

Decision Notice

Decision 172/2015: Marc Ellison and the Chief Constable of the Police Service of Scotland

Compensation payments

Reference No: 201501365

Decision Date: 9 November 2015



Summary

On 13 April 2015, Mr Ellison asked the Chief Constable of the Police Service of Scotland (Police Scotland) for details of compensation payments made by Police Scotland.

Following a request for review, Police Scotland told Mr Ellison that complying with his request would cost in excess of the £600 cost limit (and so they were not obliged to comply). Following an investigation, the Commissioner accepted this, but found that Police Scotland had failed to provide reasonable advice and assistance to help Mr Ellison narrow the request. She also found that Police Scotland failed to comply with the relevant statutory timescales.

The Commissioner required Police Scotland to go back to Mr Ellison and provide him with adequate advice and assistance.

Relevant statutory provisions

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) and (6) (General entitlement); 10(1)(a) (Time for compliance); 12(1) (Excessive cost of compliance); 15 (Duty to provide advice and assistance); 21(1) (Review by Scottish public authority)

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

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

Background

1. On 13 April 2015, Mr Ellison made a request for information to Police Scotland. He asked for:

“Details of all compensation paid out by Police Scotland since April 2013. This should include: date of pay-out; the amount; reason (i.e. wrongful arrest, injury due to excessive force, misuse of stop-search, etc); payee details (i.e. paid to a “civilian” or “company” – I don’t want actual names).”
2. On 2 June 2015, Mr Ellison wrote to Police Scotland, requesting a review on the basis that they had failed to respond to his request.
3. Police Scotland failed to respond to Mr Ellison’s requirement for review within 20 working days. It was only after Mr Ellison submitted an application to the Commissioner on the basis of that failure to respond that Police Scotland notified Mr Ellison of the outcome of their review, on 23 July 2015.
4. Police Scotland notified Mr Ellison that they were unable to comply with his request because the estimated cost of doing so was more than the sum of £600 prescribed for the purposes of section 12(1) of FOISA.
5. On 24 July 2015, Mr Ellison wrote again to the Commissioner. He applied to the Commissioner for a decision in terms of section 47(1) of FOISA. Mr Ellison did not agree

with the application of section 12(1) of FOISA. He was also unhappy with Police Scotland's delays in responding to his request and requirement for review.

Investigation

6. 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 their response to that request before applying to her for a decision.
7. On 14 August 2015, Police Scotland were notified in writing that Mr Ellison had made a valid application.
8. 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, with particular reference to the requirements of section 12(1) of FOISA.
9. Police Scotland responded to the investigating officer with their comments and continued to rely on section 12(1) of FOISA.

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 her by both Mr Ellison and Police Scotland. She is satisfied that no matter of relevance has been overlooked.

Section 12(1) - Excessive cost of compliance

11. 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). Consequently, the Commissioner has no power to require the disclosure of information should she find that the cost of responding to a request for information exceeds this sum.
12. 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) 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 public authority may not charge for the cost of determining whether it actually holds the information requested, or whether or not it should provide the information. The maximum rate a Scottish public authority can charge for staff time is £15 per hour.
13. Mr Ellison thought it likely that Police Scotland would hold the information he was seeking in electronic form.
14. Police Scotland submitted that the full set of information sought by Mr Ellison could only be found in manual case files held by its Legal Services Department. They estimated there were at least 200 files to be reviewed. Some of these would be closed and located either elsewhere within the force or in third-party storage facilities. There was limited information on each file in an electronic database, which would help in their location and retrieval.
15. Police Scotland submitted that Mr Ellison sought a significant level of detail from the individual files. Given the nature of the information, extracting what was relevant would require specialist assessment by a solicitor. To locate the relevant files, the solicitor would

need to review nine databases – one for each year for each force command area. The relevant files would be highlighted on a printed list, for retrieval by a member of support staff: review of each list, to determine which files were open and which closed, would take approximately one hour.

16. Following this, each file would require to be retrieved with a request made to recover the file, perhaps from off-site (third-party) storage. Recovery from off-site storage would incur costs from the storage company: £5 for the delivery and £1 for each box retrieved. Police Scotland stated that an individual file might be in more than one box. They explained that there were usually 10 files in a box, although this would depend on the size of the file: there might be fewer.
17. The files would then be located and returned to the solicitor for consideration of the information requested. Police Scotland described a sampling exercise it carried out. The relevant solicitor reviewed 25 files in five hours, reading through each file to ensure that all potentially relevant information had been examined. Applying the result of this sample, Police Scotland estimated that 200 files would take at least 40 hours to review.
18. Whilst a minority of the work required to locate and retrieve information could be undertaken by administrative support staff, Police Scotland submitted that the vast majority of the work required to extract the relevant information from the files would have to be undertaken by a qualified solicitor whose actual hourly rate would exceed the prescribed maximum of £15 per hour. At this rate, they continued, 40 hours of reviewing the case files alone would reach the £600 cost limit.
19. Having taken account of the scope of the request and the nature of the information requested, the Commissioner is satisfied that the costs identified by Police Scotland in this case represent a reasonable estimate of the cost of complying with Mr Ellison's request for information. The request could not have been dealt with within the £600 cost limit, so 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 provide advice and assistance

20. Section 15(1) of FOISA requires a Scottish public authority, so far as it is reasonable to expect it do so, to provide advice and assistance to a person who has made, or proposes to make, a request for information to it.
21. The Scottish Ministers' Code of Practice on the Discharge of Functions by Scottish Public authorities under FOISA and the EIRs¹ provides (at paragraph 9.3.3 in 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 exceeded. Any narrowed request would be a separate new request and should be responded to accordingly.
22. The Commissioner considers this important if the public authority is to fulfil its duty to provide advice and assistance under section 15 of FOISA. Frequently a dialogue between the authority and the applicant will be desirable, if the applicant is to understand fully what can

¹ <http://www.gov.scot/Resource/0046/00465757.pdf>

be provided within the cost limit. Police Scotland were invited to explain how they had discharged this duty in respect of Mr Ellison's request.

