



Scottish Information  
Commissioner

**Decision 038/2006 Mr T and the Chief Constable of Grampian  
Police**

*Refusal to release copies of all information relating to Grampian Police's  
decision to refuse Mr T's application for extension of Police service*

**Applicant: Mr T**

**Authority: The Chief Constable of Grampian Police**

**Case No: 200501210**

**Decision Date: 13 March 2006**

**Kevin Dunion  
Scottish Information Commissioner**

Kinburn Castle  
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## **Decision 038/2006 – Mr T and the Chief Constable of Grampian Police**

***Information withheld –section 35(1)(g) of Freedom of Information (Scotland) Act 2002 (FOISA) – law enforcement – sections 38(1)(a) and (1)(b) of FOISA – personal information – decision to withhold information upheld***

### **Facts**

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On 3 January 2005, Mr T requested copies of all documents, reports, briefing notes, memoranda and any other information produced and used by the Chief Constable of Grampian Police (the Police) after the decision to refuse his request for extension of service had been taken by the Police.

The Police issued Mr T with a refusal notice under section 16(1) of the Freedom of Information (Scotland) Act 2002 (FOISA). In the notice, the Police claimed that the information requested was exempt from release on the basis of a wide range of different exemptions in FOISA.

Mr T asked the Police to review its decision not to release information to him, but, on review, the Police upheld its initial decision.

Mr T wrote to the Scottish Information Commissioner on 21 March 2005, requesting that he investigate the matter on his behalf.

### **Outcome**

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The Commissioner found that the information requested by Mr T was exempt from disclosure under sections 35(1)(g) (read in conjunction with section 35(2)(b)) and sections 38(1)(a) and 38(1)(b) of FOISA.



## Appeal

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Should either the Council or Mr T 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 notice.

## Background

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1. On 3 January 2005, Mr T requested copies of all information produced and used by the Police after the Police had decided to refuse his request that he be allowed to extend his service with the Police. He also requested a copy of the annotated copy of his request to extend his police service and a copy of two related reports.
2. The Police withheld the information from Mr T, stating in its refusal notice of 31 January 2005, that the information requested fell under a number of different exemptions in FOISA, i.e.:
  - a) section 36(1) and section 36(2) (confidentiality)
  - b) section 38(1)(a) and section 38(1)(b) (personal information)
  - c) section 30(b)(i), section 30(b)(ii) and section 30(c) (effective conduct of public affairs)
  - d) section 34(3) and section 34(4) (investigations by public authorities) and
  - e) section 35(1)(g) (read in conjunction with section 35(2)(b)) (law enforcement).
3. When the Police refused to extend Mr T's service, Mr T complained that certain named officers had dealt with him in an improper manner and had unfairly refused his request that he be allowed to extend his service with the Police for a further 5 years.



4. Shortly before FOISA came into force, Mr T made a subject access request under section 7 of the Data Protection Act 1998 (DPA). As a result of the subject access request, the Police released a number of documents to Mr T, including a number of documents submitted as evidence following his improper conduct complaint. In addition, after Mr T made an information request under FOISA, the Police sent additional information to Mr T in relation to the subject access request, consisting of a copy of the annotated copy of his request to extend his police service and a copy of two related reports.
5. As Mr T has now received these documents, I will not consider in this decision whether they should have been released to him by the Police under FOISA.
6. The information withheld from Mr T in relation to his information request consists of the following:
  - a) a copy of the recommendations made by an independent investigator to the Police in response to the complaint made by Mr T about the improper conduct of police officers
  - b) 21 witness statements taken by the Police as part of the investigation into Mr T's complaint and
  - c) 13 additional documents which were submitted as evidence to the Police following Mr T's complaint.
7. Mr T sought a review of the Police's decision to withhold the remaining information on 12 February 2005.
8. The Police subsequently carried out a review of his request and upheld its decision to withhold the information on 14 March 2005.
9. On 21 March 2005, Mr T applied to me for a decision as to whether the Police had dealt with his information request in accordance with Part 1 of FOISA.
10. The case was allocated to an investigating officer.

