

Decision Notice

Decision 105/2019: Mr I and the Chief Constable of the Police Service of Scotland

Registered Sex Offenders: risk assessments and search warrants

Reference No: 201801735

Decision Date: 11 July 2019



Scottish Information
Commissioner

Summary

Police Scotland were asked for a range of questions about their involvement in the risk assessment of RSOs in the community.

The Commissioner found that Police Scotland were not obliged to comply with one of the requests as the cost would exceed £600. He also accepted that Police Scotland did not hold some information they had been asked for.

However, the Commissioner found that Police Scotland failed to give notice that they did not hold some information, and did not comply in full with their duty to provide advice and assistance.

Relevant statutory provisions

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1), (3), (4) and (6) (General entitlement); 8(1)(c) (Requesting information); 12(1) (Excessive cost of compliance); 15(1) (Duty to provide advice and assistance); 17(1) (Notice that information is not held); 20(3)(c)(ii) (Requirement for review of refusal etc.); 21(4)(b) (Review by Scottish public authority)

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

Sexual Offences Act 2003 (the 2003 Act): section 96A(1) – (3) (Police powers of entry to and examination of relevant offender's home address)

The full text of each of the statutory provisions cited above is reproduced in Appendix 1 to this decision. The Appendices form part of this decision.

Background

1. On 18 July 2018, Mr I made 13 separate requests to the Chief Constable of the Police Service of Scotland (Police Scotland) for a range of information about the police's powers in relation to applying for warrants to search the homes of registered sex offenders (RSOs); the requirement on RSOs to undergo risk assessments and the sharing of information about RSOs. The requests are set out in full in Appendix 2.
2. Police Scotland responded on 15 August 2018, providing a written answer/explanation to each request, apart from requests (2) and (7). With regard to request (7), they gave Mr I notice, under section 17(1) of FOISA, that they did not hold any information falling within the scope of this request. With regard to request (2), they notified Mr I that they were relying on section 12(1) of FOISA, and were refusing to comply with this request, on the grounds that compliance would exceed £600.
3. On 2 September 2018, Mr I wrote to Police Scotland requesting a review of their decision. He did not consider their responses to his request to be satisfactory, with the exception of the response to request (1), which he did not challenge.
4. Mr I explained, in some detail, why he was dissatisfied with Police Scotland's response and he challenged their reliance on sections 12(1) and 17(1) of FOISA.
5. Police Scotland notified Mr I of the outcome of their review on 2 October 2018. Police Scotland upheld their original response in full. They noted that Mr I appeared to be asking

them to supply comment rather than recorded information and they considered that such requests were not valid FOI requests.

6. On 12 October 2018, Mr I applied to the Commissioner for a decision in terms of section 47(1) of FOISA. Mr I gave reasons why he was dissatisfied with the outcome of Police Scotland's review: in general, he was dissatisfied because they had not provided him with the information he had requested.

Investigation

7. The application was accepted as valid. The Commissioner confirmed that Mr I made requests for information to a Scottish public authority and asked the authority to review its response to those requests before applying to him for a decision.
8. On 17 October 2018, Police Scotland were notified in writing that Mr I had made a valid application and the case was allocated to an investigating officer.
9. 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 to answer specific questions. These related to questions regarding their reliance on section 12(1) and 17(1) of FOISA and their views on the validity of some of the requests.

Commissioner's analysis and findings

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

Request for review

11. Mr I has asked the Commissioner to investigate the way Police Scotland responded to all of his requests, with the exception of request (1).
12. However, on reviewing carefully the wording of Mr I request for review, the Commissioner has concluded that he is unable to consider the way Police Scotland responded to requests (12) and (13).
13. For a request for review to be valid, it must express dissatisfaction with the response. While it is clear that Mr I did not like the responses given by Police Scotland in relation to requests (12) and (13), he was not disagreeing with the FOISA response, but instead chose to make new information requests for further information, based on the responses from Police Scotland. As Mr I did not express dissatisfaction with the actual response in line with section 20(1)(c) of FOISA, the Commissioner cannot investigate requests 12 and (13).)

Validity of requests

14. In their review outcome, Police Scotland suggested that some of Mr I's information request were not seeking recorded information, but simply required Police Scotland to comment on scenarios he had put forward. Police Scotland submitted that they did not consider those requests to be valid in terms of FOISA.
15. FOISA gives the right to request any *recorded* information already held by a public authority when the information request is received. FOISA does not require a public authority to create

new information in order to respond to a request or to respond to requests which are, in effect, requests for advice or guidance rather than requests for recorded information.

