



**Decision 057/2007 Mrs Lilian Gordon and the Chief
Constable of Grampian Police**

Request for copy of investigator's report

**Applicant: Mrs Lilian Gordon
Authority: Chief Constable of Grampian Police
Case No: 200502803
Decision Date: 16 April 2007**

**Kevin Dunion
Scottish Information Commissioner**

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Decision 057/2007 Mrs Lilian Gordon and the Chief Constable of Grampian Police

Request for copy of investigator's report – information withheld under a number of exemptions – public interest interest considered to be in favour of of withholding - Commissioner partially upheld the decision by the Chief Constable

Relevant Statutory Provisions and other Sources

Freedom of Information (Scotland) Act 2002 section 1(1) (General entitlement); section 2 (Effect of exemptions); section 25(1) (Information otherwise accessible); section 30(b) and (c) (Prejudice to effective conduct of public affairs); section 34(1)(a), (3) and (4) (Investigations by Scottish public authorities and proceedings arising out of such investigations); section 35(1)(g) and (2)(b) (Law enforcement) and section 38(1)(a) and (b), (2)(a)(i) and (2)(b) (Personal information)

Data Protection Act 1998 section 1(1) (Basic interpretative provisions) (definition of "personal data"); section 2 (Sensitive personal data); Part 1 of Schedule 1 (The data protection principles – first data protection principle)

Facts

Mrs Lilian Gordon requested a copy of the report compiled by Northern Constabulary into the complaints she and her son had made about Grampian Police. The Chief Constable of Grampian Police (Grampian Police) responded to this request informing Mrs Gordon that the information was in the form of an investigating officer's report prepared under the Police (Conduct) (Scotland) Regulations 1996 and was exempt under a number of exemptions listed in the Freedom of Information (Scotland) Act 2002 (FOISA). Grampian Police listed the exemptions that it considered applied which included section 26(a) (prohibitions on disclosure), section 38(1)(a) and (b) (personal information), section 34(1)(a)(i) and (ii) and (1)(b), Section 34(3)(a) and (b) and (4) (investigations by public authorities), section 30(b)(i) and (ii) and (c) (prejudice to effective conduct of public affairs) and section 35(1)(g) and (2)(b) (law enforcement). Mrs Gordon was dissatisfied with this response and sought a review from Grampian Police. On review, Grampian Police confirmed that the information was exempt, but modified the number of exemptions that applied. Mrs Gordon applied to the Commissioner for a decision.



The Commissioner found that the Police had partially complied with Part 1 of FOISA in responding to Mrs Gordon's request and ordered the Police to release the second summary report into misconduct issues in a redacted format.

Background

1. On 29 May 2005 Mrs Gordon requested the following information from Grampian Police:

"A copy of the report compiled by Northern Constabulary into Graham Gordon's case and the complaints submitted".

2. Grampian Police responded to this request by email on 24 June 2005. Grampian Police confirmed that they held the information. Grampian Police advised, however, that the information was in the form of an Investigating Officer's report which was prepared under Grampian Police (Conduct) (Scotland) Regulations 1996 (the 1996 Regulations) and was exempt from disclosure under a number of sections of FOISA. Grampian Police listed the exemptions that applied:

Section 26(a) Prohibitions on Disclosure

3. Grampian Police indicated that information relating to individuals is exempt from disclosure under the Human Rights Act 1998, Article 8 – the right to respect privacy. Grampian Police advised that this was an absolute exemption under FOISA.

Section 30(b)(i), 30(b)(ii) and 30(c) Prejudice to effective conduct of public affairs

4. Grampian Police indicated that the disclosure of the content of an Investigating Officer's report would undermine confidence in and inhibit substantially the result and conduct of investigations under the 1996 Regulations. They indicated that it was not in the public interest for the content of such investigatory reports to be made public.

Section 34(1)(a)(i), 34(1)(a)(ii) and 34(1)(b) Investigations by Scottish public authorities and proceedings arising out of such investigations

5. Grampian Police indicated that the papers relating to any allegations of criminal conduct were exempt from disclosure. It stated that it was not in the public interest for such information to be made public as disclosure would impair the supply of frank and candid information to the Procurator Fiscal on which decisions to institute criminal proceedings were based.



Section 34(3)(a) and (b) and (4) Investigations by Scottish Public Authorities and proceedings arising out of such investigations

6. Grampian Police indicated that an Investigating Officer's report might contain confidential sources of information and it was not in the public interest for such sources to be made public.

Section 35(1)(g) (read in conjunction with section 35(2)(b)) Law enforcement

7. Grampian Police indicated that disclosure of an Investigating Officer's report would prejudice substantially investigations into improper conduct under the 1996 Regulations. They indicated that it was not in the public interest for the content of such investigations to be made public. They submitted that there must be no impediment to the candour and frankness of witnesses and others providing information to such investigations.

Section 36(2) Confidentiality

8. Grampian Police indicated that the publication of the contents of an Investigating Officer's report might reveal information, the disclosure of which might lead to an actionable breach of confidence. This was an absolute exemption.

Section 38(1)(a) and 38(1)(b) Personal information

9. Grampian Police indicated that an Investigating Officer's report might contain personal information pertaining to other data subjects where disclosure would breach any of the data protection principles. This was an absolute exemption.
10. Grampian Police advised Mrs Gordon that she might wish to make an application for personal data under the Data Protection Act 1998 (DPA) and attached a form for this purpose.
11. On 7 July 2005 Mrs Gordon requested a review of the decision by Grampian Police to refuse her a copy of the report.
12. On 27 July 2005 Grampian Police responded to Mrs Gordon's request for review. On review, Grampian Police confirmed that the exemptions against disclosure of the information originally cited were both relevant and sufficient, other than the exemptions under section 26(a) and 36(2)(b) of FOISA. Grampian Police confirmed that the information was exempt by virtue of the remaining exemptions.
13. By letter received on 11 October 2005 Mrs Gordon applied to me for a decision.
14. The case was allocated to an investigating officer within my Office.



Investigation

15. Mrs Gordon's appeal was validated by establishing that she had made a valid information request to a Scottish public authority, and had appealed to me only after asking the authority to review its response to her request.
16. My investigating officer contacted Grampian Police on 24 October 2005 giving notice that an appeal had been received and that an investigation into the matter had begun. Grampian Police were asked to comment on the issues raised by Mrs Gordon's case under section 49(3)(a) of FOISA and to provide supporting documentation for the purposes of the investigation.
17. In particular, Grampian Police were asked to supply a copy of the information withheld, to provide further analysis of the application of the exemptions cited, and, where appropriate, the application of the public interest test. Grampian Police were also asked to provide information about how the review was carried out and provide copies of any guidance relied on by Grampian Police in deciding whether the information should be supplied or withheld.

Scope of the information covered by the investigation

18. In a meeting on 4 November 2005 with my investigating officer, Grampian Police supplied copies of the information withheld and explained its content. Grampian Police advised that the information requested by Mrs Gordon constituted two separate reports and six files relating to those reports. Grampian Police explained the relevance of this information to Mrs Gordon's request and the process that had been followed following the complaints she and her son had made.
19. Grampian Police advised that Mrs Gordon's son had been charged and convicted of an offence and was serving a prison sentence. (Mrs Gordon's son has subsequently been released from prison.) Mrs Gordon had sought an investigation into the way in which Grampian Police had handled the original investigation into her son's offences. Both she and her son had made a number of complaints against the officers involved. The Chief Constable of Grampian Police had requested Northern Constabulary to carry out an investigation in connection with Mrs Gordon's son's arrest, the circumstances leading up to his arrest and his subsequent conviction and to prepare a report under the 1996 Regulations. Deputy Chief Constable Garry Sutherland of Northern Constabulary was appointed as Officer in Charge of the Investigation and Detective Superintendent Gordon Urquhart of Northern Constabulary was appointed as Investigating Officer.



20. Grampian Police advised that the alleged offences against Grampian Police officers were criminal in nature. Therefore, in the first instance, Northern Constabulary carried out an investigation and produced a report that looked into the alleged criminal offences. This report was passed to the Area Procurator Fiscal's Office to decide whether criminal charges should be laid. After considering the report and seeking advice from Crown Counsel, the Area Procurator Fiscal intimated that proceedings would not be instigated.
21. Following the decision from the Area Procurator Fiscal that criminal proceedings would not be instigated, Northern Constabulary then investigated the alleged misconduct offences. A second report was produced. This Report was referred to the Deputy Chief Constable of Grampian Police. Grampian Police advised that no action had been taken against the individual officers in respect of the misconduct charges. However, Northern Constabulary had made a series of recommendations relating to Grampian Police's procedures and the handling of the original investigation. I understand that these recommendations were accepted by Grampian Police.
22. Grampian Police advised that the findings of Northern Constabulary and its recommendations were communicated to Mrs Gordon by the Deputy Chief Constable of Grampian Police on 31 January 2005. I understand that Mrs Gordon also met with Grampian Police and Northern Constabulary officers to explain the situation to her.
23. Grampian Police advised that each Report refers to documents contained within the six files. Grampian Police are of the view that the two Reports could not be read without referring to the information within the files and therefore considered that the two Reports and the information within the six files together constituted the "Report" of the investigation carried out by Northern Constabulary and, as a consequence, the information requested by Mrs Gordon. However, Grampian Police sought my guidance on this point. I will address the content of the investigator's report and the scope of this investigation in my analysis and findings below.
24. Grampian Police also supplied copies of their internal review of the request for information. The memorandum from the Information Disclosure Manager to the Chief Superintendent Ewan Stewart, who was responsible for carrying out the internal review, set out Grampian Police's views on the application of the exemptions.
25. This memorandum confirmed Grampian Police's view that Mrs Gordon acts with the full authority of her son. It also advised that Mrs Gordon made a subject access request (under section 7 of the DPA) to Northern Constabulary for sight of these reports but had, at that time, made no request to Grampian Police under the DPA. Mrs Gordon was reportedly in dialogue with the Data Protection Officer at Grampian Police about her rights under that legislation, but I understand that no formal request has been made.



