

# Decision Notice 197/2021

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## **Police and vigilante group entrapment of individuals involved in conversations of a sexual nature**

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**Applicant: The Applicant**

**Public authority: Chief Constable of the Police Service of Scotland**

**Case Ref: 202100876**



Scottish Information  
Commissioner

## Summary

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Police Scotland were asked, in relation to the Sexual Offences (Scotland) Act 2009, for the number of cases where people impersonated an individual between 13 and 16 years of age to entrap another individual; of those, how many involved police officers acting undercover and how many crimes were reported by vigilante groups who had entrapped people, for the year 2020.

Police Scotland refused to confirm nor deny whether they held some information, and stated that to supply some of the information would cost in excess of £600 (and so they were not required to comply).

The Commissioner found that Police Scotland were entitled to refuse to respond to the request on cost grounds, but that they should have offered advice and assistance on how to refine the request to bring it under the cost limit.

As this advice and assistance was provided during the investigation, the Commissioner did not require Police Scotland to take any further action.

## Relevant statutory provisions

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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

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1. On 19 May 2021, the Applicant made a request for information to the Chief Constable of the Police Service of Scotland (Police Scotland). The information requested was for the year 2020 and related to the Sexual Offences (Scotland) Act 2009, as follows:
  - The number of “victims” who were NOT of the ages between 13 and 16, i.e. people who impersonated an individual between 13 and 16 to entrap another individual into conversations of a sexual nature (part 1)
  - The split between the above numbers as to who were Police officers acting undercover and the number of people representing themselves or a vigilante group (part 2)
  - The number of crimes reported by vigilante groups who had taken the law into their own hands to entrap people they believed to be committing an offence (part 3)

The Applicant in his request defined a vigilante as “a member of a volunteer committee organised to suppress and punish crime summarily (as when the processes of law are viewed as inadequate), broadly: a self-appointed doer of justice”.

2. Police Scotland responded to parts 1 and 3 of the request on 17 June 2021, in terms of section 12(1) (Excessive cost of compliance) of FOISA. They estimated that it would cost well in excess of £600 to comply with these parts and explained why.

3. In response to part 2 of the request, Police Scotland refused to confirm nor deny, under section 18 of FOISA, whether the information existed or was held.
4. On 29 June 2021, the Applicant wrote to Police Scotland, requesting a review of their decision on section 12(1) of FOISA only, noting that he had made a previous request for similar information, for a different time period. That request had also been denied on the grounds of cost but, in that instance, Police Scotland had estimated the cost on the basis that each record would take five minutes to check (as opposed to the 10 minutes used in this case). The Applicant considered that if the five-minute time had been used, given the number of cases to be checked, the cost should have fallen below the £600 cost limit. He questioned the doubling of the time.
5. Police Scotland notified the Applicant of the outcome of their review on 20 July 2021, upholding their original decision and providing a further explanation of how this cost was determined.
6. On 20 July 2021, the Applicant wrote to the Commissioner, applying for a decision in terms of section 47(1) of FOISA. The Applicant stated he was dissatisfied with the outcome of Police Scotland's review because he questioned the difference in the time estimate for each case to be checked from his first request to this one, and also from the request to review stage. He also queried the hourly rate being applied and considered cost was being used to prevent information being released to the public.
7. The Applicant also queried the application of section 18 part 2 of his request. However, given that he had not raised this with Police Scotland as an area of dissatisfaction at review, the Commissioner cannot investigate this.

## Investigation

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8. 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 him for a decision.
9. On 2 August 2021, Police Scotland were notified in writing that the Applicant had made a valid application and the case was allocated to an investigating officer.
10. 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 focused on the application of section 12(1) of FOISA and asked for submissions explaining how they had concluded that it would cost in excess of £600 to provide the information to the Applicant.

## Commissioner's analysis and findings

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11. 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 the Applicant and Police Scotland. He is satisfied that no matter of relevance has been overlooked.

### Section 12(1) - Excessive cost of compliance

12. Section 12(1) of FOISA 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 amount

prescribed in the Fees Regulations. This amount is currently set at £600 (regulation 5). Consequently, the Commissioner has no power to require an authority to disclose information should he find that the cost of responding to a request for information would exceed that sum.

13. The projected costs an 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.
14. The authority may not charge for the cost of determining whether it:
  - (i) actually holds the information requested, or
  - (ii) should provide the information
15. The maximum rate a Scottish public authority can charge for staff time is £15 per hour.

#### *Submissions from Police Scotland*

##### Time to locate and retrieve information

16. Police Scotland were asked to explain how they had estimated the cost of complying with the Applicant's request would exceed the £600 statutory limit.
17. Police Scotland described how, at review stage, a member of the FOI team carried out a timed exercise on a random sample (five in number) of the 326 records found:
  - Record 1 - 6:45 minutes/seconds – equates to 405 seconds to check (3 documents checked)
  - Record 2 - 1:03:30 hours/minutes/seconds - equates to 3,810 seconds to check (25 documents checked)
  - Record 3 - 25:07 minutes/seconds - equates to 1,507 seconds to check (9 documents checked)
  - Record 4 - 12:05 minutes/seconds - equates to 725 seconds to check (12 documents checked)
  - Record 5 - 49:05 minutes/seconds - equates to 2,945 seconds to check (27 documents checked)

They explained that, in order to accurately determine if they met the criteria of the request, all of the attached documents to a case would require to be checked.