16. Section 8(1)(c) of FOISA states that, for a request to be valid, it must describe the recorded information being requested. Unless the request adequately describes the information (there is generally a low test for this), the request will not be valid. Where a request is unclear, the authority may ask the requester to clarify the request (section 1(3)).
17. When dealing with requests which appear to be for advice or guidance or with requests which do not adequately describe the recorded information being requested, authorities must always take account of section 15(1) of FOISA, which requires them to provide reasonable advice and assistance to a person who has made, or intends to make, an information request. This could include, for example, giving the requester advice on what to do to make a valid request under FOISA.
18. The Commissioner has reviewed each of Mr I's information requests (with the exception of requests (1), (12) and (13) to consider whether they are, in fact, valid information requests. The Commissioner has concluded that requests (5), (6), (10) and (11) are not valid information requests. The Commissioner's reasoning is set out below. The Commissioner is satisfied that the remaining information requests are valid.

Request (5)

19. In this request, Mr I asked: "In general terms, how do Police Scotland anticipate an RSO to address the serious concerns they may have about his/her behaviour when it is their policy not to disclose those concerns to the person?" He appears to be questioning the efficacy of Police Scotland's policy and asking Police Scotland to justify their policy position. Police Scotland have submitted that this request is not a request for recorded information.
20. Mr I has contended that request (5) is seeking recorded information. Mr I referred to nationally agreed frameworks regarding the risk management of offenders, and he argued that in order for assessments and plans to manage risk to be effective, they need to be understood by the persons that they concern (i.e. they should be shared with the offender). Mr I contends that if Police Scotland have a policy of not sharing the outcome of risk assessments with RSOs there should be recorded information regarding Police Scotland's decision.
21. The Commissioner acknowledges the arguments put forward by Mr I, but is satisfied that the only way that Police Scotland could respond to this request would be by providing their views or opinions on the question raised by the request, rather than by identifying and disclosing recorded information. The Commissioner is satisfied that request (5) is not a valid request for recorded information.

Request (6)

22. In request (6), Mr I asked: "Are Police Officers permitted to question any citizen about their legal matters?" This request lacks clarity or focus in terms of the information he requires. It is not clear what "legal matters" Mr I is referring to. Police Scotland have submitted that this request is not a valid request for recorded information.
23. Mr I contended that request (6) is very straightforward and relates to the safeguarding of human rights; therefore, the information should be recorded. Mr I referred to Article 8(1) of the European Convention on Human Rights (ECHR) which provides that everyone has the right to respect for his private and family life, his home and his correspondence. Mr I further noted that Article 8(2) of the ECHR states that there can be no interference by a public

authority unless it is in accordance with law and it is necessary in a democratic society and falls within one of the various grounds for exception (for example, national security). Mr I questioned why this was not a request for recorded information.

24. The Commissioner has taken account of the arguments put forward by Mr I but he does not consider that this is a request for recorded information; instead, he considers that Mr I is seeking a legal opinion from Police Scotland. The Commissioner notes that, in his requirement for review, Mr I asked Police Scotland to “confirm yes or no” whether Police Scotland are permitted to question citizens about their legal matters which, under common law, are strictly confidential. While the Commissioner recognises that a request requiring a “yes/no” answer can, in certain situations, be a valid information request (see, for example, *Decision 073/2015 Brian George and Glasgow City Council*¹), in this case he considers that the request for a “yes/no” answer supports his view that Mr I was not seeking recorded information but was asking Police Scotland to give a legal view on the powers that they may or may not hold. He has concluded that request (6) is not a valid request for recorded information.

Request (10)

25. In part (10) of his request, Mr I asked: “Should all the risk assessments carried out when visiting an RSO’s home address be informal?”
26. Police Scotland responded to this part of Mr I’s information request by stating that officers undertaking home visits use accredited risk assessment tools as well as their own skills, experience and professional judgement, and that the accredited risk assessment tools can be used without the formal involvement of the RSO.
27. However, it is not clear what Mr I meant by use of the term “informal”, in the context of his request and, again, it appears to the Commissioner that Mr I is seeking an opinion or view rather than recorded information. In the circumstances, the Commissioner is not satisfied that this is a request for recorded information.

Request (11)

28. In request (11), Mr I asked: “What procedures must be undertaken prior to police informing a third party about an RSO’s status and convictions?”
29. Police Scotland responded to this request by outlining the reasons why disclosure to a third party might be considered necessary, particularly if the RSO presents harm to an individual. Police Scotland noted that, in such circumstances, RSOs should be provided with an opportunity to self-disclose their status/conviction to the individual and if this is not done, then police will disclose information as considered necessary and proportionate.
30. In his requirement for review, Mr I argued that Police Scotland had not provided him with the information he had requested.
31. In submissions to the Commissioner, Police Scotland explained that the extent of information provided to a third party is dependent on individual circumstances, but is restricted to that information necessary for an individual to make informed decisions in relation to their continued association with the RSO. Police Scotland noted that disclosure is a last resort, but ultimately disclosure is an option which police will pursue where an individual is believed to

¹ <http://www.itspublicknowledge.info/ApplicationsandDecisions/Decisions/2015/201402321.aspx>

represent such a risk to another that disclosure is the only way to ensure they are able to consider their own personal future safety and/or that of another.

