



Scottish Information
Commissioner

**Decision 085/2007 - Mr Robert Dowdles and the Chief
Constable of Strathclyde Police**

*Request for information relating to a police investigation and report to the
Procurator Fiscal*

**Applicant: Mr Robert Dowdles
Authority: Chief Constable of Strathclyde Police
Case No: 200502941
Decision Date: 31 May 2007**

**Kevin Dunion
Scottish Information Commissioner**

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Decision 085/2007 – Mr Robert Dowdles and the Chief Constable of Strathclyde Police

Requests for information relating to a police investigation and report to the Procurator Fiscal

Relevant Statutory Provisions and other Sources

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) (General entitlement); 17 (Notice that information is not held); 34(1)(a)(i) (Investigations by Scottish public authorities and proceedings arising out of such investigations); 38(1)(a) and (b) (Personal information).

Data Protection Act 1998 (the DPA) sections 1 (Basic interpretative provisions) and 2 (Sensitive personal data); Schedule 1 Part I (The data protection principles); Schedule 3 (Conditions relevant for purposes of the first principle: processing of sensitive 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

In 2005 Mr Dowdles asked for certain information relating to a Fraud Squad enquiry into the operation of a death benefit scheme by the Scottish Police Federation (the Federation). Strathclyde Police (the Police) informed him that some of the information was not held, while some was exempt from disclosure under FOISA. Mr Dowdles made a second request for information on the same matter in 2006, which again was refused on the grounds that the information was exempt from disclosure.

During the investigation into Mr Dowdles' first request, the Police discovered that they held certain information which had not been considered in their response. This information was also held to be exempt from disclosure.

Following reviews in respect of each request, Mr Dowdles applied to the Commissioner for a decision. The Commissioner found that the Police had dealt with Mr Dowdles' request in accordance with Part 1 of FOISA, the information being either not held or exempt from disclosure.



Background

1. Mr Dowdles wrote to Strathclyde Police on 21 August 2005 to ask for the following information, all relative to a Fraud Squad investigation into the operation of a death benefit scheme by the Federation:
 - (a) the identities of those witnesses interviewed by the Fraud Squad in the course of their enquiries
 - (b) the Crime Reference Number or Subject Sheet Reference Number allocated by the Fraud Squad to the report submitted to the Procurator Fiscal
 - (c) copies of any documents given to, seized by, or otherwise obtained by the Fraud Squad in the course of the enquiry, other than documents that Mr Dowdles had himself provided in the first instance.
2. The Police replied on 19 September 2005, notifying Mr Dowdles that a decision had been made not to supply the information he had requested in point (a) above as it was considered to be exempt from disclosure under FOISA. The exemptions cited were section 38(1)(b) (Personal information) and section 35(1)(a) and (b) (Law enforcement). In relation to the section 35 exemptions, they argued that the public interest in maintaining the exemption outweighed the public interest in disclosure of the information
3. In relation to point (b) in paragraph 1, the Police advised Mr Dowdles that no crime number had been raised and the subject sheets did not contain a reference number from which the investigation could be identified. In terms of section 17 of FOISA, the Police advised that the information was therefore not held.
4. In relation to point (c) in paragraph 1, the Police advised that no such documents were held. The Police explained that all documents seized by the Fraud Squad were returned to their owners at the conclusion of the investigation, and the only documents held were those provided by Mr Dowdles and another complainant.



