

Decision Notice

Decision 188/2016: The applicant and the Chief Constable of the Police Service of Scotland

Incidents involving transgender women

Reference No: 201600643

Decision Date: 30 August 2016



Scottish Information
Commissioner

Summary

On 19 February 2016, the applicant asked the Chief Constable of the Police Service of Scotland (Police Scotland) for statistical information about incidents concerning the mistreatment of transgender women by police officers.

Police Scotland failed to respond to this request. Following a review, the applicant remained dissatisfied and applied to the Commissioner for a decision.

The Commissioner investigated and found that Police Scotland had partially failed to respond to the applicant's request for information in accordance with Part 1 of FOISA.

The Commissioner found that Police Scotland correctly gave the applicant notice under section 17(1) of FOISA that some information was not held. However, Police Scotland was wrong to give notice that it did not hold other information covered by the request. In relation to this information, Police Scotland correctly relied on section 12(1) of FOISA (Excessive cost of compliance). The Commissioner did not require Police Scotland to take any action in relation to the applicant's application.

Relevant statutory provisions

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1), (4) and (6) (General entitlement); 12(1) (Excessive cost of compliance); 17(1) (Notice that information is not held)

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 19 February 2016, the applicant made a request for information to Police Scotland. The information requested was:

A full count of all incidences, accusations, charges, convictions, logs, notes or reports of mistreatment, discrimination, assault (both physical and sexual), rape, torture, murder, suicides or deaths of sacred transgender women while stopped, detained, arrested, imprisoned, transported or otherwise handled by any employee of Police Scotland including any one of its prior constituent constabularies between 1/1/2010 – 1/1/2016.

2. Police Scotland did not respond to this request.
3. On 23 March 2016, the applicant wrote to Police Scotland requesting a review of its decision on the basis that it had failed to provide a response.
4. Police Scotland notified the applicant of the outcome of its review on 5 April 2016. Police Scotland stated that it did not hold statistics relating to convictions and that it only records the gender of a victim or accused as female, male or other. Police Scotland gave the applicant notice under section 17(1) of FOISA that it did not hold the information.

5. On 11 April 2016, the applicant applied to the Commissioner for a decision in terms of section 47(1) of FOISA. The applicant was dissatisfied with the outcome of Police Scotland's review and argued that its reliance on section 17(1) of FOISA was not supported by the explanation it had provided.

Investigation

6. The application was accepted as valid. The Commissioner confirmed that the applicant made a request for information to a Scottish public authority and asked the authority to review its response to that request before applying to her for a decision.
7. On 6 May 2016, Police Scotland was notified in writing that the applicant had made a valid application. The case was then allocated to an investigating officer.
8. Section 49(3)(a) of FOISA requires the Commissioner to give public authorities an opportunity to provide comments on an application. Police Scotland was invited to comment on this application and answer specific questions including justifying its reliance on any provisions of FOISA it considered applicable to the information requested.

Commissioner's analysis and findings

9. 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 her by both the applicant and Police Scotland. She is satisfied that no matter of relevance has been overlooked.

Section 17(1) – information not held

10. 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 in this case. If no such information is held by the authority, section 17(1) of FOISA requires it to give the applicant notice in writing to that effect.
11. In relation to the request for "a full count" of convictions, Police Scotland explained that convictions are a matter for the Crown Office and Procurator Fiscal Service (COPFS) and not the police. Police Scotland stated that it does not hold statistics surrounding conviction data; it only holds and can provide reported crime statistics and their associated detection rates (i.e. where a person has been reported to COPFS for consideration of criminal proceedings being instituted).
12. When asked about its practice on recording gender, Police Scotland explained that the crime management system of the Analysis and Performance Unit, which is responsible for the collation of statistics for Police Scotland, uses the gender terms, "male", "female" and "unknown". Police Scotland submitted that the term "other" is not recorded, in relation to gender, and it apologised for this error in its review outcome. Police Scotland explained that the gender type "unknown" was used in incidents where complainants may not have identified the gender of a suspect (e.g. it was dark or the assailant was wearing a mask and the complainant was unsure if it was a man or a woman).
13. Police Scotland was advised that the applicant was not just seeking statistics, but had also requested information from log notes, reports of mistreatment, attempted suicides, murder,

torture, rape, etc. Police Scotland was asked if it had searched for this information and, if not, if it could now do so.

