



Scottish Information  
Commissioner

**Decision 069/2007 Mr Leslie Brown and the Chief  
Constable of Strathclyde Police**

*Request for Police case file relating to Moira Anderson*

**Applicant: Mr Leslie Brown  
Authority: Chief Constable of Strathclyde Police  
Case No: 200502645  
Decision Date: 15 May 2007**

**Kevin Dunion  
Scottish Information Commissioner**

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## **Decision 069/2007 – Mr Leslie Brown and the Chief Constable of Strathclyde Police**

***Request for police case file – subject missing 50 years – information withheld – section 25(1) – section 38(1)(b) – section 34(1)(a) and (b) – section 35(1)(a) and (b) – section 39(1) – public interest considered***

### **Relevant Statutory Provisions and other Sources**

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Freedom of Information (Scotland) Act 2002 sections 1(1) (General entitlement); 2 (Effect of exemptions); 34(1)(a) and (b) (Investigations by Scottish public authorities); 35(1)(a) and (b) (Law enforcement); 38(1)(b) (Personal information); 39(1) (Health and safety).

The full text of each of these provisions is reproduced in the Appendix to this decision. The Appendix forms part of this decision.

### **Facts**

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On 21 June 2005 Mr Brown wrote to the Chief Constable of Strathclyde Police (Strathclyde Police) seeking access to all papers in the Moira Anderson case. Strathclyde Police responded to this request for information on 27 July 2005. Strathclyde Police described the categories of information covered by this request and advised that the information was exempt under a series of exemptions. Strathclyde Police identified a number of items that were otherwise accessible and then set out the exemptions that applied to each “class” of documents. Strathclyde Police concluded that the public interest in disclosing the information was outweighed by the public interest in withholding it. On 10 August 2005 Mr Brown asked for a review of the decision not to allow access to the information. On review, Strathclyde Police upheld its position and identified further exemptions that applied to certain of the “classes” of information. Mr Brown applied to the Commissioner for a decision.

The Commissioner found that Strathclyde Police had complied with Part 1 of the Freedom of Information (Scotland) Act 2002 (FOISA) in withholding the information requested by Mr Brown.



## Background

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1. On 21 June 2005 Mr Brown wrote to Strathclyde Police and requested the “appropriate papers” in the case of Moira Anderson who went missing on 23 February 1957.
2. Strathclyde Police acknowledged this request for information on 4 July 2005 and responded substantively on 27 July 2005. They advised that the information requested by Mr Brown consisted broadly of the statements taken from witnesses during the investigation, police reports and other correspondence with the Procurator Fiscal, information detailing the enquiries undertaken by the police at various stages of the investigation, letters of assistance sent by members of the public and information relating to the identification and interview of suspects during the investigation.
3. Strathclyde Police advised that they also held further information in respect of this case, namely a series of press clippings. These were supplied to Mr Brown. Strathclyde Police also identified a publication and copy of a documentary held by them, both of which they considered to be exempt under section 25(1) of FOISA in that the information was otherwise accessible.
4. Strathclyde Police identified the exemptions that applied to each category of information. They provided reasons as to why they considered each exemption to apply, including (where relevant) reasons why they considered the public interest to favour maintaining the exemptions. I will detail the submissions in my analysis and findings below. In summary, Strathclyde Police applied the following exemptions to each category of information:

*a) Witness statements*

Section 38(1)(b) – Personal information

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

Section 35(1)(a) and (b) – Law enforcement

*b) Reports made by the police and other correspondence with the Procurator Fiscal*

Section 38(1)(b) – Personal information

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

Section 39(1) – Health, Safety and the Environment



c) *Information detailing the enquiries undertaken by the police at various stages of the investigation*

Section 38(1)(b) – Personal information

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

Section 35(1)(a) and (b) – Law enforcement

d) *Letters of assistance sent by members of the public*

Section 38(1)(b) – Personal information

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

Section 35(1)(a) and (b) – Law enforcement

e) *Information relating to the identification and interview of suspects during the investigation*

Section 38(1)(b) – Personal information

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

Section 39(1) – Health, Safety and the Environment

5. On 10 August 2005 Mr Brown requested an internal review of this decision. He complained that a number of press cuttings included were entirely unrelated to the case. Mr Brown set out his reasons for seeking information about the Moira Anderson case, which included seeking information about a potential suspect.
6. Strathclyde Police acknowledged the request for review on 15 August 2005. They indicated that they understood Mr Brown did not consider the exemptions cited to be relevant in the circumstances.
7. Strathclyde Police responded substantively to the request for review on 8 September 2005. They apologised for the inclusion of unrelated press cuttings and indicated that these had been included in error. Strathclyde Police upheld their original position that the information was exempt and advised that a number of additional exemptions were considered to apply. The additional exemptions are set out below:

a) *Witness statements*

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

b) *Reports made by the police and other correspondence with the Procurator Fiscal*

Section 35(1)(a) and (b) – Law enforcement



- c) *Information detailing the enquiries undertaken by the police at various stages of the investigation*

Section 39(1) – Health, Safety and the Environment

- e) *Information relating to the identification and interview of suspects during the investigation*

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

Section 35(1)(a) and (b) – Law enforcement

8. Mr Brown was dissatisfied with this response and on 18 September 2005 applied to me for a decision.
9. Mr Brown's appeal was allocated to an investigating officer and validated by establishing that he had made a request for information to a Scottish public authority, and had applied to me for a decision only after asking the authority to review its response to his request.

