



Scottish Information
Commissioner

**Decision 197/2007 Mr Alan Turner and the Chief Constable of
Grampian Police**

*Eyewitness statements in connection with the crash of two USAF F-15 aircraft in
the Cairngorms on 26 March 2001*

**Applicant: Mr Alan Turner
Authority: Chief Constable of Grampian Police
Case No: 200600889
Decision Date: 29 October 2007**

**Kevin Dunion
Scottish Information Commissioner**

Kinburn Castle
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Decision 197/2007 Mr Alan Turner and the Chief Constable of Grampian Police

Request for eyewitness statements in connection with the crash of two USAF F-15 aircraft in the Cairngorms on 26 March 2001 – refused under sections 34, 35 and 38(1)(b) – refusal upheld by Commissioner

Relevant Statutory Provisions and Other Sources

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) (General entitlement); 2 (Effect of exemptions); 34(2)(b)(ii) (Investigations by Scottish public authorities and proceedings arising out of such investigations); 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

Mr Alan Turner asked the Chief Constable of Grampian Police (Grampian Police) to supply copies of eyewitness statements gathered as part of police investigations into the crash of two United States Air Force (USAF) F-15 aircraft in the Cairngorms on 26 March 2001. Grampian Police refused Mr Turner's request in reliance on sections 34(1)(a) and (b), 34(2)(b), 35(1)(a) and (b), and 38(1)(b) of FOISA. Mr Turner was dissatisfied with this response and asked Grampian Police to review its decision. Grampian Police carried out a review, and informed Mr Turner that the previously cited exemptions were considered to be both relevant and sufficient to withhold the requested information. Mr Turner remained dissatisfied and applied to the Commissioner for a decision. Following an investigation, the Commissioner found that the eyewitness statements were properly withheld under sections 34(2)(b)(ii) and 38(1)(b) of FOISA, given in particular the reasonable expectations of the witnesses who provided them, and therefore Grampian Police had dealt with Mr Turner's request in accordance with Part 1 of FOISA.



Background

1. On 19 February 2006, Mr Turner wrote to Grampian Police with reference to “a tragic accident involving two [USAF] F15s ... in the Cairngorms on 26th March 2001”. He requested “any eyewitness statements which [Grampian Police] gathered as part of [its] own investigations”.
2. On 17 March 2006, Grampian Police informed Mr Turner that it was unable to provide copies of the eyewitness statements. Grampian Police relied on the exemptions in sections 34(1)(a) and (b), 34(2)(b), 35(1)(a) and (b), and 38(1)(b) of FOISA.
3. On 29 March 2006, Mr Turner wrote to Grampian Police requesting a review of its decision.
4. On 25 April 2006, Grampian Police informed Mr Turner of the outcome of its review. Grampian Police confirmed its original decision, stating that the previously cited exemptions were considered to be both relevant and sufficient to withhold the eyewitness statements.
5. On 6 May 2006, Mr Turner wrote to my Office, stating that he was dissatisfied with the outcome of Grampian Police’s review and applying to me for a decision in terms of section 47(1) of FOISA.
6. The application was validated by establishing that Mr Turner 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 that request. The case was allocated to an investigating officer.

The Investigation

7. On 25 May 2006, the investigating officer notified Grampian Police in writing that an application had been received from Mr Turner, in accordance with section 49(3)(a) of FOISA. The investigating officer requested copies of the eyewitness statements, and a full explanation of Grampian Police’s reasons for considering these to be exempt under FOISA.
8. The requested information was received on 7 June 2006.
9. In the course of the investigation, it was necessary to go back to Grampian Police on a number of occasions to request further clarification.



10. It was also necessary to make enquiries of the Ministry of Defence. The need for, and nature of these enquiries, will be apparent from the detailed analysis and findings below.
11. In addition, Mr Turner was invited to make further submissions regarding his view of the public interest considerations favouring disclosure of the eyewitness statements.
12. I will consider the submissions of Mr Turner and Grampian Police more fully in my analysis and findings below.