## **The Investigation**

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11. Mr T's appeal was validated by establishing that he had made a valid information request to a Scottish public authority and had appealed to me only after asking the public authority to review its response to his request.
12. On 8 April 2005, my Office asked the Police to provide me with information to allow me to carry out an investigation into this case.



13. This information was provided by the Police at a meeting with the investigating officer on 11 April 2005. Over the next few months, the investigating officer, in conjunction with the Police, spent time checking through the information which related to Mr T and confirming what had and had not already been released to Mr T.
14. On 7 October 2005, the Police provided the investigating officer with the 13 documents which had been submitted as evidence following Mr T's complaint, and subsequently withheld from Mr T in response to his request for information. (Apart from the witness statements, all of the other documents had already been released to Mr T.)
15. In terms of section 49(4) of FOISA, I may endeavour to effect a settlement between an applicant and a public authority before issuing a decision notice. In this case, the Police offered to release a further six of the 13 additional documents to Mr T in an attempt to pursue settlement.
16. These were released to Mr T on 26 October 2005. However, Mr T advised me on 20 December 2005 that he wished me to continue to investigate the case.
17. Given that six of the 13 additional documents have been released to Mr T by the Police, I do not intend to consider in this decision whether the information contained within those documents could have been subject to any of the exemptions contained in FOISA.

## **The Commissioner's Analysis and Findings**

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18. The Police argue that each of the remaining pieces of information requested by Mr T is exempt from disclosure by virtue of all of the exemptions contained in sections 36(2), 38(1)(a), 38(1)(b), 30(b)(i), 30(b)(ii), 30(c), 34(3), 34(4) and 35(1)(g) (read in conjunction with section 35(2)(b)) of FOISA. In this case, although the Police have presented arguments in relation to their use of each of these exemptions, I have found it necessary, for reasons which will become apparent, to consider only the exemptions contained within sections 35(1)(g), 38(1)(a) and 38(1)(b) in this decision.

### **The information requested by Mr T**

19. The Police have refused to disclose three categories of information to Mr T. Taken together, the information requested comprises an Investigator's Report prepared in line with the Police Conduct (Scotland) Regulations 1996 (the 1996 Regulations). The information withheld from Mr T is made up of:



- a) recommendations submitted to the Police in response to the complaints made by Mr T
- b) 21 witness statements which were attached to these recommendations and
- c) 13 additional documents attached as evidence to the recommendations.

### **Recommendations submitted to the Police**

- 20. The primary document withheld by the Police contains the recommendations of the police officer who carried out an investigation into the complaint by Mr T. Such a document must be produced where there has been an allegation of misconduct made against a police officer under the 1996 Regulations. The document recommends whether further action should be taken against the police officers who have been accused of misconduct. The action may include referring the matter to the Procurator Fiscal to decide whether criminal proceedings should be raised as a result of the complaint.
- 21. The recommendations specifically dealt with the allegations of misconduct made by Mr T against police officers prior to his retirement from the Police. Mr T alleged that certain officers had dealt with him in an improper manner and had unfairly refused his request that he be allowed to extend his service with the Police for a further 5 years. The recommendation in this case was that there was insufficient evidence for the allegations to be proved, and that no further action should be brought against the police officers concerned.

### **The witness statements**

- 22. Of the 21 witness statements taken as part of the investigation into Mr T's allegations of misconduct under the 1996 Regulations, two are statements supplied by Mr T. The remaining 19 documents are statements taken from witnesses to the incidents which gave rise to Mr T's complaint.

### **The remaining documents**

- 23. The remaining 13 documents were submitted as evidence as part of the investigation into Mr T's complaint under the 1996 Regulations. Six of these documents were disclosed by the Police to Mr T after my own investigation under FOISA had begun (see paragraph 15-17 above).