## Investigation

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10. The investigating officer contacted Strathclyde Police on 7 October 2005, giving notice in terms of section 49(3)(a) of FOISA that an appeal had been received and advising that an investigation into the matter had begun. Strathclyde Police were asked to comment on the issues raised by Mr Brown's case and to provide supporting documentation for the purposes of the investigation.
11. In particular, Strathclyde Police were asked to supply a copy of the information withheld from Mr Brown. Strathclyde Police were also asked to provide a detailed analysis of the exemptions and the public interest, information about how the review had been carried out and copies of any internal correspondence relating to consideration of this request.

## Submissions from Strathclyde Police

12. Strathclyde Police responded on 7 November 2005. They provided some general background to this case. Strathclyde Police explained that the disappearance of Mary (Moira) McCall Anderson was initially investigated in 1957. A further investigation had been conducted in 1993. Strathclyde Police indicated that the case had been subject to periodic reviews and at that time, was the subject of a "cold case review". Strathclyde Police further advised that one month previously a witness had come forward after almost 50 years. The witness had been interviewed and their evidence investigated.



13. Strathclyde Police advised that it remained their position that the possibility still existed of new evidence coming to light which would assist in resolving the issues surrounding Moira's disappearance. They submitted that this might lead to a report being submitted to the Procurator Fiscal in the future. Strathclyde Police submitted that it could not be in the public interest to release information which might assist the perpetrator of a crime or prevent them from being brought to justice.
14. Strathclyde Police further submitted that the release of the information would be likely to cause great emotional distress to the family of Moira Anderson. They argued that given the nature of this enquiry and the emotions it was capable of raising even after almost 50 years, there existed a real possibility of some form of physical retribution being taken against suspects identified during the course of the investigations.
15. Strathclyde Police made a number of submissions in respect of the categories of information being withheld and the application of the exemptions to these categories of information. I will set these out in my analysis and findings below.

### **Submissions from the applicant**

16. Mr Brown made a number of submissions in his letter of application to me and in his correspondence with Strathclyde Police. Mr Brown advised that he was a former detective who had been asked by the Moira Anderson Foundation to carry out an investigation into this case and find out what happened.
17. He disputed that the information held was required for the purposes of an investigation, pointing out that Moira Anderson had disappeared over 50 years ago.
18. Mr Brown is also seeking information about a named person who had been the subject of allegations (and a book). This person is now deceased.

### **Commissioner's analysis and findings**

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19. Strathclyde Police supplied my office with three files of information which comprised the information relevant to this application. As stated above, Strathclyde Police have categorised the documents into certain classes and applied a number of exemptions to each class of documents.



20. I consider it helpful to emphasise at the outset that when assessing the information withheld in this case I must consider whether it can be released to a member of the public. Section 1(1) of FOISA (which contains the general entitlement to information requested) refers to “a person” (without qualification) and as I cannot impose conditions on what an applicant does with the information once it has been disclosed I am, in essence, deciding whether information can be released into the public domain.
21. The applicant has argued that he is seeking the information for a specific purpose and provided information about his background to demonstrate, in effect, his reasons for seeking this information. However, I am unable to take into account the experience or qualifications of the applicant or, in general, the reasons why they are seeking the information requested, however valid. I can only consider whether the information should be released to a member of the public.
22. I also consider it helpful to comment on the process when considering the information withheld in this case. Strathclyde Police have categorised information under a series of classes of information and then listed the exemptions that applied to each class. Certain exemptions listed in Part 2 of FOISA (but not all of those claimed by Strathclyde Police in this case) protect, in effect, a “class” of information. Where information falls into that class then it is protected by that exemption. However, when considering the public interest it is essential that authorities consider the actual content of the information being withheld.
23. In almost all cases Strathclyde Police have applied the same exemptions to each class of documents. Further, their submissions in respect of the application of each exemption to each class are generally similar. In view of this, I intend to consider each exemption in turn and then its application to each class of documents and the information it contains. I should emphasise that in reaching my conclusions I have considered all information and not simply the classes to which it belongs.
24. Strathclyde Police have identified the following classes of information:
  - a) Statements taken from witnesses during the investigation
  - b) Reports made by the police and other correspondence with the Procurator Fiscal
  - c) Enquiries undertaken by the police at various stages of the investigation
  - d) Letters of assistance sent by members of the public
  - e) The identification and interview of suspects during the investigation



25. I am satisfied that all of the information withheld falls into one or other of these classes.

### **Application of section 25(1) information otherwise accessible**

26. In its original response to Mr Brown of 27 July 2005 Strathclyde Police advised that two items of information, namely a publication and a copy of a documentary, were exempt by virtue of section 25(1) of FOISA in that the information was otherwise accessible. I note that Mr Brown did not challenge this application of section 25(1) in his request for review nor did he raise this matter in his application to me. As a result, I have not considered the application of section 25(1) to the two items identified by Strathclyde Police but have, instead, focussed on the application of exemptions to the remainder of the information.

