



Scottish Information
Commissioner

**Decision 059/2007 – Mr David Ferguson and the
Chief Constable of Grampian Police**

Request for investigators' reports relating to the applicant

**Applicant: Mr David Ferguson
Authority: Chief Constable of Grampian Police
Case No: 200501478
Decision Date: 11 April 2007**

**Kevin Dunion
Scottish Information Commissioner**

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Decision 059/2007 – Mr David Ferguson and the Chief Constable of Grampian Police

Request for investigators' reports about the applicant – withheld on the basis of section 30: prejudice to the effective conduct of public affairs – section 34: investigations by Scottish public authorities and proceedings arising out of such investigations – section 35: law enforcement – section 36: confidentiality- section 38: personal information – Commissioner partially upheld the Chief Constable of Grampian Police's reliance on the exemptions in sections 35 and 38 for withholding information.

Facts

Mr Ferguson submitted an information request to the Chief Constable of Grampian Police (Grampian Police), for all the information held on him in respect of (i) a complaint made by members of the public into his conduct and (ii) a complaint he himself made about the conduct of another officer who investigated the complaint about him. In particular, Mr Ferguson was seeking information concerning the opinions of the officers who investigated both of these complaints.

Grampian Police issued Mr Ferguson with a refusals notice under section 16(1) of the Freedom of Information (Scotland) Act 2002 (FOISA). In the notice Grampian Police claimed that the information requested was exempt from release on the basis of a wide range of different exemptions in FOISA.

This decision was upheld by Grampian Police on review. Mr Ferguson applied to the Scottish Information Commissioner on 15 April 2005, requesting that he investigate the matter.

Some information was released to Mr Ferguson during the course of the investigation although this did not include the investigator's reports.



Outcome

The Commissioner found that Grampian Police had partially complied with Part 1 of FOISA in relying on the exemptions in sections 35 and 38(1)(a) of FOISA for withholding certain information in Report No 1 from Mr Ferguson. However, he found that other information in that report was not exempt under either section, or under any of the other exemptions relied upon by Grampian Police, and required the release of that information to Mr Ferguson.

The Commissioner found that Grampian Police had partially complied with Part 1 of FOISA in relying on the exemptions in sections 35 and 38(1)(b) of FOISA for withholding certain information in Report No 2 from Mr Ferguson. However, he found that other information in that report was not exempt under either section, or under any of the other exemptions relied upon by Grampian Police, and required the release of that information to Mr Ferguson.

Appeal

Should either Mr Ferguson or the Chief Constable of Grampian Police wish to appeal against this decision, there is an 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.

Background

1. On 14 February 2005, Mr Ferguson submitted an information request to Grampian Police for all of the information which they held on him in respect of a complaint made by members of the public into his conduct and a complaint he himself made about the conduct of another officer who investigated the complaint about him. In particular, Mr Ferguson was seeking information concerning the opinions of the officers who investigated both complaints.



2. Grampian Police responded on 25 February 2005, indicating that they held the information which Mr Ferguson was seeking but were refusing to release this to him on the basis of the exemptions under the following sections of FOISA.
 - Section 30(b)(i)&(ii) – Prejudice to the effective conduct of public affairs (free and frank provision of advice; or the free and frank exchange of views for the purposes of deliberation)
 - Section 30(c) – Prejudice to the effective conduct of public affairs (would otherwise prejudice substantially or be likely to prejudice substantially the 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) – Investigations by Scottish public authorities and proceedings arising out of such investigations
 - Section 34(4) – Investigations by Scottish public authorities and proceedings arising out of such investigations
 - Section 35(1)(g) – Law enforcement
 - Section 36(2) – Confidentiality
 - Section 38(1)(a) and (b) – Personal information
3. Mr Ferguson submitted a request for a review of Grampian Police’s decision on 3 March 2005.
4. Grampian Police responded to Mr Ferguson on 31 March 2005, upholding the decision that had been made in response to his original request.
5. On 15 April 2005, Mr Ferguson applied to me for a decision as to whether Grampian Police had breached Part 1 of FOISA in withholding the information. The case was subsequently allocated to an investigating officer.

The Investigation

6. Mr Ferguson’s appeal was validated by establishing that he had made a valid information request to a Scottish public authority under FOISA and had appealed to me only after asking Grampian Police to review their response to his request.



7. A letter was sent by the investigating officer to Grampian Police on 3 May 2005, asking for their comments on Mr Ferguson's application in terms of section 49(3)(a) of FOISA. Grampian Police were asked to provide, amongst other items, a copy of the information which had been withheld, details of the application of each exemption claimed and the reasoning behind their application. They were also asked to provide a detailed analysis of their consideration of the public interest test in relation to these exemptions.
8. A full response was received from Grampian Police on 20 May 2005.
9. During a meeting with Grampian Police on 4 November 2005 it was agreed that certain information would be released to Mr Ferguson in respect of both of the investigators' reports. The information that was released to Mr Ferguson included copies of General Orders made under the Criminal Procedure (Scotland) Act 1995, extracts from the Road Traffic Act 1988, guidance used by Police in respect of damage to or caused by Police vehicles and General Orders in relation to the CCTV system in place in Aberdeen City Centre.
10. The exemptions claimed by Grampian Police in relation to the information withheld are as set out in paragraph 2 above. I will consider their reasoning for relying on each exemption further in the section on Analysis and Findings below.

The Commissioner's Analysis and Findings

The information requested by Mr Ferguson

11. Grampian Police refused to disclose to Mr Ferguson information contained in two investigators' reports. These reports were prepared under the Police Conduct (Scotland) Regulations 1996 (the 1996 Regulations). The information withheld from Mr Ferguson is made up of:
 - a) Recommendations and conclusions submitted by an investigating officer to the Deputy Chief Constable in relation to an investigation of alleged misconduct by Mr Ferguson (Report No 1):
 - b) Recommendations and conclusions submitted by an investigating officer to the Deputy Chief Constable in relation to an investigation concerning a complaint made by Mr Ferguson about the conduct of another officer who investigated him (Report No 2);
 - c) 16 witness statements referred to in Report No 2;
 - d) 4 additional documents attached as evidence to Report No 2.



Reports submitted to the Police

12. The two investigators' reports which Mr Ferguson has requested contain the recommendations of police officers who carried out investigations which related to Mr Ferguson. An investigator's report is required where there has been an allegation of misconduct made against a police officer below the rank of Assistant Chief Constable under the terms of the Police (Conduct) (Scotland) Regulations 1996 (the 1996 Regulations). The report recommends whether further action should be taken against the police officer who is accused of misconduct and this could include a report being submitted to the Procurator Fiscal, to allow the Procurator Fiscal to decide whether criminal proceedings should be raised as a result of the complaint.
13. Report No 1 deals with a complaint which was made about Mr Ferguson's conduct by members of the public. Report No 2 deals with the investigation of a complaint which Mr Ferguson made in relation to the way in which the original investigating officer investigated the complaint of alleged misconduct against him.

The witness statements

14. Of the 16 witness statements taken as part of the investigation into Mr Ferguson's complaint about the police officer who investigated the complaints of alleged misconduct made against him under the 1996 Regulations, two are statements given by Mr Ferguson. The remaining 14 documents are statements taken from third parties, 13 of these being other Grampian Police personnel, some of whom were witnesses to the alleged misconduct. The remaining statement was taken from one of the individuals who alleged that Mr Ferguson had acted inappropriately. The witness statements are only being looked at in relation to Report No 2. This is because the investigator's report specifically identifies that these statements form part of this report as they are enclosures with the report.

