



Scottish Information  
Commissioner

**Decision 192/2006 – Mr David Sharpe and the  
Chief Constable of Strathclyde Police**

*Request for copies of witness statements given by named  
individuals to Strathclyde Police, and the full written record of the  
trial which involved Mr Sharpe*

**Applicant: Mr David Sharpe  
Authority: Chief Constable of Strathclyde Police  
Case No: 200600650  
Decision Date: 26 October 2006**

**Kevin Dunion  
Scottish Information Commissioner**

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## Decision 192/2006 – Mr David Sharpe and the Chief Constable of Strathclyde Police

### *Request for copies of witness statements given by named individuals to Strathclyde Police, and a copy of the full trial record*

#### Relevant Statutory Provisions and Other Sources

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Freedom of Information (Scotland) Act 2002: sections 1(1) (General entitlement); 17(1) (Notice that information is not held) and 38(1)(b) (Personal information).

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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Mr Sharpe submitted an information request to the Chief Constable of Strathclyde Police (the Police) for copies of witness statements taken by the Police from two named individuals who had made allegations against Mr Sharpe. In his request for information, Mr Sharpe also requested the name(s) of the Police Officer(s) who took the statements from the individuals. Mr Sharpe also requested a copy of the full record of the trial which involved Mr Sharpe, as written by the Justice of the Peace during the trial.

The Police refused to provide Mr Sharpe with copies of the witness statements on the basis of the following exemptions: section 34 (Investigations by Scottish public authorities and proceedings arising out of such investigations); section 35 (Law enforcement) and section 38 (Personal information). In their response, the Police did not address Mr Sharpe's request for the trial record. On review, the Police upheld their decision in respect of the request for the witness statements on review and advised Mr Sharpe that the trial record was not held by them.

Following an investigation, the Commissioner found that the Police were correct to withhold the witness statements on the basis of the exemption contained in section 38(1)(b) of FOISA. He did, however, order the Police to release the names of the police officers who had taken the statements to Mr Sharpe.

The Commissioner also found that the trial record was not held by the Police.



## Background

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1. On 9 February 2006, Mr Sharpe submitted an information request to the Police. In this information request, Mr Sharpe sought access to:
  - Witness statements which had been made to the Police by two named individuals who had made allegations against Mr Sharpe.
  - The name(s) of the Officer(s) who took the witness statements from the named individuals.
  - The trial notes written by the Justice of the Peace during Mr Sharpe's trial (the trial record).
2. The Police responded on 22 February 2006. In their response the Police confirmed that they held the information that Mr Sharpe was seeking, but advised him that they were relying on the exemptions under section 34(1)(a)(i), section 35(1)(a) and (b) and section 38(1)(b) for withholding the information from Mr Sharpe. This response did not address Mr Sharpe's request for the trial record. This response did, however, provide Mr Sharpe with information about his right to request a review of the Police's decision, and his right to appeal to me.
3. Mr Sharpe submitted a request for review to the Police on 27 February 2006.
4. A response was provided to Mr Sharpe's request for a review by the Police on 20 March 2006. In this response, the Police upheld their original decision in respect of the witness statements. However, the Police also indicated that they did not hold the trial record and they provided Mr Sharpe with a notice under section 17 of FOISA (Notice that information is not held).
5. On 24 March 2006, Mr Sharpe applied to me for a decision as to whether the Police had breached Part 1 of FOISA in refusing to provide him with the information in the witness statements (which include the name(s) of the Officer(s) who had taken the statements) and the trial record. The case was subsequently allocated to an investigating officer and Mr Sharpe's appeal was validated by establishing that he had made a valid information request to a Scottish public authority under FOISA and had applied to me only after asking the Police to review their response to his request.



## The Investigation

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6. A letter was sent by the investigating officer to the Police on 11 April 2006. In this letter, the investigating officer asked the Police to comment on Mr Sharpe's application in terms of section 49(3)(a) of FOISA. The Police were asked to provide, amongst other items, a copy of the information that had been withheld from Mr Sharpe and an analysis of the exemptions that they were relying on in withholding the information from Mr Sharpe. The Police were also asked to provide an analysis of their consideration of the public interest test in relation to these exemptions where applicable.
7. A response was received from the Police on 27 April 2006. Within this response, the Police provided copies of the information which they had withheld from Mr Sharpe and confirmed again that they did not hold a copy of the trial record.