### **Application of section 38(1)(b) personal information**

27. Strathclyde Police considered that section 38(1)(b) of FOISA applied to all classes of information.
28. Strathclyde Police submitted that information within these classes contained personal data relating to living individuals, in the form of their personal details such as name, age, date of birth and addresses as well as personal recollections and opinions. Strathclyde Police submitted that release of this information to a third party would breach the requirement to process personal data fairly, as laid down by the first data protection principle in Schedule 1 of the Data Protection Act 1998 (DPA). In this case, Strathclyde Police submitted that the data was gathered for the purpose of policing and to process it for another purpose would be unlawful. Strathclyde Police indicated that section 38(1)(b) was an absolute exemption and was not subject to the public interest test.
29. Section 38(1)(b) of FOISA states that information is exempt information if it constitutes third party personal data and the disclosure of the information to a member of the public would contravene any of the data protection principles.
30. "Personal data" is defined in section 1(1) of the DPA as:
- "data which relate to a living individual who can be identified –
- a) from those data, or
- b) from those data and from 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."





31. It is worth noting that the definition of “personal data” includes only information relating to “living individuals”. Therefore information about deceased individuals will not be protected by DPA. Given the time that has elapsed since the investigation into Moira Anderson’s disappearance was first opened it is clear that some of the witnesses (both civilians and police officers) and others responding to the appeal will now be deceased. However, I also accept that Strathclyde Police will not always know whether an individual is still living. In such cases, it is likely to be reasonable for the authority to err on the side of caution unless there is overwhelming evidence to the contrary; for example, where the authority has explicit confirmation that an individual is deceased or the date of birth of the person is such that they could no longer be living.
32. I have considered carefully the information within each class. I accept that witness statements (category (a)) are likely to contain personal information. This information might relate to the witnesses themselves in that the statement will contain their name and contact details and is likely to include information about that individual’s actions, opinions and recollections. The statements may also include information about third parties.
33. Some of the letters sent in response to the public appeal (category (d)) contain personal data. This is either in the form of the name and address of the author and/or because the information includes reference to a third party. In some cases, the description of the third party is oblique e.g. “a man driving a car along a street”. However, in other cases the individual is identifiable either because they are named or because the description is sufficiently detailed to be able to identify that individual. In such cases, I accept that both the name and address of the author and the information about an identifiable third party will amount to personal data.
34. I accept that reports (category (b)) made by the police are likely to include information relating to specific suspects and therefore will contain sensitive personal data of the suspect (see definition in paragraph 38 below) and potentially the personal data of other third party witnesses.
35. The police have not set out the specific information covered by enquiries undertaken by the police (category (c)). However, it is clear from the information I have considered that at various times over the years the police have followed up leads and, that in some cases, this information contains third party personal data. I accept that information within this category does include some personal data and sensitive personal data (in that it relates to potential suspects).
36. Finally, I accept that information relating to the identification and interview of suspects (category (e)) includes the sensitive personal data of those individuals and may also include personal data supplied by third party witnesses.



37. Third party personal data is exempt from release under section 38(1)(b) of FOISA (read in conjunction with section 38(2)(a)(i) or 38(2)(b)) if the release of the information would breach any of the data protection principles contained in Schedule 1 to the DPA. Strathclyde Police have argued that, in this case, to disclose the personal data of third parties would breach the first data protection principle. The first data protection principle states that the processing of personal data (which includes the release of data in response to a request made under FOISA) must be fair and lawful and, in particular, that data 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.
38. Sensitive personal data is defined in section 2 of the DPA and includes information “as to the commission or alleged commission by [the individual] of any offence.” In this case, therefore, this would include any information relating to potential suspects whether this was provided by those individuals or by third parties. Again, this provision would only apply to living individuals.
39. 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?
40. I accept that in this case much of the information gathered by Strathclyde Police was gathered with a view to establishing whether a criminal offence had been committed and, if so, to identify and prosecute the individual responsible. It is arguable that this would have an impact on the expectations of individuals contributing to the investigation.