The remaining documents

15. The remaining 4 documents were submitted as evidence as part of the investigation into the complaint made by Mr Ferguson concerning the conduct of another officer under the 1996 Regulations.

The investigators' reports

16. In setting out my decision I am going to look at each investigator's report separately in terms of the application of the exemptions.



Report No 1

17. This report was compiled following an investigation into allegations of misconduct made against Mr Ferguson by members of the public. The original investigating officer who carried out this investigation submitted a final report of his findings to the Procurator Fiscal. It is clear from Mr Ferguson's request for review that this report to the Procurator Fiscal does not fall within the scope of his request for information. That investigating officer subsequently retired and a different officer was appointed to carry out an investigation under the terms of the 1996 Regulations to determine whether Mr Ferguson had acted in a manner which could be deemed to be misconduct.
18. Of the information which has been withheld by Grampian Police the information which is contained in the first eight pages in separator 30 of the binder for this investigation is the investigator's report which is being sought by Mr Ferguson. The remaining information which has been provided by Grampian Police within this file does not come within the scope of Mr Ferguson's request.

Section 35(1)(g) – Law Enforcement

19. To be able to rely on the exemption under section 35(1)(g) of FOISA, Grampian Police would have to show that if the information withheld from Mr Ferguson were to be disclosed this would, or would be likely to, prejudice substantially the exercise by any public authority (within the meaning of the Freedom of Information Act 2000) or Scottish public authority of its functions for any of the purposes mentioned in subsection (2). Grampian Police have cited the purpose in section 35(2)(b) of FOISA: to ascertain whether a person is responsible for conduct which is improper.
20. The exemption under section 35 is a qualified exemption and as such it is subject to the public interest test. This exemption also contains the substantial prejudice test. There is no definition in FOISA of what is deemed to be substantial prejudice, but it is my view that for an authority to be able to show that release of the information would be substantially prejudicial it would need to show that there was a real risk or likelihood of actual harm being caused by disclosing the information, at some time in the near (certainly the foreseeable) future, not simply that harm was a remote possibility. The authority would also have to show that the harm caused by such a release would (or would be likely to) be of real and demonstrable significance.



21. In justifying its use of the exemption under section 35(1)(g) (read in conjunction with section 35(2)(b)), Grampian Police have submitted that Report No 1 was prepared as a result of an investigation carried out under the 1996 Regulations. The Police advise that a report prepared under the 1996 Regulations would include the opinion of the investigating officer on the subject matter under investigation and that officer's conclusions and recommendations to the Deputy Chief Constable as to what, if any, action should be taken in relation to the matter.
22. Grampian Police go on to submit that disclosure of Report No 1 would prejudice substantially investigations into improper conduct. They argue that this is the case as release would inhibit the conduct of an inquiry and the gathering of candid and frank witness statements and allegations of misconduct. The Police contend that it is essential that investigating officers should be able to gather evidence of misconduct by police officers with a view to being in a position to determine whether the conduct has been improper. The Police submit that this will also allow the investigating officer to make a judgement and allow the Deputy Chief Constable to come to a frank, and fair decision for all concerned. Further, Grampian Police submit that in order for the Deputy Chief Constable to take a decision on the matter he should be in a position to do so on the basis of the best available advice, and be confident that this advice has been given without reservation.
23. In applying the terms of the public interest test to the exemption under section 35, Grampian Police looked at the public interest in disclosing the information and the public interest in maintaining the exemption. They then sought to balance this to determine whether the public interest in maintaining the exemption outweighed that in disclosing the information. The arguments raised by Grampian Police are detailed below.

Considerations favouring non disclosure

- The fair treatment of an individual. Investigating officers' reports may contain unsubstantiated allegations and it is not in the public interest that these be released.
- Efficient and effective conduct of the Force and the conduct of future law enforcement. The role of the Force might be compromised by the release of the content of the investigating officer's report. The flow of information to the police service would be impeded and it would be more difficult for a force to gather information to enable it to perform its public statutory duty. The flow of information from informants and the public must be maintained.
- The Force is under a legal obligation to maintain confidences. It would not be in the public interest to release information if the grounds for this duty can be shown to be valid.



Considerations favouring disclosure

- **Accountability.** Grampian Police consider that the Force must be accountable for its actions, effectiveness and efficiency. They accept that disclosure of this report may in some effect lead to this being achieved.
- **Public Debate.** Grampian Police submit that the release of the investigating officer's reports may contribute to the quality of public debate and information and that the public interest may in fact be served by disclosure.
- **Improper actions of public officials.** Grampian Police accept that disclosure of an investigating officer's report may put into the public arena information regarding the abuse of office and misadministration.

After balancing the arguments for and against disclosure, Grampian Police have concluded that the arguments in favour of maintaining the exemption outweigh those in favour of disclosure. In coming to this conclusion they state that they have taken into account a case in 1997 that was heard by the Ombudsman in England and Wales in relation to a complaint about the Inland Revenue (in particular, a comment made by the Ombudsman that the complainer had already been advised of the results of the investigation and further disclosure was felt to be unnecessary).

24. In the first instance, I must determine whether the information which Grampian Police have withheld from Mr Ferguson would come within the scope of the exemption under section 35(1)(g) (read in conjunction with section 35(2)(b)). If I am satisfied that this is the case I will then need to go on to consider the application of the substantial prejudice test and, if satisfied that the exemption applies, the public interest test .
25. In determining whether the exemption under section 35(1)(g) (read in conjunction with section 35(2)(b)) has been applied correctly I must satisfy myself that the information which has been withheld is required by a Scottish public authority for the purpose of that authority carrying out a function. I must also satisfy myself that the authority is empowered to carry out that function to ascertain whether a person is responsible for conduct which is improper. Finally I must satisfy myself that the disclosure of the information sought by Mr Ferguson would or would be likely to cause substantial prejudice to the exercise of that function.
26. Having taken into consideration the submissions from Grampian Police, I am satisfied that the 1996 Regulations give Grampian Police the statutory function of carrying out an investigation to ascertain whether an officer below the rank of Assistant Chief Constable may be responsible for actions which could be deemed to be misconduct. I am also satisfied that the information which has been withheld from Mr Ferguson is information which was gathered by Grampian Police in pursuance of that function, that is in the course of an investigation under the 1996 Regulations.



27. From the submissions given by Grampian Police, I accept that police officers and others who give evidence to an investigation such as this should not feel inhibited when providing their evidence and should be able to make frank and candid statements, and that the provision of such unreserved evidence and advice is crucial in allowing a thorough investigation. In many cases, therefore I am likely to find that this exemption applies to the information contained in the 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 whole circumstances of the case.
28. In this case, it is clear that comments recorded in Report No 1 are derived from statements and comments that have been made by the complainers, police officers and other witnesses, and that these comments concern the allegations that were made against the applicant. In some cases these comments justify why particular actions were taken. Having considered the submissions received from Grampian Police, together with the comments in Report No 1 which originate from the complainers and witnesses (other than police officers) and which are attributed to these individuals, I am satisfied in the circumstances that such witnesses would be less free and frank with their statements if they considered that this information would be disclosed into the public domain in response to an FOI request. I am satisfied that as a result this would mean that the level and quality of evidence being provided by such witnesses might not be sufficient to allow a future decision on such an investigation to be reached on the basis of all relevant information.
29. In respect of the information in Report No 1 which is derived from statements and comments made by certain police officers asked to comment on the actions of a fellow officer (and which is attributed to these officers), I accept that disclosure of this information would or would be likely to prejudice substantially the exercise by Grampian Police of their functions under the 1996 Regulations. I am of this view taking account of the relatively junior ranks of the officers who provided the information to the investigating officer and I accept the likelihood that if this information were to be disclosed then they and others in a similar position would be less likely to provide such full and unreserved statements in future in order to co-operate with investigations of this kind.
30. However, I do not consider that Grampian Police have demonstrated why all of the information in Report No 1 is exempt by virtue of section 35(1)(g) of FOISA.



