



Scottish Information
Commissioner

**Decision 020/2007 – Mr Hugh Gavin and the Chief Constable of
Central Scotland Police**

Investigator's report relating to complaints made by the applicant

Applicant: Mr Hugh Gavin

Authority: The Chief Constable of Central Scotland Police

Case No: 200502796

Decision Date: 31 January 2007

**Kevin Dunion
Scottish Information Commissioner**

Kinburn Castle
Doubledykes Road
St Andrews
Fife
KY16 9DS



Decision 020/2007 Mr Hugh Gavin and the Chief Constable of Central Scotland Police

Request for police investigator's report regarding complaints made by the applicant.

Relevant Statutory Provisions and other Sources

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) (General entitlement); 30(b) & (c) (Prejudice to effective conduct of public affairs); 34(1)(b) (Investigations by Scottish Public Authorities); 35(1)(b) & (g) in conjunction with 35(2)(b) & (d)(ii) (Law enforcement); and section 38(1)(a) &(b), (2) and (3) (Personal information).

Data Protection Act 1998 section 1(1) (Basic interpretative provisions) (interpretation of "personal data").

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

Facts

At the time of his request Mr Gavin was the father of a serving police officer and had previously made several complaints to the Chief Constable of Central Scotland Police (the Police) about an investigation into his son's conduct by its Professional Standards Department. A report had been sent to the area procurator fiscal following the police investigation into the conduct of Mr Gavin's son and another officer. Mr Gavin's son had submitted a precognition or statement to the fiscal which made allegations against the officers who had carried out the investigation into his conduct.

On the advice of the area procurator fiscal, an investigation was carried out by officers from Strathclyde Police, and this investigation included the complaints made by Mr Gavin on behalf of his son. The investigator's report was submitted to the area procurator fiscal.

Mr Gavin asked to see the report as it related to his complaints. The report was withheld under several exemptions in the Freedom of Information (Scotland) Act 2002 (FOISA).



Background

1. Mr Gavin had made several complaints to the Police regarding the treatment of his son by members of the Professional Standards Department of Central Scotland Police. His complaints had been examined as part of a wide-ranging investigation by officers from Strathclyde Police into allegations and complaints made by his son and another police officer against other officers in Central Scotland Police. In a letter dated 3 May 2005 Mr Gavin asked for copies of his complaints and the reports pertaining to these.
2. The Police replied on 5 July 2005, noting that Mr Gavin's letter had been post-marked 6 June and had been received by them on 7 June 2005. The Police told Mr Gavin the report by Strathclyde Police into his complaints was exempt from disclosure under section 30(b) & (c), section 34(1)(b), section 35(1)(b), section 35(1)(g), and section 38(1)(b) of FOISA.
3. Mr Gavin requested a review of this decision on 12 August 2005. In this letter he used the phrase "my complaints investigation report" to describe the information he had requested. On 13 September 2005 the Police informed him that, after review, the decision to withhold the report had been confirmed without modification.
4. Mr Gavin applied to me for a decision on the matter on 10 October 2005. In his letter he indicated that he would be willing to visit the Police headquarters to view the documents.
5. The case was allocated to an investigating officer and the application validated by establishing that Mr Gavin had made a valid information request to a Scottish public authority and had appealed to me only after asking the public authority to review its response to his request.



Investigation

6. The Police were informed that an application had been received from Mr Gavin and were invited to comment on the matters raised by the applicant and on the application as a whole in terms of section 49(3)(a) of FOISA. The Police were asked to provide a copy of all information withheld from Mr Gavin, and an explanation of which information had been withheld under each exemption cited. The Police were also informed that Mr Gavin would be willing to view the information at Police headquarters rather than have a copy provided to him, and were invited to comment on this suggestion.
7. The Police provided a copy of the report withheld, along with its appendices. The Police did not consider it appropriate to allow Mr Gavin to view the information at Police headquarters, believing that the reasons for withholding the information under FOISA would apply equally to the disclosure of the information within this context.
8. During the investigation the Police advised that they also wished to rely upon the exemption in section 38(1)(a) of FOISA to withhold information which is Mr Gavin's own personal data.

The Commissioner's Analysis and Findings

Scope of the information and Mr Gavin's request

9. The report prepared by Strathclyde Police detailed the findings of the investigation into allegations made by Mr Gavin's son and another officer against Central Scotland Police. The allegations were made in precognitions submitted to the Stirling Area Procurator Fiscal after both officers had been separately investigated by the Central Scotland Police Force Professional Standards Department in relation to unconnected allegations of fraud. The Procurator Fiscal recommended that the Chief Constable should arrange for an outside police force to conduct an independent investigation into the allegations made by the two officers.