41. I consider that information gathered with a view to the possible instigation of criminal proceedings must raise particular expectations. Where a witness to an alleged criminal offence or a person accused of such an offence is asked to provide a statement or where an individual responds to a public appeal in such cases 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.
42. This raises the question of whether disclosure in open court is the same as supplying that information to a 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 by a person other than the individual to whom it relates.
43. Therefore, in my view, while the individuals contributing to the investigations 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 individual and below I have considered each category in turn.

#### ***Personal data of ordinary members of the public***

44. In respect of information relating to civilian witnesses (including those individuals who responded to the public appeal) 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 42 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. 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.



45. 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 over the years have contributed to this investigation, either in response to public appeals or as witnesses interviewed by the police. 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).
46. Given that I have accepted that the disclosure of the information would be unfair I have not gone on to 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 37 above).
47. Even though I accept that disclosure of information relating to civilian witnesses would be unfair, I have also considered whether it would be possible to redact personal data from this information and disclose the remainder. I have looked at the statements obtained from witnesses and the letters from members of the public to see whether it would be possible to anonymise this information by removing names and addresses. The difficulty with this arrangement is that in many cases, the witness or individual will still be identifiable from the information because the circumstances or perspective could only relate to them. However, I accept that in some cases it will be possible to redact personal data from certain information.
48. I recognise that there may be other reasons why this information should not be disclosed under FOISA. I will only order disclosure of this information if I find that it is not exempt under any of the other exemptions cited by Strathclyde Police.
49. Clearly, information relating to ordinary members of the public in a case such as this will not be confined to the personal data of witnesses or to those responding to the public appeal. All classes of information held by Strathclyde Police include third party personal information. For example, witness statements and letters from members of the public sometimes refer to the actions, comments or statements of third parties. Where there is any implication of wrongdoing in respect of that third party (that is, where they may be a potential suspect) then the information is likely to constitute sensitive personal data and will be afforded special protection under DPA. This is discussed further in paragraphs 58 to 60 below.



50. However, there are also references to the actions, comments and opinions of third parties where there is no implication of wrongdoing. I have therefore considered whether it would be fair to disclose information about these individuals. In considering whether disclosure would be fair, I have taken into account that this information has been gathered in the course of a police investigation and that some individuals may not even know that information is held about them. Others will be aware that information is held but will not necessarily be familiar with the exact content. I accept that certain individuals may be content for information about them to be disclosed and may already have voluntarily disclosed information about their actions and thoughts to the press or other media. However, I consider that it would be unrealistic and unreasonable for Strathclyde Police to approach each member of the public referred to in information held by them in order to ascertain whether they would object to the release of this information.
51. I take the view that, in general, ordinary members of the public would not expect information about them obtained during the course of a criminal investigation to be released into the public domain outwith formal court proceedings. I consider that disclosure of this information would generally be unfair and therefore in breach of the first data protection principle.

#### ***Personal data of police officer witnesses***

52. In respect of the personal data of those police officer witnesses who have participated in the investigation I consider that there are different considerations in assessing whether disclosure of their data would be unfair. While 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 publicised, not necessarily only in a court of law.
53. 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.
54. While I have generally found that disclosure of information relating to police officer witnesses will be fair, I accept that there may be other reasons why this information should not be disclosed under FOISA. Therefore, while I will need to consider whether disclosure would be lawful and whether a condition in Schedule 2 can be met before requiring disclosure of this information, I will only go on to do so if I consider that the information is not exempt by virtue of any other exemption cited by Strathclyde Police.



### ***Personal data of professional witnesses***

55. The investigation includes information supplied by professional witnesses. The content of statements from professional witnesses is likely to vary. In some cases, a witness may record the nature of their expertise and simply state 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 professional witness but also that of a third party forming the subject of the investigation or examination.
56. Where a professional 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). Professional 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, professional 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 a case by case basis and will be dependent on the content of the statement, the nature of the information, its relative sensitivity, the type of witness and the extent to which it discloses personal data of the witness. In some cases, this information will not be disclosed because it cannot be disconnected from other third party data.
57. While I have generally found that disclosure of information relating to professional witnesses will be fair, I accept that there may be other reasons why this information should not be disclosed under FOISA. Therefore, while I will need to consider whether disclosure would be lawful and whether a condition in Schedule 2 can be met before requiring disclosure of this information, I will only go on to do so if I consider that the information is not exempt by virtue of any other exemption cited by Strathclyde Police.

### ***Section 38(1)(b) sensitive personal data***

58. The nature of the information requested means that there are additional considerations in respect of the application of section 38(1)(b). Where the information requested constitutes "sensitive personal data" the DPA affords this information further protection.
59. At least one of the conditions in Schedule 3 of the DPA must be satisfied before processing of sensitive personal data can be considered to be fair and lawful.