31. In my view, 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, as in this case. However, given the relative seniority of the police officer in charge of the investigation and the responsibility placed in him to determine whether any misconduct appears to have taken place, I am not convinced that he or others in a similar position would be inhibited in like cases from recording their findings, conclusions and recommendations, particularly where these related 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. 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 website.
32. However, I accept that there are differences between these reports and the investigator's report which is being considered here. 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, internal organisational issues and the management and deployment of staff and resources, 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.
33. My own view is that if certain of the information withheld were to be disclosed, future investigating officers would certainly be aware that information from their own reports might be required to be disclosed and it is likely that this would be borne in mind. However, I am not convinced that any inhibition that would or would be likely to occur as a consequence 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.



34. Consequently, I do not accept that disclosure of the information in sections 5 (Summary of Conclusions and Recommendations) or 6 (Organisational Issues/Learning Points) of Report No 1 would or would be likely to prejudice substantially the exercise by Grampian Police of their functions under the 1996 Regulations. However, where the information relates to personal information of either individual officers or others this may be subject to the exemptions in sections 38(1)(a) and/or section 38(1)(b) of FOISA. This will be considered later in this decision notice.
35. As I am satisfied that the exemption in section 35(1)(g) applies to all of the information in Report No 1 with the exception of sections 5 and 6, I must go on to consider the application of the public interest test to that exempt information.
36. I accept that the applicant has a particular interest in disclosure of this report. In applying the public interest test, however, I cannot simply take into account what is of interest to the applicant. Although there is no definition in FOISA as to what is meant by the public interest, it has been described as being what is in the interest of the public rather than what is of interest to the public. I must consider what is in the interests of the public as a whole, not just one person.
37. In his submissions to my Office, Mr Ferguson did provide submissions as to why he was of the view that release of the investigator's report would be in the public interest. I have taken Mr Ferguson's views into account in my consideration of the application of the public interest test, along with the submissions of Grampian Police on the public interest.
38. I accept that to release Report No 1 would lead to greater transparency and accountability on the part of the Police, in terms of how such investigations are carried out. I also accept that it would allow the public to understand what actions are taken where allegations are made regarding the actions of Police officers in the course of their professional duties. However, this report does contain unsubstantiated allegations and as such I accept the point made by Grampian Police that the release of this would have an adverse impact on the fair treatment of an individual. Therefore I accept the argument that has been advanced by Grampian Police that release of this information would harm the efficient and effective conduct of Grampian Police and the conduct of future law enforcement. I have also taken account of the fact that, as indicated in paragraph 31 above, there are other ways in which the public can scrutinise the effectiveness and performance of Grampian Police.



39. On balance, I am of the view that the public interest in ensuring that Grampian Police can carry out thorough and fully informed investigations into allegations of misconduct against their officers outweighs the public interest in disclosure of the information. I am satisfied, therefore, that the information contained in Report No 1, apart from sections 5 and 6, is exempt under section 35(1)(g) of FOISA.

Section 38(1)(a) – Personal Information

40. In order for Grampian Police to be able to rely on the exemption under section 38(1)(a) it would have to show that the information was personal data of which the applicant (Mr Ferguson) was the data subject.

41. The exemption under section 38(1)(a) is an absolute exemption and therefore is not subject to the public interest test.

42. In seeking to justify its reliance on the exemption under section 38(1)(a) Grampian Police have submitted that they have taken into account the definition of personal data from section 1 of the Data Protection Act 1998 [the DPA] which defines personal data as follows:

“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;”

Grampian Police submit that on this definition Mr Ferguson’s request is clearly one which is a request for personal data of which he is the data subject. They contend that the information that Mr Ferguson has sought is therefore absolutely exempt from disclosure under section 38(1)(a) of the Act.

43. In their submissions to my office, Grampian Police indicated that the appropriate avenue to request disclosure of this type of information was to utilise the existing Subject Access procedures under the DPA, not under FOISA. They advised that they did intimate this to Mr Ferguson when he made his request and did furnish him with a form to assist him had he wished to make a subject access request.
44. In determining whether Grampian Police have applied the exemption under section 38(1)(a) correctly I need to be satisfied that the information contained in Report No 1 is Mr Ferguson’s personal data as defined in section 1 of the DPA.



45. Having taken into account the submissions from Grampian Police and reviewed the content of Report No 1, which (of necessity) includes a lot of information about the applicant, I am satisfied that most of the information in the report is the personal data of Mr Ferguson. The report identifies him and is substantially about and focused on him as an individual.
46. I am satisfied therefore that Grampian Police have correctly applied the exemption under section 38(1)(a) to the information in Report No 1, with the exception of section 6 on page 8. Section 6 deals with organisational issues and learning points. It is my view that although this information relates to the conclusions reached by the investigating officer in respect of this investigation, the conclusions concern operational matters generally and are not specific to an individual. I am satisfied that the information in this part of the report would not lead to the identification of the individual who is the focus of the report.
47. As I am satisfied that all of Report No 1 with the exception of section 6 is exempt under section 38(1)(a) of FOISA, and that all of it with the exception of sections 5 and 6 is exempt under section 35(1), I shall go on to consider the remaining exemptions claimed by Grampian Police in relation to section 6 only.

Section 38(1)(b) – Personal Information

48. In order for Grampian Police to be able to rely on the exemption under section 38(1)(b), they would have to show that the information being withheld was personal data and that either the condition mentioned in subsection (2) (the “first condition”) or that mentioned in subsection (3) (the “second condition”) was satisfied.
49. Within section 6 of Report No 1, I cannot identify anything that would fall within the definition of personal data contained in section 1(1) of the DPA (see paragraph 42 above). Therefore, I cannot accept that section 38(1)(b) of FOISA is capable of applying to the information in that section of the report.

Section 36(2) – Confidentiality

50. For Grampian Police to be able to rely on the exemption under section 36(2), they would have to show that the information withheld from Mr Ferguson was obtained by them from another person (which could be another Scottish public authority). They would also have to show that the disclosure of the information to the public other than under FOISA would constitute a breach of confidence actionable on the part of the person from whom they had obtained the information (or any other person).



51. Largely, section 6 of Report No 1 comprises the conclusions of the investigating officer. Where it does draw on evidence gathered during the investigation, it draws on a collation of that evidence rather than any particular item provided by a particular individual. Therefore, I cannot accept that any of it could be described as information obtained from another person for the purposes of section 36(2)(a) of FOISA and therefore cannot uphold Grampian Police's reliance on section 36(2) in relation to this section of the report.

