (b) would, or would be likely to, inhibit substantially-

...

- (ii) the free and frank exchange of views for the purposes of deliberation;

...

Freedom of Information (Fees for Required Disclosure) (Scotland) Regulations 2004

3 Projected costs

- (1) In these Regulations, "projected costs" in relation to a request for information means the total costs, whether direct or indirect, which a Scottish public authority reasonably estimates in accordance with this regulation that it is likely to incur in locating, retrieving and providing such information in accordance with the Act.
- (2) In estimating projected costs –
 - (a) no account shall be taken of costs incurred in determining –
 - (i) whether the authority holds the information specified in the request; or
 - (ii) whether the person seeking the information is entitled to receive the requested information or, if not so entitled, should nevertheless be provided with it or should be refused it; and
 - (b) any estimate of the cost of staff time in locating, retrieving or providing the information shall not exceed £15 per hour per member of staff.

5 Excessive cost - prescribed amount

The amount prescribed for the purposes of section 12(1) of the Act (excessive cost of compliance) is £600.

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