32. Police Scotland submitted that to resolve this part of Mr I's information request, they are prepared to provide the rationale/justification for disclosure in a specific circumstance as each is unique; however, they would require Mr I to provide them with a specific scenario that he requires them to consider and respond to.
33. The Commissioner considers that Police Scotland could not reasonably provide Mr I with a response to his request until they obtained more information from him, with regard to the specific circumstances in which information would be disclosed.
34. Police Scotland have highlighted that there are different procedures for disclosure depending on the individual (for example, if the risk is to a child or an adult) and the type of risk involved (such as significant domestic violence and abuse). Until Mr I provides Police Scotland with a specific set of circumstances, Police Scotland could not comply with this part of Mr I's request for information.
35. The Commissioner finds that Police Scotland should have provided Mr I with advice and assistance on this point and explained what he was required to do to make a valid information request. Police Scotland failed to comply with section 15(1) in relation to this part of Mr I's request, and, as a consequence, have also failed to comply with section 1(1) of FOISA
36. In the circumstances, the Commissioner requires Police Scotland to give advice and assistance to Mr I, in line with section 15(1) of FOISA to allow him to make a valid information request in relation to request (11).

Section 17(1) – Notice that information is not held

37. As noted above, 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. This is subject to qualifications, but these are not applicable here. If no such information is held by the authority, section 17(1) of FOISA requires the authority to give the applicant notice in writing to that effect.
38. The standard of proof to determine whether a Scottish public authority holds information is the civil standard of the balance of probabilities. In determining this, the Commissioner will consider the scope, quality, thoroughness and results of the searches carried out by the public authority. He will also consider, where appropriate, any reason offered by the public authority to explain why the information is not held.
39. Police Scotland have submitted that they do not hold any information falling within the scope of requests (3), (4), (7), (8) and (9).

Request (7)

40. In request (7), Mr I asked for: "A copy of the risk assessment tool that Police Scotland use with specifies that OMU Officers must request to look around the home of an RSO as part of the risk assessment process; including details of how the assessor must score the RSO's risk in relation to this issue". In response, Police Scotland notified Mr I that they did not hold any risk assessment tool that met the terms of his request and they gave Mr I notice, under section 17(1) of FOISA, that they did not hold information covered by his request. Police Scotland listed two risk assessment tools which they use.

41. In their submissions to the Commissioner, Police Scotland maintained that there was no risk assessment tool which specifies that OMU officers must request to look around the home of an RSO as part of the risk assessment process, nor how the risk assessor must score the RSO. Police Scotland provided an overview of the risk assessment tools they use and general information on how risk assessments are approached and the considerations and factors they must take into account.
42. In his requirement for review, Mr I questioned how officers can carry out the risk assessment of a RSO's home if there is no tool available to help them.
43. The Commissioner notes Mr I's concerns, but having considered the submissions and explanations provided by Police Scotland, he is satisfied that Police Scotland do not hold a risk assessment tool which meets the description given by Mr I in his request. He finds that Police Scotland correctly gave notice to Mr I, under section 17(1) of FOISA, that they did not hold information covered by this part of his request.

Request (3)

44. Request (3) was as follows: "Concerning those subject to the notifications requirements of [the 2003 Act]), the amendment which now makes it a statutory requirement for all [RSOs] to participate in risk assessment with Police and also must permit OMU officers to look around their home as part of such process (i.e. to look within a kitchen, toilet, bedroom, lounge, cupboards etc.)". In response, Police Scotland stated: "*There is no specific amendment to the [2003 Act]...*" and went on to explain that a section 96A warrant will be issued if a Sherriff is satisfied that a constable of the relevant force has been denied entry to premises when they are seeking to assess the risk of the offender committing a sexual offence. (The relevant parts of section 96A are set out in Appendix 1.)
45. In their submissions to the Commissioner, Police Scotland confirmed that they were relying on section 17(1) of FOISA in relation to this part of Mr I's information request, as they did not hold the requested information.
46. Police Scotland explained that they do not have any statutory powers to gain access to an offender's home in pursuance of their management as an RSO unless they obtain a section 96A warrant. Police Scotland explained that the section 96A warrant gives them power to enter and search a property for the purpose of risk assessment, where there is no compulsion on an offender to assist or participate in that risk assessment.
47. Having considered the wording of request (3), along with the explanations provided by Police Scotland, the Commissioner is satisfied that Police Scotland do not hold any information falling within the scope of this request. Police Scotland failed to give Mr I notice of this when responding to his request or request for review, and accordingly failed to comply with section 17(1) of FOISA in this respect. Mr I was informed during the Commissioner's investigation that Police Scotland's position was that they did not hold any information covered by request (3).