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

52. In order for Grampian Police to be able to rely on the exemption under section 34(1)(a) of FOISA, they would have to show that the information withheld from Mr Ferguson was held by them at any time for the purpose of an investigation which Grampian Police had a duty to conduct. This investigation would have also had to have been for the purpose of ascertaining whether a person should be prosecuted for an offence; or to ascertain whether a person prosecuted for an offence was guilty of it.
53. While I accept that the information in Report No 1 was recorded for the purpose of an investigation which Grampian Police had a duty to conduct, I do not accept however that this information was recorded for the purpose of ascertaining whether a person should be prosecuted for an offence. Nor do I accept that this information was recorded for the purpose of determining whether a person who has been prosecuted for an offence was guilty of it.
54. I am of this view as it is clear from the circumstances surrounding the investigation and the substance of Report No 1 (the fact that a final report concerning criminal allegations had already been lodged with the Procurator Fiscal regarding the complaints against the subject officer, prior to the misconduct investigation beginning) that the intention of this investigation was not to ascertain whether a person should be prosecuted for an offence, or if prosecuted for an offence was guilty of it. The clear intention behind this investigation was to ascertain, following the conclusion of criminal proceedings, whether the subject officer had acted in a manner which constituted misconduct, and not whether any criminal offence had been committed. As a result I do not accept that any of the information in Report No 1, including that recorded in section 6, would come within the scope of the exemption in section 34(1)(a) of FOISA.
55. As I am not satisfied that any of the information in Report No 1 would come within the scope of the exemption in section 34(1)(a) of FOISA, I am not required to go on to consider the application of the public interest test in section 2(1)(b) of FOISA.



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

56. For Grampian Police to be able to rely on the exemption under section 34(1)(b) of FOISA, they would have to show that the information withheld from Mr Ferguson was held at any time by them for an investigation, conducted by Grampian Police, which in the circumstances might 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.
57. Having considered the submissions that have been provided by Grampian Police, together with the information contained in the investigator's report, I am not satisfied that the information in this report would come within the scope of this exemption. As I have indicated in paragraph 17 above, a final report regarding allegations of the commission of criminal offences by the subject officer was lodged with the Procurator Fiscal prior to the commencement of this misconduct investigation. This report was processed by the Procurator Fiscal, again prior to the commencement of this misconduct investigation. It is also clear from the substance of the information in Report No 1 that where this investigation did consider the actions of the subject officer which had given rise to the allegations from the complainants, it was not the case that an outcome of this investigation might have been a report to the Procurator Fiscal. As a result I cannot accept that any of the information in Report No 1, including the information recorded in section 6, would come within the scope of the exemption under section 34(1)(b) of FOISA.
58. I therefore do not accept that the information in the investigating officer's report is exempt from disclosure under section 34(1)(b) of FOISA.
59. The exemption in section 34(1)(b) of FOISA is subject to the public interest test contained in section 2(1)(b) of FOISA. However, given that I have not upheld the use of the 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.

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

60. Grampian Police have applied the exemption in section 34(3) of FOISA to the information in the investigators report. This exemption has four strands to it, all of which must be satisfied for the exemption to apply to the information withheld.

These four strands are:

- (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.
61. I accept that the information in the investigating officer's report meets the criteria set out at points (i) – (iii) above. The power to conduct the investigation into alleged misconduct comes 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)(b) of FOISA:
- “to ascertain whether a person is responsible for conduct which is improper;”
62. For the exemption in section 34(3) to apply, however, the information withheld must relate to the obtaining of information from confidential sources. Grampian Police have argued that it is essential where there are any confidential sources of information held within an investigator's report, these sources should not be revealed as revealing them would in fact totally compromise the methods by which the information is obtained.
63. I do not accept Grampian Police's reliance on the exemption in this case. I do not agree that the content of Report No 1 does reveal or discuss the process of obtaining information from confidential sources for the purposes of the investigation. In particular, section 6 of the report has nothing at all to say about the obtaining of confidential information. As a result, I do not accept that any of the information in Report No 1, including that in section 6, falls within the scope of the exemption in section 34(3) of FOISA.
64. I therefore do not accept that the information in Report No 1 is exempt from disclosure under section 34(3) of FOISA.
65. The exemption in section 34(3) of FOISA is subject to the public interest test contained in section 2(1)(b) of FOISA. However, given that I have not upheld the use of the 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.



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

66. The exemption in section 34(4) of FOISA exempts information if the information has been obtained or recorded by a Scottish public authority, in this case Grampian Police, for the purposes of civil proceedings, brought by or on behalf of the authority, which arise out of investigations under subsections (1) and (3).
67. As I have indicated in the preceding sections of this decision, I have not accepted that the investigation that was carried out by Grampian Police in this case fell within the scope of section 34(1) of FOISA. I have, however, accepted that the investigation fell within the scope of section 34(3), although I did not accept that section 34(3) applied to the information in Report No 1.
68. I also do not accept that the information which is contained in section 6 of Report No 1 was obtained or recorded by Grampian Police for the purpose of civil proceedings. While I accept that a possible outcome of a misconduct investigation is a misconduct hearing and that such a hearing might be classified as civil proceedings, the information in section 6 was not obtained or recorded for the purposes of such proceedings. It was created by the investigating officer and recorded for the purposes of identifying to the Deputy Chief Constable areas in which Grampian Police might review or improve its practice in the light of issues arising from the investigation.
69. As a result I am not satisfied that any of the information in section 6 of Report No 1 would come within the scope of the exemption under section 34(4) of FOISA.
70. I therefore do not accept that the information in section 6 of Report No 1 is exempt from disclosure under section 34(4) of FOISA.
71. As I am not satisfied that the information contained in section 6 of Report No 1 would come within the scope of section 34(4) of FOISA, I am not required to consider the application of the public interest test in section 2(1)(b) of FOISA.

Section 30 – Prejudice to the effective conduct of public affairs

72. The exemptions under section 30(b) of FOISA are qualified exemptions, this means that where Grampian Police find that certain information falls within the scope of the exemption, they are then required to go on to consider the application of the public interest test laid down in section 2(1)(b) of FOISA.
73. In order for Grampian Police to be able to rely on the exemptions laid down in section 30(b) of FOISA they would have to show that the disclosure of the information 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.



74. As I have said in previous decisions (e.g. 174/2006, Christine Grahame MSP and the Scottish Executive), it is my view that the standard to be met in applying these tests is high. In applying these exemptions, the chief consideration is not whether the information constitutes advice or opinion, but whether release of the information would inhibit substantially the provision of advice or exchange of views. I take the view that in this context inhibit means to restrain, decrease or suppress the freedom with which advice is given, and opinions or options are expressed.
75. When considering the application of these exemptions, each request should be considered on a case by case basis, taking into account the effects anticipated from the release of the particular information involved. For example, this would involve considering:
- The nature of the information, and whether it does actually contain the provision of advice, or an exchange of views.
 - The subject matter of the advice or exchange of views.
 - The manner in which the advice or exchange of views are expressed, and
 - Whether the timing of release would have any bearing (releasing advice or views whilst a decision was being considered, and for which further views were still being sought, might be more substantially inhibiting than once advice has been taken).
76. The exemption in section 30 (c) of FOISA is also a qualified exemption, which is subject to the application of the public interest test in section 2(1)(b) of FOISA.
77. Section 30 (c) of FOISA exempts information which would otherwise prejudice substantially, or be likely to prejudice substantially, the effective conduct of public affairs.
78. As I stated in my decision 017/2006 (Mrs X and Angus Council) I expect any public authority citing this exemption to show what specific harm would be caused to the conduct of public affairs by release of this information. Any damage caused by release of this information would have to be real or very likely, not hypothetical. The harm caused must be significant and not marginal.
79. Grampian Police have relied on the exemptions in sections 30(b)(i), 30(b)(ii) and 30(c) of FOISA for withholding the information in Report No 1 from Mr Ferguson.
80. In their submissions to my Office, Grampian Police have provided combined submissions in support of their reliance on the exemptions in sections 30(b)(i), 30(b)(ii) and 30(c) of FOISA. I will consider Grampian Police's reliance on the exemptions in sections 30(b)(i) and 30(b)(ii) of FOISA first.