The Commissioner's Analysis and Findings

13. In coming to a decision on this matter, I have considered all the information and submissions that have been presented to me by Mr Turner and Grampian Police, and I am satisfied that no matter of relevance has been overlooked.
14. Before setting out the detailed reasoning behind that decision, I summarise the background to Mr Turner's request and application.

Background

15. On 26 March 2001, two USAF F-15 aircraft crashed into Ben MacDhui in the Cairngorms, with fatal consequences for the pilots on board.
16. On 27 March 2001, a Royal Air Force (RAF) Board of Inquiry (BOI) was convened. According to the Ministry of Defence briefing note on the BOI process¹, the purpose of such an inquiry is to establish the circumstances surrounding serious accidents and incidents. The BOI is an 'in-house' investigation within the Armed Forces; it does not apportion blame.
17. On 18 April 2001, the BOI was suspended pending the outcome of a police and RAF investigation into the actions of the air traffic controller.
18. In 2002, a support group consisting of military and civilian air traffic controllers was formed to support the air traffic controller and his family. I understand that Mr Turner is a member of this group.

¹ <http://www.mod.uk/DefenceInternet/FactSheets/BoardOfInquiryboiProcessBriefingNote.htm>



19. On 27 January 2003, the air traffic controller was court-martialled on two charges of “doing an act in relation to aircraft causing loss of life to a person contrary to s 49 of the Air Force Act”, and an alternative charge of “negligently performing a duty contrary to s 29 of the Air Force Act”. The court martial concluded on 25 February 2003. The air traffic controller was acquitted of all charges.
20. On 13 March 2003, the RAF BOI was reconvened.
21. The BOI reported its findings in February 2006. It considered the air traffic controller’s actions, the pilots’ actions, and corporate factors that might have contributed to the accident. It reached a number of conclusions in this regard. However, the ones which appear particularly relevant for my purposes are as follows:
 - The most likely sequence of events was that the two aircraft maintained a straight line of descent into the mountain from the last known radar plot (paragraphs 17-20). In reaching this conclusion, the Board considered eyewitness reports of the two F-15s already “in formation low flying in the area around the time of the last known radar plot” (paragraph 21). For certain reasons, the Board judged that the eyewitnesses were mistaken in identifying the aircraft they saw as the two F-15s (paragraph 23).
 - The accident occurred “because the formation accepted a potentially unsafe [Air Traffic Control] instruction and descended without sufficient references to avoid hitting the ground” (paragraph 48).
22. I understand that the support group objects strongly to the conclusions reached by the BOI. In addition to Mr Turner’s submissions, I am aware of the significant amount of discourse on this subject that has occurred on an online forum “Professional Pilots Rumour Network” (www.pprune.org).
23. There appears to be a view among some quarters that – in concluding that the cause of the accident was a “potentially unsafe” air traffic control instruction – the BOI has effectively attributed blame for that accident to the air traffic controller (i.e. something not within its remit to do).
24. Mr Turner has explained that the support group’s major concern is that the BOI ignored the eyewitness evidence accepted at the court martial that the aircraft were already flying at low level. Mr Turner has stated that, in order to refute the BOI’s claim that the eyewitnesses were not credible, the support group needs to establish, from as many sources as possible, what aircraft types were observed on the day in question.



Information at issue

25. One hundred and forty-four witness statements were supplied by Grampian Police. These included statements provided by civilians who saw or heard aircraft prior to the crash, as well as statements provided by the police, RAF and Mountain Rescue personnel involved in the aftermath and investigation of the crash.
26. On receipt of Mr Turner's public interest submissions, it became apparent that he was seeking to obtain eyewitness statements relating to pre-crash sightings of the aircraft. Accordingly, the investigating officer asked Mr Turner whether he wished to narrow the scope of information covered by his application.
27. In response, Mr Turner confirmed he was seeking only:
 - "...eyewitness statements [of] those who believe they had sighted the two aircraft prior to the crash in the Cairngorms on 26 March 2001; and
 - "other statements made by members of the public ... pertaining specifically to sightings of any other aircraft in the vicinity on that day prior to the crash".
28. This left 36 witness statements at issue.

