



Scottish Information
Commissioner

**Decision 120/2007 Mr Russell Findlay and the Chief
Constable of Fife Constabulary**

Request for copy of investigator's report and expert reports

**Applicant: Mr Russell Findlay
Authority: Chief Constable of Fife Constabulary
Case No: 200600465
Decision Date: 26 July 2007**

**Kevin Dunion
Scottish Information Commissioner**

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Decision 120/2007 Mr Russell Findlay and the Chief Constable of Fife Constabulary

Request for copy of investigator's report and expert reports – various exemptions applied – public interest considered – exemptions generally upheld

Relevant Statutory Provisions and other Sources

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) (General entitlement); 2 (Effect of exemptions); 25 (Information otherwise accessible); 34(1)(b) (Investigations by Scottish public authorities and proceedings arising out of such investigations); 38(1)(b) (Personal information).

Data Protection Act 1998 (the DPA) sections 1 (Basic interpretative provisions); 2 (Sensitive personal data); Schedule 1 (The data protection principles).

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

Facts

Mr Findlay requested a copy of a report of an investigation by Strathclyde Police into a named police officer in Fife Constabulary. He also requested two related expert reports. The Chief Constable of Fife Constabulary (Fife Constabulary) refused to supply this information and cited a series of exemptions in support of this decision. This position was subsequently upheld by Fife Constabulary when Mr Findlay requested a review.

Following an investigation the Commissioner found that the information request was exempt and that generally Fife Constabulary was correct to withhold the information.



Background

1. On 17 January 2006 Mr Findlay requested the following information from Fife Constabulary:
 - Copies of the reports of two academic experts asked for independent opinions about numerous books written by Chief Inspector Robin Lumsden (of Fife Constabulary), as part of an investigation of issues involving Chief Inspector Lumsden carried out by Strathclyde Police
 - A copy of the final report produced into this matter by Strathclyde Police
2. Fife Constabulary responded to this request on 31 January 2006, advising that the police reports and statements were exempt from disclosure under sections 34, 38 and 26 of FOISA.
3. Mr Findlay was dissatisfied with this response and on 3 February 2006 requested a review of this decision.
4. Fife Constabulary responded to the request for review on 23 February 2006. The authority upheld its original position but expanded on the arguments in support of each exemption. While Fife Constabulary no longer chose to rely on section 26 it considered that a number of additional exemptions applied. It submitted that sections 30, 34, 35, 38 and 39 of FOISA all applied to the information requested. Further, having considered the public interest, it advised that it had concluded that release of the information would (when compared to any benefits) have a greater and more damaging effect on the effectiveness of the police force and the wider police service in general in conducting investigations.
5. Mr Findlay was dissatisfied with this response and made an application to me for a decision as to whether Fife Constabulary had dealt with his request for information in terms of FOISA. The case was allocated to an investigating officer and the application validated by establishing that Mr Findlay 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.



The investigation

6. The officer formally contacted Fife Constabulary on 7 March 2006 in terms of section 49(3)(a) of FOISA, asking for comment on the application as a whole and seeking further information for the purposes of the investigation
7. Fife Constabulary responded formally on 21 March 2006. It enclosed a copy of the investigation report, which included the views of both academic witnesses.
8. The Fife Constabulary expanded on some of its submissions in respect of the exemptions on which it was seeking to rely. I will consider these submissions and those made by Mr Findlay in my analysis and findings below.

Commissioner's analysis and findings

9. This application relates to a request for a report of an investigation carried out by Strathclyde Police in respect of Chief Inspector Robin Lumsden of Fife Constabulary. In its submissions to my Office, Fife Constabulary advised that following the publication of an article in the *Sunday Mail* newspaper dated 29 April 2001 featuring negative inferences on matters of race and fascism in respect of Chief Inspector Lumsden, the Deputy Chief Constable had wished all issues raised investigated by an outside force in terms of the Police (Conduct) (Scotland) Regulations 1996 (the 1996 Regulations). The investigation and report of the investigation were carried out by Strathclyde Police.
10. In the course of the investigation Strathclyde Police commissioned two experts to review and comment on the publications of Chief Inspector Lumsden.
11. Mr Findlay has requested a copy of the report produced by Strathclyde Police as well as copies of the two expert opinions.