Sections 30(b)(i) and 30(b)(ii)

81. Having taken into account the submissions that have been made by Grampian Police, together with the information in section 6 of Report No1, while I accept that the information contained in section 6 does relate to the provision of advice and views on the part of the investigating officer, I do not accept that release of the information in section 6 would substantially inhibit the free and frank provision of advice, or the free and frank exchange of views for the purposes of deliberation.
82. I am of this view as I accept that the investigating officer in cases where they are duty bound to investigate an allegation of misconduct must feel able to express their views freely on the basis of the evidence obtained, as to whether it appears that misconduct has occurred. However, for the same reasons set out at paragraphs 32 onwards above, I do not accept that release of the information in section 6 of Report No 1 would substantially inhibit an investigating officer from making similar recommendations in future.
83. As a result I do not uphold Grampian Police's reliance on the exemptions in sections 30(b)(i) and 30(b)(ii) of FOISA in respect of the information contained in section 6 of Report No 1.
84. The exemptions in sections 30(b)(i) and 30(b)(ii) of FOISA are subject to the application of the public interest test in section 2(1)(b) of FOISA. As I am not satisfied that the information contained in section 6 of Report No 1 would be exempt under section 30(b)(i) or 30(b)(ii) I am not required to consider the application of the public interest test in section 2(1)(b) of FOISA.

Section 30(c)

85. Having considered the submissions that have been made by Grampian Police regarding their reliance on the exemption in section 30(c) of FOISA, together with the information contained in section 6 of Report No 1, I do not agree that release of the information in this section would prejudice substantially the effective conduct of public affairs. I am of this view as the information that is contained in section 6 relates to advice and recommendations about police procedures, internal organisational issues and the management and deployment of staff and resources. Release of this information would not, in my view, prejudice an investigating officer from gathering evidence, witness statements and productions for future misconduct investigations, nor would it inhibit individuals from coming forward with vital views and opinions which may be of paramount importance to any future investigation. As a consequence of this I cannot uphold Grampian Police's reliance on the exemption in section 30(c) of FOISA in respect of the information in section 6 of Report No 1.



86. The exemption in section 30(c) of FOISA is subject to the application of the public interest test in section 2(1)(b) of FOISA. As I am not satisfied that the information in section 6 of Report No 1 would come within the scope of the exemption in section 30(c) of FOISA, I am not required to go on to consider the application of the public interest test.

Conclusion regarding Report No 1

87. On the basis of the exemptions under sections 35 and section 38(1)(a) of FOISA, I am satisfied that the information in Report No 1 is exempt from disclosure, with the exception of section 6 on page 8. I am also satisfied, however, that the information in section 6 of the report would not be exempt under either these sections of FOISA or under the other sections (30(b)(i) and (ii), 30(c), 34(1)(a) and (b), 34(3), 34(4), 36(2) and 38(1)(b)) claimed by Grampian Police. I therefore require that the information in section 6 of Report No 1 should be released to Mr Ferguson.

Report No 2

88. The second investigating officer's report which has been withheld from Mr Ferguson by Grampian Police covers the investigation of a complaint which was made by Mr Ferguson in relation to the conduct of the officer who investigated the allegation of misconduct against him. Report No 1 is also referred to and forms part of Report No 2. In respect of Report No 1 all of the comments and conclusions that have already been reached in this decision notice regarding this report would also apply here. As a result I will not consider Report No 1 any further.
89. Of the information which has been withheld by Grampian Police the information which is contained within separator 30 of the binder for this investigation is the investigator's report which is being sought by Mr Ferguson. The information contained in separators 9, 10, 11, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 28 & 29 also form part of the investigator's report. So does Report No 1, which is referred to within Report No 2. The remaining information which has been provided by Grampian Police within this file does not come within the scope of Mr Ferguson's request.
90. It should be noted that a copy of a General Order which had been withheld from Mr Ferguson as part of this report was released to him during the course of this investigation. This is contained in separator 28 of the report.
91. Grampian Police have relied on the same exemptions for withholding this investigator's report from Mr Ferguson as they did in relation to Report No 1. I have taken a similar approach to these to that taken above in relation to Report No 1.



Section 35(1)(g) – Law Enforcement

92. I have considered the requirements of section 35(1)(g) and Grampian Police's arguments in favour of its application to this case in my analysis in relation to Report No 1 at paragraphs 19 – 39 above. Broadly, the same arguments have been advanced in relation to both reports.
93. Having considered Report No 2 and the relevant arguments advanced by Grampian Police, once again I am satisfied in the circumstances that the information in the report falls within the scope of section 35(1)(g) (read along with section 35(2)(b)) of FOISA, being information which was gathered by Grampian Police in the course of an investigation under the 1996 Regulations. I now have to consider whether release of any of the information in Report No 2 would prejudice Grampian Police substantially in exercising their functions in carrying out such an investigation.
94. Once again, I accept that police officers and others who give evidence to an investigation such as this should not feel inhibited when providing their evidence and should be able to make frank and honest statements, the provision of such unreserved evidence and advice being crucial in allowing a thorough investigation. I accept that the reasons for withholding the majority of Report No 1 under section 35(1)(g) apply with equal force to the majority of Report No 2, including the various witness statements and handwritten notes forming part of that report, and to the file notes and the email that are associated with the report. Equally, following the same reasoning as in relation to Report No1, I am not satisfied that the exemption applies to the information in sections 13 and 14 of Report No 2, being the investigating officer's Recommendations and Conclusions.
95. I am not satisfied that if the information contained in the CCTV records that have been used as part of this case were to be disclosed that this would prejudice substantially the exercise by Grampian Police of their functions under the 1996 Regulations. I am of this view as the information contained in these 4 documents relates to procedural issues and records which are routinely kept by Grampian Police. I cannot accept that release of this information in this case would mean that these records would not continue to be kept, or that they would cease to be made available (if needed) for similar investigations.
96. As I am satisfied that all of the information contained within Report No 2, with the exception of sections 13 and 14 and the information in the CCTV records, is exempt under section 35(1)(g) (read in conjunction with section 35(2)(b)) of FOISA, I must now go on to consider the application of the public interest test.