Exemptions claimed

29. As noted above, Grampian Police has relied on a number of subsections within section 34 (Investigations by Scottish public authorities and proceedings arising out of such investigations), as well as sections 35(a) and (b) (Law enforcement), and 38(1)(b) (Personal information).
30. In my view, the applicable exemptions are sections 34(2)(b)(ii) and 38(1)(b).

Application of section 34(2)(b)(ii)

31. Section 34(2)(b)(ii) provides that information is exempt if it has at any time been held by a Scottish public authority for the purposes of an investigation carried out "for the purpose of making a report to the procurator fiscal as respects, the cause of death of a person".
32. This exemption:
 - is a "class exemption";

It is sufficient if information falls within the particular "class" of information described. There is no need to establish that disclosure will result in substantial prejudice to the investigation concerned.



- applies in perpetuity;

Information, once exempt, is always exempt.

- is a “qualified” exemption;

Where this section applies, it is still necessary to consider whether, in all the circumstances of the case, the public interest in disclosure is outweighed by the public interest in maintaining the exemption.

33. The procurator fiscal has a duty to investigate all sudden and suspicious deaths in his or her district. The police act as the procurator fiscal's agents in this regard.
34. It is clear that the witness statements in this case were gathered and held by Grampian Police for the purpose of investigating the cause of death of the pilots of the two aircraft, and for reporting to the procurator fiscal in relation to that matter. I understand that the police investigation resulted in a report being submitted to the procurator fiscal, and that the witness statements formed part of that report.
35. Having satisfied myself that the witness statements fall within the class of information exempted by section 34(2)(b)(ii), the matter turns on the application of the public interest test.

Public interest considerations in favour of withholding

36. Section 34 reflects an inherent public interest in ensuring the proper and effective conduct of police (and other) investigations. In this context, there are related public interests in avoiding prejudice to ongoing investigations; avoiding prejudice to any subsequent criminal or other proceedings, and the right of an accused to a fair trial; and protecting victims and witnesses, and thereby the ongoing willingness of members of the public to cooperate with the various investigatory processes making up the justice system, and the system for dealing with sudden deaths and fatal accidents.
37. The weight of these interests has, in a number of cases to date, led me to reject the “routine” or “regular” disclosure of witness statements. In one case only have I concluded that the weight of the public interest lies in favour of disclosing witness statements, and in that case, the deciding factor was the age of the information at issue (the information related to an investigation conducted over 90 years ago; see decision 174/2007 Mr Edmund Raphael-Beldowski and the Chief Constable of Tayside Police).



38. In this particular case, the police and RAF investigations have concluded. The air traffic controller was acquitted of all charges at the court martial, and the BOI has reported its findings. In the circumstances, although a report was sent to the procurator fiscal following the police investigation, it is unlikely that there will be further (non-military) criminal proceedings or a fatal accident inquiry arising out of the incident. The main public interest argument for withholding concerns the protection of witnesses, and their ongoing willingness (and that of potential future witnesses) to cooperate with the police.
39. This is the central argument put forward by Grampian Police, who submit that disclosure of the witness statements would:
- prejudice substantially the freedom with which the police gather information and report to the procurator fiscal;
 - prejudice public confidence in police investigations; and
 - discourage members of the public from providing information to the police if they thought the information would be released without a compelling reason to do so.
40. Grampian Police further submit that it is not in the overall public interest to disclose the information at issue because it would “inhibit the provision of information that leads directly to a more effective police response”, and “make it difficult for the police service to carry out investigations to the highest standard”.
41. In a recent decision, I considered the “deterrent” or “inhibitory” effect likely to arise from disclosure of civilian witness statements gathered by the police (155/2007, David Leslie and the Chief Constable of Northern Constabulary). I commented as follows:
- “51. ... I have generally taken the view that there is a strong case not to interfere with the assurances and confidence with which witness statements are given to the police in the expectation that they will be used only as part of the formal investigative/judicial process.



52. There exists the very real prospect that witnesses, aware that every nuance or interpretation of their statements might be interpreted as evidence of either their own or someone else's wrongdoing, would be more reticent in providing full statements to the police if they believed that they might be used for other purposes or indeed released into the public domain. I am of the view that it is in the public interest that police forces are able to take comprehensive and unreserved statements from the public to assist with investigating deaths and making reports to the procurator fiscal.