23. Police Scotland highlighted the limited time available to ascertain what information they might have been able to disclose within the cost limit. They also highlighted their general experience of Mr Ellison expecting all the information he had asked for. They submitted that if they could have retrieved the cumulative total amount paid in compensation, they would have put this to Mr Ellison as an option (although they did not believe this would have been acceptable to him as he expected itemised detail).
24. The Commissioner does not accept that it is appropriate to make a blanket assumption in relation to a regular requester's wishes, of the kind Police Scotland appear to have made here. In this case, looking at it objectively, she can see no reason why it should have been unreasonable to expect Police Scotland to engage with Mr Ellison, with a view to explaining what information might be provided within the cost limit and thus assisting him to make a request which might result in the provision of information. She acknowledges that simply reducing the number of files might not be of value to someone in Mr Ellison's position, but that would not appear to close down all potential avenues for narrowing the request – for example, by offering cumulative figures, narrowing the timeframe or reducing the categories of information sought.
25. The Commissioner also considers that the refusal notice issued by Police Scotland should have provided a clear explanation of how the costs had been calculated. This would have helped Mr Ellison to understand why it would cost so much to comply with his request.
26. For these reasons, the Commissioner has concluded that Police Scotland failed to comply fully with its duty under section 15(1) of FOISA. She requires Police Scotland to contact Mr Ellison, to discuss how his request might be narrowed in order that information could be provided within the cost limit. In preparing for this, she would urge Police Scotland to consider whether more limited categories or sets of information might be obtainable from sources which could be searched more readily than legal case files.

Failure to comply with timescales in FOISA

27. In his application to the Commissioner Mr Ellison noted that Police Scotland failed to respond to his request and review requirement within the prescribed timescales.
28. Section 10(1) of FOISA gives a Scottish public authority a maximum of 20 working days following receipt of an information request to respond to that request, subject to qualifications which do not apply here. In this case, Police Scotland failed to respond to the request within that period and consequently breached the requirements of section 10(1).
29. Section 21(1) of FOISA requires a Scottish public authority to comply with a requirement for review not later than the twentieth working day after receipt of the requirement. Police Scotland responded to Mr Ellison's request for review outwith the prescribed timescale. In doing so, the Commissioner finds that Police Scotland breached the requirements of section 21(1) of FOISA.
30. Police Scotland stated that they had offered their apologies for the delay in responding to the request and requirement for review. They explained the competing demands on the staff concerned, in particular the frequent need for legal staff to respond to other mandatory requirements at short notice. The Commissioner has noted this explanation, but must also note that Police Scotland is hardly alone amongst Scottish public authorities in facing

competing demands of this kind. FOISA does not allow for the extension of response timescales, regardless of the workloads of those required to respond to the request.

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 accepts that Police Scotland were not obliged to comply with Mr Ellison's information request, given that section 12(1) of FOISA applied.

However, the Commissioner must also find that Police Scotland failed to provide reasonable advice and assistance to Mr Ellison, by way of explaining what information could be provided within the cost limit. In this respect, Police Scotland failed to comply with section 15(1) of FOISA.

The Commissioner requires Police Scotland to go back to Mr Ellison and discuss with him how his request could be narrowed in scope, and how much (and what kind of) information could be disclosed within the cost limit. She requires Police Scotland to do this by **12 January 2016**.

The Commissioner also finds that Police Scotland failed to comply with the timescales for responding to Mr Ellison's information request and requirement for review, thereby breaching sections 10(1) and 21(1) of FOISA. Given Police Scotland's eventual response and apology, the Commissioner however does not require any action on the part of Police Scotland in relation to these timescale breaches, in response to Mr Ellison's application.

Appeal

Should either Mr Ellison or the Chief Constable of the Police Service of Scotland wish to appeal against this decision, they have the right to appeal to the Court of Session on a point of law only. Any such appeal must be made within 42 days after the date of intimation of this decision.

Enforcement

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

Margaret Keyse
Head of Enforcement

9 November 2015

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.

...

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

10 Time for compliance

- (1) Subject to subsections (2) and (3), a Scottish public authority receiving a request which requires it to comply with section 1(1) must comply promptly; and in any event by not later than the twentieth working day after-

- (a) in a case other than that mentioned in paragraph (b), the receipt by the authority of the request; or

...

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).

21 Review by Scottish public authority

- (1) Subject to subsection (2), a Scottish public authority receiving a requirement for review must (unless that requirement is withdrawn or is as mentioned in subsection (8)) comply promptly; and in any event by not later than the twentieth working day after receipt by it of the requirement.

...

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