5. Mr Dowdles requested a review of this response on 23 September 2005. The Police replied on 24 October 2005, upholding the view that certain information was exempt from disclosure. Further information was provided in relation to the request for crime reference or subject sheet numbers: the Police confirmed that a reference number quoted by Mr Dowdles was an internal Fraud Squad reference number and had never been transmitted to the Procurator Fiscal in the correspondence exchanged.
6. The Police amended their response in relation to the documents seized or otherwise obtained by the Fraud Squad. They confirmed that the Force held copies of documentation supplied by other witnesses, but asserted that the information in these documents was exempt from disclosure under section 35(1)(a) and (b) of FOISA. The Police considered the public interest in upholding the exemption to outweigh the benefits of disclosure in terms of justice to the individual and accountability regarding the police investigation.
7. Mr Dowdles applied to me for a decision on 28 October 2005. The case was allocated to an investigating officer.
8. Mr Dowdles subsequently made another information request to Strathclyde Police (30 May 2006) for:
 - (a) the names of the witnesses contained in the Subject Report to the then Procurator Fiscal
 - (b) the list of documents contained or mentioned in the Report
 - (c) a copy of the Report itself, with names and personal details removed.
9. The Police replied on 2 June 2006. They interpreted Mr Dowdles' request as a request for the copies of the 8 police reports forwarded to the Procurator Fiscal in connection with the police investigation, with personal details removed. They advised Mr Dowdles that the information was exempt from disclosure under section 34(1)(a)(i) (Investigations by Scottish public authorities and proceedings arising out of such investigations) and section 35(1)(a) and (b) (Law enforcement). In both cases the Police argued that, on balance, the public interest in maintaining the exemption outweighed the public interest in disclosure of the information.
10. Mr Dowdles requested a review of this response on 7 June 2006. On 29 June 2006 the Police confirmed that, after review, the exemptions applied had been upheld without modification. However, the review panel had found that two other exemptions in FOISA should also be applied: section 35(1)(g) (Law enforcement) and section 38(1)(a) (Personal information).
11. Mr Dowdles applied to me for a decision on 2 July 2006. His two cases were conjoined and together form the subject of this decision notice.



12. Mr Dowdles' applications were validated by establishing that he had made his requests for information to a Scottish public authority, and had appealed me only after requesting the authority to review its response to each request.

The Investigation

13. Following Mr Dowdles' initial application, a letter was sent to the Police on 11 November 2005 informing them that an appeal had been received and that an investigation into the matter had begun. The Police were asked to comment on matters raised by the application and on the application as a whole, in terms of section 49(3)(a) of FOISA.
14. The Police were asked to provide a statement of their understanding of the background to the case. They were also asked to supply copies of the documents withheld from Mr Dowdles, to provide any additional comments in support of the exemptions cited, and to provide any documentation which would explain why the report to the Procurator Fiscal would not have been given a unique reference number.
15. The Police replied on 13 December 2005, providing the information and comments requested above. In this letter they advised that they now believed that the exemption in section 34(1)(a)(i) also applied to some of the information withheld. This letter was followed by a meeting at which the Police provided further explanation about the documents in the case.
16. Regarding Mr Dowdles' second application, the Police were similarly advised (5 July 2006) that an application had been received and an investigation would be carried out, and asked for their comments in terms of section 49(3)(a). These were duly provided.
17. During the investigation other comments and explanation were obtained from the Police in relation to their approach to both of Mr Dowdles' requests. These are considered later in this decision notice.
18. Mr Dowdles was invited to provide his view of the public interest associated with disclosure of the information he had requested, and did so in letters dated 4 and 11 September 2006.



The Commissioner's Analysis and Findings

Information falling within the scope of the requests

19. It may be useful at this point to summarise the information requests submitted by Mr Dowdles. I have allocated a reference number to each request for the purposes of this decision notice. Mr Dowdles' first letter contained three separate requests for information:
- 1) the identities of those witnesses interviewed by the Fraud Squad in the course of their enquiries
 - 2) the Crime Reference Number or Subject Sheet Reference Number allocated by the Fraud Squad to the report submitted to the Procurator Fiscal
 - 3) copies of any documents given to, seized by, or otherwise obtained by the Fraud Squad in the course of the enquiry, other than documents that Mr Dowdles had himself provided in the first instance.
20. Mr Dowdles subsequently wrote again to Strathclyde Police (30 May 2006), asking for:
- 4) the names of the witnesses contained in the Subject Report to the then Procurator Fiscal
 - 5) the list of documents contained or mentioned in the Report
 - 6) a copy of the Report itself, with names and personal details removed.
21. Mr Dowdles framed his second request in terms of the "Subject Report" sent to the Procurator Fiscal. The Police have interpreted this request broadly to include 8 separate reports submitted to the Procurator Fiscal at various points during the Fraud Squad investigation. It follows that requests 4 and 5 should both be treated as requests for information within any of the 8 subject reports submitted to the Procurator Fiscal.