60. 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 in this case. Given the nature of this investigation a significant proportion of the information held by Strathclyde Police amounts to sensitive personal data in that all information relating to potential suspects (where they are still living) will fall within this definition.
61. In conclusion, therefore, I am satisfied that all categories of information contain information that constitutes the personal data of third parties. Where this information relates to ordinary members of the public I consider that, in general, disclosure would be unfair. I accept that in some cases it would be possible to redact this information and thereby sufficiently anonymise this information so that the third party would no longer be identifiable. I am satisfied that disclosure of information relating to police officers or professional witnesses would generally be fair. I am satisfied that certain information held by Strathclyde Police amounts to sensitive personal data. I have been unable to identify a condition in Schedule 3 of the DPA that would justify disclosure in this case.
62. Section 38(1)(b) is an absolute exemption. This means that if I find the exemption to apply I am not required or permitted to consider the public interest in disclosing the information.

#### **Application of section 34(1)(a)(i) and (b)**

63. Strathclyde Police also cited section 34(1)(a)(i) as applying to all classes of information and section 34(1)(b) as applying to witness statements and to information relating to the identification and interview of suspects.
64. Strathclyde Police submitted that the information gathered during the investigation was exempt as it was gathered for the purposes of an investigation which Strathclyde Police had a duty to conduct to ascertain whether a person should be prosecuted for an offence. Strathclyde Police indicated that much of the information was reported to the Procurator Fiscal.
65. Section 34(1) states 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.
66. Section 34(1)(a) and (b) are class exemptions. This means that if information falls within the description set out in this section I am obliged to accept it as exempt. There is no harm test; I am not required or permitted to consider whether disclosure would substantially prejudice an interest or activity, or otherwise to consider the effect of disclosure.
67. The scope of section 34(1)(a) is potentially very broad in that it could cover any information held by the police where they consider a criminal offence might have been committed. Section 34(1)(a) is not time limited in that it applies to information held “at any time”. Further, in order for information to fall within the scope of this exemption the police do not need to have “identified” the person that should be prosecuted. Where the police consider that a criminal offence might have been committed and carry out an investigation into this, all information held for the purpose of that investigation will fall within the scope of section 34(1)(a).
68. In the circumstances, I accept that information requested in this case falls within the scope of section 34(1)(a) in that this information has been held for the purposes of ascertaining whether a person should be prosecuted for an offence.
69. Strathclyde Police also submitted that section 34(1)(b) applied to information in two of the categories. These were (a) statements taken from witnesses and (e) information relating to the identification and interview of suspects. I accept that many of the witness statements were obtained with a view to identifying a potential suspect or in respect of suspects already identified. I accept that both this information and information contained in category (e) falls within the scope of section 34(1)(b) in that it is information held for the purposes of an investigation which 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. As I have indicated above, section 34(1)(b) contains no harm test and I am obliged to accept its application to information providing that information falls into the relevant class.
70. However, both section 34(1)(a) and (b) are subject to the public interest test. Therefore I need to go on to consider whether the public interest in disclosing the information is outweighed by the public interest in maintaining the relevant exemption.





71. It should be noted that in considering the public interest test I am considering it only in respect of information that is not exempt by virtue of section 38(1)(b). The public interest does not apply to information exempt by virtue of section 38(1)(b), that is the personal data and sensitive personal data relating to living individuals where disclosure would contravene any of the data protection principles.
72. The public interest test under FOISA requires me to carry out a balancing exercise in respect of those arguments in favour of disclosing the information and those arguments against disclosure.

### ***Arguments in favour of disclosure on public interest grounds***

73. 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 public officials’ actions.”
74. In general, it seems to me that there are a number of reasons why disclosure of this kind of information could be in the public interest. There is a general public interest in information being accessible because this enhances scrutiny of decision-making processes and thereby improves accountability and participation. Disclosure in such cases might also arguably contribute to the administration of justice and enforcement of the law by improving standards of service.
75. Further, disclosure of information in connection with criminal investigations carried out by the police could provide insight into the expenditure of public funds and whether the public has obtained value for money. Disclosure of this kind of information might also contribute to ensuring that a public authority with regulatory responsibilities was adequately discharging its functions.
76. I have also identified two specific reasons why arguably it would be in the public interest for information requested in this case to be disclosed. Firstly, it would provide information about the way in which the police had handled the investigation since the time of Moira Anderson’s disappearance. Where such information existed disclosure could provide information about police mismanagement of the case and/or errors that had been made in investigating Moira’s disappearance. Disclosure in this sense would provide scrutiny and accountability of the actions of Strathclyde Police. This would clearly be in the public interest.



77. Mr Brown has expressed particular interest in the way in which the investigation was handled by the police when Moira Anderson first went missing. Disclosure of the information held by Strathclyde Police would reveal how the police had reacted on receiving the news that Moira Anderson had disappeared and the steps taken by them to investigate this. It might be argued that given the age of the case and the length of time that has elapsed since Moira Anderson went missing there would be a real benefit in reviewing the information held and determining whether any relevant steps had not been followed.
78. Secondly, disclosure of the information might arguably assist with the resolution of this case. The disappearance of Moira Anderson has never been solved and still remains very much a matter of speculation. This has been clearly very distressing for family members. It is possible that disclosure of information held by the Strathclyde Police could prompt individuals to recollect important information or realise the significance of seemingly innocuous information.
79. The disappearance of Moira Anderson in 1957 was and remains a matter of considerable local and national concern. If disclosure of this information would assist in resolving her disappearance then there would be a strong public interest in disclosure.

