



Scottish Information
Commissioner

**Decision 067/2007 - Mr Leslie Brown and the Chief
Constable of Central Scotland Police**

*Request for copy of police statements, letter to police and
statement by applicant to police*

**Applicant: Mr Leslie Brown
Authority: Central Scotland Police
Case No: 200600689
Decision Date: 4 May 2007**

**Kevin Dunion
Scottish Information Commissioner**

Kinburn Castle
Doubledykes Road
St Andrews
Fife
KY16 9DS



Decision 067/2007 – Mr Leslie Brown and the Chief Constable of Central Scotland Police

Request for police statements – information refused – personal information section 38(1)(b) – law enforcement section 35(1)(g) – letter supplied to police by applicant – information not held section 17(1)(b) – copy of statement made to police by applicant – information refused – personal information section 38(1)(a) – Commissioner upheld authority’s decision

Relevant Statutory Provisions and other Sources

Freedom of Information (Scotland) Act 2002 sections 17(1) (Notice that information is not held); 35(1)(g), (2)(b) and (2)(d)(ii) (Law enforcement); 38(1)(a); 38(1)(b) and 38(2)(a)(i) (Personal information).

Data Protection Act 1998 section 1 (Basic interpretative provisions); 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 Brown made a request to Central Scotland Police for statements made by two police constables in relation to a complaint made by Mr Brown in relation to their conduct following an incident at Mr Brown’s house; a letter, allegedly supplied to a police officer by Mr Brown during the course of the investigation of his complaint; and a copy of a statement made by Mr Brown to Dunblane Police on 14 December 1998. Central Scotland Police refused the request, citing sections 35(1)(g), 38(1)(a) and section 38(1)(b) of the Freedom of Information (Scotland) Act 2002 (FOISA). Central Scotland Police also cited section 17 of FOISA (information not held).

Following an investigation the Commissioner found that that the Chief Constable of Central Scotland Police had dealt with Mr Brown’s request for information in accordance with Part 1 of FOISA and was justified in its application of the exemptions claimed and in arguing that certain information was not held.



Background

1. Between 4 November 2005 and 2 December 2005 an exchange of correspondence occurred between Mr Brown and Central Scotland Police in which it was established that Mr Brown wished to request information under FOISA. However, Central Scotland Police felt that Mr Brown's request required more clarity. On 8 December Central Scotland Police established that Mr Brown required the following:-
 - Statements made by two police constables in relation to a complaint made by Mr Brown in 1998 against them in relation to their conduct following an incident at Mr Brown's house in 1994
 - a letter, allegedly supplied to the investigating officer by Mr Brown during the course of the investigation of Mr Brown's complaint in 1998.
2. On 6 January 2006 Central Scotland Police responded to Mr Brown's request refusing the statements under sections 35(1)(g) (with reference to section 35(2)(b) and (2)(d)(ii)), 38(1)(a) and 38(1)(b) (with reference to section 38(2)(a)(i)) of FOISA. Central Scotland Police informed Mr Brown that they did not hold the letter allegedly supplied by him to the investigating officer.
3. In that same response Central Scotland Police advised that if Mr Brown was referring to his own statement, taken by the investigating officer on 14 December 1998, the information was held. They refused to disclose it, however, citing section 38(1)(a) of FOISA.
4. On 2 February 2006 Mr Brown wrote to Central Scotland Police and requested a review of the decision to withhold the police constables' statements. In his request for review Mr Brown appears to have requested a copy of a witness statement provided by him in 1998.
5. On 9 February 2006 Central Scotland Police responded to Mr Brown's request for review, upholding the original decision of 6 January 2006. The Review Officer suggested that Mr Brown might receive a copy of his statement of 14 December 1998 were he to make a Subject Access Request (SAR) under the terms of the Data Protection Act 1998 (DPA).
6. On 3 April 2006 Mr Brown applied to the Scottish Information Commissioner for a decision as to whether Central Scotland Police had dealt with his information request in accordance with FOISA.
7. The case was allocated to an investigating officer and Mr Brown's appeal was validated by establishing that he 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.