97. Grampian Police provided the same public interest arguments in relation to Report No 2 as in relation to Report No 1. These are set out at length in paragraph 23 above. They also pointed out that, for various reasons, the officer who was the subject of the investigation was not invited to comment or contribute at any point.
98. In his submissions to my Office, Mr Ferguson did provide submissions as to why he was of the view that release of the investigators report would be in the public interest. I have taken Mr Ferguson's views into account in my consideration of the application of the public interest test.
99. Having considered the submissions from Grampian Police and Mr Ferguson in relation to the application of the public interest test, I accept that to release the relevant parts of Report No 2 would lead to greater transparency and accountability on the part of the Police. I also accept that disclosure of the information would lead to the public being made aware of instances where public officials have (where such allegations are substantiated) acted in a manner which is improper and that this would inform public debate on the effectiveness of Grampian Police. However, I also accept that in this case particularly, where for various reasons the individual officer who was the subject of the investigation was not approached for comment by Grampian Police and ultimately no action could be taken in respect of any allegations found to be substantiated, that it would not be in the public interest for this information to be disclosed.
100. Once again, therefore, I accept that disclosure would have an adverse impact on the fair treatment of an individual. Consequently, I accept that disclosure would harm the efficient and effective conduct of Grampian Police and the conduct of future law enforcement. In the circumstances, therefore, I am therefore satisfied on balance that the public interest in allowing the Police to carry out a full and thorough investigation outweighs that of disclosure. I am satisfied, therefore, that the information contained in Report No 2, apart from sections 13 and 14 and the CCTV records, is exempt under section 35(1)(g) of FOISA.

Section 38(1)(b) – Personal Information

101. The exemption under section 38(1)(b) is an absolute exemption, and is not subject to the application of the public interest test in section 2(1)(b) of FOISA.
102. In order for Grampian Police to be able to rely on the exemption under section 38(1)(b) it would have to show that the information being withheld was personal data and that either the condition mentioned in subsection (2) (the "first condition") or that mentioned in subsection (3) (the "second condition") was satisfied.



103. In justifying their reliance on the exemption under section 38(1)(b) Grampian Police have submitted that the investigator's report contains a lot of personal data about persons other than Mr Ferguson. Grampian Police also submit that release of the third party personal data which is held in the investigating officer's report would breach the first principle under the DPA. Grampian Police indicate that in their view release of the information in Report No 2 would not amount to fair and lawful processing of personal data as is required under the first principle in the DPA.
104. Having looked at the information that has been provided by Grampian Police, together with their submissions, I am satisfied that Report No 2 (along with the associated witness statements, handwritten notes, file notes, email and CCTV records) does contain a considerable amount of third party personal data, of the officer who was the subject of Mr Ferguson's complaint, the various witnesses interviewed for the purposes of the investigation and others.
105. As indicated above, Grampian Police have submitted that release of this information would breach the first data protection principle, which requires that personal data shall be processed fairly and lawfully and, in particular, shall not be processed unless at least one of the conditions in Schedule 2 of the DPA is met. If the data in question is sensitive personal data, at least one of the conditions in Schedule 3 of the DPA must also be met. Having considered the third party personal data in Report No 2 and the various associated documents, I am satisfied in the circumstances that they do not contain any sensitive personal data as defined in section 2 of the DPA.
106. In considering whether release of this information would breach the first data protection principle, I first have to establish whether the information sought by the Police is personal data as defined in section 1(1) of the DPA.
107. Section 1(1) of the DPA defines personal data as "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."
- I then must go on to consider whether release of the information in response to an FOI request would amount to fair and lawful processing.



108. In determining whether release would breach the first data protection principle I intend to consider the information that is the personal data of the non-police witness first. I will then consider the personal data of the police officer witnesses and the police support staff who were witnesses, together with information regarding the officer against whom the complaint was made. Finally I will consider the information contained within the handwritten notes recorded by the investigating officer during a court case.

Non-police witness

109. This report contains references to and observations on a statement which had been made by a non-police witness. The full statement made by the witness also forms part of this report. I am satisfied that the main body of the report does contain third party personal data relating to this non-police witness. I am also satisfied that the witness statement provided by the non-police witness contains a significant amount of their own personal data.

110. In considering whether release of this information would breach the first data protection principle I feel that it is appropriate to take into consideration the likely expectation of the witness who provided this statement to the Police for the purposes of this investigation. Grampian Police have indicated that when a witness makes a statement they are not informed as to what this statement might be used for subsequently.

111. In light of the submissions from Grampian Police, and the fact that I have no evidence to suggest that the witness was advised as to what his statement might be used for, I accept that although the witness should have expected the statement to be used for the purposes of the relevant investigation they would not have any expectation that this statement might be released to the wider public.

112. As a result, I am satisfied that it would not be fair to release the personal data of the non-police witness contained in the main body of Report No 2, their witness statement, the file note titled "Policy Log Entry 1" and the email dated 13 January 2004. As a result, disclosure of this information would be in breach of the first data protection principle and it is therefore exempt under section 38(1)(b) of FOISA.

113. As I have accepted that disclosure of this information would be unfair I am not required to consider whether it would be unlawful, or whether it would meet any of the conditions in Schedule 2 to the DPA.



Police officers and support staff

114. In considering the personal information contained in Report No 2 and the various associated documents which relates to statements made by police officers and police support staff, it is clear that they would have different expectations from the non-police witness. The police witnesses (both officers and support staff) made the statements in the course of their professional duties; as such it should have been within their expectations that such statements would be used in any subsequent reports that were produced as a result of the investigations. However, I accept that the police witnesses' expectations would be less likely to extend to possible disclosure to the wider public.
115. It is clear that the statements which have been given by the police witnesses relate to their own actions in particular situations, and their observations of the actions of other individuals, including police officers. I am also satisfied that the main body of Report No 2, the 2 CCTV production sheets, the file note entitled "Policy Log Entry 1 and Entry 2" and the email dated 13 January 2004 all also contain personal data of the police witnesses, the officer who is the subject of the report and other police officers.
116. In deciding whether it would be fair to disclose personal data relating to the police witnesses and other police officers, I have taken into account the guidance from the Information Commissioner on the disclosure of employees' personal data, particularly with regard to the seniority of the officer and the extent to which the data is already in the public domain.
117. I have also taken account of the fact that the Police witnesses who provided the statements were not officers of senior rank, as defined in the Police (Conduct)(Senior Officers)(Scotland) Regulations 1996 and 1999. These Regulations define officers of senior rank to be the Chief Constable, the Deputy Chief Constable and Assistant Chief Constables. I also note that Grampian Police did not contact the subject officer at any time in connection with the investigation, so he had no opportunity to comment on any of the evidence gathered in relation to his actions.
118. I accept that disclosure of the personal data of police witnesses and other police officers and support staff would be unfair because (even where they provided the information or were otherwise aware of its existence in the report and associated documents) they would have had no reasonable expectation that the information would be placed in the public domain. I accept that they should have expected that the information would be used in any subsequent investigation and any proceedings following on from that investigation, but it does not follow that they would have expected any wider disclosure than would be usual in such processes (which would not normally be disclosure to the public at large).



119. As I have concluded that it would not be fair to release this information I do not have to consider whether release would be lawful or whether it would meet any of the conditions in Schedule 2 to the DPA.

Handwritten notes

120. Having considered the information which is contained in the handwritten notes taken by the police officer during the court case, I am satisfied that these contain a considerable amount of third party personal data, relating to the police and non-police witnesses, the accused and others involved in the trial.
121. Insofar as the third party personal data which is included in these notes relates to persons not involved in the investigation to which Report No 2 relates, I am satisfied that it would be unfair to release this information to a member of the public. I am of this view as I accept that these individuals would be aware that their evidence was being heard in court but not that the information may be used for the purpose of a different investigation, or release under FOISA.
122. I am also satisfied that it would be unfair to release the information which is contained in the handwritten notes which relate to those persons involved in the investigation to which Report No 2 relates. I am of this view for the same reasons as I have outlined in the preceding paragraph in relation to the personal data of the individuals not involved in the investigation.
123. Although this information was heard in court, it does not follow that the information revealed in open court will be strictly reflected in the information which has been noted down by the officer who attended the trial. It could be that the officer has summarised what was said, rather than recording it verbatim. Also it is not clear from this report, or Report No 1, or the submissions from Grampian Police whether the trial for Mr Ferguson was a Sheriff and Jury trial, in which case a transcript of the proceedings would have been recorded, or whether it was a trial which just involved a Sheriff, in which case it would have been unlikely that such a transcript of the proceedings would exist. Therefore it is not clear whether this information would be truly available in the public domain. Further, it is not clear whether the notes taken by the police officer are a full account, and consequently it is my view that if this information were to be released it could be taken out of context or misconstrued.
124. For the same reasons as I have given above in relation to witnesses expectations, I am satisfied that the third party personal data relating to the other individuals mentioned in the notes cannot not be released fairly and therefore that release would contravene the first data protection principle.