18. Police Scotland provided further reasoning why the time taken could vary so greatly between records and why all of the documents attached to a case needed to be checked. They explained that the following documents had to be read:
  - Crime report
  - SPR (Police report)
  - Witness statements
  - Officer/Staff statements (in particular providing evidence from forensic examination of devices)
  - Subject reports (which might contain additional charges)

- Memos

They stated that additional offences can often be uncovered when witnesses are interviewed, or electronic devices examined resulting in additional charges being added to the report (which needed to be checked to see if they involved a victim that provided a pseudo-age or similar). They noted that, where a crime is recorded but there is no accused there will not be an SPR recorded, so additional systems may have to be checked if the information is not listed on the crime report.

19. Police Scotland also noted that the reports collated for this response were held across Police Scotland on a number of different systems, as each area operates an independent crime recording system and so different staff would have to be tasked with retrieving the information.
20. Police Scotland then reviewed a further batch of records to determine whether the number of subject reports/witness statements/memos present in the middle and longest records was common in these cases (and found it to be so).
21. Police Scotland stated that an initial estimate was provided in response to the request, while an additional timed check was carried out at review stage for a more accurate picture (which determined that the actual time taken was in excess of the 10-minute estimate initially provided to the Applicant).

#### Cost of staff time

22. Police Scotland explained that, during this exercise, a Lead Disclosure Officer had carried out the work but that, as no access to restricted systems was required, this task could be carried out by a Disclosure Officer. They stated that the mid-point of the salary scale for this grade of staff was £28,217 (not including employer national insurance or pension contributions) and that breaking this down gave an hourly rate of £15.50. Therefore, the maximum rate permissible in the Fees Regulations (£15 per hour) was used to determine that £600 equated to 40 hours of work.

#### Application of section 12(1) to parts 1 and 3 of the Applicant's request

23. Police Scotland explained that, for both parts 1 and 3 of the Applicant's request, a manual search would need to be carried out on all 326 crime reports. Part 1 relied upon checking of victim information specifically, whereas part 3 relied upon checking of the person reporting the crime. Police Scotland noted that the information might not be obvious from the report, hence the need to check additional documents. They explained that crime reports were recorded with complainer/victim details, such as a person's name and address, rather than the name of a group such as an Online Child Sexual Abuse Activist Group (OCAG); any reference to an OCAG would be in free text rather than searchable fields.

#### *Submissions from the Applicant*

24. As mentioned above, the Applicant had made a previous request to Police Scotland asking for similar information but for a different, longer time period. The Applicant explained that this had been refused on the grounds of cost, on the basis that there were 1,547 cases and Police Scotland estimated a time of five minutes to check each case, thereby exceeding the £600 threshold.
25. In this instance, the Applicant stated that he was informed there were 326 records found and, in his initial response, an estimate of 10 minutes per record was given. The Applicant

submitted that the review increased the time required per record again, to an average of 31 minutes per record: he questioned how this could be correct.

26. The Applicant also challenged the hourly rate he believed this cost would equate to, comparing it to the minimum living wage for an adult over 21 which, he stated, was £8.91 (at the time of the request).

#### *The Commissioner's findings*

27. Having considered the explanations provided by Police Scotland and the way the information is recorded, all of which he accepts as reasonable, the Commissioner is satisfied that Police Scotland could not have complied with the Applicant's request within the £600 cost limit. Consequently, he finds that Police Scotland were entitled to rely on section 12(1) of FOISA and were under no obligation to comply with the request.

#### **Section 15 – Duty to advise and assist**

28. 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.
29. 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 2004*<sup>1</sup> (the Section 60 Code), is taken to comply with the duty to provide reasonable advice and assistance in section 15(1).
30. 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 [the authority] may wish to take account of how much the cost limit has been exceeded. Any narrower request would be a separate new request and should be responded to accordingly.”
31. Police Scotland did not provide the Applicant with any advice or assistance, in either their initial response or review outcome, on how he could possibly make a new request to allow him to access the information he was looking for, within the cost limit. They explained in their submissions that the timeframe of the request was already one year, which is what they would normally offer to reduce statistics requests to in an effort to reduce costs. Police Scotland submitted that reducing them to any shorter period could render the statistics useless, but did suggest that this was something they could look at if the Applicant wanted to reduce the timeframe to a month or two, or (alternatively) to look at one geographical area for one year.
32. Police Scotland provided advice and assistance to the Applicant in the course of the investigation on how he might make a new refined request, within the cost limit.

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<sup>1</sup> [FOI/EIR: section 60 code of practice - gov.scot \(www.gov.scot\)](http://www.gov.scot/foi/eir/section-60-code-of-practice)

### *The Commissioner's findings*

33. The Commissioner accepts that Police Scotland took steps during the investigation to provide the Applicant with advice and assistance. This should, however, have been done when responding to the initial request or at review. The Applicant had already demonstrated that he was willing to alter the time frame of his FOI requests in relation to these matters, as he referred in his correspondence with Police Scotland to a previous request he had made for similar information that covered a longer period.
34. The Commissioner therefore finds that Police Scotland failed to comply with the duty under section 15(1) of FOISA to provide advice and assistance.
35. Given that Police Scotland provided this during the investigation, the Commissioner does not require any further action be taken in this case.

## **Decision**

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The Commissioner finds that, in respect of the matters specified in the application, the Chief Constable of the Police Service of Scotland (Police Scotland) complied with Part 1 of the Freedom of Information (Scotland) Act 2002 (FOISA) in responding to the information request made by the Applicant, in particular, by refusing to comply with the request on the basis that section 12(1) of FOISA applied.

The Commissioner is not satisfied, however, that Police Scotland met their duty to provide advice and assistance in responding to the request, as required by section 15(1) of FOISA.

Given that, during the investigation, the Applicant was provided with relevant advice and assistance, the Commissioner does not require Police Scotland to take any action in respect of this failure in response to the Applicant's application.

## **Appeal**

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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**

**10 December 2021**

## Appendix 1: Relevant statutory provisions

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### 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  
...
- (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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