22. The Police advised Mr Dowdles that they had interpreted requests 5 & 6 as a single request for the subject reports with all personal data removed. This would include the information asked for in request 5. They noted that when Mr Dowdles sought a review of the response to his second request, he did not express any dissatisfaction with the terms of the request as notified to him in the letter of response.
23. It could be assumed that if information relating to request 6 was supplied, it would include the information relating to request 5. However, the question remains whether request 5 could be fulfilled if the information relating to request 6 was otherwise deemed to be exempt from disclosure under FOISA. The Police advised that in this situation they would not be minded to disclose the information relating to request 5, believing it to be exempt from disclosure under the exemptions cited in relation to the subject reports.

Information not held (requests 2 and 3)

24. Mr Dowdles asked (request 2) for the Crime Reference Number or Subject Sheet Reference Number allocated by the Fraud Squad to the report submitted to the Procurator Fiscal. The Police advised him that this information was not held, as the manner in which such reports were submitted would not require a unique reference number. The Police confirmed to the investigating officer that each subject report contains only a footer number, which is a filing reference incorporating the initials of the typist and the Fiscal. The footer number was not used as a means of reference by either the Police or the Procurator Fiscal in the correspondence. The correspondence was referenced by the investigating officer's name.
25. Having examined the subject reports submitted to the Procurator Fiscal and discussed this question with staff from the Crown Office and Procurator Fiscal Service, I accept that the documents bear no reference number of the type requested by Mr Dowdles, and that the information is therefore not held by the Police.
26. Mr Dowdles asked (request 3) for copies of any documents given to, seized by, or otherwise obtained by the Fraud Squad in the course of the enquiry, other than documents that Mr Dowdles had himself provided in the first instance. The Police advised that all documents seized from the insurance company and the Federation had been returned to the owners. They provided copies of administrative documents to demonstrate that insurance documentation provided to the Fraud Squad investigation had been returned to the insurance company.



27. However, after my Office contacted the Police to ask for information in relation to Mr Dowdles' application, the Police discovered that the Force did in fact hold additional information which had been seized or otherwise obtained by the Fraud Squad in relation to the criminal enquiry, but which had not been considered when the Police responded to Mr Dowdles' first information request. The Police considered that this information was exempt from disclosure under section 35(1)(a) and (b), and section 34(1)(a)(i), of FOISA. Section 38(1)(b) was also applicable to some of the information. The use of these exemptions in relation to this information is considered later in this decision notice.

Information withheld

28. The Police have withheld information relating to requests 1, 3, 4, 5, and 6 under the exemptions in section 34(1)(a)(i), section 35(1)(a), (b) and (g), and section 38(1)(a) and (b). I will consider each exemption in turn and how it applies to the information requested.

Section 38 – personal information

29. The Police have cited the exemptions in section 38(1)(a) and (b) of FOISA in relation to information in the subject reports and to the identities of witnesses (requests 1 & 4). Section 38(1)(b) has also been cited in relation to some of the information which was seized or otherwise obtained by the Fraud Squad during the investigation (request 3), and to any personal data within the subject reports besides names and addresses (request 6).

Section 38(1)(a) – personal data of which the applicant is the subject

30. Section 38(1)(a) of FOISA exempts all personal data of which the applicant is the data subject. It is an absolute exemption and therefore the public interest is not relevant to its application.
31. Section 38(5) states that “data subject” and “personal data” have the meanings respectively assigned to those terms by section 1(1) of the DPA. “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 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.” The same section defines “data subject” as “an individual who is the subject of personal data”.
32. The two references to Mr Dowdles in the subject reports contain minimal personal information relating to him. Even so, I accept that this information does constitute his personal data, and that the Police were therefore acting in compliance with FOISA in withholding this information under section 38(1)(a).