Request (4)

48. In request (4), Mr I asked for: "The reasons why Police Scotland refuse to discuss the results of any risk assessment they have completed on an RSO with the individual, including the reason why Police Scotland refuse to provide the RSO with a copy of those risk assessments". In response, Police Scotland explained that they use risk assessment tools to assess the risk of reoffending and reconviction but these tools are not considered in isolation: other information is taken into account to inform the overall MAPPA (Multi-Agency Public

Protection Arrangements) risk relating to risk of serious harm. Police Scotland argued that discussion of risk assessments and provision of the results may impact on their ability to effectively manage the assessed risks. It may provide the RSO with an opportunity to manipulate the overall assessment.

49. In submissions to the Commissioner, Police Scotland contended that request (4) was seeking an explanation from them rather than recorded information.
50. Mr I did not accept that request (4) was not seeking recorded information and he referred to the Framework for Risk Assessment, Management and Evaluation (FRAME), which details the shared and consistent framework to promote proportionate, purposeful and defensible risk assessment and management practice by all Scottish criminal justice agencies. Mr I referred to the foundations of risk assessment and management practice set out in FRAME and which provides that:

To be effective and purposeful, assessments and plans to manage risk need to be understood by those whose action they seek to inform and must be accessible to those whom they concern, whether a young person or an adult.
51. Mr I noted that the Association of Chief Police Officers in Scotland both contributed to and agreed to comply with the above framework. He argued that “because Police Scotland no longer adhere to such national objectives, values and principles it must be recorded in terms of transparency and public safety how they now envisage an RSO to address the serious concerns they may have about their behaviours when it is now their policy not to communicate those concerns to the individual”. He described this as a “major decision by Police Scotland”.
52. Police Scotland acknowledged that FRAME provides a “framework” to promote proportionate, purposeful and defensible risk assessment and management practices by all Scottish Criminal Justice Agencies and they accepted that the FRAME foundations referred to by Mr I set out the values agreed by agencies in 2011 as a collective approach to risk management. However, Police Scotland noted that each agency performs a different role, has different functions and is bound by the legal and procedural parameters associated within each organisation.
53. Police Scotland noted that, unlike other MAPPA partners, they do not have responsibility for an RSO’s rehabilitation and therefore they are not tasked with delivering sex offender treatment programmes or involved in their reintegration into society. These activities and roles are carried out by the other MAPPA partners. Police Scotland are not equipped or trained to undertake such tasks. Risk assessments completed by Police Scotland are shared only with their MAPPA partners, both to inform the formulation of risk management plans, and to enable their partner agencies to have access to information which is relevant to the ongoing supervision and/or treatment programmes they are responsible for delivering with offenders.
54. Police Scotland submitted that their statutory function is protecting the public and they are duty-bound to balance the rights of individual offenders against the rights of the broader public. Where individuals are considered to present a risk of serious harm, Police Scotland’s primary responsibility is to protect the public.
55. The Commissioner has considered the arguments put forward by Mr I and Police Scotland. While accepting that the FRAME foundations refer to the importance of sharing risk assessments with the individuals concerns, he has no reason to doubt Police Scotland’s view

of their role and responsibilities in the management of RSOs. The Commissioner is satisfied that Police Scotland differ from the other MAPPA partners in terms of remit and function and accepts that their practice is to share risk assessments only with their MAPPA partners, and not with the RSO who is assessed for the risk they pose.

56. Police Scotland do not accept that request (4) is a request for recorded information. The Commissioner notes that, although request (4) was worded in a way that appeared to be seeking advice rather than recorded information, he accepts that it could potentially have been answered by the provision of recorded information: it is possible that Police Scotland could hold recorded information about how FRAME should be applied in practice. However, based on the explanation that Police Scotland have provided of their responsibilities and role in relation to the FRAME process, the Commissioner is satisfied that they do not hold any recorded information that would answer this request.

Request (8)

57. In request (8), Mr I asked: “How many formal Police warnings have been issued in the past 8 years to RSO’s for refusing OMU Officers to look around their home to enable a risk assessment (i.e. to look within a kitchen, toilet, bedroom, lounge, cupboards, etc.)” In response, Police Scotland stated that “*There is not a formal police warning for this*” and stated that RSOs would be advised of the powers provided by section 96A of the 2003 Act. In their submissions to the Commissioner, Police Scotland argued that the information is not held as there is no formal police warning system and they submitted that section 17(1) of FOISA applies.
58. In his requirement for review, Mr I set out his views on why the information should be held, which revolved around his opinion that a recorded warning system is required prior to a section 96A warrant being issued. In further comments to the Commissioner, Mr I argued that if a section 96A warrant can be issued after an officer has been refused entry to an RSO’s home on two separate occasions, then Police Scotland must be able to evidence to the Court that the RSO received a formal warning for each refusal.
59. Police Scotland explained that they do not issue formal police warnings and do not need to evidence to the Court that they have done so. Police Scotland submitted that they only have to satisfy to the Court that an officer has been unable to gain access to the property on more than one occasion where:
- ...it would assist the carrying out of the purpose mentioned in subsection (3), for a constable of the relevant force to examine and search the premises and the things in them; and that on more than one occasion, a constable of the [Police Service of Scotland] has attempted to examine and search the premises and the things in them for the purpose mentioned in subsection (3) and has been unable (whether by not being able to search and examine the premises and the things in them, or by not being able to obtain entry to the premises) to do so.*
60. Police Scotland also noted that section 96A of the 2003 Act provides that “*A sheriff is to determine an application for a warrant under subsection ²(1) without hearing from the relevant offender or any other person who has an interest in the premises*”.
61. The Commissioner has reviewed section 96A of the 2003 Act, along with the submissions provided by both Police Scotland and Mr I and he is satisfied that Police Scotland do not hold