Scope of the information request

12. The information supplied to my Office comprised the final report by Strathclyde Police and 15 appendices to that report incorporating the opinions of the two experts. Having considered the information supplied to me I am satisfied that the appendices form part of the report and therefore both the report and its appendices fall within the scope of Mr Findlay's request for information.
13. Fife Constabulary advised that two appendices were missing (Appendices "N" and "O"). Fife Constabulary indicated that the missing documents were accounts and invoices relating to the work of the academic experts. Fife Constabulary advised that attempts had been made to locate these invoices, which it understood should be held on microfiche at Fife Council.
14. There followed correspondence between my Office and Fife Constabulary to establish whether the invoices were held by Fife Constabulary for the purposes of FOISA. In its submissions to my Office, Fife Constabulary advised that Fife Council was responsible for payment of all invoices on behalf of Fife Constabulary and that such invoices were forwarded to the Debtors Section at the Council for processing. In subsequent correspondence Fife Constabulary provided further detail on this process. Under the previous system applicable to this case, invoices were sent to Payment of Accounts, Fife Council for payment processing and to be microfiched and retained by the Council. Fife Constabulary confirmed that it held no copies of invoices passed for payment.
15. Fife Constabulary submitted that in this circumstance the invoices were held by Fife Council as the Police Authority for Fife Constabulary.
16. I am of the view that as Fife Council processes the invoices on behalf of Fife Constabulary the information is still held by the Constabulary for the purposes of FOISA; the fact that Fife Council processes the invoices does not alter the fact that these are expenses incurred by Fife Constabulary for which, presumably, it is accountable. There are examples within the public sector whereby one authority processes the invoices of another. This arrangement originally existed in my own Office, whereby the Scottish Parliament processed invoices for me in much the same way. Such administrative arrangements do not mean that on processing of the payment it becomes disconnected from the original authority. From the information supplied to me I consider that Fife Council is simply holding the information on behalf of Fife Constabulary. As a result, I consider that the two invoices fall within the scope of this request in that they are appendices to the main report and are held by or on behalf of Fife Constabulary.



17. During the course of the investigation Fife Constabulary managed to retrieve copies of the two invoices from Fife Council. These were subsequently supplied to my Office.

Application of the exemptions to the information withheld

18. Fife Constabulary relied on a series of exemptions to withhold the information requested by Mr Findlay:
- a) Section 30(b)(ii)
 - b) Section 34(1)(b)
 - c) Section 35(1)(g)
 - d) Section 38(1)(b)
 - e) Section 39(1)

In each case, Fife Constabulary set out its reasoning as to why these exemptions applied.

19. I will now consider the application of the above exemptions to the information withheld.
20. Seven of the appendices are press articles relating to the issues under investigation by Strathclyde Police. In some cases press articles will be exempt under section 25(1) of FOISA, being information which the applicant can reasonably obtain other than by requesting it under section 1(1). However, the applicant may not be familiar with the articles held by the authority or where they may be found. In such cases, the authority should (in accordance with its duty to advise and assist in terms of section 15 of FOISA) supply a list of the articles in sufficient detail to enable the applicant to locate them: it may, of course, simply choose to provide copies of the articles. It is also possible, that the articles in question may not be reasonably obtainable and therefore are not subject to section 25(1).
21. In this case, Fife Constabulary did not choose to apply section 25(1) to the articles appended to the report but has since clarified that it does not consider them to be exempt under any provision of FOISA. I should be surprised if the applicant was interested in this information, particularly given that he is the author of some of the articles. However, I consider that Fife Constabulary should provide Mr Findlay with copies of the articles.
22. I will consider the remainder of the information held by Fife Constabulary and relevant to this request. I have initially considered the application of section 38(1)(b) to the information withheld. This is because section 38(1)(b) is an absolute exemption and if I conclude that the information is exempt by virtue of section 38 it will not be necessary to examine the remainder of the exemptions cited.