53. There may be a case for departing from the general non-disclosure position if, having seen the information, I believe that release will demonstrably be in the public interest. However, if it is not apparent to me that such a case can be made – even if there may be a *potential* public interest in release – then that is unlikely to be justified where there is the more obvious risk of harm to the public interest through the inhibition of potential witnesses...

60. There is significant public interest in maintaining public willingness to co-operate with the police through providing witness statements, and this willingness might well be compromised if witness statements were lightly or routinely released under FOISA.

61. I consider that it is generally in the public interest that witness statements are protected to a degree in order that the greater public interest – maintenance of the principles behind a fair and effective justice system – is maintained. I also consider that it is in the public interest that the police are able to gather witness statements in the course of their inquiries without those supplying them fearing that they will be disclosed at a later date as a matter of course".

42. I believe these comments remain apposite in the present case.
43. In his request for review, Mr Turner submitted that "the public would not be discouraged by release of this information". Rather, "it would be supportive when it becomes known that an RAF [BOI] came to a grossly different conclusion compared with that of a previously convened military Court Martial".



44. The only way I could (potentially) have tested Mr Turner's assertion, would have been to consult the 36 witnesses whose statements are at issue. If the witnesses consented to disclosure, one would not expect this to inhibit or deter them from co-operating with the police in the future. It might also be possible to argue that they formed a reasonable sample on which to base a similar conclusion in respect of potential future witnesses. Consulting the witnesses in this way would have been a significant, but not impossible, undertaking.
45. I note that a witness's consent to disclosure of their statement may be a relevant factor to take into consideration in deciding whether information is properly exempt under FOISA. (Although I also note, for future reference, that just because a witness consents to disclosure of their statement does not automatically mean such disclosure should occur. There may be other relevant considerations to take into account. For instance, a statement may contain information about third parties other than the witness, or information the disclosure of which would prejudice an ongoing investigation or the right of an accused to a fair trial.)
46. After careful consideration, however, I decided not to consult the 36 witnesses whose statements are at issue here.
47. There may be a range of reasons why a witness would not want their statement to be disclosed to the world at large. I considered it entirely plausible that some witnesses would consent to disclosure of their statements, while others would not. I did not consider it appropriate to distinguish between the statements solely on the basis of whether the witness consented (or not) to disclosure. It seemed to me that partial disclosure of the statements would only lead to misinformed public debate, which would not be in the public interest.
48. Consent from only some of the witnesses would also make it difficult, if not impossible, to draw sustainable conclusions in respect of the likely expectations of future potential witnesses. Being unable to test Mr Turner's assertion that disclosure of the witness statements at issue in this case would not inhibit or deter future potential witnesses, I am also unable to accept it.
49. I have also considered the argument that certain factors in this case may limit the likely deterrent or inhibitory effect of disclosure of the witness statements, namely:
 - a. the extent to which the information contained in the witness statements could be said to be in the public domain; and
 - b. the sensitivity of the information contained in the witness statements.



Information in the public domain

50. As noted above, the court martial of the air traffic controller was heard in open court. I understand that transcripts of courts martial are able to be purchased. The case was relatively widely reported in the media. In addition, the events and arguments presented at the court martial were covered in depth by members of the air traffic controller's support group on www.pprune.org². The various reports discuss the testimony given by five civilian eyewitnesses.
51. The BOI process is not conducted in an open forum. However, BOI reports, including this one, are published (subject to redaction of personal data) on the Ministry of Defence website (see <http://www.mod.uk/DefenceInternet/AboutDefence/CorporatePublications/BoardsOfInquiry/>). In addition, I am aware that the Ministry of Defence received a request under the Freedom of Information Act 2000 for copies of the eyewitness statements gathered by the BOI. I understand the Ministry disclosed between 10 and 20 statements provided by civilian eyewitnesses, again with redactions to personal data (the Ministry was unable to confirm the precise number).
52. To the extent that the contents of the witness statements at issue here are the same as the information disclosed in open court at the court martial, or following disclosure of the separate set of eyewitness statements gathered by the BOI, it could be argued that some of the information at issue is in the public domain.
53. In a previous decision, I considered whether the hearing of a witness's testimony in open court equates with the public disclosure of the contents of that witness's statement to the police (155/2007, David Leslie and the Chief Constable of Northern Constabulary). I concluded:

"56. While it is true that witness statements are from time to time read out in open court, I consider this to be a far cry from the police unilaterally releasing witnesses' statements (which have not necessarily been subject to due process in court) into the public domain.

