

Decision Notice

Decision 168/2018: Mr Marc Ellison and Chief Constable of the Police Service for Scotland

Specified reports and staff certification for occupational safety training

Reference No: 201800352

Decision Date: 24 October 2018



Scottish Information
Commissioner

Summary

Police Scotland were asked for a range of information about operational safety training, the completion of “Use of Force” forms, etc.

Police Scotland said it was not obliged to comply with two parts of the request as compliance with each part would cost more than £600.

Following an investigation, the Commissioner found that Police Scotland had only partially complied with FOISA in responding to the request. While he accepted that complying with one part would cost more than £600, he did not accept that responding to the other part would cost more than £600. He required Police Scotland to disclose the information or issue a new response to this part of the request,

Relevant statutory provisions

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1), (4) and (6) (General entitlement); 12(1) (Excessive cost of compliance); 15 (Duty to provide advice and assistance)

The Freedom of Information (Fees for Required Disclosure) (Scotland) Regulations 2004 (the Fees Regulations) regulations 3 (Projected costs) and 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 23 November 2017, Mr Ellison made a request for information to the Chief Constable of the Police Force of Scotland (Police Scotland). His request was as follows:

“Using Police Scotland’s ‘Use of force’ standard operating procedure ... as a point of reference, please:

- Tell me, for each financial year between 2013/14 and 2017/18 (to date) how many (a) ‘Use of force’ forms have been completed on SCoPE, and (b) how many ‘CS-PAVA Spray Discharge’ reports (form 064-001) have been completed, and (c) how many ‘Accident, Incident, Dangerous Occurrence, Third Party’ Reports (form 076-003) have been completed. If possible for (a) and (c), please provide me with a high level description of the ‘incident’ i.e. use of spit hood. (Part 1)
- Provide me with electronic copies of all (a) ‘Use of force’ SCoPE forms, (b) ‘CS-PAVA Spray Discharge’ reports (form 064-001), and (c) ‘Accident, Incident, Dangerous Occurrence, Third Party’ Reports (form 076-003) completed since December 2016. I understand that names will need to be redacted. (Part 2)
- Tell me how many individuals currently engaged in operational duties have (a) not received training in operational safety training (OST), and/or (b) whose OST has expired and not been re-certified. (Part 3)

May I remind you of your duty to advise and assist under FOISA. As such, please do not hesitate to contact me if clarification or refinement of this request is needed.”

2. Police Scotland responded on 23 January 2018. For part 1 of the request, they provided a table containing the numbers of forms by year, but applying section 12(1) (Excessive cost of compliance) to the request for a “high level description” of each incident. Police Scotland provided some contextual explanation of the figures, explaining that officers had received revised guidance and advice about the benefits of submitting these forms, which had contributed to the increase in submissions since 2014/15.
3. For part 2 of the request, Police Scotland applied section 12(1) and supplied a brief breakdown of the costs that would be incurred in complying with this request.
4. In relation to part 3 of the request, Police Scotland explained that all Police Officers receive Operational Safety Training on appointment and are required to attend annual re-certification. Police Scotland were aware that a report of 25 October 2017 showed that the certification had lapsed for 1,168 officers, a number of whom were on modified/protected duties, on a service break or sick leave. A number were also waiting to attend a future, pre-arranged re-certification course.
5. On 23 January 2018, Mr Ellison wrote to Police Scotland requesting a review of their decision in relation to parts 2 and 3 of his request, for the following reasons:
 - Part 2 – Police Scotland stated that the work would cost over £600, but had failed to indicate what the actual cost would be;
 - Part 2 – Police Scotland had failed in their duty to advise and assist. Not only was the response a month overdue, but the force failed to contact him in advance of issuing the decision. Had they done so, they could have discussed what could have been released within the cost threshold. Mr Ellison stated that he would be willing to limit his request to the “Use of force” forms for 2017/18. He considered that, if the forms were stored electronically in the SCoPE database, it would be a simple exercise to export fields into a spreadsheet.
 - Part 3 – Police Scotland had stated that a number of officers were (a) currently on protected duties, on a service break or currently sick, and (b), waiting to attend a future course. However, the force had failed to state these numbers.
6. Police Scotland notified Mr Ellison of the outcome of their review on 20 February 2018. They apologised for the failure to respond within the required timescale. With regard to part 2 of the request, Police Scotland provided an expanded breakdown of the costs of compliance and reconfirmed reliance on section 12(1). Police Scotland explained that, even if the request was reduced in scope, as suggested by Mr Ellison, the cost of compliance would still exceed the £600 cost limit; they provided an explanation on this point.
7. With regard to part 3 of the request, Police Scotland stated that section 12(1) applied, explaining that the reason why Officer Safety Training has lapsed is not recorded and records would require to be manually checked to find out if each of the police officers to whom this applied was on modified/protected duties/service break or long term absence.
8. On 21 February 2018, Mr Ellison applied to the Commissioner for a decision in terms of section 47(1) of FOISA. Mr Ellison was dissatisfied with the outcome of Police Scotland’s review because he believed there should be a way of providing the information he required without incurring excessive costs. He described the manual checking process that Police Scotland said it would use as “antiquated” and suggested a different method. In relation to part 3 of the request, he complained that Police Scotland had not provided the numbers of

officers who were either on protected duties, a service break, sick leave, or waiting to attend a future course.