Application of section 38(1)(b) – personal information

23. Fife Constabulary submitted that the information withheld was exempt by virtue of section 38 of FOISA in that it was personal information and was gathered for the purpose of an internal and possibly criminal investigation. Fife Constabulary argued that the report looked at the officer's actions and personal interests and commented on his judgement. Fife Constabulary submitted that the opinions of the two experts focused on the officer. The authority argued that release of this information would be in breach of the data protection principles contained in Schedule 1 to the DPA.
24. Mr Findlay has indicated that any names could be withheld if appropriate. In the case of the academic experts, he argued that they were working in a professional capacity and therefore their identities could be released.

Information relating to Chief Inspector Lumsden

25. Fife Constabulary did not originally specify which part of section 38 it was relying on. In subsequent correspondence with my Office it confirmed that it was relying on section 38(1)(b) of FOISA which protects personal data relating to a third party.
26. Section 38(1)(b) of FOISA states that information is exempt information if it constitutes personal data and the disclosure of the information to a member of the public would contravene any of the data protection principles.
27. "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."
28. I am satisfied that information within the report amounts to the personal data of Chief Inspector Lumsden in that the information relates to his personal interests and includes comments on his judgement and actions. In the circumstances I accept that the information would affect his privacy and that the information has him as its focus.



29. I have considered the extent to which section 38(1)(b) potentially applies to the content of the report and the appendices. Given the purpose of the investigation it is not surprising that almost all information aside from limited information relating to the academic experts amounts to Chief Inspector Lumsden's personal data.
30. However, FOISA does not protect information simply because it relates to a third party. Personal data is only exempt from release under section 38(1)(b) of FOISA (read in conjunction with section 38(2)(a)(i) or, as appropriate, section 38(2)(b)) if the release of the information would contravene any of the data protection principles contained in the DPA.
31. Fife Constabulary has not cited the specific data protection principle(s) that would be breached if this information was to be released. However, I have assumed that Fife Constabulary is relying on the first data protection principle which states that the processing of personal data (such as the release of data in response to a request made under FOISA), must be fair and lawful and, in particular, shall not be processed unless:
 - a) at least one of the conditions in Schedule 2 (to the DPA) is met and
 - b) in the case of sensitive personal data, at least one of the conditions in Schedule 3 is also met.
32. Having considered the definition of sensitive personal data in section 2 of the DPA, I am satisfied that none of the information withheld falls into this category.
33. 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?



34. In his guidance, the Information Commissioner recognises that an issue which will often arise is whether the DPA prevents the disclosure of information identifying members of staff. The guidance states that if the information consists of the names of officials, their grades, job functions or decisions which they have made in their official capacities, then disclosure would normally be made. On the other hand, information such as home addresses or internal disciplinary matters would not normally be disclosed. The Information Commissioner also points out that it may be relevant to consider the seniority of staff: the more senior a person is, the less likely it will be unfair to disclose information about him or her acting in an official capacity.
35. I have considered this guidance in the light of the particular circumstances. I have taken into account that, in general, police officers are required to record and account for their actions as part of their ordinary professional duties. Further, police officers will be aware that their actions and opinions might subsequently be challenged, not necessarily only in a court of law. To that extent, their professional actions may often attract a higher level of public scrutiny than some other public sector staff. Importantly, the nature of their professional duties are such that they are often identifiable in an individual rather than simply in an organisational capacity. All of this, it seems to me, must have an impact on their expectations regarding public awareness and accountability in respect of their individual actions.
36. On the other hand, I am of the view that information relating to internal disciplinary matters in relation to public sector staff would not generally be released to any member of the public who requested it. It seems to me that where public sector employees are the subject of a complaint and/or disciplinary action that some protection must be afforded to the information they supply about themselves as part of that process (as well as that supplied by others). Naturally, there may be circumstances where information relating to a public sector employee in these cases could be disclosed. However, such disclosure should be made within well-defined parameters and made strictly on a case by case basis. One factor which is likely to have a bearing on whether disclosure would be fair is the seniority of the officer.
37. The Information Commissioner has issued guidance (*Data Protection Technical Guidance: Freedom of Information: access to information about public authorities' employees*) on disclosure of personal information about employees. His view is that (in general) public sector employees working in an official capacity should, depending on their seniority and the nature of their jobs, expect to be identified in relation to their professional activities and (if sufficiently senior) subject to greater levels of public scrutiny than those in more junior roles.