The Investigation

8. My investigating officer contacted Central Scotland Police for their comments on the application, as required under section 49(3)(a) of FOISA, and for further information in relation to this case, in particular the information requested by Mr Brown. Central Scotland Police responded on 11 May 2006.
9. Central Scotland Police submitted that they had considered Mr Brown's request for information to be as follows:-
 1. Statements made by the two constables in relation to a complaint made by Mr Brown about an incident at his home on 20 May 1994.
 2. A letter, allegedly supplied to the investigating officer during the course of the investigation of Mr Brown's complaint; and
 3. A copy of the statement made by Mr Brown to Central Scotland Police on 14 December 1998.
10. With reference to item 1 above, Central Scotland Police stated that they had refused the information under sections 35 and 38 of FOISA and referred to their initial letter of response to Mr Brown dated 6 January 2006.
11. With reference to item 2 above, Central Scotland Police advised that there was no record of the item being held. It was alleged that the letter was on Central Scotland Police headed note paper and contained abusive text in relation to Mr Brown. Central Scotland Police stated that they could find no evidence of the letter having been composed or handed to the investigating officer. It was for this reason that the information was not supplied as requested.
12. With reference to item 3 above, Central Scotland Police asserted that it was correct to apply the exemption under section 38(1)(a) of FOISA in relation to item 3, as the information constituted personal information of which the applicant was the data subject. It was for this reason that the information was not supplied as requested.
13. Central Scotland Police indicated that Mr Brown had been supplied with a copy of his witness statement of 14 December 1998 further to a SAR made by him under the DPA.
14. Mr Brown provided background information to the original incident in 1994 and stated that he was dissatisfied at having not received any information relating to his request.



The Commissioner's Analysis and Findings

15. I am satisfied that Central Scotland Police offered every reasonable advice and assistance to Mr Brown in order to establish the information he required.
16. I am therefore satisfied that the three items mentioned in point 15 above, represent accurately the information Mr Brown requested.
17. I will now consider Central Scotland Police's response to each of the three items.

Item 1 – Statements made by two constables

18. In relation to item 1, Central Scotland Police have applied two exemptions to the entire documents – section 38(1)(b) (with reference to section 38(2)(a)(i)) of FOISA and section 35(1)(g) (with reference to section 35(2)(b) and 35(2)(d)(ii)) of FOISA.
19. Normally I would consider each exemption in turn but if it can be shown that section 38(1)(b) of FOISA can be upheld in relation to the information withheld, it will not be necessary for me to consider section 35 as the effect of section 38(1)(b) will be to prevent release of the information.

Consideration of section 38(1)(b)

20. Central Scotland Police cited section 38(1)(b) of FOISA as grounds for withholding the statements made by the two constables. Therefore, the investigation must address whether this exemption was correctly applied to the constables' statements.
21. Section 38(1)(b) allows Scottish public authorities to withhold information if it is "personal data", as defined by section 1 of the DPA and if it satisfies either of the conditions laid down in sections 38(2) or 38(3) of FOISA. Section 38(2)(a)(i) applies where the disclosure of personal data would contravene any of the data protection principles contained in Schedule 1 to the DPA.

Is the information "personal data"?

22. Section 1(1) of the DPA defines personal data as "data which relate to a living individual who can be identified (a) from those data, or (b) from those data and other information which is in the possession of, or is likely to come into the possession of, the data controller".



23. The information in item 3 comprises biographical information about the constables who provided the statements and descriptions of the events complained about from their perspectives. Given the nature of this information and the circumstances in which it was obtained, I am satisfied that it is the personal data of the constables.
24. I have considered the definition of “sensitive personal data” in section 2 of the DPA and do not consider that any of the information sought by Mr Brown falls into this category.

Would release of the information breach any of the data protection principles?

25. Central Scotland Police argued that the release of the constables’ statements would breach the first data protection principle.
26. The first data protection principle requires that personal data shall be processed fairly and lawfully and, in particular, shall not be processed unless (assuming it is not sensitive personal data) at least one of the conditions in Schedule 2 [to the DPA] is met. The question to consider here, therefore, is whether the release of the information in item 1 would be fair and lawful.
27. In guidance (Freedom of Information Act Awareness Guidance No 1: Personal Data), the Information Commissioner (who is responsible for enforcing the DPA) recommends that public authorities consider the following questions when considering whether release of personal data would be fair within the context of freedom of information legislation:-
 - would disclosure cause unnecessary or unjustified distress or damage to the data subject?
 - would the data subject expect that his or her information might be disclosed to others?
 - has the person been led to believe that his or her information would be kept secret?
28. Investigations into allegations of misconduct by police officers below the level of assistant chief constable are governed by the Police (Conduct) (Scotland) Regulations 1996 (the 1996 Regulations). There is nothing in these regulations which specifically indicates that the investigation of alleged misconduct, or the information resulting from such investigations, is secret or confidential.