26. As noted above, Grampian Police are relying on a series of exemptions to withhold the information requested by Mrs Gordon:

Section 30(b)(i), section 30(b)(ii) and section 30(c) *Prejudice to effective conduct of public affairs*

Section 34(1)(a) and (b) *Investigations by Scottish public authorities and proceedings arising out of such investigations*

Section 34(3) and section 34(4) *Investigations by Scottish public authorities and proceedings arising out of such investigations*

Section 35(1)(g) (read in conjunction with section 35(2(b))) *Law enforcement*

Section 38(1)(a) and section 38(1)(b) *Personal information*

27. I will set out Grampian Police's detailed submissions in my Analysis and Findings below.

Submissions from Mrs Gordon

28. In her application to me, Mrs Gordon set out a number of reasons why she considers the exemptions cited by Grampian Police do not apply. She was of the view that disclosure of the report would not substantially prejudice the administration of justice but would, in fact, have the opposite effect. She considers that it is in the interests of justice for her to receive a copy of report.
29. Mrs Gordon understands that the Report she requested was not designed with criminal prosecution in mind as the Area Procurator Fiscal had already decided that no criminal action was to be taken against Grampian Police officers. She does not accept that the information is pertaining to legal proceedings.
30. Mrs Gordon has intimated that she would not wish to receive any personal information subject to DPA. She has indicated that she would be content for any such personal information to be withheld as she simply wishes to see the report as it pertains to the internal workings of Grampian Police investigation.
31. She has advised that Grampian Police had been reluctant to provide her with information about this case, even the name of the person in charge of the enquiry.



32. In subsequent correspondence, Mrs Gordon supplied my Office with correspondence she had had with Her Majesty's Chief Inspector of Constabulary (HMIC). This letter sets out her concerns about the trial itself, but also about the subsequent inquiry by Northern Constabulary. She expresses her concerns that no action was apparently taken in respect of the allegations of misconduct. It is clear that Mrs Gordon considers there are unanswered questions in respect of the inquiry by Northern Constabulary and the reasons why certain conclusions were reached.
33. Mrs Gordon also made further submissions in respect of the public interest in relation to this information. Mrs Gordon indicated that it would be in the public interest for this report to be made public. She indicated that she had recovered information under FOISA and the testimony of the officers involved and was concerned that various facts in the Northern Constabulary report were inaccurate. In particular, she wishes to establish whether:
 - a) Grampian Police furnished Northern Constabulary with false information or
 - b) Northern Constabulary were not provided with all the facts or
 - c) Northern Constabulary were deliberately misleading in the reasons given for Grampian Police Officers' failure to carry out their statutory duties.
34. In subsequent correspondence Mrs Gordon gave a specific incidence where she felt Grampian Police had given her false information which related to blood tests taken at the time of her son's arrest.
35. Mrs Gordon also raised concerns about discrepancies between the evidence given at court and the information Grampian Police had recently supplied to the Scottish Criminal Cases Review Commission (SCCRC) in relation to the forensics undertaken.
36. Mrs Gordon considers that it is essential for this Report to be made public, not only for the relevance to her son's case, but in the interests of justice for the general public at large.
37. In considering this application I have taken into account all submissions made by the applicant and the authority.

Commissioner's analysis and findings

Scope of the information

38. Mrs Gordon requested the "Report produced by Northern Constabulary into the complaints made by her and her son against officers at Grampian Police."



39. Grampian Police advised that Mrs Gordon and her son had made a number of complaints against officers at Grampian Police in respect of the original investigation and subsequent conviction of Mrs Gordon's son. Under the 1996 Regulations Grampian Police asked Northern Constabulary to carry out an investigation and prepare a report into the allegations against Grampian Police officers involved. As the allegations were criminal in nature, the initial report prepared by Northern Constabulary was sent to the Area Procurator Fiscal. The second report, which reproduced and summarised some content from the earlier report, addressed the issues of misconduct and was sent to the Chief Constable of Grampian Police.
40. Grampian Police supplied my Office with six files containing information retained and gathered as part of the Northern Constabulary investigation. This information includes the statements obtained during the original Grampian Police investigation of Mrs Gordon's son, statements taken for the purposes of Northern Constabulary investigation, various correspondence and other associated documents. Grampian Police submitted that the information requested by Mrs Gordon comprised both Reports and all associated documents contained in the six files.
41. The Report to the Procurator Fiscal ("the First Report") sets out the information considered as part of the investigation. It lists the statements, witnesses, all correspondence and other associated documents. The Report then summarises each complaint made, the key evidence and the observations of the investigating officer. Grampian Police advised that all information listed in the Report and contained within the six files would have been supplied to the Area Procurator Fiscal for his consideration.
42. In determining the scope of this investigation and whether the "Report" includes all associated documents, I have looked at the guidelines produced by the Lord Advocate on the investigation of complaints against Grampian Police. These guidelines set out the process to be followed in such cases. They also include an Appendix to the guidelines (Appendix A) which sets out the format of the Report to the Procurator Fiscal and the headings that should be included in the report. It is clear from this document that the Report should include all witness statements and relevant enclosures.
43. My understanding is that the documents contained within the six files are appendices to the main report and therefore, as such, are part of the First Report.



44. In her submissions to me, Mrs Gordon emphasised that the Report she was seeking was not that sent to the Area Procurator Fiscal but the investigation into the charges of misconduct. In reality, the second report produced by Northern Constabulary into the allegations of misconduct ("the Second Report") cannot be separated from the First Report and accompanying documents. The Second Report derives most of its content from the Report to the Area Procurator Fiscal with the exception of the findings of Northern Constabulary and its recommendations in respect of the allegations of misconduct. Most of the statements and evidence discussed are those referred to in the First Report and are derived from the associated documents contained within the six files.
45. Therefore, I am satisfied that, for the purposes of this investigation, the "Report" requested by Mrs Gordon is not simply the summary of evidence, analysis of this evidence and comments of the Investigating Officer (the First and Second Reports) but all documents contained in the six files supplied to my Office.

Content of the information requested

46. I consider it helpful to set out the content of the reports (incorporating the documents within the six files) in order to clarify the scope of the information sought by Mrs Gordon.
47. The Report to the Area Procurator Fiscal contains the following:
- a) Statements from the original investigation into the conduct of Mrs Gordon's son
 - b) Statements obtained in the course of the Northern Constabulary investigation
 - c) Associated documents (File 1): Documents 1 to 36 are various documents relating to the original investigation into Mrs Gordon's son. The remaining documents (Documents 37 to 50) primarily relate to Mrs Gordon's complaints about the handling of the investigation
 - d) Associated documents (File 2): Further documentation relating to Mrs Gordon's complaints about the handling of the investigation
 - e) Associated documents (File 3) relating to connected allegations.
 - f) Interview tapes and police notebooks
 - g) Correspondence (primarily between the complainers or on their behalf and Grampian Police (Grampian Police and Northern Constabulary)
 - h) Brief information about the officers complained against
 - i) Brief information about the complainers and the complaint
 - j) Procedural history



- k) In each case, the report sets out the complaint, the observations on the complaint and the Investigating Officer's comments. The observations will often summarise the relevant evidence.
48. The Second Report, which addresses the allegations of misconduct, contains the following content:
- a) The report refers back to the full report (the First Report) and then reproduces much of the text. The Report lists the information considered, the nature of the complaints, the officers complained against and the procedural history.
 - b) The terms of reference and the remit are set out.
 - c) Each complaint is addressed and, where appropriate, recommendations made. Often the report will refer back to the observations and findings contained in the First Report.
 - d) The report ends with a conclusion and lists the recommendations.
49. I consider it helpful to clarify the format of the Second Report. This Second Report is in the format of a memorandum from Chief Inspector Andrew MacLean, Head of Professional Standards & Conduct Unit, at Northern Constabulary to the Deputy Chief Constable of Northern Constabulary. A supplementary memorandum was produced by Chief Inspector MacLean to address further matters that Mrs Gordon had raised following her meeting with Deputy Chief Constable Garry Sutherland and Detective Superintendent Urquhart.
50. In commenting on the issues of misconduct Chief Inspector MacLean has incorporated many of the findings of Detective Superintendent Urquhart in the First Report. I understand that the Investigating Officer in this case was Detective Superintendent Urquhart. However, it seems to me that Chief Inspector MacLean was also acting in this role to some extent in respect of the misconduct issues.
51. Unless stated otherwise the Second Report comprises both memoranda.
52. Deputy Chief Constable Sutherland forwarded both the Second and First Reports to the Deputy Chief Constable of Grampian Police.
53. For the sake of completeness, I have considered the relevant content of Grampian Police notebooks listed in the First Report and I am satisfied that the information they contain is reproduced in the statements of either witnesses or officers.



Information already supplied to Mrs Gordon

54. Grampian Police advised my Office that Mrs Gordon had received a detailed letter from Grampian Police following the completion of Northern Constabulary's investigation explaining the findings of the enquiry. Grampian Police subsequently supplied my Office with a copy of this letter which was sent on 31 January 2005 and runs to 30 pages. In each case, the Deputy Chief Constable of Grampian Police summarises the complaint, provides a summary of the evidence considered, the findings and recommendations of the Investigating Officer and whether or not these recommendations have been accepted by Grampian Police. Many of the recommendations made by Northern Constabulary are procedural and have been accepted by Grampian Police.
55. I mention this because it means that, in reality, Mrs Gordon has already received a significant amount of information from both Reports. I have compared the content of this letter with the subsequent report on misconduct and a significant amount of information contained within this report has already been supplied to Mrs Gordon.
56. I have also compared this letter to the Report to the Area Procurator Fiscal. Again, a significant amount of the information in the summary report appears in the letter. It is perhaps unfortunate that Grampian Police did not make Mrs Gordon aware of this when she first made her request for information. I assume that this information was supplied to her as complainer and not in response to an information request under FOISA. However, I consider it would have been helpful to explain to Mrs Gordon the amount of information she had already received. Mrs Gordon's request was for information (rather than a document) and, in the circumstances, it would have been helpful to indicate the amount of information she already possessed.
57. It is worth emphasising at the outset that in considering this request for information, I must consider whether the information can be released to a member of the public. There may be information that could or should be released to Mrs Gordon (and her son) as complainers in this case and because they are already aware of many of the facts and the identities of the individuals involved. That does not necessarily mean, however, that the information should or could be made available to any member of the public who requests it.