10. The investigation by officers of Strathclyde Police included, among other matters, consideration of 13 complaints made by Mr Hugh Gavin about the treatment of his son. These complaints were summarised in the investigation report. The original letters of complaint sent by Mr Gavin are included within the 8 box files of statements and other productions associated with the case. The Police do not consider these documents to form part of the Report itself.
11. I believe that the way in which Mr Gavin worded his information request and his request for review makes it clear that he wished to see the investigators' findings relating to his own complaints, rather than the full report which examines many other allegations and complaints.
12. One sub-section of the report provides a summary of Mr Gavin's complaints and an account of his participation in the investigation. However, it does not examine each of his complaints in full. As most of Mr Gavin's allegations mirrored those brought by his son, the report refers its readers to the findings regarding his son's allegations rather than recording the investigators' findings in relation to each of Mr Gavin's complaints.
13. The Police believe that because each section of the report makes frequent reference to other sections, it would be difficult, if not impossible, to separate out the information relating to Mr Gavin's complaints. I accept that the way in which the report has been written means that this would generally be true. However, the sub-section of the report referring specifically to Mr Gavin stands alone and is immediately identifiable as information relating to his request.
14. Before considering the practicalities of disclosure of the information requested by Mr Gavin, I will first examine whether the Police complied with FOISA in deciding that the information he asked for is exempt from disclosure.

Section 34(1)(b) – investigations by Scottish public authorities

15. The Police cited several exemptions in FOISA to justify their decision to withhold information from Mr Gavin. I will first consider the use of the exemption in section 34(1)(b), which allows a Scottish public authority to withhold information if it has at any time been held by an authority for the purposes of an investigation, conducted by the authority, which 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.



16. The exemption in section 34(1)(b) of FOISA does not cease to apply once an investigation has been concluded. Information gathered for the purposes of the investigation still falls under the exemption. In addition, in order for the exemption to apply, it is not necessary for the procurator fiscal to have brought proceedings as a result of the investigation. All that is required is for the information to have been part of an investigation which may lead the authority to decide to make a report to the fiscal, or to establish whether criminal proceedings should be instituted. (The exemption is, however, subject to the public interest test required by section 2(1)(b) of FOISA and I will discuss this in more detail below.)
17. In this case the investigation by Strathclyde Police was carried out on the recommendation of the area procurator fiscal, and the report was sent to the fiscal on completion. I accept that the investigation was of a type which would allow the Police to cite the exemption in section 34(1)(b) of FOISA, and that the information in the report is therefore covered by that exemption.
18. However, the exemption in section 34(1)(b) is subject to the public interest in section 2(1)(b) of FOISA. This means that although I have found that the information is exempt under section 34(1)(b), I must go on to consider whether, in all the circumstances of the case, the public interest in disclosing the information is outweighed by the public interest in maintaining the exemption. If I find, on balance, that the public interest lies in release, I must order disclosure of the information.
19. The Police have argued that the report is based largely on statements which are quoted from extensively and without which the report would be rendered virtually meaningless. They stressed that some of the matters on which statements were taken concerned allegations of criminal behaviour, which had been obtained from officers in the expectation that they would be treated confidentially.
20. The Police have pointed out that neither members of the public nor police officers are under any obligation to provide statements to those investigating complaints of misconduct, and that disclosure of information from those statements would destroy witnesses' expectation of confidentiality and be likely to seriously prejudice similar investigations in future. The Police have advised that internal investigations, by their very nature, are difficult, and argue that anything which would make them more so would not be in the wider public interest.



21. The Police have also stated that the report was prepared for consideration by the procurator fiscal and its disclosure without the authorisation of the fiscal would destroy the confidentiality of the report, damage relations between the police and the fiscal service and undermine public confidence in the system by which such complaints are handled. This would have a detrimental effect on future investigations of a similar nature, which would be against the public interest.
22. The Police recognised that there is an undoubted public interest in the proper conduct of investigations into complaints of misconduct or criminality by police officers, but take the view that, overall, the public interest lies in maintaining the exemptions cited. In their correspondence with Mr Gavin they have acknowledged that he has a strong personal interest in the contents of the report, but given that disclosure under FOISA is effectively disclosure to the general public, they have taken the view that the wider public interest lies in protecting the confidentiality of the investigative process.
23. The exemption in section 34(1)(b) was intended to prevent the rights of access to information through FOISA from subverting the rules of disclosure within criminal proceedings. During the progress of the Bill through the Scottish Parliament the Justice Minister stressed that witnesses and persons under investigation should not be subject to the risk of trial by media without any protection. I take the view that there may be strong reasons why it is in the public interest to uphold this exemption, even when the information is no longer part of an ongoing investigation.
24. I accept that disclosure of information from the report in this case would be likely to entail disclosure of the witness statements which are considered within it. The witness statements are frank and contentious, and disclosure would be likely to affect the professional or personal lives of those who provided them. I believe that it is likely that disclosure of such information would deter witnesses in future cases from providing full and frank statements, and that this could prevent the Police from identifying and dealing with misconduct or criminal behaviour among their own officers. Clearly such an outcome would not be in the public interest.
25. The section of the report dealing specifically with Mr Gavin's complaints is slightly different, in that it does not contain any witness statements apart from the information he himself provided to the Police. Therefore, although the information falls under the exemption in section 34(1)(b), the public interest arguments provided by the Police in relation to the report's contents are perhaps less compelling in relation to the information in this part of the report. However, in this case I have found that there is a strong general public interest in protecting the confidentiality of the process by which information is provided to the procurator fiscal, and consider that this outweighs the public interest in providing Mr Gavin with information about the investigation into his complaints.