#### ***Arguments in favour of withholding the information on public interest grounds***

80. On the other hand, I am also aware of the concerns surrounding disclosure of this kind of information. During the Parliamentary debates concerning this exemption, Jim Wallace the then Justice Minister 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.*

81. This is reflected in the public interest arguments presented by Strathclyde Police in this case.
82. I have also considered the views of the Parliamentary Ombudsman who up 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 the Ombudsman 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*

83. I recognise the strong public interest arguments for making accessible information gathered in the course of the investigation which still remains unsolved. On the other hand, I find compelling the arguments made by the Minister for Justice and the Lord Advocate for the need to avoid trial by media. I can foresee that if I were to release these statements the alleged guilt of the certain individuals might well become a matter for public debate.
84. I am of the view that trial by media is not a substitute for a decision reached by the Procurator Fiscal in a dispassionate and objective setting, followed (where appropriate) by proper criminal proceedings. In the absence of the safeguards afforded by due legal process, it is impossible to guarantee the fair treatment of any of those who might be involved.
85. I also need to be satisfied that disclosure into the public domain would increase the chances of Moira Anderson's disappearance being solved. The police carried out an extensive review of this case in 1993 interviewing and re-interviewing over 100 witnesses. I would need to be satisfied that there was real benefit in disclosure of this information and that members of the public would be better equipped to solve the disappearance than the police.
86. I am also conscious that certain information cannot, in any event, be disclosed because it is third party personal data and exempt by virtue of section 38(1)(b). Therefore the most that could be achieved on public interest grounds would be partial disclosure.
87. In assessing the public interest I have also considered the extent to which information about the disappearance of Moira Anderson is already in the public domain. Newspaper cuttings supplied to the applicant and to me demonstrate that the Moira Anderson case has been the subject of media coverage since 1957, and continues to be so. I have noted that at least one individual has been identified as a potential suspect and his alleged actions discussed at length in the media. However, it is my understanding that not all of this information has been derived from the police but from individual witnesses and other interested parties. I make this point as it seems to me that the information in the media will not necessarily reflect accurately all of the relevant information held by the police.



88. In other words, the information that appears in the newspapers may be speculative on the part of the witnesses or on the part of the author and will not necessarily represent accurately or completely the record held by the police. Where information has been disclosed in a newspaper report, witnesses themselves may also consider the media account to be inaccurate. Disclosure of the information in such cases could lend weight to some speculative reports and call others into question. Therefore I do not consider that simply because information about this case has been the subject of books and newspaper reports that the information withheld is now in the public domain.
89. I need to decide whether, on balance, disclosure of the information requested by Mr Brown would be in the public interest. I have set out above the two key reasons why, in my view, disclosure might be in the public interest. That is, because it would reveal how the police had handled this investigation when Moira Anderson first disappeared and secondly, because it might lead to the mystery of her disappearance being solved. I am conscious, however, that in the first case partial release (excluding certain personal data) would not necessarily reveal all actions taken by the police or all investigations subsequently pursued. In the second case, partial disclosure (which excluded certain personal data) might result in leads being pursued in the future that had, in fact, been properly considered and dismissed by Strathclyde Police.
90. I also consider relevant the fact that the case is not “closed”. Strathclyde Police have advised that if further evidence comes to light this will be investigated and indeed, did so in 1993, 2003 and again in 2005. My opinion on this matter might differ if there had been no developments on this case for 50 years; in such cases, it would be more difficult to argue that disclosure would not be in the public interest.
91. 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 this information is outweighed by the public interest in maintaining the exemption. While I understand that there is a high level of public interest in the information held by the Strathclyde Police I have to be satisfied that there would be a real benefit in disclosure when weighed against the risks to any future investigation by the police on this matter. I am also conscious that a significant proportion of this information could not be disclosed on the basis that it is personal data. In all the circumstances, I do not consider that partial release of the information held by the police would disclose fully and accurately how Strathclyde Police had handled the initial investigation, nor am I persuaded that partial disclosure would assist significantly in solving Moira Anderson’s disappearance.



92. Even though I consider that all information requested in this case to be exempt under section 34(1)(a) I have gone on to consider the application of section 35(1)(a) and (b).