125. As I am satisfied that it would be unfair to release this information I am not required to consider whether it would be unlawful or whether it would meet any of the conditions in Schedule 2 to the DPA.
126. In all the circumstances, therefore, I accept that to release the content of Report No 2, apart from section 13 and the CCTV historical record forms (which do not contain any personal data as defined in section 1(1) of the DPA), to a member of the public would not be fair and therefore would contravene the first data protection principle. I am satisfied, therefore, that Grampian Police have correctly applied the exemption in section 38(1)(b) to the information in Report No 2, including all of the witness statements and handwritten notes, the file note entitled "Policy Log: Entry 1 and Entry 2", the email dated 13 January 2004, and the two CCTV production sheets (but not section 13 and the CCTV historical record forms).
127. As I am satisfied that all of Report No 2, with the exception of section 13 and the CCTV historical record forms, is exempt under section 38(1)(b) of FOISA, and that all of it, with the exception of sections 13 and 14 and the CCTV records, is exempt under section 35(1), I shall go on to consider the remaining exemptions claimed by Grampian Police in relation to section 13 and the CCTV historical record forms only.

Section 36(2) – Confidentiality

128. As I have indicated above (see paragraph 51) there are a number of key requirements in the exemption under section 36(2). The first of these is that the information must have been obtained by Grampian Police from another person (which could be another Scottish public authority). It does not appear to me that this could be said of any of the information in section 13 or the CCTV historical record forms. These are, respectively, organisational recommendations drawn from the investigation and the investigating officer's knowledge of Grampian Police, and internal Grampian Police records. There is no particular item of information in them which could be described as having been obtained from a person other than Grampian Police. Therefore, I cannot accept that any of it could be described as information obtained from another person for the purposes of section 36(2)(a) of FOISA and therefore cannot uphold Grampian Police's reliance on section 36(2) in relation to this section of the report.



Section 38(1)(a) – Personal Information

129. In considering whether any of the information in section 13 of Report No 2 is subject to section 38(1)(a) of FOISA, I would refer to my consideration of that section in relation to Report No 1, starting at paragraph 40 above. Having considered all of the information in section 13 and the CCTV historical record forms, I can identify nothing which could be described as Mr Ferguson's personal data for the purposes of section 1(1) of the DPA and therefore must conclude that the exemption in section 38(1)(a) of FOISA does not apply to the information.

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

130. As I have mentioned already at paragraph 52 above there are certain conditions that Grampian Police would require to satisfy before they could successfully rely on the exemption in section 34(1)(a) of FOISA.
131. Having considered the information contained in Report No 2, I accept (as I did in the case of Report No 1) that this information was recorded for the purpose of an investigation which Grampian Police had a duty to conduct. I do not accept, however, that this information was recorded for the purpose of ascertaining whether a person should be prosecuted for an offence. Nor do I accept that this information was recorded for the purpose of determining whether a person who had been prosecuted for an offence was guilty of it.
132. I am of this view as it appears in the circumstances of this case that a further police investigation would have been required had any potentially criminal conduct been identified in the course of the investigation which led to Report No 2. Therefore, I cannot accept that the purpose of the investigation for which Report No 2 was produced was to ascertain whether a person should be prosecuted for an offence, or whether a person who has been prosecuted for an offence is guilty of it.
133. As a result I cannot uphold Grampian Police's reliance on the exemption in section 34(1)(a) of FOISA in relation to the information contained in Report No 2, including the information recorded in section 13 and the CCTV historical record forms.
134. As I am not satisfied that any of the information in Report No 2 would come within the scope of the exemption in section 34(1)(a) of FOISA, I am not required to go on to consider the application of the public interest test in section 2(1)(b) of FOISA.



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

135. As I have indicated already at paragraph 56 above Grampian Police, for the purposes of this exemption Grampian Police would have to show that the information in Report No 2 was held at anytime by them for an investigation, conducted by them, which in the circumstances might lead to a decision by them to make a report to the Procurator Fiscal to enable it to be determined whether criminal proceedings should be instituted.
136. Having considered the submissions that have been made by Grampian Police, together with the information in Report No 2, I cannot uphold Grampian Police's reliance on this exemption. I am of this view for the same reasons as I have set out in relation to section 34(1)(a) above: in the circumstances of this particular case, a further police investigation would have been required before it could be determined whether a report to the Procurator Fiscal would be appropriate. As a result I cannot accept that an outcome of this investigation could have been a decision to make a report to the Procurator Fiscal to determine whether criminal proceedings should be instituted.
137. I therefore do not accept that any of the information in Report No 2, including that in section 13 and the CCTV historical record forms, is exempt from disclosure under section 34(1)(b) of FOISA.
138. The exemption in section 34(1)(b) of FOISA is subject to the public interest test contained in section 2(1)(b) of FOISA. However, given that I have not upheld the use of the 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.

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

139. Grampian Police have applied the exemption in section 34(3) of FOISA to the information in Report No 2. As I have indicated at paragraph 60 above there are four strands to this exemption which Grampian Police must satisfy to be able to rely on this exemption. These four strands are set out at paragraph 60 above.
140. I accept, as I did in the case of Report No 1, that the information in Report No 2 meets the criteria set out at points (i) – (iii) above. The power to conduct the investigation into alleged misconduct comes from the Police (Conduct) (Scotland) Regulations 1996. Grampian Police have stated, and I have accepted, that this type of investigation fulfils the purpose laid down in section 35(2)(b) of FOISA.



“to ascertain whether a person is responsible for conduct which is improper;”

141. For the exemption in section 34(3) to apply, however, the information withheld must relate to the obtaining of information from confidential sources. Grampian Police have argued that it is essential where there are any confidential sources of information held within an investigator's report, these sources should not be revealed as revealing them would in fact totally compromise the methods by which the information is obtained.
142. I do not accept Grampian Police's reliance on the exemption in this case. I do not agree that the content of Report No 2 does reveal or discuss the process of obtaining information from confidential sources for the purposes of the investigation. There is certainly nothing in section 13 or in the CCTV historical record forms about this process. As a result, I do not accept that any of the information in Report No 2 falls within the scope of the exemption in section 34(3) of FOISA.
143. I therefore do not accept that the information in Report No 2, including that in section 13 and the CCTV historical record forms, is exempt from disclosure under section 34(3) of FOISA.
144. The exemption in section 34(3) of FOISA is subject to the public interest test in section 2(1)(b) of FOISA. However, given that I have not upheld the use of the 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.