29. While there may be no formal or technical duty of secrecy or confidentiality, I am sensitive to the fact that there is a general expectation in such investigations into alleged misconduct that the privacy of both the person making the allegation and the police officers concerned is maintained and that the information gathered and recorded in the course of the investigation will not (except through the medium of court proceedings, where relevant) find its way into the public domain.
30. Although both constables provided statements in relations to the allegations made by Mr Brown to a Detective Sergeant within Central Scotland Police, I am advised by Central Scotland Police that these statements were not obligatory, although providing them greatly assists the investigative process into alleged misconduct.
31. Given the nature of such investigations and the lack of obligation to provide statements it would seem reasonable to assume that the constables participated with no expectation that the information they provided would be disclosed to others.
32. In this case, therefore, it is clear from the evidence provided to me that the constables provided these statements in the expectation that they would not be further disclosed. I am satisfied that it would therefore be a breach of the first data protection principle for Central Scotland Police to disclose the information in them, in that disclosure 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 disclosure would be unlawful or whether any of the conditions in Schedule 2 to the DPA can be met.
33. I am therefore satisfied that Central Scotland Police correctly applied section 38(1)(b) of FOISA to the statements made by the constables. As section 38(1)(b) is an absolute exemption, I am not required to consider whether the public interest favours disclosure or the maintenance of the exemption.

Consideration of section 35(1)(g)

34. As I have accepted that section 38(1)(b) of FOISA applies to the entirety of the constables' statements and the effect of this is to exempt the statements from disclosure under FOISA absolutely, I am not required to (and therefore will not) consider the application by Central Scotland Police of the exemption under section 35(1)(g) of FOISA.

Item 2 – a letter, allegedly supplied to the police by the applicant

35. I am satisfied on the basis of the evidence submitted to my Office that Central Scotland Police took all reasonable steps to attempt to locate a letter falling within the description of item 2.



36. I am therefore satisfied that Central Scotland Police were correct in informing Mr Brown that they did not hold that information and that they correctly applied section 17(1) of FOISA to that part of Mr Brown's request.

Item 3 – a copy of statement made by the applicant

37. Having viewed the information contained in the statement identified as item 3, I am satisfied that the information does indeed constitute personal information of which the applicant (Mr Brown) is the data subject.
38. I am therefore satisfied that section 38(1)(a) of FOISA was correctly applied to Mr Brown's request for his own statement and that the information was correctly refused by Central Scotland Police under that exemption.
39. I note that Mr Brown's statement was later supplied by the Police to Mr Brown under the terms of the Data Protection Act 1998.

Decision

I find that the Chief Constable of Central Scotland Police dealt with Mr Brown's requests for the constables' statements fully in accordance with Part 1 of the Freedom of Information (Scotland) Act 2002 (FOISA), in that it applied section 38(1)(b) (with reference to section 38(2)(a)(i)) of FOISA correctly to that information.

I also find that the Chief Constable of Central Scotland Police dealt with Mr Brown's requests for a letter allegedly supplied to the investigating officer by Mr Brown fully in accordance with Part 1 of FOISA, in that it applied section 17(1) of FOISA correctly as the information was not held by Central Scotland Police.

I also find that the Chief Constable of Central Scotland Police dealt with Mr Brown's requests for a copy of a statement by himself fully in accordance with Part 1 of FOISA, in that it applied section 38(1)(a) correctly to that information.



Appeal

Should either Mr Brown or the Chief Constable of Central Scotland Police wish to appeal against my 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

4 May 2007



APPENDIX 1

Relevant Statutory Provisions

Freedom of Information (Scotland) Act 2002:

17 Notice that information is not held

- (1) Where –
 - (a) a Scottish public authority receives a request which would require it either –
 - (i) to comply with section 1(1) ... but
 - (b) the authority does not hold that information, it must, within the time allowed by or by virtue of section 10 for complying with the request, give the applicant notice in writing that it does not hold it.

35 Law enforcement

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



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;

SCHEDULE 1

THE DATA PROTECTION PRINCIPLES

PART I

THE 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.