² <https://www.legislation.gov.uk/ukpga/2003/42>

the information that Mr I requested in part (8) of his information request. The Commissioner acknowledges that Mr I expects the information to be held, but this does not mean that the information is actually held.

Request (9)

62. In request (9), Mr I asked: “How many RSO’s have been reported to the Procurator Fiscal in the past eight years for refusing OMU Officers to look around their home to enable a risk assessment (i.e. to look within a kitchen, toilet, bedroom, lounge, cupboards, etc.)” In their response, Police Scotland stated that this is not an offence and would not be reported to the Crown Office and Procurator Fiscal Service.
63. In submissions to the Commissioner, Police Scotland also explained that, as it is not an offence for an RSO to refuse to let an OMU officer look around their home, it would not be reported and there would be no record. Police Scotland submitted that their original response to Mr I had been clearly expressed and stated that they were relying on section 17(1) of FOISA, as they did not hold the requested information.
64. Mr I argued that Police Scotland’s comments were incorrect. He referred to a standard operating procedure (SOP) which explained that police could request a section 96A warrant to search an RSO’s home if the RSO had refused them entry on two previous occasions to conduct a risk assessment.
65. The Commissioner has taken account of Mr I’s comments regarding the grounds on which Police Scotland can obtain a section 96A warrant. He has also considered the wording of section 96A of the 2003 Act which sets out the grounds on which a warrant can be granted. Mr I is correct in understanding that Police Scotland can request a section 96A warrant if, on more than one occasion, they have been unable to access a RSO’s home for the purpose of carrying out a risk assessment.
66. However, the Commissioner would also note that obtaining a section 96A warrant is not the same as reporting an RSO to the Procurator Fiscal because a crime has been committed. Police Scotland have asserted that it is not a crime for an RSO to refuse to let OMU officers search their home and the Commissioner is satisfied that this is the case. Given that there is no offence to report, the Commissioner accepts that Police Scotland do not hold any record of an RSO being reported to the Procurator Fiscal on the grounds specified by Mr I.

Notification under section 17(1)

67. The Commissioner is satisfied that Police Scotland gave Mr I notice, under section 17(1) of FOISA, that they did not hold information falling within the scope of request (7).
68. Police Scotland consider that they clearly gave Mr I notice, under section 17(1) of FOISA, that they do not hold the information he asked for in requests (3), (4), (8) and (9) of his request, but the Commissioner is not satisfied that this is the case. The Commissioner considers that “not held” may have been inferred by Police Scotland’s response to these requests, but they did not clearly give notice to this effect. This was a breach of Part 1 of FOISA.
69. As the Commissioner accepts that Police Scotland did not hold any information falling within the scope of parts (3), (4), (8) and (9) of Mr I’s request, they had a duty to issue a notice in writing to that effect, to comply with the terms of section 17(1) of FOISA.

70. By failing to give Mr I notice under section 17(1) that they did not hold the information, the Commissioner must find that Police Scotland failed to comply with Part 1 in responding to these parts of Mr I's request.

Section 12(1) – Excessive cost of compliance

71. Under section 12(1) of FOISA, a Scottish public authority is not obliged to comply with a request for information where the estimated cost of doing so would exceed the amount prescribed for that purpose in the Fees Regulations. This amount is currently £600 (regulation 5). Consequently, the Commissioner has no power to order a public authority to disclose information should he find that the cost of responding to a request for that information exceeds this sum.

72. The projected costs the public 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, the authority reasonably estimates it is likely to incur in:

- locating,
- retrieving, and
- providing the information requested in accordance with Part 1 of FOISA.

73. The maximum rate a Scottish public authority can charge for staff time is £15 per hour.

74. An authority can take into account the time taken to redact information in order that a response can be provided when calculating the costs involved, but cannot take account of the cost of determining:

- whether it actually holds the information requested, or
- whether or not it should provide the information.

75. Police Scotland have argued that they are not required to comply with request (2) as they would incur costs exceeding the £600 cost ceiling set out in the Fees Regulations.