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

145. As I have indicated at paragraph 66 above, the exemption in section 34(4) of FOISA exempts information if the information has been obtained or recorded by a Scottish public authority, in this case Grampian Police, for the purposes of civil proceedings, brought by or on behalf of the authority, which arise out of investigations under subsections (1) or (3).
146. As I have indicated at paragraphs 136 and 142 above I have not accepted that the investigation which was carried out by Grampian Police in this case was for the purposes of subsection (1) under section 34. I have accepted that Grampian Police did carry out an investigation for the purposes of a statutory duty that it had and that this came within the scope of section 34(3), although I did not accept that section 34(3) of FOISA applied to the information in Report No 2.



147. I do not accept that the information contained in section 13 of Report No 2, or in the CCTV historical record forms, was obtained by Grampian Police for the purpose of civil proceedings. I have reached this conclusion largely for the same reasons as set out at paragraph 68 above in relation to Report No 1: section 13 was created by the investigating officer and recorded for the purposes of identifying to the Deputy Chief Constable areas in which Grampian Police might review or improve its practice in the light of issues arising from the investigation, rather than for any purpose relating to potential civil proceedings. The CCTV records may have been obtained for the purposes of an investigation which in certain circumstances might have led to civil (i.e. disciplinary) proceedings, but I am satisfied in the circumstances of this particular case that this could not have been an outcome of the investigation.
148. As a result I am not satisfied that any of the information in section 13 of Report No 2, or in the CCTV historical record forms, would come within the scope of the exemption under section 34(4) of FOISA.
149. I therefore do not accept that the information in section 13 or in the CCTV historical record forms is exempt from disclosure under section 34(4) of FOISA.
150. As I am not satisfied that the information contained in Report No 2 would come within the scope of section 34(4) of FOISA, I am not required to consider the application of the public interest test in section 2(1)(b) of FOISA.

Section 30 – Prejudice to the effective conduct of public affairs

151. In considering Grampian Police's reliance on the exemptions in sections 30(b)(i), 30(b)(ii) and 30(c) of FOISA to the information in section 13 and the CCTV historical record forms, I have applied the tests set out at paragraphs 72 to 78 above.
152. As I have indicated previously in this decision notice, Grampian Police have provided combined submissions for their reliance on the exemptions in sections 30(b)(i), 30(b)(ii) and 30(c) of FOISA. I will consider Grampian Police's reliance on the exemptions in sections 30(b)(i) and 30(b)(ii) of FOISA first.



Sections 30(b)(i) and 30(b)(ii)

153. Having taken into account the submissions that have been made by Grampian Police, together with the information in section 13 and the CCTV historical record forms, while I accept that the information contained in section 13 does relate to the provision of advice and views on the part of the investigating officer, I do not accept that release of the information in section 13 would substantially inhibit the free and frank provision of advice, or the free and frank exchange of views for the purposes of deliberation.
154. I take this view accepting that the investigating officer in cases where they are duty bound to investigate an allegation of misconduct must feel able to express their views freely on the basis of the evidence obtained, as to whether it appears that misconduct has occurred. However, for the same reasons set out in paragraph 31 above I do not accept that release of the information in section 13, which relates to the investigating officers recommendations, or the information in the CCTV historical record forms, would substantially inhibit an investigating officer from making similar recommendations in future, or inhibit individuals from recording information concerning CCTV tapes.
155. As a result I do not uphold Grampian Police's reliance on the exemptions in sections 30(b)(i) and 30(b)(ii) of FOISA in respect of the information contained in section 13, and the CCTV historical records in Report No 2. As I am not satisfied that the information contained in section 13, and the CCTV historical record forms in Report No 2 would be exempt under sections 30(b)(i) and 30(b)(ii) I am not required to consider the application of the public interest test in section 2(1)(b) of FOISA.



Section 30(c)

156. Having considered the submissions that have been made by Grampian Police regarding their reliance on the exemption in section 30(c) of FOISA, together with the information contained in section 13 and the CCTV historical record forms, I do not agree that release of the information in this section or in the records would prejudice substantially the effective conduct of public affairs. I am of this view as the information that is contained in section 13 relates to the investigating officer's recommendations as to what actions could be taken regarding operational matters in light of the investigation. Release of the information would not, in my view prejudice an investigating officer from gathering evidence, witness statements and productions for future misconduct investigations, nor would it inhibit individuals from coming forward with vital views and opinions which may be of paramount importance to any future investigation. The information contained in the CCTV historical record forms concern internal records that are held by Grampian Police regarding CCTV tapes, and I do not accept that release of this information would prejudice an individual substantially from recording the use of these tapes in future. As a consequence of this I cannot uphold Grampian Police's reliance on the exemption in section 30(c) of FOISA in respect of the information in section 13 or the CCTV historical record forms.

157. The exemption in section 30(c) of FOISA is subject to the application of the public interest test in section 2(1)(b) of FOISA. As I am not satisfied that the information in section 13, or that in the CCTV historical record forms, would come within the scope of the exemption in section 30(c) of FOISA, I am not required to go on to consider the application of the public interest test.

Conclusion regarding Report No 2

158. On the basis of the exemptions in under sections 35 and section 38(1)(b) of FOISA, I am satisfied that the information in Report No 2 is exempt from disclosure, with the exception of section 13 and the CCTV historical records. I am also satisfied, however, that the information in section 13 and the CCTV historical record forms in the Report would not be exempt under either these sections of FOISA or under the other sections (30(b)(i) and (ii), 30(c), 34(1)(a) and (b), 34(3), 36(2) and 38(1)(b)) claimed by Grampian Police. I therefore require that the information in section 13 and the CCTV historical records in Report No 2 be released to Mr Ferguson.



Decision

I find that, in withholding most of the information in the two investigating officers' reports requested by Mr Ferguson, the Chief Constable of Grampian Police (Grampian Police) dealt with Mr Ferguson's request for information in accordance with Part 1 of the Freedom of Information (Scotland) Act 2002 (FOISA).

In particular, I find that Grampian Police were correct to withhold all of Report No 1 with the exception of sections 5 and 6 under section 35(1)(a) (read in conjunction with section 35(2)(b)) of FOISA, and all of it with the exception of section 6 under section 38(1)(a) of FOISA. I do not find the information in section 6 to be exempt under any of sections 30(b)(i) or (ii), 30(c), 34(1)(a) or (b), 34(3), 34(4), 36(2) or 38(1)(b) of FOISA and therefore find that Grampian Police failed to comply with section 1(1) of FOISA by claiming exemption for that information.

In relation to Report No 2 (including the witness statements and handwritten notes gathered for the purposes of that report, the associated file notes and email and the CCTV records examined for the purposes of the investigation, I find that Grampian Police were correct to withhold all of the information with the exception of sections 13 and 14 and the CCTV records under section 35(1)(a) (read in conjunction with section 35(2)(b)) of FOISA, and all of it with the exception of section 13 and the CCTV historical record forms under section 38(1)(b) of FOISA. I do not find the information in section 13 or the CCTV historical record forms to be exempt under any of sections 30(b)(i) or (ii), 30(c), 34(1)(a) or (b), 34(3), 34(4), 36(2) or 38(1)(a) of FOISA and therefore find that Grampian Police failed to comply with section 1(1) of FOISA by claiming exemption for that information.

I require Grampian Police to release to Mr Ferguson the information in section 6 of Report No 1 and section 13 of Report No 2, and the information in the CCTV historical record forms, within 45 days of receipt of this decision notice.

Kevin Dunion
Scottish Information Commissioner
11 April 2007