Investigation

9. 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.
10. On 15 March 2018, Police Scotland were notified in writing that Mr Ellison had made a valid application and the case was allocated to an investigating officer.
11. 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 section 12(1) of FOISA.

Commissioner's analysis and findings

12. 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 12(1) – excessive cost of compliance

13. Section 12(1) 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.
14. 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. 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. The maximum rate a Scottish public authority can charge for staff time is £15 per hour.

Part 2 of the request

15. In their response to Mr Ellison, Police Scotland provided details of the number of forms falling under part 1 of the request, but, with regard to the request for copies of the forms requested in part 2, they stated that this would exceed the £600 limit in the Fees Regulations. The work involved would take more than 40 hours. Police Scotland explained the work they considered would be required in order to provide copies of the forms.
16. In his request for review, Mr Ellison stated his dissatisfaction with the lack of an actual cost estimate for part 2 of his request and the lack of opportunity to discuss how he could have reduced the scope of his request to reduce the cost. He stated a willingness to limit his request to the “use of force” forms for 2017/18.

17. In their review response, Police Scotland explained each form would need to be checked on the SCoPE system, then printed, redacted manually, and scanned. They stated that it was not possible to shorten the timeframe, for example to 2017/18 (as suggested by Mr Ellison), due to the number of forms which would require to be checked. For 2017/18, there were 1,505 forms. Police Scotland explained that at five minutes to process each form, 1,505 forms would take a minimum of 125 hours and cost a minimum of £1,881.25.
18. Mr Ellison submitted that Police Scotland should be able to use computer programming to export the information (held on the SCoPE database) to a spreadsheet. He acknowledged that Police Scotland had said this was not possible, but gave reasons why he believed this should be challenged. He commented that someone from their team should be able to quickly write a SQL query that could be used for an export of all "Use of force" forms.
19. Police Scotland stated that they have access to database analysts who are skilled in extracting data from their HR and Duty Management database but, in line with FOISA, they considered that there was no requirement for Police Scotland to have IT specialists design programmes to extract information to answer an FOI request. The data was held in a format to suit their business needs. Police Scotland stated that, even if the information was extracted into a spreadsheet, the data and contents of each form would still have to be reviewed to determine what information should be redacted. Due to the number of forms, the work would exceed the 40 hour limit. Therefore, Police Scotland considered that section 12(1) applied.
20. The Commissioner, having considered the explanations provided, accepts that, in the main, due to the limitations of the computer systems within Police Scotland, it is not able to readily extract the data requested by Mr Ellison with regard to part 2 of his request. Even if it was able to export the data to a spreadsheet or other report, time would still be required to review each entry and redact personal data. Because of the numbers of forms involved, Police Scotland could not reasonably undertake this work required within the £600 limit.
21. Public authorities are not allowed to charge for costs incurred in determining whether information is exempt. It is not clear from their submissions whether Police Scotland took this into account in calculating the cost of compliance. However, even disregarding the time required for such consideration, it would still be likely that the time required to copy and redact the forms would exceed £600 in terms of the cost of staff time.
22. Consequently, the Commissioner is satisfied that Police Scotland were entitled to rely on section 12(1) of FOISA in relation to part 2 of Mr Ellison's request, and therefore were under no obligation to comply with that request.

Part 3 of the request

23. Mr Ellison asked how many individuals currently engaged in operational duties have:
 - (a) not received training in operational safety training (OST), and/or
 - (b) OST which has expired and not been re-certified.
24. Police Scotland told him that a report from October 2017 showed that the Operational Safety Training certification of 1,168 officers had lapsed, but they did not say how many of these officers were engaged in operational duties. In its review response, Police Scotland stated that the reason why Officer Safety Training has lapsed is not recorded and would again require SCoPE to be manually checked to find out if each officer is on modified/protected

duties, a service break, or long term absence. Police Scotland submitted that this exercise would cost more than £600.