33. I understand that during the period of the investigation Mr Dowdles made a subject access request under the Data Protection Act 1998 for access to his own personal data as held by the Police, but that the information relating to him in the subject reports was not provided. The question of whether this information should have been provided in response to a subject access request is outside my remit, and should be considered by the Information Commissioner responsible for data protection issues if Mr Dowdles wishes to take the matter further.

Section 38(1)(b) – personal data of a third party

34. Section 38(1)(b) of FOISA, read in conjunction with section 38(2)(a)(i) (or, where appropriate, section 38(2)(b)), allows an authority to withhold the personal data of a third party if disclosure would contravene any of the data protection principles laid down in Schedule 1 to the DPA. The Police have applied this exemption to the identities of witnesses (requests 1 and 4) and to personal data within the subject reports (request 6) and within the information seized or otherwise obtained by the Fraud Squad (request 3). I note that Mr Dowdles asked for a copy of the subject reports with names and addresses removed (request 6), but it is possible that even with these redactions some of the remaining information could be considered to be personal data.
35. In considering whether the Police complied with FOISA in withholding information under this exemption there are two tests to apply: is the information withheld “personal data” and, if so, would its disclosure contravene the data protection principles?
36. In this case I have found that there are distinctions to be drawn between information about people who were involved in the investigation in a purely professional or administrative capacity, and information about those who were involved as witnesses or were questioned during the investigation. Some of the witnesses represented the insurance company or the Federation; other witnesses were complainants about the changes to the benefits scheme. Having considered the information held which relates in some way or other to any of these individuals, I have accepted that all of it is their personal data.
37. The first data protection principle states that personal data shall be processed fairly and lawfully and, in particular, shall not be processed unless at least one of the conditions in Schedule 2 to the DPA is met and, in the case of sensitive personal data, at least one of the conditions in Schedule 3 is also met.
38. The Police consider that disclosure of the personal data relating to the witnesses would be unfair processing.



39. In general I have not accepted that disclosure of the names of people who were involved in the matter in a professional or administrative capacity would contravene the first data protection principle. This is in line with guidance from the Information Commissioner responsible for data protection matters (“Freedom of Information Act Awareness Guidance No 1”):

“information which is about someone acting in an official or work capacity should normally be provided on request unless there is some risk to the individual concerned”.

40. The Information Commissioner also advises that in considering whether disclosure of personal information is fair, it is relevant to take into account whether or not the third party would expect that his/her information might be disclosed to others.
41. I accept that, in general, there is an expectation that information provided by witnesses to a criminal investigation will not be disclosed to a third party except during court proceedings. The witnesses in this case have not given explicit consent for the disclosure of personal information relating to themselves.
42. Mr Dowdles has argued that he provided some, if not all, the names of the witnesses who were eventually interviewed during the investigation, and so was already in possession of the personal details of the witnesses. His request was an attempt to find out which people had been interviewed from the list of names he had supplied. However, disclosure of information under FOISA is effectively disclosure to the public at large and not just to the applicant. I must consider whether disclosure to the general public would be fair and lawful, rather than disclosure only to Mr Dowdles.
43. I find that in these circumstances it would be unfair to disclose the identities of the retired policemen who were interviewed in connection with the fraud squad investigation and who have not requested or consented to disclosure of the reports containing their personal information. Although they might well be willing for their information to be disclosed in connection with this matter, to do so without their consent would contravene the first data protection principle: accordingly I uphold the decision that this information is exempt from disclosure under section 38(1)(b) of FOISA.
44. The data protection principles only apply to personal information relating to a living individual. In this case it is known that one of the complainants recently died. The Police have submitted that although the exemption in section 38(1)(b) cannot now apply to information relating to this person, they believe the information should be withheld under the other exemptions applied to the subject reports. The information relating to this person has therefore been included in my consideration of those exemptions, later in this decision notice.