Agreed release of information

58. During the course of the investigation, Grampian Police identified a number of documents they were content to release to Mrs Gordon. The documents are:

Associated Documents: File 1: Document 47: Scottish Home and Health Department (SHHD) Police Circular 7/1985



Associated Documents: File 1: Document 48: Grampian Police Force General Orders – Section 44, page 12

Associated Documents: File 1: Document 49: Chief Constable Memorandum 27/99 dated 21 July 1999 – Investigation of Rape and Sexual Offences

Associated Documents: File 1: Document 50: Grampian Police Force General Order – Section 47, pages 1 and 2

Associated Documents: File 2: Document 2: Scottish Criminal Law – Crimes against the Persons.

59. Given that Grampian Police are content to disclose the above information to Mrs Gordon it is excluded from my consideration of the exemptions below.

Application of the exemptions

60. Grampian Police have relied on a number of exemptions to withhold the information requested by Mrs Gordon. I will consider the application of each of these in turn. I should emphasise that Grampian Police have not indicated to which part of the information each exemption relates but have applied all exemptions to all information withheld.
61. I have considered initially the application of the absolute exemptions cited by Grampian Police, that is sections 38(1)(a) and (b) and then gone on to consider the application of those exemptions which are subject to the public interest test required by section 2(1)(b) of FOISA.

Application of Section 38(1)(a) – information relating to Mrs Gordon and her son

62. Grampian Police relied on section 38(1)(a) to withhold certain information. Grampian Police submitted that the content of the Investigator's Report will contain much personal data of which Mrs Gordon (or her son) is the data subject. Section 38(1)(a) of FOISA states that information is exempt information if it constitutes personal data of which the applicant is the data subject. This is an absolute exemption under FOISA in that it is not subject to the public interest test contained in section 2(1)(b) of FOISA.
63. The definition of "personal data" is contained in section 1(1) of the DPA (and is set out in the Appendix). The definition is subject to the interpretation contained in *Durant v Financial Services Authority* [2003] EWCA Civ 1746. In this decision, the (English) Court of Appeal held that if information is to be viewed as personal data, the information has to be biographical in a significant sense, i.e. go beyond the recording of the individual's involvement in a matter or event that has no personal connotations. The individual also has to be the focus of the information, rather than some other person with whom that individual may have been involved. The Court of Appeal summarised these two aspects as information affecting a person's privacy, whether in his personal or family life, business or professional capacity.



64. As a result, section 38(1)(a) will apply to any personal information that relates to Mrs Gordon and her son, given Grampian Police's understanding that Mrs Gordon is acting on his behalf. (Mrs Gordon is seeking access to personal information of which she is the subject. She is also acting as her son's agent, and so is in the same position as her son would be if he were making an information request on his own behalf.) This means that any personal information supplied by Mrs Gordon or which otherwise relates to her or her son will be exempt from FOISA will fall outwith the scope of this investigation. In such cases, the applicant can seek access to this information under section 7 of the DPA. Section 38(1)(a) will not only apply to the submissions made by Mrs Gordon and her son but to any information in the witness statements that relates to them. For example, as stated above, one file contains correspondence much of which is from and to Mrs Gordon or on her behalf. I would anticipate that most of this information would fall within the scope of section 38(1)(a) in that it would relate to Mrs Gordon and/or her son.
65. As mentioned above, the exemption in section 38(1)(a) is absolute, in that it is not subject to the public interest test required by section 2(1)(b) of FOISA. As a result, I am not required to consider whether the public interest would be better served by the information being released or withheld.
66. During the course of the investigation, Mrs Gordon and her son indicated that they gave full consent for all information about them to be disclosed. Unfortunately, the position is slightly more complicated than this. Section 38(1)(a) exempts entirely from FOISA information about the applicant. As a result, I do not possess the powers to order release of this information even if I was inclined to do so.
67. While I do not have the powers to order the release of information that relates to Mrs Gordon and her son, I consider that on receipt of Mrs Gordon's request for information Grampian Police should have treated Mrs Gordon's request for information under both FOISA and the DPA. I note that Grampian Police advised Mrs Gordon that she could make a request under DPA but I query whether this extra step was in fact necessary.
68. Unless it had concerns about the true identity of Mrs Gordon and her son, it seems to me that Grampian Police should have dealt with the request under both DPA and FOISA. Where Grampian Police considered that certain information could not be released to Mrs Gordon or her son under DPA then the appropriate exemptions under DPA should have been cited. Where information was refused Mrs Gordon and her son could have raised this matter with the Information Commissioner based in Wilmslow who has responsibility for DPA on a UK-wide basis.



Section 38(1)(b) - information relating to a third party

69. Grampian Police also relied on section 38(1)(b) to withhold the information requested by Mrs Gordon. Grampian Police submitted that the content of the Investigator's Report will contain personal data of other persons. Grampian Police submitted that disclosure of this information would breach the data protection principles, in particular, the first principle which requires personal data to be processed fairly and lawfully.
70. Both reports understandably include information about the officers who are the subject of the allegations and about other witnesses (police officers, expert witnesses and ordinary members of the public). In many cases, this information will relate to a person either because it is information they have themselves supplied or information about them that has been supplied by others. Not only will witness statements contain personal data, but the comments from the Investigating Officer(s) and the recommendations might also contain information which constitutes personal data where it relates to an identifiable individual.
71. I am satisfied therefore that much of the information contained within the reports amounts to the personal data (as defined in paragraphs 63 above) of either the officers who are the subject of allegations or other witnesses in that it is information about their actions, thoughts and opinions.
72. Personal data is exempt from release under section 38(1)(b) of FOISA (read in conjunction with section 38(2)(b)(i)) if the disclosure of the information to a member of the public otherwise than under FOISA would contravene any of the data protection principles contained in the DPA. Grampian Police have argued that, in this case, to disclose the personal data of third parties would breach the first principle of the DPA.
73. The first data protection principle will, in most circumstances, be the most relevant principle to consider. This states that the processing of personal data (such as the release of data in response to a request made under FOISA), must be fair and lawful and, in particular, shall not be processed unless:
 - a. at least one of the conditions in Schedule 2 is met and
 - b. in the case of sensitive personal data, at least one of the conditions in Schedule 3 is also met.
74. The Information Commissioner, who is responsible for enforcing the DPA, has provided guidance (Freedom of Information Act Awareness Guidance No 1) on the consideration of the data protection principles within the context of freedom of information legislation. This guidance recommends that public authorities should consider the following questions when deciding if release of information would breach the first data protection principle:



- a) would disclosure cause unnecessary or unjustified distress or damage to the data subject?
 - b) would the data subject expect that his or her information might be disclosed to others?
 - c) has the person been led to believe that his or her information would be kept secret?
75. In this case, there are different categories of individuals whose personal data are included in these reports:
- a) the officers who are the subject of the allegations
 - b) police officer witnesses involved in the original Grampian Police investigation into Mrs Gordon's son (excluding officers in category a))
 - c) expert witnesses involved in the original Grampian Police investigation
 - d) civilian witnesses (i.e. members of the public) involved in the original Grampian Police investigation
 - e) police officer witnesses called as part of the Northern Constabulary investigation (excluding officers in category a))
 - f) civilian witnesses involved in the Northern Constabulary investigation.
76. In each case the information was gathered from these witnesses in respect of alleged criminal offences, either in respect of the original Grampian Police investigation or in respect of the complaints made against the police officers. I mention this because I consider this must have had an impact on the expectations of these witnesses. I recognise that where allegations of misconduct (as opposed to criminal activity) are alleged the individual's expectation may be different. In those cases, witnesses may expect that the information they provide and information about them could subsequently be raised at a disciplinary hearing. These hearings, I understand, are currently held in private and not open to the public.
77. I consider that information gathered with a view to the instigation of criminal proceedings must raise different expectations. Where a witness to an alleged criminal offence or a person accused of such an offence is asked to provide a statement there must be a reasonable expectation that the information could ultimately end up being disclosed in a court of law. In other words, there must be a reasonable expectation that the information could be revealed in open court.



78. This raises the question of whether an expectation that information might be disclosed in open court is the same as an expectation that information might be supplied to any member of the public who requests it. In my view, it is not. Where information is revealed in the context of court proceedings there are rules and regulations to govern its release and the assumptions that can be drawn from that information. Above all, witnesses and the accused will be given the opportunity to defend that information, explain it, contradict it or attempt to correct inaccuracies. The same protection is not afforded to individuals where this information is released directly to a member of the public.
79. Therefore, in my view, while the individuals contributing to these investigations and subsequent reports may reasonably have expected their information to be disclosed into the controlled environment of the court, I am not satisfied that they would have expected that information to be directly released into the public domain (without it having been first the subject of a court hearing.) Whether this in itself would make disclosure unfair, however, is another matter. In my view, different considerations will apply depending on the type of witness and below I have considered each category in turn.

Personal data of civilian witnesses

80. In respect of information relating to civilian witnesses I consider that, in general, it would be unfair to release information to any member of the public who requests it where that information has not been disclosed in open court. As I said in paragraph 78 above where information is revealed in the context of court proceedings there are rules and regulations to govern its release and the assumptions that can be drawn from that information. Above all, witnesses and the accused will be given the opportunity to defend that information, explain it, contradict it or attempt to correct inaccuracies. The same protection is not afforded to individuals where this information is released directly to a member of the public. While members of the public are not one homogenous group I consider that many individuals who contribute to police investigations would find it distressing to discover that the information they had supplied had been disclosed into the public domain in the absence of a court hearing.
81. The Report requested by Mrs Gordon incorporates all information from the original investigation into her son. As a result, some information will have been discussed in open court during the trial and subsequent appeal. I must therefore consider whether it would be fair to order disclosure of the information disclosed in open court. I am not persuaded that simply because information is disclosed in open court it will automatically be in the public domain. However, I accept that there may be a written record of the hearing and/or judgement accessible to members of the public.