Request (2)

76. In request (2), Mr I asked for: “A breakdown of exactly how many occasions Police Scotland have applied to the courts for a search warrant after an RSO has allowed OMU officers entry into his/her home but has refused a request from an OMU officer on two separate occasions to look around their accommodation to enable a risk assessment; including how many of those applications were granted by a Sheriff.”

77. Mr I did not accept that compliance with this part of his request would exceed £600. Mr I argued that the information was held within the Divisional Registry as detailed in Police Scotland's Record Retention SOP. Police Scotland had not provided him with any reason to explain why the information could not be obtained from this source.

78. In their submissions, Police Scotland explained that the search warrant referred to by Mr I (a section 96A warrant) is unique to RSOs. Police Scotland explained that a section 96A warrant is not applied for via a standard evidential warrant; instead, a Sherriff may grant a warrant “if satisfied on the application of a senior police officer”. Police Scotland submitted that the application of a section 96A warrant is only ever craved by OMU officers.

79. Police Scotland submitted that, as a section 96A warrant differs from a standard evidential warrant, it is not submitted to Divisional Command Registry. It is physically located within each RSO's paper record by the relevant OMU and electronically within ViSOR (a database which functions as a central store for up-to-date information about offenders that can be accessed and updated by the three Responsible Authority agencies – the police, the Prison Service (both public and the contracted-out estate) and Probation Trusts).
80. Police Scotland noted Mr I's insistence that the information was held in the Divisional Registry Police Scotland, but explained that the relevant SOP refers to the information being retained within the "Divisional Registry/Filing facility", which is a loose term specifically chosen due to the different filing structures/systems in place across the force due to legacy arrangements. Police Scotland stated that there is no "Divisional Warrants Registry" as such. They reiterated that the only place where the paper section 96A warrant is retained is within the paper file held by the relevant OMU. An entry referring to the fact that the section 96A warrant has been obtained is recorded within the activity log of ViSOR in the free text field.
81. Police Scotland argued that, in order to locate the figure requested by Mr I, they would need to search the paper records of 13 Divisional OMUs, which comprise 33 separate offices. Police Scotland explained that there are 5,600 current RSOs, and if the search were to be expanded to include those who are no longer required to register, that would be in excess of 11,000 records. Police Scotland submitted that to identify all the relevant files would be a mammoth undertaking.
82. With regard to electronic records, Police Scotland explained that a section 96A warrant is recorded in the activity log for each individual RSO on ViSOR, but there is no mandatory field in ViSOR in which to record the issue of a section 96A warrant. Police Scotland explained that there might be reference to such a warrant within the detail of a home visit update or even the minute of a risk management plan or MAPPA meeting, but the most likely place would be within an activity log. Police Scotland submitted that within the activity log, a section 96A warrant would be recorded either as a standalone entry detailing the application for or granting and execution of the warrant, or within an Actions and Update document, where any significant information pertinent to the period of the risk management plan to which it relates, should be recorded.
83. Police Scotland argued that the only way to know if there was a reference to a section 96A warrant in an RSO's ViSOR record would be to check the content of the Actions and Updates document, and this would have to be done for every document held within the ViSOR record. In addition, Police Scotland submitted that the activity logs themselves are free text entries which do not contain any searchable data fields.
84. Police Scotland noted that Mr I has asked how many times the warrant has been issued; therefore they would need to search all of the RSO records they hold in order to provide the information requested. Even if searching each file would only take a minute, the minimum time it would take to search 5,600 files would be 90 hours at a cost of some £1,399.50 (allowing for an hourly rate of £15) which well exceeds the £600 cost ceiling.

Commissioner's conclusions on section 12(1)

85. The Commissioner accepts that, in order to comply with Mr I's information request, Police Scotland would have to search all of the records belonging to individual RSOs as there is no central registry that records the issue of section 96A warrants. The Commissioner notes that Mr I has not limited this request to a specific timeframe, so it is likely that to fully comply with

the request Police Scotland would have to search not only the records of current RSOs, but records for RSOs who may no longer be on the register. This would involve a search of over 11,000 records.

86. The Commissioner has examined the calculations put forward by Police Scotland and he is satisfied that their estimate of the time it would require to search the paper records of each RSO (one minute) is fair (and likely to be an underestimate). Given this, he is satisfied that a search of each RSO's paper records could not be completed within the £600 cost ceiling.
87. The Commissioner has gone on to consider whether Police Scotland could comply with request (2) by searching the ViSOR database and, if so, whether this would be quicker and less costly than searching the paper records.
88. The Commissioner notes that the issue of a section 96A warrant is usually recorded in the activity log of ViSOR and that this is a free text field which does not contain any searchable data fields. Police Scotland have argued that it could take up to 12 minutes of scrolling the activity logs on ViSOR before they could determine whether a section 96A warrant has been issued. The Commissioner does not accept that it would take 12 minutes to search each electronic RSO record on ViSOR. He acknowledges that some RSO records will be substantial and may well take 12 minutes or more to identify whether a section 96A warrant has been identified or not, but other RSO records will be significantly less populated.
89. The Commissioner considers it likely that it will take at least one minute to interrogate each RSO file on ViSOR. As there are as many electronic records as paper records to search, the costs involved in searching over 11,000 records would exceed the £600 cost ceiling set out in the Fees Regulations. Overall, the Commissioner is satisfied that Police Scotland were entitled to rely on section 12(1) of FOISA in relation to request (2), and were not obliged to comply with this request.