25. Police Scotland were asked to carry out another sampling exercise of 20 records, to provide a breakdown of the cost of complying with this part of Mr Ellison's request.
26. After carrying out this exercise, Police Scotland responded that it would take one minute per SCoPE record to establish if an officer was currently engaged in operational duties. This did not include the time required to determine if they were absent through illness, on a career break or on modified/protected duties.
27. The Commissioner notes that, with regard to this part of the request, Mr Ellison was simply asking for the number of officers engaged in operational duties whose Operational Safety certification had lapsed. He not asking for a further breakdown, and he was not asking for copies of forms. Therefore, this would be a tallying exercise which would not require the same scanning and redacting as part 2 of the request.
28. Allowing one minute to check 1,168 files would be likely to take just over 19 hours, based on the sampling exercise carried out by Police Scotland. The maximum charge for staff time allowed under the Fees Regulations is £15. Even at the maximum of £15 per hour, the cost of checking the 1,168 files would be only £285, on the cost calculation provided by Police Scotland. Allowing two minutes per record would cost £585. Given that there would be no requirement for copying, scanning or redacting the information, the Commissioner cannot accept that part 3 of the request could not have been responded to within the £600 limit.
29. Consequently, the Commissioner is not satisfied that Police Scotland were entitled to rely on section 12(1) of FOISA in relation to part 3 of Mr Ellison's request.
30. In this case, the Commissioner requires Police Scotland to provide Mr Ellison with the information covered by part 3 of his request, or, if they consider that they are not required to do so for reasons other than excessive cost, to issue Mr Ellison with a revised review response in terms of section 21(4) of FOISA.

Section 15 – Duty to provide advice and assistance

31. The Commissioner notes that Mr Ellison expressed dissatisfaction with the lack of advice and assistance offered by Police Scotland. The Commissioner will now consider whether Police Scotland responded in line with section 15 of FOISA.
32. Section 15(1) of FOISA requires a Scottish public authority, so far as is 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. In terms of section 15(2), this duty is taken to be met where, in any given case, the authority conforms with the relevant guidance in the Code of Practice issued under section 60 of FOISA (the Section 60 Code).
33. The Section 60 Code¹ provides (at paragraph 9.4.3 on Part 2):

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

¹ <https://beta.gov.scot/binaries/content/documents/govscot/publications/advice-and-guidance/2016/12/foi-eir-section-60-code-of-practice/documents/e8e4fb4a-d101-40c4-aa33-388776b952d8/e8e4fb4a-d101-40c4-aa33-388776b952d8/govscot:document/>

exceeded. Any narrowed request would be a separate new request and should be responded to accordingly.

34. The Commissioner considers this important if the public authority is to fulfil its duty to provide advice and assistance under section 15 of FOISA.
35. Mr Ellison submitted that, although Police Scotland had advised that the work would exceed the £600 cost limit, it had not provided an actual cost. He considered that Police Scotland should have contacted him to discuss ways in which he could have reduced the scope of his request. He offered to limit his request to the “use of force” forms for 2017/18.
36. In their submissions to the Commissioner, Police Scotland explained that Mr Ellison had been very clear in his request regarding the information he requested and that appropriate searches were undertaken. However, due to the way the information is held on their systems, they considered that there was no further advice that Police Scotland could provide to Mr Ellison to allow him to refine his request to bring it within the cost limit.
37. In relation to part 2, the Commissioner accepts that Police Scotland were unable to offer advice which would have enabled Mr Ellison to bring his request within the £600 cost limit, because of the number of forms involved. Even so, he takes the view that Police Scotland should have provided a clearer breakdown of costs when first responding to Mr Ellison’s request. That may have provided sufficient information to allow Mr Ellison to understand the cost implications of his request, and the difficulty in limiting it in a way which would bring it under £600. With this in mind, the Commissioner agrees that a clearer breakdown of the costs should have been provided to Mr Ellison in fulfilment of Police Scotland’s duty under section 15(1) of FOISA, even if it would not have allowed Mr Ellison to make a request which was likely to fall within the cost limit.
38. As noted above, the Commissioner does not accept that the cost of responding to part 3 of Mr Ellison’s request would exceed £600. With regard to part 3, had Police Scotland offered to discuss with Mr Ellison how the information was held, it may have been possible to clarify that the information he sought was simply the total numbers of officers in each category, not information which would require redaction before disclosure..
39. Consequently, the Commissioner does not accept that Police Scotland complied fully with their duty under section 15(1) of FOISA. Given that this decision notice provides further information about the calculation of costs relating to part 2 of his request, the Commissioner does not require Police Scotland to provide any further advice to Mr Ellison.

Decision

The Commissioner finds that the Chief Constable of the Police Service of Scotland (Police Scotland) partially failed to comply 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 Police Scotland were not obliged to comply with part 2 of Mr Ellison's request, given that the cost of compliance exceeded £600 (section 12).

However, the Commissioner is not satisfied that complying with request 3 would have incurred excessive costs. He requires Police Scotland to provide Mr Ellison with the statistical information covered by part 3, or to provide him with a revised review response in terms of section 21(4) of FOISA.

The Commissioner also finds that Police Scotland failed to provide reasonable advice and assistance to Mr Ellison regarding parts 2 and 3 of his request, in breach of section 15(1) of FOISA,

The Commissioner requires Police Scotland to provide Mr Ellison with the information covered by part 3 of his request or with a revised review outcome in relation to part 3 of his request, by **7 December 2018**.

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 fail 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 they had committed a contempt of court.

Margaret Keyse
Head of Enforcement

24 October 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.

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.

(2) A Scottish public authority which, in relation to the provision of advice or assistance in any case, conforms with the code of practice issued under section 60 is, as respects that case, to be taken to comply with the duty imposed by subsection (1).

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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