38. In its submissions to my Office, Fife Constabulary accepted that Chief Inspector Lumsden is a relatively senior police officer. However, in respect of this issue, I have also considered the rules governing investigations into alleged misconduct by police officers, which distinguish between officers of senior and those of junior rank. The Police (Conduct) (Senior Officers) (Scotland) Regulations 1996 and 1999 set out the process in respect of allegations of misconduct made against senior officers. The regulations define “senior officers” as officers of the rank of Assistant Chief Constable and above. Chief Inspector Lumsden does not fall into this category.
39. In this case, some information about the allegations made against Chief Inspector Lumsden is in the public domain by virtue of media reports. I have therefore also considered whether this fact has heightened the need for information about the subsequent investigation by Strathclyde Police to be disclosed. While I can see that members of the public might be interested in the content of the final report I must also take into account that public sector officials should be afforded some protection where they are the subject of complaints and/or disciplinary action.
40. There may be cases where information about the findings and conclusions in respect of a misconduct investigation should be made publicly available. However, as I said above, such disclosure should be made strictly on a case by case basis. I have considered carefully the particular information in this case and the nature of the allegations. In all the circumstances, I am satisfied that disclosure of the information would be in breach of the first data protection principle in that it would be unfair.
41. Given that I have found disclosure to be unfair I have not gone on to consider whether disclosure would be unlawful or whether one of the conditions in Schedule 2 would be met. Section 38(1)(b) is an absolute exemption and therefore there is no requirement to consider the public interest test.
42. I have previously stated that the application of section 38(1)(b) would extend to all information relating to Chief Inspector Lumsden contained within the report and the appendices (excluding the press articles, which are dealt with at paragraph 20 above).

Information relating to the two academics

43. Fife Constabulary was asked whether it wished to make any specific submissions in respect of information relating to the two academic witnesses. In response, Fife Constabulary advised that it had contacted one of the academics who had indicated that they did not wish their details to be released. The authority intimated that while the wishes of individuals did not necessarily carry any weight it thought it might assist with this case.



44. Mr Findlay is of the view that the witnesses were acting in a professional capacity and therefore their names could be released.
45. I am satisfied that the names of the two academics constitutes their personal data in that it is information that relates to them. Likewise, I am satisfied that the invoice submitted by each expert constitutes their personal data. However, as discussed above, personal data is only exempt from release under section 38(1)(b) of FOISA (read in conjunction with section 38(2)(a)(i) or, as appropriate, section 38(2)(b)) if the release of the information would contravene any of the data protection principles.
46. Again, Fife Constabulary has not cited the specific data protection principle(s) that would be breached if this information was to be released. However, I have assumed that Fife Constabulary is relying on the first data protection principle.
47. In paragraph 33 above I have set out the questions that the Information Commissioner has proposed should be considered when deciding whether disclosure would be fair. The wishes of the subject of the information are relevant to the decision making process but are not determinative. As I understand it, the academics in this case were being asked to provide an opinion based on their knowledge and expertise. As such, it seems to me, they were acting as expert witnesses. Where an expert witness simply records factual information, I have generally found that it would be both fair and lawful to disclose information relating to them (as opposed to any third party data). Where an expert witness provides a statement as part of a criminal investigation, for example, I consider that they must expect that information supplied by them might be disclosed in a court of law. I am also of the view that, unlike ordinary civilian witnesses, expert witnesses would not have the same concerns if such information was disclosed to a member of the public outwith a court of law. Expert witnesses may provide expert opinion in a whole range of settings and will not always have control over its dissemination or subsequent use.
48. In this particular case, Fife Constabulary expressed concern that should the expert witnesses be identified others might misrepresent or misunderstand the views they offered in this context, for mischievous or malicious reasons. Fife Constabulary indicated that they could be targeted by persons who took an extreme view of the subject matter.