## Submissions from the Police

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8. In their submissions to my Office, the Police indicated that the trial record sought by Mr Sharpe is information which is not held by them. As such, they were relying on the terms of section 17 of FOISA.
9. The Police also confirmed that they are relying on the following exemptions in withholding the witness statements from Mr Sharpe. (Given that the names of the Officers who took the statements are included in the witness statements themselves, I have proceeded on the basis that these arguments also apply to the release of the names of the Officers.)
  - 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
  - Section 38(1)(b) – Personal information
10. I will consider the Police's reasoning for relying on these exemptions further in the section on Analysis and Findings below.



## Submissions from Mr Sharpe

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11. In communications with my Office, Mr Sharpe has made it clear that he considers that he has been wrongly convicted of an offence, and that the information contained within the documents he is seeking will be of assistance to him in proving his innocence.

## The Commissioner's Analysis and Findings

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12. Although the Police have sought to rely on four exemptions in respect of the information that they have withheld in relation to the individual witness statements, I have found it necessary to consider only one of the exemptions (section 38(1)(b)) in respect of these. The reason for this will become apparent later in this Decision Notice.
13. In respect of their response to Mr Sharpe concerning his request for a copy of the trial record, the Police have submitted that they are relying on section 17 of FOISA, in that this is not information which is held by them.

### Section 17 – information not held

14. In order to determine whether the Police were correct to cite section 17 of FOISA in respect of the trial record, I must be satisfied that the Police do not hold (and did not hold at the time of Mr Sharpe's request) a copy of this information.
15. In their submissions to my Office, the Police have indicated that the notes taken by a Justice of the Peace during a trial is not information which they, as a Police Force, would normally hold.
16. Mr Sharpe's trial was heard before a District Court. District Courts are established under the District Court (Scotland) Act 1975 (the 1975 Act) and are run by local authorities. Trials in the District Court are presided over by a Justice of the Peace, assisted by a legally qualified clerk, appointed by a local authority. The Police have no role in the administration of any of the functions under the 1975 Act and, as a result, would not normally hold the notes taken by Justices of the Peace.
17. The Police have indicated that in their response to Mr Sharpe they suggested he consider making an application to Inverclyde District Court for the trial record and I am aware that Mr Sharpe has subsequently done this.



18. I am satisfied, on the basis of the submissions provided by the Police, that the trial record sought by Mr Sharpe is not information which is held by the Police.

### **Section 38(1)(b)**

19. During the investigation, the Police provided copies of the witness statements made to the Police by two named witnesses relating to the conduct of Mr Sharpe. The Police cited the exemption under section 38(1)(b) for withholding this information from Mr Sharpe.
20. The exemption under section 38 relates to personal information. Section 38(1)(b) (read in conjunction with section 38(2)(a)(i)), exempts information if it constitutes personal data, the disclosure of which to a member of the public would contravene any of the data protection principles. This particular exemption is an absolute exemption, so where a public authority considers that information falls within the scope of this exemption, it is not required to consider the public interest in the disclosure or release of the information.
21. In order for the Police to be able to rely on this exemption, they would have to show that the information which has been requested is personal data for the purposes of the Data Protection Act 1998 (the DPA), and that disclosure of this personal data to a member of the public would contravene the data protection principles.
22. The information in the witness statements contains information which relates to living persons, such as the witnesses and the Officers. These statements contain details of the witnesses' recollections and opinions of what happened in relation to an incident involving Mr Sharpe.
23. The Police's consider that release of this information to a member of the public would breach the first data protection principle under the DPA, as release would not satisfy the requirement to process personal data fairly. The Police have also commented that the information contained in witness statements was gathered for the purposes of policing and to process it for any other purpose would be unlawful.
24. In considering the application of the exemption, I first have to establish whether the information which has been withheld by the Police is personal data as defined in section 1(1) of the DPA.



25. Section 1(1) of the DPA defines personal data as:
- “data which relate to a living individual who can be identified-
- a) from those data, or
  - b) from those data and other information which is in the possession of, or is likely to come into the possession of, the data controller,
- and includes any expression of opinion about the individual and any indication of the intentions of the data controller and any other person in respect of the individual”.
26. If I am satisfied that the information which is being withheld from Mr Sharpe in terms of the witness statements is personal data, as defined in section 1(1) of the DPA, I am then required to consider whether release of this information would breach any of the data protection principles.
27. I also have to bear in mind the effect that the Court of Appeal case of *Durant v Financial Services Authority* [2003] EWCA 1746 had on the interpretation of the definition of personal data under section 1(1) of the DPA. This case highlighted that for information to be personal information it must relate to an individual, be biographical in respect of the individual concerned to a significant extent and must have that individual at its focus – in short it must affect the individual's privacy.
28. I have split my consideration of the personal information in the statements into two separate areas, in line with the original request made by Mr Sharpe: the information given by the witnesses (together with their personal details) and the names of the Officers who took the statements.
29. In considering the information given by the witnesses and their personal details, I am satisfied that this information constitutes the personal data of the two named individuals who made the statements. I am satisfied that the information within the statements contains information which is biographical about the individual witnesses, and which could lead to the identification of the witnesses. I am also satisfied that the focus of the information within the statements is information which has been provided by the named witnesses about an incident that they were involved in.
30. In considering the names of the Officer(s) who took the statements, I am also satisfied that this information is the personal data of the Officer(s) who took the statements from the two named witnesses.