### **Application of section 35(1)(a) and (b)**

93. Strathclyde Police also relied on section 35(1)(a) and (b) to withhold the information requested in this case. They indicated that they considered this exemption to apply to all classes of information.
94. This exemption states that information is exempt if its disclosure would, or would be likely to, prejudice substantially:
- a) the prevention or detection of crime;
  - b) the apprehension or prosecution of offenders
95. Strathclyde Police made a number of submissions in respect of the application of this exemption to the information held relevant to Mr Brown's request. The submissions slightly differed in respect of each category of information and I will summarise them below. In respect of (a) witness statements and (d) letters of assistance Strathclyde Police submitted that in the course of an investigation such as this, the police interview and gather evidence from any person who might be in a position to assist them. Strathclyde Police argued that there was an acceptance that the information gathered would not be disclosed to a third party other than in the course of criminal proceedings. Strathclyde Police argued that disclosure in response to this request would undermine this expectation and might deter victims or witnesses from assisting the police in the future. They argued that this would hamper police investigations.
96. In respect of (c) information detailing the enquiries undertaken by the police Strathclyde Police advised that this information consisted of the details of those regarded as suspects, their habits and movements at a particular time and the evidence against them. Strathclyde Police argued that the release of this information would allow a person responsible to gauge the strength and detail of the evidence against him or her and to formulate a defence based on that knowledge, thus preventing them from being brought to justice. Strathclyde Police did not make any specific submissions in respect of information in the other two categories.
97. I accept that all information requested in this case is held by Strathclyde Police for the purposes of the prevention and detection of crime and the apprehension or prosecution of offenders in that the information has been obtained for the purposes of determining whether a criminal offence has been committed and, if so, by whom with a view to prosecution. However, I need to be satisfied that disclosure of this information would, or would be likely to, prejudice substantially these purposes.



98. For example, Strathclyde Police have applied this exemption to all witness statements. They have argued that disclosure in response to this request would undermine the expectation that information would not be released to third parties in the absence of criminal proceedings and that disclosure might deter victims or witnesses from assisting the police in the future. They argued that this would hamper police investigations. I query whether this would occur in respect of all witness statements.
99. As I have said above in respect of section 38(1)(b) above, a wide range of witness statements have been obtained during the course of the investigation. These include statements from members of the public (civilian witnesses), professional witnesses and police officers. I am unable to accept that the same considerations will apply to all statements from these witnesses. Further, it seems to me that consideration must be given to the nature of the crime, its seriousness and relative sensitivity. Witness statements in connection with a minor driving offence are less likely to contain sensitive information than, for example, those in respect of a case of aggravated burglary.
100. I am of the view that due regard must be had to the nature of the offence and type of witness before the harm test in section 35(1) will be met. For example, it is difficult to see how police officer witnesses would be deterred from providing information if they became aware that their statements might be disclosed to third parties in the absence of court proceedings. Police officers are required to record and account for their actions as part of their ordinary professional duties and will be aware that their actions and opinions might be subsequently publicised, not necessarily just in a court of law. Likewise, professional witnesses providing factual information and opinion within their area of expertise are arguably less likely to be deterred if information they supply is disclosed into the public domain.
101. In this particular case, I have taken into account the sensitivity of the case and the fact that it involves a missing child and the nature of the allegations that have been made in respect of this. As a result, witness statements from both suspects and other members of the public often contain sensitive information. As I have said above, while witnesses might (and perhaps must) have expected that information they supplied in a witness statement could be disclosed in open court they will not have necessarily expected that information to be disclosed into the public domain without the protection and objective scrutiny afforded by a court of law. I can see that in cases such as this, there is a real and substantial risk that disclosure of information contained in witness statements which has not been subject to the scrutiny of court proceedings could lead to individuals not supplying information to the police or cooperating with future investigations.



102. However, I do not accept that disclosure of police witness statements and those of forensic and other professional witnesses would prejudice substantially the detection or prevention of crime in that I am not persuaded that these witnesses would be deterred from co-operating with an investigation. On the other hand, I do accept that disclosure of the information contained within these witness statements might otherwise substantially prejudice the prevention or detection of crime. I accept that the case is still “open” to the extent that if further evidence were to come to light this would be investigated by Strathclyde Police. Therefore it is feasible that the disclosure of information contained within police statements and professional witness statements might be used by individuals to avoid detection or could prejudice statements or other evidence given by future witnesses.
103. Likewise I accept that disclosure of information about the identification and interview of potential suspects (e) might prejudice substantially the detection or prevention of crime in that it might allow a person responsible to gauge the strength and detail of the evidence against him or her and to formulate a defence based on that knowledge, thus preventing them from being brought to justice. This, of course, will not apply to information in connection with suspects who are no longer living. However, it is still feasible that this information could be used by other individuals to avoid detection or could prejudice statements made or evidence given by future witnesses. As a result, I accept that where enquiries made by the Police during the investigation (category (c)) relate to potential suspects that this information will be exempt by virtue of section 35(1).
104. Strathclyde Police also considered that section 35(1) applied to reports to the Procurator Fiscal and related correspondence (category (b)). I accept that section 35(1) applies to information within those reports that relates to civilian witnesses for the reasons set out in paragraph 101 above. Likewise I consider that where these reports contain information supplied by police officer or professional witnesses that certain information might be used by individuals to avoid detection or could prejudice statements or evidence given by future witnesses and therefore would also be exempt.
105. I do not consider that Strathclyde Police has demonstrated that all information it holds will be covered by this exemption. The information held by the case is voluminous and certain information is routine correspondence between different parties and within the police force. Further I do not consider that all information supplied by police officers will inevitably prejudice the detection or the prevention of crime. In all cases, it will be necessary to look at the actual content of the information.
106. Given that I accept that all information is exempt under section 34(1) I have not sought to identify the specific documents falling within and outwith the scope of section 35(1).