49. As I have said above, it is only the identities of the expert witnesses that I am currently considering rather than the opinions they have expressed (these being exempt as Chief Inspector Lumsden's personal data). It can be assumed that the academics approached by Strathclyde Police are known experts in respect of the issues addressed by the Strathclyde Police investigation or they would not have been asked to provide an opinion. Information available over the internet about one of the witnesses (Witness 1) lists their specialist areas and publications. As one would expect, Witness 1's published field of expertise includes the areas considered by the Strathclyde Police investigation. I fail to see how connection with this particular investigation would cause distress to the academics given that they must be known experts in the area.
50. I accept that in this case, the matter remained an internal investigation and did not become the subject of subsequent criminal proceedings. I also accept that the academics approached are arguably different to those expert witnesses generally required to appear in criminal proceedings, such as those providing forensic and/or medical opinion. On the other hand, it is arguable, that a witness approached by the police to give expert opinion must expect that their opinion might subsequently lead to a criminal investigation and therefore to proceedings.
51. While I do not consider that disclosure of the identities of the academics who provided expert opinion in the Strathclyde Police investigation would *prima facie* be unfair I consider that due account should be taken of the effect of disclosure of this information in isolation from the other information requested by Mr Findlay. This is a matter which I consider in more detail in my assessment of section 34(1)(b) and the public interest. As a result, I will set out my conclusion on the application of section 38(1)(b) to this information following my discussion of section 34(1)(b).
52. I have also considered whether disclosure of the invoices submitted by the two academics would be in breach of the first data protection principle. It is worth noting that where this kind of information related to a company rather than to an individual it would normally be released. This is a one-off payment for a particular service rendered and unless the company (or authority) could demonstrate that disclosure would harm its commercial interests to the extent required by section 33(1)(b) it would normally be released on the grounds that it demonstrated how public funds were used.
53. In this particular case, disclosure of payment made will not reveal the total annual income of the academics; it will simply disclose a payment received from one particular source for one specific service.



54. Although I do not consider this to be a significant use of public funds I am satisfied that disclosure of the invoices would be fair. However, I will only go on to consider whether a condition in Schedule 2 can be met if I consider that this information is not exempt by virtue of any other exemption cited by Fife Constabulary.
55. Given that I have accepted that Chief Inspector Lumsden's personal information is exempt by virtue of section 38(1)(b) I will not consider the application of the other exemptions cited by Fife Constabulary to this information. However, I will now consider the application of the other exemptions cited by Fife Constabulary to the remainder of the information.

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

56. Fife Constabulary claimed that section 34(1)(b) applied to the information requested. This exemption 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.
57. 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, without limit of time. 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.



58. Fife Constabulary stated that in all cases where an internal police investigation is undertaken in relation to the 1996 Regulations there is a requirement to refer any matter which could be construed as criminal in nature to the procurator fiscal for independent consideration. Regulation 7 of the 1996 Regulations states that the Assistant Chief Constable has the power to refer the matter to the procurator fiscal if it may be reasonably inferred that a criminal offence has been committed. I understand that this step may be taken immediately on receipt of the allegation or following the report from the investigating officer. Given that this possibility existed at any stage of the investigation process and given the broad wording of section 34(1)(b) I am obliged to accept that the report of this investigation (including all appendices) falls within the scope of section 34(1)(b) in that the investigation might have led to a decision by Fife Constabulary to make a report to the procurator fiscal.
59. However, the exemption in section 34(1)(b) is subject to the public interest test 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.
60. Fife Constabulary made a number of submissions in respect of the public interest test. A number of these submissions directly relate to the content of the investigation and subsequent report. To reflect these arguments in this decision notice would potentially disclose exempt information. In general, Fife Constabulary acknowledged that there was a need to maintain public confidence and that internal investigations must be seen to be thorough and effective. Fife Constabulary accepted that openness about the report would lead to improved accountability. On the other hand, Fife Constabulary was concerned about the wider effect release of an investigation report would have on the ability of the police service to conduct effective investigations in the future. The authority argued that there was a real danger that witnesses would not be prepared to make full statements to the police if there was a fear that their statements or opinions would become available to the public at large. I have considered all relevant submissions made by Fife Constabulary in this case.
61. 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.