45. Some witnesses were involved in their professional capacities. Bearing in mind the guidance from the Information Commissioner, I have not found that it would be unfair to disclose the names of witnesses representing the insurance company, where there was no inference of any wrongdoing against the company or the individuals representing it. Before reaching a conclusion as to whether this information should have been withheld under section 38(1)(b) of FOISA, I am still required to consider whether disclosure would be lawful and as to the effect of any of the Schedule 2 conditions. I will go on to do this after considering the other exemptions claimed by the Police in relation to this information, if that analysis does not lead me to conclude that the information is exempt in any event.
46. The subject reports refer to persons being interviewed under caution. Under section 2 of the DPA, personal information about the commission or alleged commission of any offence is deemed to be “sensitive personal data”, which can only be disclosed if one of the conditions for lawful processing set out in Schedule 3 of the DPA is met (in addition to at least one of the conditions in Schedule 2). I accept that where a person was interviewed under caution, information about their identity should be regarded as “sensitive personal data”.
47. I have not found that any of the required conditions in Schedule 3 can be met, and therefore I accept that disclosure of personal information relating to persons interviewed under caution would contravene the first data protection principle. I uphold the view taken by the Police that personal information relating to those persons is exempt under section 38(1)(b) of FOISA.

Personal Information - Conclusion

48. I have found that the Police were justified in withholding personal data relating to witnesses who were complainants, and personal data relating to persons interviewed under caution, under section 38(1)(b) of FOISA. This applies to information in the subject reports and information contained within documents which were seized or otherwise obtained by the Fraud Squad during their investigation. I have not found that disclosure of the personal data of witnesses or other persons involved in the case in a professional or administrative capacity would be unfair and will go on to consider questions of lawful processing and compliance with the Schedule 2 conditions in relation to this data if required to do so, i.e. if the information is not exempt under any other of the exemptions claimed by the Police. I must now consider these other exemptions.



Section 34(1)(a)(i) - Investigations by Scottish public authorities

49. Section 34(1)(a)(i) of FOISA allows a public authority to withhold information if it has at any time been held for the purposes of an investigation which the authority has a duty to conduct to ascertain whether a person should be prosecuted for an offence.
50. The Police have a duty to conduct investigations to ascertain whether a person should be prosecuted for an offence, and I accept that the information in the subject reports was created and held for the purposes of such an investigation. However, before accepting that the information should be withheld under section 34(1)(a)(i) I must consider whether the public interest in maintaining the exemption outweighs that in disclosing the information.
51. The Police have identified “accountability” and “justice to the individual” as reasons why there would be a public interest in disclosure. They have acknowledged that disclosure of the information requested would demonstrate that the police investigation was thorough, would allow the applicant and others to have a degree of confidence in the investigation, and would allow the applicant to better understand the investigation and to consider any possible civil remedy.
52. However, the Police found that on balance the public interest lay in withholding the information. Several arguments in support of this position were provided, all of which have been considered during the investigation; however, in this decision notice I will discuss only those which seem most directly relevant to this particular case.
53. The Police argued that disclosure of information gathered during such investigations would deter individuals from reporting matters or providing evidence. With this flow of information impeded the Police would find it difficult to investigate crime, one of their core duties. The Police took the view that the very nature of a criminal investigation favoured non-disclosure of information relating to the process, and that disclosure should only be considered when there was a strong countervailing public interest. In this case, the Police felt that while the information was of interest to the applicant and others, there was no wider public interest to be served by disclosure.