### ***Application of the public interest test***

107. I have considered the public interest arguments in respect of section 34 above and some of the same arguments arise in respect of section 35(1). In favour of disclosure I consider the following to be strong arguments:
108. Firstly, it would provide information about the way in which the police had handled the investigation since Moira Anderson first disappeared and in the subsequent years. Secondly, disclosure of the information might arguably assist with the resolution of this case.
109. On the other hand, Scotland has developed over centuries a whole system for the detection and prevention of crime and for the prosecution of offenders. This process designates the police as the responsible body for collecting evidence and carrying out the investigation. The decision as to whether to prosecute then rests with the Procurator Fiscal. Prosecution, if taken forward, is carried out through an independent judicial process with appropriate legal responsibilities and safeguards. Therefore there is an established process for considering this information, with clear responsibilities for the various roles to be discharged in this process. In this particular case, I am satisfied that the case is still open in that new evidence has been considered as recently as 2005. Further, at least three reports have been sent to the Procurator Fiscal and no proceedings have yet been instigated.
110. In the circumstances, disclosure of information at this point would bypass the established process and could, instead, lead to trial by the media (which, as I have indicated at paragraph 84 above, is unlikely to be in the public interest).
111. In this particular case and considering all the circumstances I am satisfied that the public interest in disclosing this information is outweighed by the public interest in maintaining the exemptions under section 35(1)(a) and (b) of FOISA.

### **Application of section 39(1)**

112. Strathclyde Police also relied on section 39(1) of FOISA to withhold certain information. Given that I have accepted all information is exempt by virtue of other sections in Part 2 of FOISA, I do not intend to consider the application of this section to the information withheld.





## Conclusion

113. I have been asked to consider granting access to the whole police file held by Strathclyde Police on the disappearance of Moira Anderson. In reaching my decision on this matter I have been very aware of the distressing circumstances forming the background to this request for information. I know that my refusal to accede to this request will be very disappointing to family members and to friends who, understandably, are desperate to solve the mystery of Moira Anderson's disappearance.
114. However, I have to take into account that disclosure under FOISA is not confined to a specific group of individuals who have a very personal interest in this information, but rather is a decision as to whether information can be released into the public domain. A decision to release to one is effectively a decision to release to all.
115. The case file, understandably, includes a significant amount of personal data which under the terms of FOISA can never be released on public interest grounds. It will come as no surprise that much of the information contained within the police file is very sensitive and, in some cases, extraordinarily personal.
116. This means that, at most, I could only order disclosure on a very partial basis. Having read through hundreds of witness statements, transcripts and reports it is not at all clear that finality would be achieved and a variety of conclusions could be arrived at. I am not satisfied that partial disclosure would resolve the disappearance of Moira Anderson nor would it disclose fully how Strathclyde Police had investigated the case in the fifty years since Moira Anderson disappeared. In other words, I do not consider that partial release of this information would provide family members and other interested parties with the conclusion they are seeking. Nevertheless I can appreciate that those with a direct connection to this case will be of the view that any information held in the files may be of use or comfort.
117. However, that would not justify setting aside the privacy to which those making statements to the police are entitled to expect. Nor can I justify the real damage to the integrity of conducting police investigations which would entail and, whilst the case remains open, jeopardising any action which the police wish to take. Ultimately, I must take into account that there still remains the possibility that a further suspect could be identified in the future. Disclosure of information within the police file, even on a partial basis, could harm that investigation and any subsequent criminal proceedings. This would clearly not be in the public interest.



## **Decision**

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I find that the Chief Constable of Strathclyde Police complied with Part 1 of the Freedom of Information (Scotland) Act 2002 (FOISA) in withholding information from Mr Brown, that information being exempt under sections 34(1)(a), 34(1)(b), 35(1)(a), 35(1)(b) and 38(1)(b) of FOISA.

## **Appeal**

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Should either the Chief Constable of Strathclyde Police or Mr Brown 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**  
**15 May 2007**



## Appendix

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### 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.



### **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;

...

### **35 Law enforcement**

- (1) Information is exempt information if its disclosure under this Act would, or would be likely to, prejudice substantially-
- (a) the prevention or detection of crime;
  - (b) the apprehension or prosecution of offenders;

### **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.