Section 15(1) – duty to advise and assist

90. Section 15(1) requires a Scottish public authority, so far as reasonable to expect it to do so, to provide advice and assistance to a person who has made, or proposes to make, a request for information to it. Section 15(2) states that a Scottish public authority which, in relation to the provision of advice and assistance in any case, conforms to the Scottish Ministers' Code of Practice on the discharge of functions by Scottish public authorities under FOISA and the Environmental Information (Scotland) Regulations 2004³ (the Section 60 Code), is taken to comply with the duty to provide reasonable advice and assistance in section 15(1).
91. The Section 60 Code provides guidance to Scottish public authorities on the practice which Scottish Ministers consider desirable for authorities to follow in connection with the discharge of their functions under FOISA. The Section 60 Code provides (at 9.4.3):

When refusing a request on cost grounds, it is good practice for the authority's response to provide clear advice on how the applicant could submit a new, narrower request within the cost limit. In giving advice you may wish to take account of how much the cost limit has been exceeded. Any narrowed request would be a separate new request and should be responded to accordingly.
92. In their submissions, Police Scotland acknowledged that they did not offer Mr I any advice on how to narrow or frame request (2) in a way that would bring it under the £600 cost limit, but

³ <https://www.gov.scot/publications/foi-eir-section-60-code-of-practice/>

they maintained that this was not possible. Police Scotland noted that the number of current RSOs and those no longer on the register exceeds 11,000 records. They noted that, even if Police Scotland asked Mr I to limit his request to RSOs currently on the register, that would only reduce the scope of the request to 5,600 records. The cost would still exceed £600.

93. Police Scotland submitted that any exercise to reduce the cost of servicing this request is likely to render the data which could be provided irrelevant or not of benefit to Mr I, given that he is seeking how many times a section 96A warrant has been craved. Police Scotland referred to its previous explanations of how the section 96A warrants are stored and the difficulties involved in identifying how many warrants have been issued.
94. Police Scotland notified Mr I, in their original response to his information request, that they would need to search more than 11,000 records in order to provide the information he had requested. In his requirement for review, Mr I questioned why 11,000 records would need to be searched and he made reference to his belief that the information would be easily accessible from the Divisional Registry. Police Scotland did not address this point in their review outcome; they simply upheld their previous response.
95. It is clear from Police Scotland's submissions in this case that Mr I may have misunderstood the reference to a Divisional Registry in the SOP and this may have led him to believe that the information was easily obtainable. Police Scotland did not seek to correct Mr I's views on this matter, nor did they explain why they would need to search 11,000 records to identify the information he had requested.
96. Police Scotland have argued that they did not offer Mr I any advice or assistance on how to narrow the scope of his request as they did not consider that a narrower request would sufficiently reduce the costs involved. The Commissioner does not accept that this is the case. There are 13 Divisional OMUs with a total of 33 offices across those divisional units. If Police Scotland had explained to Mr I how information on section 96A warrants is stored, it is possible that Mr I may have reduced his request to just one Divisional OMU and he may have limited it further by limiting the request to those RSOs currently registered.
97. The Commissioner does not know if narrowing the request in this way would bring it within the £600 cost ceiling, but he would have expected Police Scotland to have taken some steps (in complying with their duty under section 15(1) of FOISA) to explain to Mr I why they would need to undertake 11,000 searches and how the information is stored, particularly since Mr I raised these points in his requirement for review. If Police Scotland considered that the request could not be narrowed to the extent that it could be complied with within the £600 cost ceiling, they should have communicated this to Mr I in their review outcome.
98. In the circumstances, the Commissioner finds that Police Scotland failed to comply with their duty under section 15(1) of FOISA to provide Mr I with adequate advice and assistance, in relation to request (2).

Decision

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 I.

The Commissioner finds that Police Scotland:

- were not required to respond to requests (5), (6), (10) or (11) under FOISA;
- correctly notified Mr I that they did not hold any information falling within request (7);
- were entitled to refuse to comply with request (2) on the grounds of excessive costs.

However, Police Scotland:

- failed to notify Mr I that they did not hold information falling within the scope of parts (3), (4), (8) and (9) of his request
- failed to offer reasonable advice and assistance (as required by section 15(1) of FOISA) in relation to requests (2) and (11).

The Commissioner therefore requires Police Scotland to provide reasonable advice and assistance to Mr I in relation to requests (2) and (11) (as set out in the decision) in terms of section 15(1) of FOISA. This must be done by **26 August 2019**.