82. I understand that under the Criminal Procedure (Scotland) Act 1995 a transcript of the criminal proceedings at the High Court of Justiciary can be sought from the Clerk to that court on payment of a fee by any person who requests it. Therefore, it would appear that any member of the public could, theoretically, seek this information. In this case, I assume that information contained in the original statements and potentially those made in the course of the Northern Constabulary investigation could also appear in the transcript of the proceedings and in the opinion of the appeal court. However, it does not follow that information revealed in open court will strictly emulate the information contained in the witness statements; the information may be expanded, clarified or not even appear. I therefore take the view that in respect of civilian witnesses it would be unfair to release their statements whether made as part of the original investigation or as part of the subsequent investigation into Mrs Gordon's complaints. Where information contained within these statements was disclosed in open court (and therefore recorded as part of the transcript) or appears in the opinion of the appeal court then I take the view that this information is arguably otherwise accessible under section 25(1).
83. In all the circumstances, I am of the view that it would be unfair to disclose the personal data of civilian witnesses (that is, ordinary members of the public) who contributed to the original Grampian Police investigation and to the subsequent Northern Constabulary investigation. As a result, disclosure of this information would be in breach of the first data protection principle and exempt by virtue of section 38(1)(b).
84. Given that I have accepted that the disclosure of the information would be unfair I have not gone into consider whether disclosure would be unlawful or whether disclosure would meet a condition in Schedule 2 (and, where relevant, 3) to the DPA (see paragraph 73 above).

Personal data of police officer witnesses (not the subject of the allegations)

85. In respect of the personal data of those police officer witnesses who were not the subject of allegations, I consider that there are different considerations in assessing whether disclosure of their data would be unfair. While I have found that the police officers may not have expected their personal data to be disclosed to a member of the public outwith a court of law, I am not satisfied that this in itself would make disclosure unfair. Police officers are required to record and account for their actions as part of their ordinary professional duties. Police officers will be aware that their actions and opinions might subsequently be challenged, not only in a court of law.



86. In general, I do not consider that disclosure of factual information about the professional actions of police officers where no criticism is attached to be unfair. The application of this view to the current request would seem to permit the disclosure of information supplied by the police officers not the subject of the allegations in respect of both the Grampian Police investigation and the Northern Constabulary investigation (with the exclusion of any third party information contained within those statements).
87. However, I consider that the position is slightly more complicated given the remit of the Northern Constabulary investigation. Although Mrs Gordon and her son made complaints against specifically named officers, it is clear that the Northern Constabulary investigation assessed how Grampian Police as a corporate body had handled the original investigation. Indeed, the majority of the recommendations made by the investigating officer address Grampian Police rather than the individual officers. Therefore the statements supplied by all police officers about their own actions during the Northern Constabulary investigation could have led to criticism and a finding of possible misconduct. Therefore I take the view that the disclosure of information supplied by all police officers during the course of the Northern Constabulary investigation would generally be unfair in that their own actions might also become of the subject of criticism and comment.
88. I take the view that where public sector staff are the subject of a complaint and/or disciplinary action that some protection must be afforded to the information they supply about themselves as part of that process. Of course, there may be circumstances where information relating to them, whether that is information they themselves supply or findings and conclusions about their actions, can be disclosed. However, such disclosure should be made within well-defined parameters and made strictly on a case by case basis. I will address this matter further below in respect of the officers who are the subject of the specific allegations made by Mrs Gordon and her son.
89. I take the view that disclosure of information supplied by the officers about themselves during the Northern Constabulary investigation will necessarily have an impact on my assessment of the information supplied by these officers during the original Grampian Police investigation. As I said above, ordinarily it seems to me that disclosure of factual information about the actions of police officers would be fair. I consider, however, that this position will be altered where those actions subsequently come under criticism. In such cases, the information would fall into the same kind of information as that supplied by the officers during the Northern Constabulary investigation. In this particular case and given its individual circumstances, I am of the view that the release of information relating to the police officers who are not the subject of the specific complaints made by Mrs Gordon and her son would be unfair and therefore contrary to the first data protection principle.



90. Given that I have accepted that the disclosure of the information would be unfair I have not gone into consider whether disclosure would be unlawful or whether disclosure would meet a condition in Schedule 2 (and, where relevant, 3) to the DPA (see paragraph 73 above).
91. I appreciate that some information relating to these police officers might have been disclosed in open court and form part of the transcript of proceedings. As I stated above, however, it does not follow that information revealed in open court will strictly emulate the information contained in the witness statements; the information may be expanded, clarified or not even appear. Where information contained within these statements was disclosed in open court (and therefore recorded as part of the transcript) or appears in the opinion of the appeal court then I take the view that this information is arguably otherwise accessible under section 25(1).

Personal data of expert witnesses

92. The original investigation by Grampian Police includes information supplied by expert witnesses. The content of statements from expert witness is likely to vary. In some cases, a witness may record the nature of their expertise and simply offer factual information relating to the investigation. In other cases, witnesses may offer their expert opinion. Such statements may incorporate not only the personal data of the expert witness but also that of a third party forming the subject of the investigation or examination.
93. Where an expert witness simply records factual information, I have generally found that it would be both fair and lawful to disclose information relating to them (as opposed to any third party data). Expert witnesses who provide a statement as part of a criminal investigation must expect that information supplied by them might be disclosed in a court of law. I am of the view that, unlike civilian witnesses, expert witnesses would not have the same concerns were such information disclosed to a member of the public outwith a court of law. Such witnesses may provide expert opinion in a whole range of settings and may have little control over the dissemination or subsequent use of this information. In the circumstances, I do not consider that release of their personal data would normally be unfair. However, the decision to disclose this data will need to be made on case by case basis and will be dependent on the content of the statement, the nature of the information, its relative sensitivity and the extent to which it discloses personal data of the expert witness. In some cases, this information will not be disclosed because it cannot be disconnected from third party data.



94. While I have generally found that disclosure of information relating to expert witnesses will be fair, I accept that there may be other reasons why this information should not be disclosed under FOISA. Therefore I will only go on to consider whether a condition in Schedule 2 (and, where relevant, 3) can be met if I consider that this information is not exempt by virtue of any other exemption cited by Grampian Police.

Personal data of police officers the subject of these allegations

95. Finally, I need to consider whether disclosure of the personal data of the officers who were the subject of the allegations would breach the first data protection principle. The personal data of the officers will be contained in their original statements made as part of the Grampian Police investigation and the information they supplied about their actions as part of the Northern Constabulary investigation. Statements from other witnesses also contain information about these officers' actions as do the comments and findings of the Investigating Officer(s). I mention this to emphasise the extent of the information relating to the officers which forms the content of the reports. I understand that it is this information that is of particular interest to Mrs Gordon and unfortunately, as I will explain, the most problematic.
96. As previously stated, I have concluded that the Grampian Police officers are unlikely to have expected that information about their actions during the original investigation to be supplied to a member of the public outwith formal court proceedings. However, I have also stated that given the professional duties of police officers that this in itself would not make disclosure unfair. I have above distinguished between factual information recorded by police officers during the course of an ordinary criminal investigation and information relating to a subsequent investigation or complaint about their actions. I have also taken the view that where public sector staff are the subject of a complaint or disciplinary action that some protection must be afforded to the information they supply about themselves as part of that process. I accept, however, that there may be circumstances where information relating to police officers in such cases, whether that is information they themselves supply or findings and conclusions about their actions, can be disclosed. However, such disclosure should be made within well-defined parameters and made strictly on a case by case basis.



97. A key factor in considering whether disclosure is fair will be the respective ranks of the officers. The Information Commissioner has issued guidance (Data Protection Technical Guidance: access to information about public authorities' employees) on disclosure of personal information about employees. His view is that public sector employees working in an official capacity should, depending on their seniority and the nature of their jobs, expect to be identified in relation to their professional activities and (if sufficiently senior) subject to greater levels of public scrutiny than those in more junior roles: this helps to ensure greater levels of accountability for senior staff. He has also indicated that, in assessing fairness, the first and paramount consideration must be the consequences that disclosure (as a form of processing) would have for the interests of the data subject.
98. The rules governing investigations into alleged misconduct by police officers distinguishes between officers of senior rank and those of junior rank. The Police (Conduct) (Senior Officers) (Scotland) Regulations 1996 and 1999 set out the process in respect of allegations of misconduct made against senior officers. The regulations define "senior officers" as a Chief Constable or Assistant Chief Constable. In this current case, none of the officers against whom the allegations were made are "senior officers" as defined by the regulations.
99. I consider that senior officers may have different expectations in respect of their own information where this relates to allegations of misconduct. Arguably, senior officers must expect a greater level of public scrutiny of their actions. The extent to which information should be disclosed to meet this enhanced requirement for scrutiny and transparency will again need to be decided on a case by case basis. A distinction may need to be drawn between the summary findings and conclusions of the Investigating Officer and the detailed witness statements of the officers.
100. In this case, I am of the view that the officers would not have expected information about their alleged misconduct to enter the public domain in a case where there was no subsequent disciplinary hearing or criminal proceedings. Further, given all the circumstances of the case and particularly given the rank of the officers I am not satisfied that disclosure of their personal data would be fair.
101. In any event, there are additional considerations in respect of the personal data of those officers the subject of the complaints. In the first instance, these officers were investigated for alleged criminal offences and a report was sent to the Procurator Fiscal. As a result, their personal data is afforded even greater protection by the DPA.



