| Police Scotland logo | Freedom of Information ResponseOur reference: FOI 24-0983Responded to: 28th May 2024 |
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Your recent request for information is replicated below, together with our response.

## 1- Were any transgender staff involved in making the decisions listed in your reply?

## 2- Were any transgender people consulted-with in making your decisions?

Having considered your request in terms of the Act, I am refusing to confirm or deny whether the information sought exists or is held by Police Scotland in terms of section 18.

Section 18 applies where the following two conditions are met:

* It would be contrary to the public interest to reveal whether the information is held.

Whilst we accept that the public may be interested in the decision-making process and the individuals involved, the overwhelming public interest lies in protecting individual’s rights to privacy.

* If the information was held, it would be exempt from disclosure in terms of at least one exemption set out in the Act. In this instance, the exemption set out at section 38(1)(b) of the Act applies - personal data.

Personal data is defined in Article 4 of the General Data Protection Regulation (GDPR) as:

‘Information relating to an identified or identifiable natural person (“data subject”); an identifiable natural person is one who can be identified, directly or indirectly, in particular by reference to an identifier such as a name, an identification number, location data, an online identifier or to one or more factors specific to the physical, physiological, genetic, mental, economic, cultural or social identity of that natural person’.

Section 38(2A) of the Act provides that personal data is exempt from disclosure where disclosure would contravene any of the data protection principles set out at Article 5(1) of the GDPR which states that:

‘Personal data shall be processed lawfully, fairly and in a transparent manner in relation to the data subject’.

Article 6 of the GDPR goes on to state that processing shall be lawful only if certain conditions are met. The only potentially applicable condition is Article 6(1)(f) which states:

‘Processing is necessary for the purposes of the legitimate interests pursued by the controller or by a third party, except where such interests are overridden by the interests or fundamental rights and freedoms of the data subject which require protection of personal data, in particular where the data subject is a child’.

Whilst I accept that you may have a legitimate interest with regards the disclosure of this information, I do not agree that disclosure could be considered necessary in the circumstances.

Notwithstanding, I am further of the view that your interests are overridden by the interests or fundamental rights and freedoms of the data subjects.

On that basis, it is considered that disclosure of the information sought would be unlawful.

## 3- To lead my question, I first wish to quote you a very important paragraph from case law: "Usage and sensitivities may change over time...There can be no yardstick of gross offensiveness otherwise than by the application of reasonably enlightened, but not perfectionist, contemporary standards to the particular message sent in its particular context. The test is whether a message is couched in terms liable to cause gross offence to those whom it relates." [Lord Bingham with whom Lord Nicholls of Birkenhead, Baroness Hale of Richmond, Lord Brown of Eaton-Under-Heywood agreed, DPP v Collins (2006) UKHL 20 Para 9]

## 3Q- Did you consider if the trans section of the public would consider the nature and context of the messaging series by Rowling to be grossly offensive?

## 4- You stated ECHR Article 10 was engaged in your decision.  You will be aware that no ECHR Article may be used to infringe the Article Rights of others. Did you consider this before making your decision?

##  5- What consideration was given to the ECHR Rights of others by considering Article 17?

As you may be aware, Freedom of Information legislation provides a right of access to recorded information only.

In terms of section 17 of the Act, I can advise you that no recorded information is held by Police Scotland in relation to this case and the specific questions posed.

I would reiterate that no crime was committed by Ms Rowling.

To be of assistance, I can however advise you that the threshold that is used in Scots legislation is whether a reasonable person would find something to be ‘grossly offensive’.

Comments may well be considered offensive, insulting, mocking even, but this does not make them 'grossly offensive' or beyond the pale.

Repeatedly cited in cases such as this is Laws LJ in Karsten v Wood Green Crown Court [2014] EWHC 2900 (Admin) [at 21] that:

“The courts need to be very careful not to criminalise speech which, however contemptible, is no more than offensive. It is not the task of the criminal law to censor offensive utterances”.

If you require any further assistance, please contact us quoting the reference above.

You can request a review of this response within the next 40 working days by email or by letter (Information Management - FOI, Police Scotland, Clyde Gateway, 2 French Street, Dalmarnock, G40 4EH). Requests must include the reason for your dissatisfaction.

If you remain dissatisfied following our review response, you can appeal to the Office of the Scottish Information Commissioner (OSIC) within 6 months - [online](http://www.itspublicknowledge.info/Appeal), by email or by letter (OSIC, Kinburn Castle, Doubledykes Road, St Andrews, KY16 9DS).

Following an OSIC appeal, you can appeal to the Court of Session on a point of law only.

This response will be added to our [Disclosure Log](http://www.scotland.police.uk/access-to-information/freedom-of-information/disclosure-log) in seven days' time.

Every effort has been taken to ensure our response is as accessible as possible. If you require this response to be provided in an alternative format, please let us know.