54. The Police also argued that a high degree of confidentiality had traditionally been attached to police reports and statements, both before and after criminal proceedings. The courts in Scotland had placed great weight on the assertion of the Lord Advocate that it is not in the public interest for certain documents to be disclosed except when, in particular circumstances, the interests of justice require it. This position, it was argued, recognises the need for absolute candour in the making of such reports and the courts have indicated that the most important safeguard in this regard is an absolute guarantee against publication. To disclose information such as that requested by Mr Dowdles would (the Police claimed) jeopardise the candour and freedom with which the Police report to the Procurator Fiscal.
55. I note that when the Freedom of Information legislation was being debated in the Justice 1 Committee, the Justice Minister argued against an amendment permitting the disclosure of information if and when it was decided not to institute proceedings. He was concerned that witnesses and persons under investigation should not be subject to the risk of trial by media without protection, as could happen if information became freely available, and he believed that certainty for witnesses and victims required the exemption to apply in perpetuity. He added that this did not mean that information would never be disclosed; it meant that the exemption remained available as a framework within which disclosure decisions could be made, including considerations of the public interest. However, the Justice Minister clearly shared the Lord Advocate's concern that criminal proceedings should be the sole forum for determining questions of guilt or innocence.
56. I have considered carefully the public interest arguments presented by the Police and the views of the Lord Advocate and the legislators. I accept that there are very strong arguments supporting the view that it is in the public interest to preserve the confidentiality of information held in relation to the investigation of a crime or potential crime, and that in general it will not be in the public interest to take any action which would undermine the confidence of the public in that part of the justice system or the confidence of witnesses providing information for such investigations.



57. However, there are also public interest arguments which would support the case for disclosure of the information. For instance, there is a strong argument that disclosure would promote accountability, and accountability would promote public confidence in the processes used to deliver justice. Although Mr Dowdles made his complaint against the Federation as a corporate body, the Police were in effect investigating a criminal allegation concerning an officer within their own Police force (albeit on the instructions of the Procurator Fiscal), in connection with his responsibilities in the Federation. No proceedings were brought as a result of this investigation. In such circumstances it is important that there is public confidence in the processes used. Mr Dowdles has expressed his view that the only way to show that there was no bias in favour of the Federation would be to confirm how much of the information provided by witnesses was used in the enquiry and in the subsequent report to the Procurator Fiscal.
58. In this case the complainants were told that the matter did not fall within the remit of the Insurance Ombudsman, and were informed that there was no route of complaint available through any other financial regulatory authority, the policies having been taken out before the Financial Services Act became law. This makes the public interest in ensuring justice for the individual through disclosure of the information all the stronger.
59. The applicant is clear that his complaint was brought against the Federation as a corporate body, and that he is seeking information on which to base a civil action against the Federation. However, the fact remains that the Fraud Squad were investigating allegations of criminality and that certain individuals were interviewed under caution during their enquiry.
60. In weighing up the competing public interests in this case it seems to me that, on the one hand, I must consider the effects of disclosing information which has been held as part of a criminal investigation, and in particular, whether this would be seen as weakening the general integrity and confidentiality of the legal process. On the other hand, I must consider whether disclosure would promote or provide justice for the individuals who complained about the injury they had suffered through the changes to the Federation's death benefits scheme for retired police officers.
61. After examining the information withheld from Mr Dowdles I have come to the conclusion that disclosure would achieve little in terms of securing justice for the individual. I appreciate that Mr Dowdles would certainly prefer to receive the information in order to satisfy himself on that point; however, I have decided that, on balance, the overall public interest in this case lies in upholding the use of the exemption in section 34(1)(a)(i) and so preserving the principle of confidentiality within the legal process.



62. Although there is a strong public interest in securing the accountability of public authorities for their decisions, I recognise that there is also a need to protect the independence of the Procurator Fiscal in prosecuting crime and the Police in investigating crime. This is not to say that there will never be cases in which I decide that it would be in the public interest to release information which has been held as part of an investigation by a Scottish public authority of the kind envisaged by section 34(1)(a)(i) of FOISA. However, I have not found that disclosure would be warranted in this case.
63. In reaching this decision about the balance of the public interest in the case I have taken into account the views of the Lord Advocate and the Justice Minister referred to above in paragraphs 54 and 55.

