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Date: 8 March 2022

Our Ref:

Audrey Nicoll MSP
Convener, Criminal Justice Committee
Justice Committee Clerks
Room T2.60
The Scottish Parliament
Edinburgh
EH99 1SP

By email



Fiona Taylor QPM
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Dear Convener

NON-DISCLOSURE AGREEMENTS

Thank you for your letter dated 17 February 2022 addressed to my colleague Deputy Chief Constable Malcolm Graham. Your letter has been passed to me to respond to as the use of Non-Disclosure Agreements ('NDAs') more appropriately sits within my portfolio.

As previous correspondence from Police Scotland has indicated, NDAs are not routinely used by Police Scotland, and indeed have been used in only 1.7% of settled cases in the previous three financial years. The use of a NDA can be proposed by either party to an Agreement, and where Police Scotland has sought such Agreements it is by and large for the purposes of commercial sensitivity.

It is perhaps important to outline the circumstances in which a NDA may be entered into by Police Scotland. They are where a claim for compensation or litigation has been raised against Police Scotland. As part of the settlement of that claim or litigation a NDA may be entered into to bring the matter to an end by way of negotiated settlement. Very often the detail of the financial settlement is a matter of commercial sensitivity and accordingly the sum paid becomes a matter subject to confidentiality. This is a legitimate practice used routinely by both commercial organisations and public bodies.

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The benefit of a NDA is to quickly and satisfactorily settle matters without the recourse to evidence being led within a Tribunal or Court that may give rise to costs and possible reputational damage to one or both parties. They will not, though, be used to prevent complaints being raised and investigated.

Where relevant complaints have been made these are usually investigated by Police Scotland's Professional Standards Department (PSD) (except in some, rare, occasions where a claimant refuses to engage with the PSD processes). Police Scotland strives to learn from any complaint that has been made and the complaints process is accordingly independent of any legal process that may culminate in the use of a NDA.

Police Scotland has entered into just 21 NDAs in the settlement of civil claims and cases raised against it in the previous three financial years. Police Scotland settled 1,209 claims in the same time period. Police Scotland actively sought a NDA in 14 of the 21 NDAs entered into. The information that I have indicates that 4 of the NDAs entered into fell to be classified as involving sex discrimination claims (or part of the claim centred on allegations of sex discrimination).

I should also advise that NDAs are entered into voluntarily by both parties and both parties are encouraged to avail themselves of the benefit of independent legal advice should they wish it. Where an NDA is sought in resolution to a claim which is already before an Employment Tribunal then the ET's 'COT3' process will generally be the acknowledged vehicle for conclusion of the said Agreement; alternatively, if the matter is an 'employment-type' complaint or claim but has not yet progressed to a Tribunal then regard is usually had to the applicable ACAS-approved processes. No aspect of any such NDA could be used to improperly suppress the making of a complaint or to prevent whistle blowing and Police Scotland has never entered into a NDA to such an end.

I have no difficulty in providing the Committee with a copy of the report submitted to the SPA Legal Committee in December 2021. Indeed, I understand that the SPA, intends to make the report available on its website. A copy of that report is attached herewith.

I want to reassure the Committee that Police Scotland is fully aware that the use of NDAs can draw suspicion from the public. By their very nature, NDAs preclude public knowledge of the settlement details of particular cases. I have provided details of the numbers of NDAs that Police Scotland enters into, which when compared to the overall numbers of claims settled, demonstrates that they are used by exception and for commercial reasons. They are never used as a means of hiding unacceptable behaviour from scrutiny. Further, in light of the legitimate public interest in this matter, I have instructed Police Scotland's Legal Services and People & Development department to enhance our corporate reporting by establishing a central register of all NDAs entered into in all 'employment-type' claims or cases together with details of why any such Agreement was felt necessary.

NDA Management Information will also be provided to me on a regular basis, outlining the number of NDAs entered into together with the reasons for their use. In addition, we will continue to report NDAs to the SPA Legal Committee as and when required.