26. In reaching this decision I have taken into account that fact that Mr Gavin was informed that his complaints had been considered in detail by the investigating officers from Strathclyde Police but that none of his complaints had been substantiated.
27. I have therefore found that the Police were justified in withholding the information requested by Mr Gavin under section 34(1)(a) of FOISA.

Information withheld under section 38 – personal information

28. Having found that the information requested by Mr Gavin is exempt from disclosure under section 34(1)(b) of FOISA, I am not required to consider whether the other exemptions cited by the Police would apply. However, I believe it would be useful to consider the application of the exemptions in section 38(1)(a) and (b) of FOISA.

Section 38(1)(a) – applicant’s own personal information

29. Section 38(1)(a) of FOISA exempts information if it constitutes the personal data of the applicant. “Personal data” is given the same definition as in section 1(1) of the Data Protection Act 1998 (the DPA), so that generally it means any information which allows a living individual to be identified, including any expression of opinion about the individual.
30. The Police have cited section 38(1)(a) in relation to information in the report which is personal data relating to Mr Gavin. This would include most of the sub-section dealing with his complaints, which contains information about his actions, his views, and opinions expressed about him by the investigating officers.
31. I accept that this information falls under the exemption in section 38(1)(a) of FOISA. Mr Gavin may choose to make a subject access request for this information under section 7 of the DPA if he has not already done so.

Section 38(1)(b) – personal information of other people

32. Much of the information in the report is taken directly from witness statements provided by police officers involved in the events which led to the investigation. These statements reveal the opinions and feelings of the police officers about their colleagues, as well as detailing their own actions. I accept that such information is personal data in terms of the DPA.



33. Section 38(1)(b) of FOISA, read in conjunction with section 38(2)(a)(i), exempts information if it is personal data and if disclosure of the information to a member of the public would contravene any of the data protection principles laid down in the DPA. The first data protection principle states that personal data shall be processed fairly and lawfully and, in particular, shall not be processed (here, disclosed), unless at least one of the conditions in Schedule 2 is met. In the case of sensitive personal data, at least one of the conditions in Schedule 3 is also met.
34. The DPA defines as “sensitive personal data” (in section 2(g)) any information about the commission or alleged commission of any offence by an identifiable individual.
35. I will consider first of all the question of fairness. According to guidance from the Information Commissioner (“Freedom of Information Awareness Guidance 1”) , the assessment of fairness includes looking at whether the third party would expect that his/her information might be disclosed to others and/or whether the third party would expect that his/her information would be kept private.
36. In this case the Police have stated that witnesses providing statements did so in the belief that these would be treated confidentially and would not be generally disclosed. I accept that this would be the normal expectation when giving statements to an investigation into allegations of criminality. I find that disclosure of the information relating to the investigation of Mr Gavin’s complaints would require personal information to be disclosed, and that disclosure in these circumstances would contravene the first data protection principle in that it would be unfair. Given that I have found that the disclosure of the information would be unfair, I am not required to go on to consider whether the release of the information would be unlawful or whether any of the conditions in schedule 2 and/or 3 of the DPA can be met. I therefore find that the Police were correct to withhold the information under the exemption in section 38(1)(b).
37. Section 38(1)(a) and (b) do not require me to consider the public interest for or against disclosure of the information.

Other exemptions applied to the information

38. Because I have found that the information requested by Mr Gavin should be withheld under section 34(1)(b) and section 38(1)(a) and (b), I am not required to consider whether the other exemptions applied by the Police should also be upheld.



Decision

I find that Central Scotland Police (the Police) complied with Part I of the Freedom of Information (Scotland) Act 2002 (FOISA) by withholding information requested by Mr Gavin under the exemptions in section 34(1)(b) and section 38(1)(a) and (b) of FOISA.

Appeal

Should either Mr Gavin or Central Scotland Police wish to appeal the 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.

Kevin Dunion
Scottish Information Commissioner
31 January 2007



APPENDIX

Relevant Statutory Provisions

Freedom of Information (Scotland) Act 2002:

1 General entitlement

- (1) A person who requests information from a Scottish public authority which holds it is entitled to be given it by the authority.

30 Prejudice to effective conduct of public affairs

Information is exempt information if its disclosure under this Act-

(...)

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

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

- (1) Information is exempt information if it has at any time been held by a Scottish public authority for the purposes of-
- (...)
- (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

35 Law enforcement

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



- (b) to ascertain whether a person is responsible for conduct which is improper;
- (...)
- (d) to ascertain a person's fitness or competence in relation to -
 - (...)
 - (ii) any profession or other activity which the person is, or seeks to become, authorised to carry on

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
 - (ii) section 10 of that Act (right to prevent processing likely to cause damage or distress); and
 - (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.
- (3) The second condition is that, by virtue of any provision of Part IV of that Act, the information is exempt from section 7(1)(c) of that Act (data subject's right of access to personal data).

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
 - ...