Section 34(1)(a)(i) – Request 5

64. Although I have upheld the decision that the subject reports themselves are exempt from disclosure under section 34(1)(a)(i) of FOISA, I must also consider whether the Police acted in compliance with FOISA in withholding the “list of documents contained or mentioned in the report”, as requested by Mr Dowdles (request 5) and discussed in paragraphs 22 and 23 of this decision notice.
65. As previously noted, the Police initially considered that requests 5 and 6 should be treated as a single request. During the investigation the Police were asked whether they would object to disclosure of the names or descriptions of the documents mentioned in the subject reports independently of the rest of the reports’ contents.
66. The Police indicated that they wished to rely on the exemptions cited in respect of the subject reports as a whole, as the information was gathered as part of the criminal investigation into the allegations made. The exemption in section 34(1)(a)(i) must therefore be considered in relation to the list of documents in the subject reports as well as the rest of the reports’ contents.
67. The subject reports do not contain a list of documents as such, but scattered throughout the reports there are references to the documents examined during the investigation. I have considered whether it is possible to argue that a list of these documents, as requested by Mr Dowdles, is not, in itself, information which was held by the Police as part of the investigation: if this was the case then the exemption in section 34(1)(a)(i) could not apply to this information.



68. However, I have concluded that the names or descriptions of the documents mentioned in the subject reports cannot be treated separately from any other information within those reports. As such, a list of documents mentioned in the reports (insofar as such a thing can be said to exist) must be seen as part of the information held for the purposes of the investigation. The exemption in section 34(1)(a)(i) therefore applies to this information, and as indicated above, I have decided that the exemption should be upheld in relation to the information in the subject reports.

Section 34(1)(a)(i) – Request 1

69. Mr Dowdles asked for identities of those witnesses interviewed by the Fraud Squad in the course of their enquiries (request 1). To some extent this overlaps the terms of request 4 (the names of the witnesses contained in the Subject Report to the then Procurator Fiscal). I have already made clear my decision that the Police were justified in withholding information from the subject reports under section 34(1)(a)(i) of FOISA. However, some of the witnesses interviewed were not named in the subject reports, and I must consider separately whether the names of those individuals not named in the subject reports should be provided to Mr Dowdles.
70. Initially the Police relied on the exemptions in section 38(1)(b) (Personal information) and section 35(1)(a) and (b) (Law enforcement) to withhold the identities of witnesses. During the investigation the Police advised that they also wished to cite section 34(1)(a)(i) in relation to this information.
71. The Police submitted that the information about the identities of witnesses was recorded for the purposes of an investigation which they had a duty to conduct in order to ascertain whether a person should be prosecuted for an offence. I accept that this is the case, and that the exemption in section 34(1)(a)(i) therefore applies, subject to the public interest test.
72. I have already found (paragraph 48) that the Police were justified in withholding personal data relating to witnesses who were complainants. I have considered the public interest in disclosing the identities of other witnesses, including those involved in their professional capacities. I have concluded that there is insufficient general public interest in this information to outweigh the public interest in preserving the principle of confidentiality within the legal process. I therefore uphold the decision to withhold the identities of these witnesses under section 34(1)(a)(i) of FOISA.



Conclusion

73. I have found that all the information falling within Mr Dowdles' requests 1, 3, 4, 5 and 6 falls under the exemption in section 34(1)(a)(i), and that, on balance, the public interest lies in upholding the exemption. This being so, I will not consider whether the other exemptions applied by the Police should also be upheld in relation to this information.

Decision

I find that the Chief Constable of Strathclyde Police dealt with Mr Dowdle's requests for information in accordance with Part 1 of the Freedom of Information (Scotland) Act 2002 (FOISA) in deciding that the information requested was exempt from disclosure in part under sections 38(1)(a) and 38(1)(b) of FOISA, and wholly under section 34(1)(a)(i) of FOISA, with the exception of the information described in request 2, which was not held and therefore subject to section 17(1) of FOISA.

Appeal

Should either Mr Dowdles or the Chief Constable of Strathclyde 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
31 May 2007



APPENDIX

Relevant Statutory Provisions

Freedom of Information (Scotland) Act 2002:

1 General entitlement

- (1) A person who request information from a Scottish public authority which holds is it 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 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.

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

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

(a) an investigation, which the authority has a duty to conduct to ascertain whether a person-

(i) should be prosecuted for an offence;

(...)

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) In this Act, unless the context otherwise requires-

- (a) "obtaining" or "recording", in relation to personal data, includes obtaining or recording the information to be contained in the data, and
- (b) "using" or "disclosing", in relation to personal data, includes using or disclosing the information contained in the data.