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Yours sincerely,

A handwritten signature in blue ink, appearing to read "Fiona Taylor", with a large, stylized initial "F" and a trailing period.

Fiona Taylor QPM
Deputy Chief Constable

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This paper was presented in line with SPA Corporate Governance Framework Standing Orders Section 20(f)

Meeting	SPA Legal Committee
Date	13 December 2021
Location	MS Teams
Title of Paper	Non-Disclosure Agreements (NDA's)
Presented By	James Douglas, Legal Services Manager
Recommendation to Members	For noting
Appendix Attached	No

PURPOSE

The Committee have asked that Legal Services provide a report on the use of Non-disclosure Agreements by Police Scotland, the general reasons for their use and the prevalence of use.

Members are invited to note the contents of this paper.

This paper was presented in line with SPA Corporate Governance Framework Standing Orders Section 20(f)

1. BACKGROUND

1.1 The SPA Legal Committee met on 27 October 2021. A discussion took place regarding the use of Non-disclosure Agreements by Police Scotland. Verbal responses to Committee Members' questions were provided by the Legal Services Manager of Police Scotland. Following the meeting of 27 October, the SPA Legal Committee requested a report be submitted to them for discussion at the meeting scheduled for 13 December 2021 on the use of Non-disclosure Agreements and wished the following areas to be specifically addressed:

- To what extent have Police Scotland used NDAs over the past 3 years.
- A breakdown of gender in relation to those NDAs
- Which of those NDAs followed ACAS guidelines
- How many financial settlements have been reached and which of those settlements used NDAs
- Motives for entering into NDA's and who requests them (Police Scotland or Claimant)
- Number of NDA's as a percentage of the total number of cases settled.

This report seeks to provide the information requested by the SPA Legal Committee. The figures provided herein relate solely to the use of Non-disclosure Agreements entered into by Police Scotland and does not include any figures for any Agreements that may have been entered into by the Scottish Police Authority.

2. FURTHER DETAIL ON THE REPORT TOPIC

2.1 Non-disclosure Agreements are agreements signed by both parties to a legal dispute that provides for the confidentiality of, among other things, any settlement details contained within the agreement. Indeed, Non-Disclosure Agreements (hereafter NDAs) are often referred to as "Confidentiality Agreements" or "COT-3 Agreements" when used to settle employment place disputes.

NDAs can be used following the raising of legal proceedings but can also be used to settle matters before any proceedings are raised by one or other of the parties to a dispute.

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NDA's are not unlawful, and bodies such as ACAS have produced guidance on when they are a legitimate and appropriate means of settling a dispute and when they are not. As a public body, Police Scotland are acutely aware that the use of a NDA may be viewed with suspicion by third parties as the intention behind their use is to prohibit public disclosure of details within the agreement itself. NDA's will only be entered into by Police Scotland where there are justified reasons for doing so. NDA's cannot be unilaterally imposed by one party upon the other without agreement nor can they be used to prohibit "whistleblowing".

Police Scotland do not use NDA's

- before seeing if another solution can be used instead
- when they are not needed
- to stop someone reporting discrimination, harassment or sexual harassment
- to cover up inappropriate behaviour or misconduct, particularly not if there's a risk of it happening again
- to avoid addressing disputes or problems in the workplace
- to mislead someone

NDA's are commonly used to prohibit the public disclosure of the details of a dispute settlement. This is often at the behest of the party receiving a financial settlement. Clearly any financial settlement constitutes financial data relative to an individual or an organisation and that person or organisation may not wish the details to become public knowledge. Employment disputes regularly attract media attention and employees from time to time will wish to retain a level of privacy.

NDA's are often utilised as a legitimate and appropriate means of safeguarding an organisation's commercial position. Police Scotland will only ever use a NDA where there is consensual agreement to do so.