14. Police Scotland stated that it had not conducted any searches for this information at the time the request was received. It was unlikely to hold the information (in any format); and if any information was held in the form of “log notes” or “reports” etc., this was likely to be in an unstructured, free text, record format.
15. Police Scotland explained that any complaint made against its employees would fall to its Professional Standards Department (PSD) to investigate. Police Scotland noted that staff would only record the fact that a complainant was a “transgender woman” if it was relevant to the complaint being made (e.g. alleging that a member of Police Scotland staff had committed a hate crime against a transgender woman). If the transgender status of a complainant was relevant, it would be recorded in the free text, non-searchable fields of the PSD database system.
16. Police Scotland submitted that the PSD complaints database does not use “transgender” as a search criterion and therefore any checks would require manual searching of all cases to determine if they were relevant to the request. As PSD received 6,816 complaints in 2015/16, and the applicant is seeking five years’ worth of data, it considered that compliance with this aspect of the request to be unfeasible within the cost limits of FOISA.
17. Police Scotland was asked whether it would be possible to search for “transgender woman” across all Police Scotland databases and, if so, whether this was likely to retrieve any records.
18. Police Scotland submitted that its recording systems are not sophisticated enough to conduct such searches. It noted that it is possible for some systems to identify transgender hate crimes, as a searchable “marker” can be added to the report (the Commissioner understands this is possible only at the time the report is set up). However, to ascertain whether the term “transgender woman” had been recorded would require the manual assessment of every such crime report. Police Scotland noted that it does not yet have a national “suite” of systems and continues to rely on its legacy systems for recording crimes and incidents. Police Scotland submitted that the constraints of its systems and report types mean that individual reports and/or records would have to be read in order to look for this specific term.

Commissioner’s conclusions on section 17(1)

19. The Commissioner has considered the submissions made by Police Scotland and she is satisfied that it does not hold conviction statistics; she accepts that convictions are a matter for COPFS, and that Police Scotland does not need to record or hold such information.
20. The Commissioner takes a different view in relation to information about complaints made against police officers for mistreatment or discrimination against transgender women. While Police Scotland has stated that “*it is unlikely that it would hold information falling within the scope of the request made*”, this is not evidence that Police Scotland does not hold the information, simply that it believes this to be unlikely. There is an element of doubt as to whether Police Scotland does hold information pertaining to the information request. Police Scotland’s submissions show that identifying relevant information would be difficult, rather than proving (e.g. from searches or enquiries) that it definitely does not hold any relevant information.

21. In light of this, the Commissioner finds that Police Scotland was wrong to give the applicant notice that it did not hold any information regarding allegations or complaints made against Police Scotland staff concerning the treatment of transgender women.
22. Instead, the Commissioner considers that the relevant issue, in terms of compliance with Part 1 of FOISA, is whether Police Scotland can comply with this part of the request within the cost ceiling of £600, as discussed below.

Section 12(1) – excessive cost of compliance

23. During the investigation, Police Scotland submitted that it wished to rely on section 12(1) of FOISA in relation to the request for information regarding allegations or complaints made against Police Scotland staff concerning their treatment of transgender women.
24. 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 she find that the cost of responding to a request for that information would exceed this sum.
25. 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.
26. Police Scotland submitted that the only information relevant to the request is recorded in its PSD database (referred to as Centurion) as this system is used to records complaints against Police Scotland staff.
27. Police Scotland explained that, as an indicative sample, PSD recorded 6,816 complaints during 2015/2016. The only way to ascertain whether any of these complaints was made by a transgender woman (if such information was recorded) was to manually examine every complaint file. Police Scotland submitted that, at a conservative estimate, it would take five minutes to examine each complaint, which is equivalent to 568 hours. Police Scotland submitted that analysis of the records is likely to be carried out by a PSD administrator with an annual salary of £18,954 to £21,033 which would result in an hourly rate of £11.96. Police Scotland calculated the total cost of compliance to be £6,793.28, which far exceeds the £600 cost ceiling.
28. Police Scotland was asked whether it was possible to carry out a free-text search on the Centurion system, rather than conducting manual searches of each complaint record. Police Scotland argued that free text or “wildcard” searching cannot be relied upon to provide a complete answer to the questions raised by the applicant. Police Scotland stated that “transgender” is not a searchable field description on Centurion and, while the term “transgender” can be entered in the “allegation” field, there would be no way of confirming this has captured all relevant complaints. This is mainly because complaint allegations could have been recorded without use of the term “transgender”.