62. I can see that there may be cases where disclosure of the identities of witnesses might have an inhibiting effect on future witnesses and might deter them from coming forward. However, in considering this issue I have taken into account that these are witnesses who are acting in a professional capacity. They are not members of the public nor are they police officers making statements in respect of the actions of fellow officers.
63. In relation to the invoices, I can accept a degree of public interest in scrutiny of public expenditure, although in this case it has to be noted that the sums involved are quite insignificant.
64. Nonetheless, I consider that there are, in general, strong public interest arguments why information gathered as part of an investigation falling within the scope of section 34(1)(b) should be afforded some protection. I understand the concerns of the judiciary and the police about trial by media and consider that due consideration must be given to this when assessing whether release would be in the public interest. In this particular case, for example, I have considered whether there is a real public interest in disclosure of only the identities of the academics in isolation from the opinions they expressed and the conclusions and findings of the investigating officer from Strathclyde Police. If, as Fife Constabulary anticipates, the academics are subsequently approached by the media or others they will be unable to comment in any detail about their involvement with the investigation without disclosing personal data relating to Chief Inspector Lumsden.
65. I have considered this matter carefully and it seems to me that the public interest in disclosure of the identities of the academics alone without release of the content of their opinions or the findings and conclusions of the investigating officer is outweighed by the public interest in withholding them. Similarly, I regard the limited public interest in disclosure of the invoices as being outweighed by the strong general public interest in maintaining the Section 34(1)(b) exemption.
66. In these particular circumstances and concluding my discussion of the application of section 38(1)(b) to this information (see paragraphs 43-51 above), I am satisfied that disclosure of the identities of the academics would also be unfair and in breach of the first data protection principle. Given that I have accepted that disclosure would be unfair I will not go on to consider whether disclosure would be lawful or whether a condition in Schedule 2 would be met.

Conclusion



67. I have found that all information relating to Chief Inspector Lumsden is exempt by virtue of section 38(1)(b). I have also found that the remainder of the information is also exempt by virtue of section 34(1)(b) and partially in respect of section 38(1)(b). As a result, I have not gone on to consider the remainder of the exemptions cited by Fife Constabulary.

Decision

I find that the Chief Constable of Fife (Fife Constabulary) complied with Part 1 of FOISA in withholding information requested by Mr Findlay where this information related to Chief Inspector Lumsden, on the basis that this information was exempt by virtue of section 38(1)(b) of FOISA.

I find that Fife Constabulary complied with Part 1 of FOISA in withholding the remainder of the information on the basis that this information was exempt by virtue of sections 34(1)(b) and section 38(1)(b) of FOISA. I find that the public interest in disclosing this information (insofar as relevant) is outweighed by the public interest in maintaining the section 34(1)(b) exemption.

I find that Fife Constabulary failed to comply with section 1(1) of Part 1 of FOISA by not providing Mr Findlay with copies of the relevant press articles, which were not exempt under any of the exemptions claimed.

Copies of the relevant press articles should be supplied to Mr Findlay within 45 days of receipt this decision notice.

Appeal

Should either Mr Findlay or the Chief Constable of Fife Constabulary 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
26 July 2007



Appendix

Relevant statutory provisions

Freedom of Information (Scotland) Act 2002

1 General entitlement

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

2 Effect of exemptions

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

25 Information otherwise accessible

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



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; or

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.

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.