By way of further explanation Police Scotland would not countenance the improper use of NDA's to prevent employees from revealing wrongdoing such as discriminatory behaviour or cases involving bullying or harassment. Whenever such cases are identified they are investigated and appropriate action taken/learning identified as necessary to avoid any repetition of such behaviour. NDA's are only used by Police Scotland in

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circumstances where there is consensual agreement between the parties to enter into an NDA.

2.2 *To what extent have Police Scotland used NDAs over the last 3 years?*

Police Scotland have signed 21 Non-disclosure Agreements in the previous three years. Seventeen relate to agreements reached with staff and officers and 4 relate to agreements reached with members of the public.

2.3 *A breakdown of gender in relation to those NDAs*

Fifteen of the Twenty-one agreements reached were with females and six with males.

2.4 *Which of those NDAs followed ACAS guidelines*

Seventeen of the NDAs have involved settlements reached with staff or Officers. Ten of those NDAs were signed since the ACAS guidance was published in February 2020. Seven were signed prior to the guidance being published but did not, in any event, breach the current ACAS guidance. Four NDAs related to public liability claims and although ACAS is primarily involved with employment law disputes, the terms of those four agreements similarly did not breach ACAS guidance.

Police Scotland always follows the guidance provided by ACAS when NDAs are being used in the settlement of Employer's liability claims. Any NDA signed by Police Scotland specifically excludes the Agreement from being used to prevent disclosure of any discriminatory behaviour.

2.5 *How many financial settlements have been reached and which of those settlements used NDAs*

Since the beginning of the 2018/2019 financial year, Police Scotland have settled 1,209 claims. This figure comprises 103 Employment place claims, 182 Public Liability claims and 924 Motor vehicle Liability claims. Accordingly NDAs have been used in 1.7% of settlement claims.

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2.6 *Motives for entering into NDA's and who requests them (Police Scotland or Claimant)*

The motives behind the use of NDAs in any particular case attracts legal privilege and accordingly the reasons for any individual NDA being sought cannot be provided within this report. The reasons for entering into a NDA may be subject to confidentiality requirements in and of itself.

Five of the 21 NDAs signed by Police Scotland have been at the behest of the other party. Two NDAs were recommended by ACAS, and Police Scotland sought the NDA in 14 settlements. Accordingly, Police Scotland has sought an NDA in 1.2% of the settled claims reached since the beginning of the 2018 financial year.

Police Scotland's motives for requiring a NDA are almost always for commercial sensitivity purposes. They are never used to prevent whistleblowing.

2.7 *Number of NDA's as a percentage of the total number of cases settled.*

As stated above at Paragraph 2.5 above, Police Scotland has settled 1,209 claims since the beginning of the 2018 financial year. Accordingly, the use of NDAs has featured in 1.7% of settled claims.

3. FINANCIAL IMPLICATIONS

3.1 There are no further financial implications in this report.

4. PERSONNEL IMPLICATIONS

4.1 There are no personnel implications associated with this paper.

5. LEGAL IMPLICATIONS

5.1 There are no further legal implications in this paper to those listed above.

6. REPUTATIONAL IMPLICATIONS

6.1 There are reputational implications associated with this paper.

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Although NDAs are a perfectly legitimate and appropriate means of settling disputes, Police Scotland does not seek their use as a matter of course. As a public body, it is accepted that transparency is often necessary. Police Scotland does though, have a responsibility to the public purse and will enter into a NDA where the situation merits it for commercial reasons. They are not used to prevent whistleblowing.

7. SOCIAL IMPLICATIONS

7.1 There are no social implications associated with this paper.

8. COMMUNITY IMPACT

8.1 There are no community implications associated with this paper.

9. EQUALITIES IMPLICATIONS

9.1 There are no equality implications associated with this paper.

10. ENVIRONMENT IMPLICATIONS

10.1 There are no environmental implications associated with this paper.

RECOMMENDATIONS

Members are invited to note the contents of this paper.