Appeal

Should either Mr I 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 fail to comply with this decision, the Commissioner has the right to certify to the Court of Session that Police Scotland have failed to comply. The Court has the right to inquire into the matter and may deal with Police Scotland as if they had committed a contempt of court.

Margaret Keyse
Head of Enforcement

11 July 2019

Appendix 1: Relevant statutory provisions

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.
- ...
- (3) If the authority –
- (a) requires further information in order to identify and locate the requested information; and
 - (b) has told the applicant so (specifying what the requirement for further information is), then, provided that the requirement is reasonable, the authority is not obliged to give the requested information until it has the further information.
- (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.

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.
- ...

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.
- ...

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.

...

20 Requirement for review of refusal etc.

...

- (3) A requirement for review must –

...

- (c) specify –

...

- (ii) the matter which gives rise to the applicant's dissatisfaction mentioned in subsection (1).

...

21 Review by Scottish public authority

...

- (4) The authority may, as respects the request for information to which the requirement relates-

...

- (b) substitute for any such decision a different decision; or

...

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 £600.)

Sexual Offences Act 2003

96A Police powers of entry to and examination of relevant offender's home address

- (1) A sheriff may, if satisfied on the application of a senior police officer as to the matters mentioned in subsection (2), grant a warrant authorising any constable of the Police Service of Scotland to enter premises in the sheriffdom (if necessary using reasonable force) and to examine and search them, and the things in them, for the purpose mentioned in subsection (3).
- (2) Those matters are –
- (a) that the premises are either –
 - (i) premises whose address has been notified by a relevant offender as his home address in his most recent notification of a home address under this Part; or
 - (ii) premises whose address has been notified by a relevant offender as the address of any other premises at which he regularly resides or stays, in his most recent notification under section 83(1) or 85(1) or in any notification under section 84(1) given by him since that notification;
 - (b) that the offender is not one to whom subsection (4) applies;
 - (c) that it would assist the carrying out of the purpose mentioned in subsection (3), for a constable of the relevant force to examine and search the premises and the things in them; and
 - (d) that on more than one occasion, a constable of the Police Service of Scotland has attempted to examine and search the premises and the things in them for the purpose mentioned in subsection (3) and has been unable (whether by not being able to search and examine the premises and the things in them, or by not being able to obtain entry to the premises) to do so.
- (3) That purpose is assessing the risk of the offender committing a sexual offence.

...

Appendix 2: Mr I's information requests

"Under [FOISA], please provide me with the following information:

1. The legislation which gives powers to Police to apply for a search warrant when an RSO (Registered Sex Offender) has refused a request from an OMU (Offender Management Unit) officer on two separate occasions to look around his/her home to enable a risk assessment.
2. A breakdown of exactly how many occasions Police Scotland have applied to the courts for a search warrant after an RSO has allowed OMU officers entry into his/her home but has refused a request from an OMU officer on two separate occasions to look around their accommodation to enable a risk assessment; including how many of those applications were granted by a Sheriff.
3. Concerning those subject to the notifications requirements of the Sexual Offences Act 2003, the amendment which now makes it a statutory requirement for all RSO's to participate in risk assessment with Police and also must permit OMU officers to look around their home as part of such process (i.e. to look within a kitchen, toilet, bedroom, lounge, cupboards etc.)
4. The reasons why Police Scotland refuse to discuss the results of any risk assessment they have completed on an RSO with the individual; including the reason why Police Scotland refuse to provide the RSO with a copy of those risk assessments.
5. In general terms, how do Police Scotland anticipate an RSO to address the serious concerns they may have about his/her behaviour when it is their policy not to disclose those concerns to the person?
6. Are Police Officers permitted to question any citizen about their legal matters?
7. A copy of the Risk Assessment Tool that Police Scotland use which specifies that OMU Officers must request to look around the home of an RSO as part of the risk assessment process; including details of how the assessor must score the RSO's risk in relation to this issue.
8. How many formal Police warnings have been issued in the past eight years to RSO's for refusing OMU Officers to look around their home to enable a risk assessment (i.e. to look within a kitchen, toilet, bedroom, lounge, cupboards, etc.)
9. How many RSO's have been reported to the Procurator Fiscal in the past eight years for refusing OMU Officers to look around their home to enable a risk assessment (i.e. to look within a kitchen, toilet, bedroom, lounge, cupboards, etc.)
10. Should all the risk assessments carried out when visiting an RSO's home address be informal?
11. What procedures must be undertaken prior to Police informing a third party about an RSO's status and convictions?
12. In relation to the above, what safeguards are in place to prevent unlawful and malicious disclosure of personal data to third parties?

13. If the Police disclose information to a third party about an RSO's status and convictions without having followed the correct procedure is this misconduct, and if so, how serious would Police Scotland regard this incident?

I anticipate the above is straightforward, however, if you have any queries, please do not hesitate to contact me.”

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