57. Even were I to accept that all witnesses have an expectation that their entire, unedited statements would, ultimately, be made public (and, for the record, I do not believe that to always be the case), I would also feel it necessary to consider the fairness and method of that release.

² See "F15 Court Martial Updates".



58. Where witnesses' evidence is heard in open court, it is done (generally orally but occasionally by way of sworn written statements) under strict rules and conditions. In my view, to release untested, verbatim statements into the public domain is likely to be unfair to those to whom the statements relate. Corroboration, cross examination and the legal testing of evidence are essential components of the justice system. Were these established principles of justice not to be adhered to (through the wholesale release of witness statements), there might be a form of summary justice established whereby the mere fact of a witness providing a statement in relation to some alleged offence or wrongdoing would be considered proof of that offence or wrongdoing.

59. If I accept that statements can be routinely disclosed, I must also accept that this can be done under circumstances potentially unfair to both the witness and any accused. This could have the effect of not only inhibiting witnesses' statements, but also putting into doubt whether witnesses will consent to provide statements at all".

54. Once again, I consider these comments to be relevant in the present case.
55. In addition, I note that only five eyewitness accounts were traversed in the context of the court martial, and between 10 and 20 civilian eyewitness statements gathered by the BOI were disclosed by the Ministry of Defence. It seems likely that there would have been some overlap between these two groups of witnesses. Accordingly, it appears that only a subset the 36 witness statements at issue here would have seen any degree of public disclosure.
56. It might be argued that witnesses would not be discouraged from disclosure of information contained in witness statements that is substantially the same as information already in the public domain (and therefore that the public interest in maintaining the exemption in this particular case is not strong). However, it may equally be argued that disclosure of such information would serve no practical benefit. That is, disclosure of information that is already in the public domain would not serve to enhance public understanding or debate of the issues. In the present circumstances, and particularly in light of the administrative difficulty of extracting "publicly known" information from the witness statements, I favour the latter argument.



57. Finally I note that it is not just the content of a witness statement that gives rise to an expectation of confidentiality in respect of it. It is also the context in which that statement is supplied. I agree with the view expressed by the UK Information Commissioner that there is a long-held and reasonable expectation by members of the public that information provided by them during the course of police investigations should be treated in confidence and only used for the purpose for which it was provided (see paragraph 35, decision FS50121840, Public Prosecution Service for Northern Ireland). Generally, I accept that disclosure of civilian witness statements, in contravention of this expectation, and in the absence of compelling public interest considerations in favour of disclosure, would discourage members of the public from providing information to the police.

Sensitivity of the information

58. The statements in large part concern the witnesses' observations of aircraft and weather conditions. This information could be regarded as not particularly sensitive. It might be suggested that disclosure of such information could not be expected to discourage witnesses in the future (and therefore that the public interest in maintaining the exemption in this particular case is not strong).
59. I have previously considered the sensitivity of the information at issue as a relevant factor in assessing the likely deterrent or inhibitory effect of disclosure of witness statements.
60. In decision 069/2007 (Mr Leslie Brown and the Chief Constable of Strathclyde Police), I stated:

“I am unable to accept that the same considerations will apply to all statements from these witnesses. Further, it seems to me that consideration must be given to the nature of the crime, its seriousness and relative sensitivity. Witness statements in connection with a minor driving offence are less likely to contain sensitive information than, for example, those in respect of a case of aggravated burglary”.