102. Section 2 of the DPA defines certain categories of personal information, such as information about a person's physical and mental health, as being "sensitive personal data". A further category of "sensitive personal data" is personal data consisting of information as to the commission or alleged commission by the data subject of any offence. Given that the police officers were initially investigated for offences of a criminal nature, information about them in respect of this investigation would fall within the definition of "sensitive personal data".
103. At least one of the conditions in each of Schedule 2 and Schedule 3 of the DPA must be satisfied before processing of sensitive data can be considered to be fair and lawful. I have considered the conditions in Schedule 3 first as they are generally more restrictive than the conditions in Schedule 2.
104. I have looked carefully at the conditions in Schedule 3 to the DPA and have been unable to identify a condition that would justify disclosure of sensitive personal data in this case.
105. Given that I am satisfied that the release of the sensitive personal data would be unfair and that there is no condition in Schedule 3 of the DPA to permit the processing of the information, I must find that the processing would breach the first data protection principle.
106. I consider it worth emphasising the extent of the application of this exemption. This exemption would not only apply to the names of the officers against whom the allegations have been made (and other individuals against whom allegations have been made) but would include information about their actions whether that is supplied by the officers or by other witnesses. In effect, this exemption will apply to most, if not all, information supplied in their witness statements. This is because, in this case, the allegations were of a criminal nature and were not confined to matters of misconduct. As previously stated, the interviews and statements, although subsequently considered in respect of the misconduct charges, were originally created in respect of the criminal charges. I make this point because it means that this situation will apply only where allegations against officers are criminal in nature.
107. Mrs Gordon indicated in her submissions to me that she would be content for any personal data to be extracted. The nature of the information is such, however, that simple redaction of the names of the officers or witnesses would not automatically prevent them from being identifiable.

Application of sections 34(1)(a)(i), 34(1)(a)(ii) and 34(1)(b)

108. Grampian Police also relied on sections 34(1)(a)(i), 34(1)(a)(ii) and section 34(1)(b) to withhold the information requested. Section 34(1)(a) and (b) state that:



- (1) Information is exempt information if it has at any time been held by a Scottish public authority for the purposes of-
 - (a) an investigation which the authority has a duty to conduct to ascertain whether a person-
 - (i) should be prosecuted for an offence; or
 - (ii) prosecuted for an offence is guilty of it;
 - (b) an investigation, conducted by the authority, which in the circumstances may lead to a decision by the authority to make a report to the procurator fiscal to enable it to be determined whether criminal proceedings should be instituted.
109. Grampian Police submitted that part of the report was to the Area Procurator Fiscal to establish whether police officers had committed any acts of a criminal nature. It submitted that, even though the case had been disposed of and no longer carried the risk of any particular proceedings being prejudiced by disclosure of the Report, this information should not be released. In support of this statement, Grampian Police cited Lord President Cooper in the 1952 case of McKie v. Western Scotland Motor Traction Company (1952 SC 206) who stated that “The only method of securing absolute candid freedom in the making of such reports.. is an absolute guarantee against publication.”
110. Grampian Police submitted that disclosure would impair the supply of frank and candid information to the Procurator Fiscal on the basis of which decisions to institute criminal proceedings are made. Grampian Police referred to the comments of Jim Wallace, the then Justice Minister, during the Parliamentary debate on this legislation (see paragraph 123 below).
111. The First Report by Northern Constabulary was produced as a result of an investigation into allegations of criminal offences made by Mrs Gordon and her son in respect of named officers. The content of this report is described above and includes not only a description of the complaints, the identities of the complainers and information about the officers complained about but includes all information listed in paragraph 47 above.
112. The First Report contains information obtained for the purposes of the investigation into the actions of Mrs Gordon's son and information obtained for Northern Constabulary investigation. All of this information was subsequently sent to the Area Procurator Fiscal to determine whether criminal proceedings should be instigated against the officers. Therefore, I am satisfied that all information contained in the First Report (and within the six files) was held for the purposes of establishing whether a person should be prosecuted for an offence or for determining whether that person was guilty of that offence.



113. As I have said previously, much of the information contained within the Second Report is derived from the First Report. The exception to this is certain comments and recommendations made by the Investigating Officer which, understandably, focus on the issues of misconduct.
114. Section 34(1)(a) and (b) are class exemptions. That means that if information falls within the description set out in these sections I am obliged to accept it as exempt. There is no harm test; I am not permitted to consider whether disclosure would substantially prejudice an interest or activity, nor am I permitted to consider the effect of disclosure.
115. Therefore I find that all of the information contained within the First Report and a significant amount of information contained within the Second Report is exempt by virtue of section 34(1)(a) and (b).
116. Section 34(1) is subject to the public interest as set out in section 2(1)(b) of FOISA, however. Therefore, I am required to consider whether, in all the circumstances of the case, the public interest in disclosing the information is outweighed by the public interest in maintaining the exemption. For the sake of clarity, at this stage I am only considering information that falls within the scope of section 34(1).

Arguments in favour of release on public interest grounds

117. In Decision 038/2006 Mr T and the Chief Constable of Grampian Police I recognised that:

there is a general public interest in releasing information that may lead to an increase in accountability and scrutiny of a public official's actions.
118. In respect of this particular request, Mrs Gordon has advanced a number of arguments in support of release on public interest grounds. Given that Mrs Gordon and her son initiated the complaints, I can understand their desire to understand fully why no further action was taken against the officers, not simply that no action was taken. Mrs Gordon has concerns about the accuracy of the information supplied by the officers during the investigation. She is unable to challenge this, however, without having access to this information. She considers that if there is nothing to hide on the part of Grampian Police then there is no reason for the information to be withheld.
119. Mrs Gordon has raised a number of specific matters where she considers there to be discrepancies between the conclusions conveyed to by Northern Constabulary and information contained in the trial transcripts and information that has subsequently come to light as a result of the parallel examination by SCCRC.



120. I have real sympathy with Mrs Gordon's desire to see the Report of the investigation. Grampian Police have acknowledged that there were a number of procedural shortcomings with the investigation and it has consequently accepted the recommendations made on each of these points by Northern Constabulary.
121. A key purpose of freedom of information legislation is to provide information about why decisions are reached and the information on which these decisions are based. Disclosure of the Investigator's Report in this case would provide this information.
122. However, Mrs Gordon has already been supplied with some information about the investigation. She has been provided with a summary of the evidence considered, the analysis of the evidence by the Investigating Officer(s) and the recommendations. Therefore, Mrs Gordon is actually seeking access to the detail of the evidence obtained and considered. Some of this, of course, will be derived from the original investigation into the original offence.

Arguments in favour of withholding the information on public interest grounds

123. On the other hand, I am also aware of the concerns surrounding disclosure of this kind of information. Grampian Police referred to the views expressed by Jim Wallace, the then Minister for Justice, during the Parliamentary debates on the Freedom of Information (Scotland) Bill. I consider it helpful to set these out in full. Jim Wallace argued that there were considerations relating to the presumption of innocence, the privacy and reputation of witnesses and informants, the effective conduct of prosecution and investigations and the role of the criminal proceedings as the forum for bringing information into the public domain. He went on to say:

We are concerned that witnesses and persons under investigation should not be subject to the risk of trial by media without any protection, as could happen if information became freely available. We should not disturb arrangements that ensure the confidentiality, privacy, and reputation of witnesses and the presumption of innocence of accused persons.

124. I have also considered the views of the Parliamentary Ombudsman, who until January 2005, had responsibility for considering applications where information had been withheld under the *Code of Practice on Access to Government Information*. In *Case No.A.36/99* which concerned the refusal to release an immigration officer's investigation report she stated:

There is a clear need for freedom of communication both internally and between bodies of the criminal justice system about the subjects of criminal investigations and about the nature of enforcement action.



125. The Lord Advocate's written submission to the Justice 1 Committee during the Parliamentary Debates addressed the information that might be supplied to victims of crime. He indicated that the long standing policy of the Crown not to provide reasons for decisions not to initiate proceedings was based upon the fact that statements and reports are confidential. However, he stated that the Crown Office and Procurator Fiscal Service was sympathetic to victims who might wish for more information for reasons for decisions taken by the Crown and that there might be situations where information could be made available, in private, to victims of crime.
126. I recognise that Mrs Gordon considers that a miscarriage of justice has occurred and that she is seeking this information in an effort to clear her son's name. I also recognise that she is unable to accept the conclusions of the Northern Constabulary Investigation where she remains suspicious of the information supplied by Grampian Police officers in their statements and therefore to the Investigating Officer. On the other hand, I am mindful of the arguments made by the former Minister for Justice and the Lord Advocate. I can foresee that if I were to release this Report, which includes the witness statements and the transcripts of interviews, that the alleged guilt of the officers may become a matter of public speculation.
127. I am also aware that there are alternative avenues to pursue where an individual considers that a miscarriage of justice has occurred. In the first instance, the Investigator's Report and all relevant enclosures were sent to and considered by the Area Procurator Fiscal. On the advice of Crown Counsel, no proceedings were instigated. Secondly, a conviction can be appealed. I understand that Mrs Gordon has also submitted the case to the SCCRC and that the SCCRC is actively reviewing the case. Needless to say, the SCCRC has wide powers to access information in order to allow it to review cases.
128. The SCCRC's role is to review and investigate alleged miscarriages of justice in relation to conviction or sentence where the convictions or sentences were imposed by a Scottish Court (the High Court, the Sheriff Court and the District Court). The SCCRC is not limited to examining materials which have already been considered at either trial or appeal; it can also consider any new evidence which has not been placed before any tribunal and it can actively seek out and obtain new evidence by, for example, tracing and interviewing witnesses and obtaining documents. After a review has been completed, the SCCRC will decide whether or not the case should be referred to the High Court. If it decides to refer a case, the case will be heard and determined by the High Court as if it were a normal appeal.