[...]

2. Sensitive personal data

In this Act 'sensitive personal data' means personal data consisting of information as to-

- (a) the racial or ethnic origin of the data subject,
- (b) his political opinions,
- (c) his religious beliefs or other beliefs of a similar nature,
- (d) whether he is a member of a trade union (within the meaning of the Trade Union and Labour Relations (Consolidation) Act 1992,
- (e) his physical or mental health or condition,
- (f) his sexual life,
- (g) the commission or alleged commission by him 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.

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.

[...]

SCHEDULE 3

CONDITIONS RELEVANT FOR PURPOSES OF THE FIRST PRINCIPLE: PROCESSING OF SENSITIVE PERSONAL DATA



1. The data subject has given his explicit consent to the processing of the personal data.
2. - (1) The processing is necessary for the purposes of exercising or performing any right or obligation which is conferred or imposed by law on the data controller in connection with employment.
 - (2) The Secretary of State may by order-
 - (a) exclude the application of sub-paragraph (1) in such cases as may be specified, or
 - (b) provide that, in such cases as may be specified, the condition in sub-paragraph (1) is not to be regarded as satisfied unless such further conditions as may be specified in the order are also satisfied.
3. The processing is necessary-
 - (a) in order to protect the vital interests of the data subject or another person, in a case where-
 - (i) consent cannot be given by or on behalf of the data subject, or
 - (ii) the data controller cannot reasonably be expected to obtain the consent of the data subject, or
 - (b) in order to protect the vital interests of another person, in a case where consent by or on behalf of the data subject has been unreasonably withheld.
4. The processing-
 - (a) is carried out in the course of its legitimate activities by any body or association which-
 - (i) is not established or conducted for profit, and
 - (ii) exists for political, philosophical, religious or trade-union purposes,
 - (b) is carried out with appropriate safeguards for the rights and freedoms of data subjects,
 - (c) relates only to individuals who either are members of the body or association or have regular contact with it in connection with its purposes, and



(d) does not involve disclosure of the personal data to a third party without the consent of the data subject.

5. The information contained in the personal data has been made public as a result of steps deliberately taken by the data subject.

6. The processing-

(a) is necessary for the purpose of, or in connection with, any legal proceedings (including prospective legal proceedings),

(b) is necessary for the purpose of obtaining legal advice, or

(c) is otherwise necessary for the purposes of establishing, exercising or defending legal rights.

7. - (1) The processing is necessary-

(a) for the administration of justice,

(b) for the exercise of any functions conferred on any person by or under an enactment, or

(c) for the exercise of any functions of the Crown, a Minister of the Crown or a government department.

(2) The Secretary of State may by order-

(a) exclude the application of sub-paragraph (1) in such cases as may be specified, or

(b) provide that, in such cases as may be specified, the condition in sub-paragraph (1) is not to be regarded as satisfied unless such further conditions as may be specified in the order are also satisfied.

8. - (1) The processing is necessary for medical purposes and is undertaken by-

(a) a health professional, or

(b) a person who in the circumstances owes a duty of confidentiality which is equivalent to that which would arise if that person were a health professional.

(2) In this paragraph "medical purposes" includes the purposes of preventative medicine, medical diagnosis, medical research, the provision of care and treatment and the management of healthcare services.



9. - (1) The processing-

(a) is of sensitive personal data consisting of information as to racial or ethnic origin,

(b) is necessary for the purpose of identifying or keeping under review the existence or absence of equality of opportunity or treatment between persons of different racial or ethnic origins, with a view to enabling such equality to be promoted or maintained, and

(c) is carried out with appropriate safeguards for the rights and freedoms of data subjects.

(2) The Secretary of State may by order specify circumstances in which processing falling within sub-paragraph (1)(a) and (b) is, or is not, to be taken for the purposes of sub-paragraph (1)(c) to be carried out with appropriate safeguards for the rights and freedoms of data subjects.

10. The personal data are processed in circumstances specified in an order made by the Secretary of State for the purposes of this paragraph.