61. However, this decision concerned the application of section 35 of FOISA, which differs significantly from section 34 in that a harm test is required to be met.
62. In considering the application of section 34, it is not necessary to establish that disclosure of the information at issue would, or would be likely to, result in substantial prejudice to the specific investigation concerned or investigatory processes more generally.
63. In this particular case, I am not satisfied that any lack of sensitivity of the information at issue significantly undermines or negates the strong public interest considerations discussed above.
64. As noted previously, the concern relates not only to the content of the information at issue, but also the context in which it was supplied to the police. In my view, members of the public will not expect information they have supplied to the police to be disclosed to the world at large simply because someone subsequently, by some objective standard, deems that information not to be sensitive. Information that may appear innocuous and not sensitive to one person, may have entirely different import or implications for another.
65. I therefore remain of the view that there is a significant public interest in maintaining public willingness to co-operate with the police through providing witness statements, and that this willingness might well be compromised if witness statements were lightly or routinely released under FOISA.
66. In consequence, any public interest considerations favouring disclosure of civilian witness statements gathered by the police must be clear and compelling.

Public interest considerations in favour of disclosure

67. While Mr Turner was under no obligation to disclose his reasons for seeking the witness statements, he agreed to do so, in order that I might properly weigh the competing public interest considerations favouring withholding and disclosure of those statements. Mr Turner's reasons for seeking the witness statements are summarised in the "background" section above.
68. It is clear that the support group objects, on a number of grounds, to the findings reached by the BOI. There appears to be a perception among some members of the air traffic control and piloting communities that those findings represent an injustice to the air traffic controller. The support group's fundamental reason for seeking the witness statements appears to be so that they may seek to challenge or overturn the BOI's findings.



69. In addition, Mr Turner's public interest submissions refer to a claim for compensation submitted by the widows of the deceased pilots against the Ministry of Defence for negligence in the provision of radar control services. Mr Turner appears to be suggesting a concern on the part of the support group that the BOI's findings may have been coloured by political imperatives arising out of the Ministry of Defence's wish to meet the compensation claims.
70. At the outset, I acknowledge that there was a significant amount of public interest in the court martial and BOI findings, as reflected in the media coverage at the time. In addition, the issue of whether the air traffic controller bears any (or no) responsibility for the aircraft crash was, throughout the court martial and BOI processes, of considerable interest and concern to those in the air traffic control and piloting communities. I have no doubt that the information contained in the witness statements would be of interest to certain members of the public, but that is not the same as disclosure of the witness statements being in the overall public interest.
71. I have identified the following public interest considerations in favour of disclosing the witness statements:
- a. the general public interest in disclosure of information held by public authorities;
 - b. the public interest in disclosure of information to promote accountability and scrutiny of police investigations; and
 - c. the public interest in ensuring individuals' "access to justice".
72. In order to outweigh the strong public interest in withholding civilian witness statements gathered by the police, there must, in my view, be considerations more compelling than the general public interest in disclosure of official information held by public authorities.
73. I acknowledge that in some cases there may be serious concerns about the police conduct of an investigation, and disclosure of information in relation to that investigation, including witness statements, may promote accountability for, and scrutiny of, that investigation. In this case, however, I do not understand there to be any concern about how the police conducted their investigation.
74. I understand there are concerns with the findings of the RAF BOI. However, information directly connected with those findings has already been disclosed, including copies of the witness statements gathered by the Board (with redactions to personal data).



75. Mr Turner's concerns appear to relate primarily to the public interest in ensuring individuals' – in this case, the air traffic controller's – access to justice. That is, the information at issue is sought to enable the BOI's findings – which are considered to represent an injustice to the air traffic controller – to be challenged.
76. There is a general public interest in individuals being able to obtain information that is necessary to enable them to have access to justice.
77. I am aware that individuals' rights of access to information, and rights of reply where charges, or potentially prejudicial findings, are made against them in the context of courts martial and military boards of inquiry, are provided for in the legislation and rules governing those processes. Those processes having concluded, disclosure of the information at issue now cannot enhance the air traffic controller's access to justice. The apparent intention of the support group is to challenge or overturn the BOI's findings. However, I understand there are no formal avenues that remain open to the air traffic controller to do this.
78. Mr Turner has indicated that the support group intends to challenge the BOI's findings through approaches to the UK Government and members of the UK Parliament. I am aware that some Members of Parliament wrote to the Secretary of State for Defence on behalf of their constituents seeking a review of the BOI's findings. However, I understand no further review or inquiry resulted from these approaches.
79. I acknowledge the support group's apparent desire to air their concerns regarding the BOI's findings in the context of the pilots' widows' claims for compensation. However, I am not persuaded that the police witness statements are so relevant to that issue, or that their disclosure is so necessary in that context, that disclosure is thereby justified and warranted in the overall public interest