29. Police Scotland also argued that it has a corporate responsibility to ensure that crime statistics are accurate and that it would not feel comfortable using the result of free text keyword searches in any request for statistical data.
30. Police Scotland argued that consideration must be given to the fact that the presence of a particular word or phrase in a report does not mean that the allegation was in any way motivated by, or even related in any way to, the topic in question. As an example, Police Scotland noted that a complaint allegation might state that a transgender person was unhappy with the service they received from Police Scotland “having made a complaint of a hate crime against another member of the public”. Searching “transgender” might find this allegation, but only by reading the details of the record would it be found that the allegation related to a general “quality of service” issue rather than a police employee being transphobic. Police Scotland asserted that any research based on the presence of keywords or phrases is not an accurate method by which the incidence of a particular type or crime or complaint can be measured.

Commissioner’s conclusions on section 12(1)

31. The Commissioner has carefully considered the submissions made by Police Scotland in conjunction with the specific request submitted by the applicant. The Commissioner is satisfied that information falling within the scope of the applicant’s request is likely to be limited to that held in the PSD Centurion database, as that is the system which records complaints against police employees. The Commissioner also acknowledges that the applicant’s request appears to be straightforward, and the applicant clearly expected Police Scotland to be able to conduct searches to locate the information being sought.
32. However, it is clear that there is no specific field in the Centurion database for recording key words such as “transgender woman” or even “transgender”. The Commissioner accepts that, in this case, a keyword search of free text fields would not retrieve accurate results: it is possible that some officers may not have recorded the word “transgender” at all while others may have used the term in complaints which are not relevant to the information request from the applicant. Therefore, the Commissioner accepts that the only way to be reasonably sure of identifying relevant records would be for Police Scotland to manually assess all complaints recorded in its Centurion system during the time period.
33. The Commissioner has assessed Police Scotland’s calculations, which concluded that it would take five minutes to analyse each record; as there were 6,816 complaints in 2015/16 alone, it would cost £6,793.28 for one years’ worth of data. The Commissioner notes that even if the time taken to analyse each record was reduced to one minute, the costs incurred for a single year would still greatly exceed the £600 cost ceiling. On balance, and given that the applicant is seeking five years’ worth of data, the Commissioner is satisfied that compliance with the request would exceed the £600 cost limit set out in FOISA, and she accepts that section 12(1) applies to this part of the information request.

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 the applicant.

The Commissioner finds that by relying on section 12(1) of FOISA to withhold information about allegations or complaints made against Police Scotland staff concerning their treatment of transgender women, and by giving the applicant notice under section 17(1) of FOISA that it did not hold information regarding conviction statistics, Police Scotland complied with Part 1.

However, Police Scotland was wrong to give notice that it did not hold information regarding allegations or complaints concerning the treatment of transgender women by its staff, and in this respect, Police Scotland failed to comply with Part 1 of FOISA.

The Commissioner does not require Police Scotland to take any action in respect of this failure in response to the applicant's application.

Appeal

Should either the applicant 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.

Margaret Keyse
Head of Enforcement

30 August 2016

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.

...

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.

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.

Scottish Information Commissioner

Kinburn Castle
Doubledykes Road
St Andrews, Fife
KY16 9DS

t 01334 464610

f 01334 464611

enquiries@itspublicknowledge.info

www.itspublicknowledge.info