129. This is a difficult case with strong public interest arguments on both sides. Grampian Police have acknowledged that there is some foundation to Mrs Gordon's complaints in terms of the competency of the investigation. However, I need to consider whether FOISA is the most appropriate instrument for addressing Mrs Gordon's concerns. In particular, it seems to me that I must also take into account the fact that the case is currently being considered by the SCCRC. Against this background, I am conscious that release of information (which includes detailed witness statements, interviews and associated evidence in connection with the original investigation) might actually harm any future proceedings if the SCCRC does decide to refer the case to the High Court.
130. It is also worth noting that I have already accepted that certain information relating to the police officers against whom the allegations have been made will amount to their sensitive personal data and therefore cannot be released. I understand that the information that Mrs Gordon really wishes to see are the statements made by the officers to the Northern Constabulary investigators. However, I have already found this information to be exempt in terms of section 38(1)(b) of FOISA. The exemption in section 38(1)(b), read in conjunction with section 38(2)(a)(i) or 38(2)(b) is an absolute exemption, in that it is not subject to the public interest test. Therefore, even if I did consider that the public interest demanded that this information should be released, the information that Mrs Gordon really wishes to see would still be exempt and could not be disclosed.
131. I am aware, of course, that some information covered by this exemption will already have been disclosed in open court, i.e. where the information relates to the investigation and subsequent conviction of Mrs Gordon's son. However, I am not satisfied that simply because some information has been revealed in open court and therefore recorded in the transcript that all information held as part of that original investigation and all information held as part of the Northern Constabulary investigation should be disclosed. It is also worth noting that some information forming part of the original investigation will not have formed part of the subsequent proceedings, in some cases, as a result of advice from the Procurator Fiscal. I consider that it would be a substantial step to release information into the public domain gathered as part of a criminal investigation which did not form part of the subsequent proceedings. In my view, where there are concerns about the investigation and/or trial there are more appropriate instruments to employ to challenge this, the SCCRC being a prime example.



132. Applications involving an overlap between FOISA and the criminal justice system will often be complex. In this particular case, having considered all of the circumstances I am of the view that the public interest in disclosing the majority of this information to be outweighed by the public interest in maintaining the exemption. This information includes the detail of the original Grampian Police investigation and the detailed information supplied by witnesses during the Northern Constabulary investigation.
133. However, I consider that some information can be released on the basis that the public interest in disclosure is not outweighed by the public interest in withholding it. This is information which concerns the procedure followed by Grampian Police and Northern Constabulary in investigating Mrs Gordon's and her son's complaints, general information about the evidence considered and obtained during the course of the investigation and the investigating officer's comments in respect of the general procedural matters and shortcomings that have been incorporated into the Second Report. This is information which appears in the First Report and makes up a significant part of the Second Report. For the avoidance of doubt this excludes all personal data of officers and witnesses.

Section 34(3) – Investigations by Scottish public authorities

134. Grampian Police also applied the exemption in section 34(3) of FOISA to the information requested by Mrs Gordon and her son. This exemption has four strands to it:
- (i) the information must have been obtained or recorded for the purposes of an investigation;
 - (ii) the investigation must have been carried out by virtue of Her Majesty's prerogative or under statutory powers;
 - (iii) the investigation must have been conducted by the authority for any of the purposes listed in section 35(2) of FOISA; and
 - (iv) the information must relate to the obtaining of information from confidential sources.
135. Grampian Police argued that confidential sources are essential for the effective management of intelligence operations which are often needed to combat serious crime. Grampian Police argued that it was vital that the means by which such information is obtained is not compromised and that it was essential that where there are any confidential sources of information within an investigating officer's report, these sources should not be revealed as it would totally compromise the method by which information is obtained.



136. I accept that the information requested meets the criteria laid down in points (i) – (iii) above. The power to conduct the investigation is derived from the 1996 Regulations. Grampian Police have stated, and I have accepted, that this type of investigation fulfils the purpose laid down in section 35(2)(c) of FOISA:
- ”to ascertain whether circumstances which would justify regulatory action in pursuance of any enactment exist or may arise;”
137. I discuss this point further in respect of section 35(1)(g).
138. For the exemption in section 34(3) to apply, however, the information withheld must relate to the obtaining of information from confidential sources. However, I take the view that the purpose of section 34(3) is not to protect information gathered from confidential sources, or necessarily the confidentiality of the source itself. It concerns information relating to the obtaining of information from those sources. This is clear from the wording of the section itself, which states that information is exempt if it “*relates to the obtaining of information from confidential sources*” (my emphasis). FOISA could, but does not, state that information is exempt if it was obtained from a confidential source, or if it would disclose the identity of a confidential source. In other words, information is exempt if it is about the process of gathering the information - in other words, if it is “about how such information is gathered, how informants are recruited and how information obtained from confidential sources is transmitted” (from my briefing “Section 34: Investigations by Scottish Public Authorities”).
139. I am satisfied that the information held by Grampian Police in this case and relevant to Mrs Gordon's request for information does not discuss or reveal the process of obtaining information from confidential sources.
140. I therefore do not accept that the information in the content of the Reports is exempt from disclosure under section 34(3) of FOISA.
141. The exemption in section 34(3) is subject to the public interest contained in section 2(1)(b) of FOISA. However, given that I have not upheld the use of this exemption by Grampian Police, I am not required to go on to consider the public interest test or the submissions made by Grampian Police in relation to the public interest.



Application of section 35(1)(g) (read in conjunction with section 35(2)(b))

142. Grampian Police also chose to rely on section 35(1)(g) of FOISA to withhold the information requested by Mrs Gordon. This section states that information is exempt information if its disclosure would, or would be likely to, prejudice substantially the exercise by any Scottish public authority of its functions for any of the purposes listed in section 35(2) of FOISA. Grampian Police chose to rely on the purpose in section 35(2)(b) of FOISA, which is the purpose to ascertain whether a person is responsible for conduct which is improper.
143. Grampian Police have not specified the information to which this exemption applies, i.e., whether it applies to the content of both Reports. Given that information from the First Report was used to identify any misconduct by the named officers (and therefore formed the basis of the Second Report) I accept that this exemption could apply to both Reports (and the enclosures).
144. The exemption in section 35(1)(g) is subject to the public interest test. This means that, when considering the use of section 35(1)(g), I must consider three separate matters in all. First of all, I must consider whether Grampian Police have a function in relation to ascertaining whether a person is responsible for conduct which is improper. If I am satisfied that they do, I must go on to consider whether release of the information would prejudice substantially Grampian Police's ability to exercise this function. Even if I am satisfied that release of the information would prejudice substantially Grampian Police's ability to exercise this function, I must go on to consider whether, in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information. If I find that the public interest would be better served by the information being disclosed, then I must order release of the information.
145. Grampian Police submitted that an investigator's report was covered by this exemption because its purpose was to ascertain whether the person was responsible for conduct which is improper. Grampian Police also submitted that disclosure of its content would prejudice substantially investigations into improper conduct in that it would inhibit the conduct of an enquiry and the obtaining of candid and frank witness statements, and allegations of misconduct. Grampian Police submitted that the level of proof in Discipline Hearings is on the balance of probabilities and therefore lower than the standard of proof required to prove criminal liability.
146. As stated above, investigations into allegations of misconduct by police officers below the level of Assistant Chief Constable are governed by the 1996 Regulations. Given the existence of the 1996 Regulations, I am satisfied that such investigations are a function of Grampian Police in terms of section 35(1)(g) of FOISA.



147. A report prepared under the 1996 Regulations includes the investigator's opinion on the matter under investigation and can offer advice for consideration by Grampian Police on recommended action for dealing with the allegations. Grampian Police have argued that it is essential that officers providing such advice are not inhibited from being frank and candid by fear of reprisal and that Grampian Police are able to take a decision on the basis of the best available advice.
148. In considering the application of section 35(1)(g) an authority is required to demonstrate that disclosure would, or would be likely to, substantially prejudice the purpose identified. There is no definition of "substantial prejudice" in FOISA, but my view is that in order to claim this exemption the damage caused by disclosing information would have to be real or very likely, not purely hypothetical. The harm caused must be significant, not marginal, and it would have to occur in the near future not in some distant time. Authorities should consider disclosing the information asked for unless it would cause them real, actual and significant harm.
149. This exemption needs to be applied to the information the Reports contain rather than to the Reports themselves. Therefore, I need to consider whether disclosure of all information within the Reports would prejudice substantially the exercise of this function. Importantly, the exemption must be applied to the information in this specific case rather than to Investigator's Reports as a class of documents. In making this assessment, I have taken account of the fact that some information considered as part of the investigation will have been disclosed in open court as part of the original trial and would have been obtained for the purposes of the investigation leading up to that trial.
150. I accept that police officers who are the subject of allegations of misconduct must be able to make comprehensive and unreserved statements. Likewise, the same candour is desirable from those who may have witnessed the alleged misconduct. In many cases, therefore, I am likely to find that this exemption applies to the information contained in investigating officer's reports. However, I do not consider that this exemption will apply in every single case. In considering whether police officers would be inhibited in expressing their views, it is necessary to consider the rank of the officers, the nature of the allegations and the circumstances of the case.



151. In this case, the recorded interviews with the officers who were the subject of the allegations go beyond simply recording steps taken during the course of the original investigation. The officers are also asked why they had taken various steps and called on to justify these. I am satisfied that in the circumstances they would be likely to be less free and frank with their statements if they considered that this information would be disclosed into the public domain. Likewise, I am satisfied that, in this particular case, police officer witnesses (i.e. those not the subject of the allegations) are being asked to comment on the actions of their fellow officers. I consider that officer witnesses would be less likely to make unreserved statements in the future if they considered that this information would be disclosed into the public domain. I am satisfied that in this particular case that disclosure of the statements from police witnesses obtained during the course of the Northern Constabulary enquiry from members of the public would or would be likely to prejudice substantially the exercise by Grampian Police of their function under the 1996 Regulations.
152. I accept also that the Investigating Officer, in such cases, must feel able to express freely his or her views on the evidence obtained and indicate whether any misconduct has occurred, particularly where this relates to specified police officers. However, given the seniority of the police officer in charge of the investigation and the responsibility he has in determining whether any misconduct has taken place, I am not convinced that he would be inhibited in recording his findings, conclusions and recommendations particularly where these relate to corporate procedural shortcomings. For instance, information about Grampian Police's performance is regularly published through other channels. Inspection and audit of the way in which a public authority carries out its functions is an accepted feature of modern public life, and constructive criticism is generally accepted by professionals as a positive (if sometimes painful) process by which a body can improve its standard of performance. Northern Constabulary's report is not unique in examining and commenting upon issues relating to the performance of Grampian Police. All Scottish police forces are regularly the subject of reports from HMIC, which comment on good practice and identify areas in which improved performance is required. These reports are available on the Scottish Executive's website.
153. However, I accept that there are differences between these reports and the Northern Constabulary report. This report names names, and focuses much more on the actions of individual officers. But in respect of his advice and recommendations about police procedures and internal organisation, management and communications, I do not accept that disclosure in this case would, or would be likely to, inhibit substantially an officer from making similar recommendations in future.