Conclusion on the public interest

80. I appreciate that the support group feels aggrieved by the BOI's findings. However, I am not persuaded that the public interest in favour of disclosing the witness statements outweighs the significant public interest in maintaining confidentiality of those statements. It is important to protect the ongoing willingness of members of the public to co-operate with the police. That co-operation most certainly requires an element of trust, which would be eroded if witness statements were disclosed in the absence of clear and compelling public interest considerations in favour of disclosure. This would not be in the interests of the effective administration of justice, and in these circumstances, I cannot order disclosure of the witness statements.

Section 38(1)(b) – Third party personal data

81. Section 38(1)(b), when read in conjunction with section 38(2)(a)(i) or (as appropriate) section 38(2)(b), provides that information is exempt if it constitutes personal data, and disclosure of that information to a member of the public otherwise than under FOISA would contravene any of the data protection principles in the Data Protection Act 1998 (DPA).
82. This section is an “absolute exemption”, meaning that where it applies, there is no scope to consider any public interest considerations for or against disclosure of the information at issue.
83. In considering the application of this section, two questions must be addressed:
- i. Is the information “personal data” as defined in section 1(1) of the DPA?
 - ii. Would disclosure of that information breach any of the data protection principles contained in Schedule 1 to the DPA?
84. “Personal data” is defined as data which relate to a living individual who can be identified from those data, or from those data and other information which is in the possession of, or is likely to come into the possession of, the data controller.
85. All witness statements will contain at least some personal data relating to the witness; the extent to which a witness statement comprises personal data about the witness will depend on the circumstances of the case.
86. As one would expect, the witness statements at issue here contain the names, ages, occupations, addresses and telephone numbers of the witnesses, as well as other information from which the witnesses could readily be identified (for instance, information about individuals' hobbies or activities and whereabouts on the day in question). This information is personal data as defined in section 1(1) of the DPA.



87. Grampian Police have submitted that disclosure of this personal data would breach the first data protection principle. The first data protection principle provides 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 met³.
88. I have considered the application of section 38(1)(b) in relation to personal data contained in police witness statements, both in relation to alleged criminal offending and misconduct investigations, on a number of occasions previously.
89. In line with my previous decisions, I have concluded in this case that the witnesses provided their personal data to the police in the expectation that it would be held in confidence and used only for the purpose of the investigation and report to the procurator fiscal. I consider that disclosure of this information would be unfair to the individuals concerned, and therefore contrary to the first data protection principle.
90. Having established that disclosure of this information would be unfair, I am not required (and do not intend) to consider whether it would also be unlawful, or whether any of the conditions in Schedule 2 to the DPA are met.

Remaining exemptions

91. Having concluded that the witness statements are exempt from release under sections 34(2)(b)(ii) and 38(1)(b) of FOISA, I am not required (and do not intend) to consider the remaining exemptions claimed by Grampian Police for the same information.

Decision

I find that the Chief Constable of Grampian Police was justified in applying sections 34(2)(b)(ii) and 38(1)(b) of the Freedom of Information (Scotland) Act 2002 (FOISA) in withholding the information requested by Mr Turner, and therefore that the Chief Constable of Grampian Police dealt with Mr Turner's request in accordance with Part 1 of FOISA.

³ Additional conditions must be met if the information at issue is "sensitive personal data" as defined in section 2 of the DPA, which is not the case here.



Appeal

Should either Mr Turner or the Chief Constable of Grampian 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 after the date of intimation of this decision notice.

Kevin Dunion
Scottish Information Commissioner
29 October 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.

...

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

- (2) Information is exempt information if –
- ...
 - (b) held at any time by a Scottish public authority for the purposes of any other investigation being carried out –
 - (i) by virtue of a duty to ascertain; or
 - (ii) for the purpose of making a report to the procurator fiscal as respects,
the cause of death of a person.

38 Personal information

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