31. As I am satisfied that both the information given by the witnesses (and their personal details) and the names of Officer(s) who took the statements are personal information, I now have to go on to consider whether release of this information would breach any of the data protection principles. As mentioned previously, the Police have argued that release of the information contained in these witness statements would contravene the first data protection principle.
32. The first data protection principle requires that personal data must be processed fairly and lawfully and, in particular, must not be processed unless at least one of the conditions in Schedule 2 of the DPA is met, and in the case of sensitive personal data, at least one of the conditions in Schedule 3 of the DPA is also met.
33. In determining whether release of the information contained in the witness statements (and their personal details) would breach the first data protection, I will first consider whether the processing of the information would be fair. I appreciate that in making such a statement to the Police, the named witnesses would have had an expectation that this information could have been used for any subsequent Police investigation that may follow. However, I am not satisfied that there would have been any reasonable expectation on the behalf of the witnesses that the information would be released for other purposes, albeit that the information provided by them came about as a result of an incident which occurred in the course of their professional duties. It should be noted that in considering whether it is fair to release this information in response to a request made under FOISA, I must consider the release of the information to the public in general and not simply to Mr Sharpe.
34. Given that I have found that release of this information would be unfair, I am not required to go on consider whether the processing of this information would be lawful or whether it would meet one of the conditions contained in Schedule 2 of the DPA.
35. I have also considered whether the release of the names of the Officer(s) who took the statements would breach the first data protection principle. Although I have accepted that in this case the name(s) of the Officer(s) is personal data, I do not accept that disclosure of the information would breach the first data protection principle. I expect that where a Police Officer attends an incident in the course of his/her professional duties and makes a record of that incident then he/she would have an expectation that the record of that incident may be included in any subsequent report that may be submitted. I am not satisfied that to release this information would be deemed to be unfair processing of the Officer's details. I do not consider the release of the information to be unlawful. I therefore require the Police to release the name of the Officer(s) who took the statements from the named witnesses to Mr Sharpe.





36. As I have accepted that the information contained within the witness statements given by the named witnesses (and their personal details) withheld from Mr Sharpe is exempt under section 38(1)(b) of FOISA, I am not required to consider any of the other exemptions cited by the Police in relation to these statements.
37. Given that the submissions from the Police did not make specific reference to the names of the Officer(s), it is unclear whether the Police intended to rely on any of the other exemptions they cited to withhold this information. I have considered the other exemptions cited by the Police and, in the circumstances of this case, am satisfied that none of them apply.

## Decision

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I find that the Chief Constable of Strathclyde Police (the Police) generally dealt with Mr Sharpe's request for information in accordance with Part 1 of the Freedom of Information (Scotland) Act 2002 (FOISA).

I find that the trial record requested by Mr Sharpe is not held by the Police.

I find that the Police were correct to withhold the information given by the witnesses in the statements and their personal details on the basis that the information was exempt under section 38(1)(b) of FOISA.

However, I find that, in withholding the names of the Officer(s) in question from Sharpe, the Police failed to comply with Part 1 of FOISA and in particular section 1(1) of FOISA.

I require the Police to release the name of the Officer(s) who took the statements to Mr Sharpe.

I am obliged to give the Police at least 42 calendar days in which to supply Mr Sharpe with this information. In this case, I require the Police to issue the name(s) of the Officer(s) to Mr Sharpe within 45 calendar days of receipt of this notice.



## **Appeal**

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Should either Mr Sharpe or the Police wish to appeal against this decision there is an appeal to the Court of Session on a point of law only. Any such appeal must be made within 42 days of receipt of this decision notice.

**Kevin Dunion**  
**Scottish Information Commissioner**  
**26 October 2006**



## 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.

##### **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); or
  - (ii) to determine any question arising by virtue of paragraph (a) or (b) of section 2(1),
- if it held the information to which the request relates; 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.

##### **38 Personal information**

- (1) Information is exempt information if it constitutes-
- (a) ...
  - (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 ...