154. My own view is that, if the information were disclosed, future investigating officers would certainly be aware that information from their own reports might be required to be disclosed, and that it is likely that this would be borne in mind. However, I am not convinced that the inhibition that would or would be likely to occur would be of a substantial nature. Other factors would come into play: for instance, the investigating officer's own commitment to a high quality public service; the increasing recognition that public officials are required to be accountable for their actions; the importance of ensuring that individual complaints are subject to fair and rigorous consideration and the desire of the commissioning authority to obtain an objective assessment of standards of performance.
155. Therefore, I do not accept that disclosure of the conclusions and recommendations of the Investigating Officer(s) in this case would or would be likely to prejudice substantially the exercise of Grampian Police of their function under the 1996 Regulations. However, where the information relates to individual officers accused of misconduct this information will be exempt under section 38(1)(b). For the sake of completeness, I consider the conclusions and recommendations of the Investigating Officer in this case to incorporate the additional findings of Chief Inspector MacLean.
156. As part of the inquiry, Northern Constabulary also interviewed relevant members of the public. I therefore have to consider whether the information supplied by these witnesses is exempt in terms of section 35(1)(g). In considering the application of this exemption, I have taken into account the fact that witnesses are not a homogenous group. Some members of the public may be content for their witness statement to be made public and may have already made clear their views and observations. However, other members of the public may be reluctant to come forward to the police if they find that statements have been released directly into the public domain without first being the subject of a court hearing and the protection that affords. I consider that routine disclosure of witness statements therefore could meet the harm test set out in section 35(1)(g) and I am satisfied that in this particular case disclosure of those witness statements obtained during the course of the Northern Constabulary inquiry from members of the public would or would be likely to prejudice substantially the exercise by Grampian Police of their function under the 1996 Regulations.



157. I do not consider that Grampian Police have demonstrated why all of the information requested in this case is exempt by virtue of section 35(1)(g) given its particular circumstances. In addition to the information discussed above, certain files contain correspondence between Mrs Gordon and Grampian Police. Further, certain information considered as part of the Northern Constabulary investigation are the statements and evidence relating to the original investigation into Mrs Gordon's son, the content of which might have been considered in open court. I am unable to see how disclosure of this information would substantially prejudice the ability of Grampian Police to carry out its function in this case.
158. As mentioned above, both Reports set out the procedure followed by Grampian Police and Northern Constabulary in investigating Mrs Gordon's and her son's complaints. I do not consider that disclosure of information about the procedure followed would substantially prejudice the ability of Grampian Police to carry out its function in this case.
159. In conclusion, therefore, I accept that section 35(1)(g) applies only to the information supplied by witnesses, both police officers and members of the public, during the course of the Northern Constabulary investigation.

Application of the public interest test in respect of section 35(1)(g)

160. Given that I have found that certain information is exempt under section 35(1)(g), I must now go on to consider whether, in all the circumstances of the case, the public interest lies in the information being withheld or released. When considering the public interest public authorities should take matters such as the following into account:
- the general public interest that information is accessible i.e. whether disclosure would enhance scrutiny of decision-making processes and thereby improve accountability and participation;
 - whether disclosure would contribute to the administration of justice and enforcement of the law including the prevention or detection of crime or the apprehension or prosecution of offenders;
 - whether disclosure would contribute to ensuring that any public authority with regulatory responsibilities is adequately discharging its functions;
 - whether disclosure would ensure fairness in relation to applications or complaints, reveal malpractice or enable the correction of misleading claims;
 - whether disclosure would contribute to a debate on a matter of public interest;
 - whether disclosure would prejudice the protection of an individual's right to privacy.



161. In deciding whether a disclosure is in the public interest, authorities should not take into account:
- possible embarrassment of government or other public authority officials;
 - the seniority of persons involved in the subject matter;
 - the risk of the applicant misinterpreting the information;
 - possible loss of confidence in government or other public authority
162. In *Decision 038/2006 Mr X and Grampian Police* I emphasised that I would consider the public interest in releasing Investigator's reports on a case by case basis.
163. The arguments in favour of disclosure on public interest grounds specific to this case are set out above in paragraphs 28 – 37 (Mrs Gordon's own submissions) and then at paragraphs 117 - 121 and I do not intend to repeat these. Grampian Police have commented that it is essential that those people who give statements to police officers carrying out investigations into allegations of misconduct must not be inhibited in any way from coming forward with information which may lead to the rooting out of misconduct or wrongdoing within Grampian Police. They argue that this would limit the effectiveness of such investigations and undermine the public interest in ensuring that vice or wrongdoing in Grampian Police is exposed and rooted out. The fear is that witnesses will be inhibited from being frank and candid if they believe their statements will be made generally available, for fear of reprisals.
164. Having considered arguments both for and against release in the public interest, I am content that there are no additional reasons in respect of the application of the public interest test to section 35(1)(g) which would make me override my conclusions on the public interest in respect of information covered by section 34(1).
165. I am therefore satisfied that in respect of the information which I have found to be exempt under section 35(1)(g) the public interest in disclosure of this information is outweighed by the public interest in withholding it.

Application of section 30(b)(i) and (ii)

166. Grampian Police also relied on section 30(b)(i) and (ii) to withhold the information requested by Mrs Gordon. Section 30(b)(i) and 30(b)(ii) of FOISA allow information to be withheld if disclosure of the information would, or would be likely to, inhibit substantially the free and frank provision of advice or the free and frank exchange of views for the purposes of deliberation, respectively.



167. Grampian Police made a number of submissions in support of its application of section 30(b). Grampian Police argued that disclosure of the content of the Investigating Officer's report would undermine confidence in, and would inhibit substantially, the result and conduct of statutory investigations made under the 1996 regulations. Grampian Police submitted that when a complaint is made against a police officer or there is an investigation into police procedures it is absolutely essential that these enquiries are conducted in such a way that those giving statements to the Investigating Officer must be permitted to do so and not inhibited in any way from coming forward with information which may lead to the rooting out of misconduct or wrong doing within the Police service.
168. Not only does an Investigating Officer's report include the narrative of witnesses, but it can also include the opinion of the Investigating Officer on the matter under investigation and could include frank and free advice or exchange of views for the purpose of advice to the Deputy Chief Constable, who is the receiver of the report, on any recommended action he should take to deal with the allegations under investigation. Grampian Police submitted it was essential that the Deputy Chief Constable should be in the position to take a decision on the basis of the best available advice and providers needed to be confident that the advice is given without reservation or fear of reprisal.
169. In order to rely on section 30(b), the information will normally either amount to an exchange of views (section 30(b)(ii)) or the provision of advice (section 30(b)(i)), given that the authority must demonstrate that future practice in these areas would be substantially inhibited by disclosure.
170. It seems to me from its submissions that Grampian Police are attempting to apply section 30(b) to a class of information rather than the specific information being withheld. In *Decision 41/2005* I indicated that release of internal communications in one case should not be taken to imply that such communications will be "routinely" released in the future. The individual circumstances of each case must be taken into consideration.
171. As I emphasised in that case, advice and expressions of opinion are to be exempt from disclosure only where this would have a substantially inhibiting effect in the future. In assessing the inhibiting effect disclosure might have the authority should consider:
 - a. the subject matter of the advice or opinion,
 - b. the content of the advice and opinion itself,
 - c. the manner in which the advice or opinion is expressed, and



- d. whether the timing of release would have any bearing (releasing advice or opinion whilst a decision was being considered, and for which further views were still being sought, might be more substantially inhibiting than once a decision has been taken).
172. I have already considered, in essence, the “inhibiting” effect that disclosure might have on the free and frank exchange of views or provision of advice in this case in my assessment of the application of section 35(1)(g). After considering all the circumstances I accept that disclosure of information supplied by members of the public and the police officer witnesses in this particular case is likely to inhibit substantially the free and frank provision of views for the purposes of deliberation and provision of advice. However, I do not accept that investigating officers would be inhibited substantially. As I indicated in paragraph 154 above, future investigating officers would certainly be aware that information from their own reports might be required to be disclosed, and that it is likely that this would be borne in mind. However, I am not convinced that the inhibition that would or would be likely to occur would be of a substantial nature.
173. The exemptions in section 30(b)(i) and 30 (b)(ii) are both subject to the public interest test required by section 2(1)(b) of FOISA. Therefore I have gone onto consider whether the public interest in disclosing this information is outweighed by the public interest in withholding it. As previously stated, the information I consider exempt by virtue section 30(b) is the same information I consider to be exempt by virtue of section 35(1)(g). I have considered the arguments for and against disclosure as set out above and, in all the circumstances, I am satisfied that the public interest in disclosing the information is outweighed by the public interest in withholding it.

Application of section 30(c)

174. Grampian Police also sought to rely on section 30(c) to withhold the information requested by Mrs Gordon. Section 30(c) of FOISA allows a public authority to withhold information if it would “prejudice substantially, or be likely to prejudice substantially, the effective conduct of public affairs”.
175. Grampian Police submitted the same arguments in respect of sections 30(b) and (c) and did not seek to differentiate between the two exemptions. As discussed above in paragraphs 166 to 167 their arguments focussed on the inhibiting effect that disclosure might have on the candour of the statements of witnesses and on the investigating officer. I consider I have addressed these concerns above in respect of section 30(b) and do not intend to repeat them here.



176. In order to rely on section 30(c) an authority has to demonstrate that disclosure would “prejudice substantially” the effective conduct of public affairs. The focus therefore is not on “inhibition” as in section 30(b) but rather on some other form of prejudice. Furthermore, section 30(c) exempts information which “would otherwise prejudice substantially, or be likely to prejudice substantially, the effective conduct of public affairs”. The word “otherwise” demonstrates that the exemption was intended to apply to situations other than those covered by the exemptions in section 30(b). I do not consider that Grampian Police has demonstrated or indeed argued how disclosure would “otherwise” substantially prejudice the effective conduct of public affairs aside from the “inhibiting” effect it has submitted and I have partially accepted in respect of section 30(b).
177. In the absence of any further submissions I find that Grampian Police has not demonstrated how section 30(c) applies to this information and therefore do not accept their use of this exemption.

Summary of information that should be disclosed

178. In the course of my analysis and findings I have identified certain information which I consider is either not exempt or can be released on the basis that the public interest in disclosure of this information is not outweighed by the public interest in disclosing it. This is information appearing in the First and Second Reports which constitutes the following:
- a) General information about the nature of the complaints by Mrs Gordon and her son, excluding the personal data of officers and other witnesses, where relevant.
 - b) Procedural information about the process followed by Grampian Police and Northern Constabulary in investigating Mrs Gordon’s and her son’s complaints.
 - c) The comments, observations and recommendations of the Investigating Officer(s) where these relate to general procedural matters and shortcomings. Again, this does not include information which constitutes the personal data of officers or witnesses.
179. All of this information appears in the Second Report and in the circumstances I recommend that the easiest method of supplying this information to Mrs Gordon is to provide her with a redacted copy of this Report. I will supply a copy of the redacted report to Grampian Police along with this decision. For the sake of clarification, this will incorporate the information contained in the First Report which I consider can be released on public interest grounds identified in paragraphs 133 above. The redacted report will only incorporate the first memorandum. I have considered the content of the second memorandum and I am satisfied that it does not include any additional information falling within a) to c) above.



180. I am of the view, that it would be helpful for Mrs Gordon to see the layout of the report and the various steps taken and the general conclusions even if the detail relating to personal data cannot be released. In this way, she will also find that she has actually received almost all of the Second Report in Grampian Police's letter to her of 31 January 2005 (referred to in paragraph 54 above).

Conclusion

181. In summary, therefore, I am satisfied that information relating to Mrs Gordon and her son is exempt by virtue of section 38(1)(a). This information falls outwith the scope of this investigation and instead can be sought under DPA.
182. I am satisfied that information relating to civilian witnesses is their personal data. I am satisfied that release of this information to a member of the public is exempt in terms of section 38(1)(b) (read in conjunction with section 38(2)(b)(i) or section 38(2)(b)) in that it would breach the first data protection principle.
183. I am satisfied that information relating to police officer witnesses (not the subject of allegations) is their personal data. I am satisfied that release of this information to a member of the public is exempt in terms of section 38(1)(b) (read in conjunction with section 38(2)(b)(i) or section 38(2)(b)) in that it would breach the first data protection principle.
184. I am satisfied that information relating to expert witnesses is their personal data. I consider that disclosure of the information relating to these witnesses is likely to be fair given that in most cases they are providing information in accordance with their professional duties and there is no criticism attached to their actions. However, I have found that such information is exempt by virtue of section 34(1)(a) and (b) (see below).
185. I am satisfied that the information relating to the officers complained against constitutes their sensitive personal data. In the circumstances, I satisfied that no condition exists in Schedule 3 to the DPA which would permit disclosure.
186. I am satisfied that all information supplied to the Area Procurator Fiscal, that is, the contents of the First Report and all information contained within the six files is exempt by virtue of section 34(1)(a) and (b). However, I consider that certain information can be released on the basis that the public interest in disclosing the information outweighs the public interest in withholding it. This is information which provides information about the procedural information and the comments of the investigating officer where these relate to general procedural issues.



187. I am satisfied that disclosure of statements from the officers who were the subject of the allegations, Grampian Police witnesses and statements obtained from members of the public by Northern Constabulary during the course of the investigation would, or would be likely to, prejudice substantially the exercise by Grampian Police of their function to carry out an investigation into allegations of misconduct and are therefore exempt by virtue of section 35(1)(g) and by virtue of section 30(b). I consider that the public interest in disclosing this information is outweighed by the public interest in withholding it.
188. I consider that procedural information about the investigation, the comments and recommendations of the investigating officer(s) are not exempt by virtue of section 35(1)(g) nor by virtue of section 30(b). Where these relate to individual officers this information will be exempt by virtue of section 38(1)(b).
189. I consider that Grampian Police has not demonstrated how section 30(c) applies to the information requested.

Manner in which the request for information was handled

190. Finally, I wish to comment on the way in which Mrs Gordon's request was handled by Grampian Police. Grampian Police cited a long list of exemptions applicable in this case. However, Grampian Police did not identify the information to which each exemption related. Further, they did not identify the information covered by the scope of this request. Given its view that it included all information contained within all six files, I would have expected Grampian Police to have set out how the exemptions applied to the information. Wherever possible, I expect authorities to provide a description of the information held. Finally, given that Mrs Gordon had already received information about the investigation in a letter to her, I would have expected Grampian Police to advise Mrs Gordon of this.

Decision

I find that the Chief Constable of Grampian Police (the Police) was correct to withhold some information from Mrs Gordon, but that, in withholding other information from Mrs Gordon (as specified above), the Police breached section 1(1) of the Freedom of Information (Scotland) Act 2002 and, subsequently, failed to comply with Part 1.

A copy of the redacted report (referred to in paragraph 179 above) must be supplied to Mrs Gordon within 45 days of receipt of this decision notice.



Appeal

Should either Grampian Police or Mrs Gordon wish to appeal against this decision, there is a right to appeal to the Court of Session on a point of law only. Any such appeal must be made within 42 days of receipt of this notice.

Kevin Dunion
Scottish Information Commissioner
16 April 2007



Appendix

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.

2 Effect of exemptions

- (1) To information which is exempt information by virtue of any provision of Part 2, section 1 applies only to the extent that –
 - (a) the provision does not confer absolute exemption; and
 - (b) in all the circumstances of the case, the public interest in disclosing the information is not outweighed by that in maintaining the exemption.
- (2) For the purposes of paragraph (a) of subsection 1, the following provisions of Part 2 (and no others) are to be regarded as conferring absolute exemption –
 - (a) section 25;
 - (b) section 26;
 - (c) section 36(2);
 - (d) section 37; and
 - (e) in subsection (1) of section 38 –
 - (i) paragraphs (a), (c) and (d); and
 - (ii) paragraph (b) where the first condition referred to in that paragraph is satisfied by virtue of subsection (2)(a)(i) or (b) of that section.

25 Information otherwise accessible

- (1) Information which the applicant can reasonably obtain other than by requesting it under section 1(1) is exempt information.



30 Prejudice to effective conduct of public affairs

Information is exempt information if its disclosure under this Act-

...

- (b) would, or would be likely to, inhibit substantially-
 - (i) the free and frank provision of advice; or
 - (ii) the free and frank exchange of views for the purposes of deliberation; or
- (c) would otherwise prejudice substantially, or be likely to prejudice substantially, the effective conduct of public affairs.

34 Investigations by Scottish public authorities and proceedings arising out of such investigations

- (1) Information is exempt information if it has at any time been held by a Scottish public authority for the purposes of-
 - (a) an investigation which the authority has a duty to conduct to ascertain whether a person-
 - (i) should be prosecuted for an offence; or
 - (ii) prosecuted for an offence is guilty of it;
- ...
- (3) Information held by a Scottish public authority is exempt information if-
 - (a) it was obtained or recorded by the authority for the purposes of investigations (other than such investigations as are mentioned in subsection (1)) which are, by virtue either of Her Majesty's prerogative or of powers conferred by or under any enactment, conducted by the authority for any purpose specified in section 35(2); and
 - (b) it relates to the obtaining of information from confidential sources.
- (4) Information is exempt information if obtained or recorded by a Scottish public authority for the purposes of civil proceedings, brought by or on behalf of the authority, which arise out of such investigations as are mentioned in subsection (1) or (3).



35 Law enforcement

- (1) Information is exempt information if its disclosure under this Act would, or would be likely to, prejudice substantially-
- ...
- (g) the exercise by any public authority (within the meaning of the Freedom of Information Act 2000 (c.36)) or Scottish public authority of its functions for any of the purposes mentioned in subsection (2);
- ...
- (2) The purposes are-
- ...
- (b) to ascertain whether a person is responsible for conduct which is improper;
- ...

38 Personal information

- (1) Information is exempt information if it constitutes-
- (a) personal data of which the applicant is the data subject;
- (b) personal data and either the condition mentioned in subsection (2) (the "first condition") or that mentioned in subsection (3) (the "second condition") is satisfied;
- ...
- (2) The first condition is-
- (a) in a case where the information falls within any of paragraphs (a) to (d) of the definition of "data" in section 1(1) of the Data Protection Act 1998 (c.29), that the disclosure of the information to a member of the public otherwise than under this Act would contravene-
- (i) any of the data protection principles; or ...
- (b) in any other case, that such disclosure would contravene any of the data protection principles if the exemptions in section 33A(1) of that Act (which relate to manual data held) were disregarded.

Data Protection Act 1998

1 Basic interpretative provisions

- (1) In this Act, unless the context otherwise requires-
- ...
- "personal data" means data which relate to a living individual who can be identified-
- (a) from those data, or
- (b) from those data and other information which is in the possession of, or is likely to come into the possession of, the data controller,



and includes any expression of opinion about the individual and any indication of the intentions of the data controller or any other person in respect of the individual

...

2 Sensitive personal data

In this Act “sensitive personal data” means personal data consisting of information as to –

...

- (g) the commission or alleged commission by [the data subject] of any offence; or
- (h) any proceedings for any offence committed or alleged to have been committed by him, the disposal of such proceedings or the sentence of any court in such proceedings.

Part I of Schedule 1: The data protection principles

- 1 Personal data shall be processed fairly and lawfully and, in particular, shall not be processed unless-
 - (a) at least one of the conditions in Schedule 2 is met, and
 - (b) in the case of sensitive personal data, at least one of the conditions in Schedule 3 is also met.