### **Prejudice to law enforcement – Section 35(1)(g)**

24. Under section 35(1)(g) of FOISA, information is exempt information if its disclosure would, or would be likely to, prejudice substantially the exercise by any public authority of its functions for any of the purposes listed in section 35(2) of FOISA. The Police chose to rely on the purpose in section 35(2)(b) of FOISA, which is the purpose to ascertain whether a person is responsible for conduct which is improper.
25. The exemption in section 35(1)(g) is subject to the public interest test. This means that, when considering the use of section 35(1)(g), I must consider three separate matters in all. First of all, I must consider whether the Police have a function in relation to ascertaining whether a person is responsible for conduct which is improper. If I am satisfied that they do, I must go on to consider whether release of the information would prejudice substantially the Police's ability to exercise this function. Even if I am satisfied that release of the information would prejudice substantially the Police's ability to exercise this function, I must go on to consider whether, in all the circumstances of the case, the public interest would be better served by the information being released or by the information being withheld. If I find that the public interest would be better served by the information being released, then I must order release of the information.
26. Investigations into allegations of misconduct by police officers below the level of Assistant Chief Constable are governed by the 1996 Regulations. Given the existence of the 1996 Regulations, I am satisfied that such investigations are a function of the Police.
27. A report prepared under the 1996 Regulations includes the investigator's opinion on the matter under investigation and can offer advice for consideration by the Police on recommended action for dealing with the allegations. The Police have argued that it is essential that officers providing such advice are not inhibited from being frank and candid by fear of reprisal and that the Police are able to take a decision on the basis of the best available advice.
28. I accept that police officers must be able to make comprehensive and unreserved statements to assist with the processes of law and order. I further accept that it is likely that if such reports were routinely disclosed, this would have the effect of inhibiting officers' and witnesses' comments and, as a result, would substantially prejudice the ability of the Police to exercise their function of investigating whether a police officer is responsible for conduct which is improper.



29. I therefore accept the Police's argument that the release of the statements and reports withheld from Mr T could reasonably be expected to prejudice the effectiveness of future investigations. Such an outcome could reasonably be expected to prejudice substantially the performance of the Police's function of carrying out such investigations, and therefore I find that that section 35(1)(g) applies to the information requested. Given that I have found that the information is exempt under section 35(1)(g), I must now go on to consider whether the public interest lies in the information being withheld or released.

### **The Public Interest**

30. I will consider the public interest in releasing police reports on a case by case basis. Arguments based on the public interest in disclosure will have to be specific and strongly persuasive to allow me to conclude that particular police reports should be released.
31. In this case, I am of the view that there is a general public interest in releasing information that may lead to an increase in accountability and scrutiny of public official's actions. However, the investigation did not find any wrongdoing on the part of the officers against whom allegations had been made, or on the part of the Police as a whole. The report was not submitted to the Procurator Fiscal to pursue criminal a criminal action, and the police officer who carried out the investigation into Mr T's complaint clearly believed the matter to be closed on the submission of his recommendations to the Police.
32. During the investigation, the Police commented that it is essential that those people who give statements to police officers carrying out investigations into allegations of misconduct must not be inhibited in any way from coming forward with information which may lead to the rooting out of misconduct or wrongdoing within the Police. They argue that this would limit the effectiveness of such investigations, and undermine the public interest in ensuring that vice or wrongdoing in the Police is exposed and rooted out. The fear is that witnesses will be inhibited from being frank and candid if they believe their statements will be made generally available, for fear of reprisals.





33. I am satisfied that the Police have demonstrated to the public that the correct procedure for investigating complaints made against police officers was followed in this instance. From sight of the documents in question, I do not see that further disclosure would add anything to public debate on the issue, or to increase the accountability of the Police in carrying out its internal investigation. In conclusion, I am not of the view that the public interest in releasing the documents requested by Mr T would override the general public interest in withholding information relating to investigators' reports under the 1996 Regulations. Therefore, I find the information requested by Mr T to be exempt from disclosure by virtue of section 35(1)(g) of FOISA, and that, on balance, the public interest lies in favour of withholding the information in this instance.
34. I will now consider the arguments submitted by the Police in support of the exemptions contained within section 38 of FOISA.

### **Section 38(1)(a) Information relating to the applicant**

35. Two of the witness statements taken as part of the investigation were provided by Mr T. In addition, the witness statements and the additional documents provided as part of the investigation deal specifically with Mr T, his actions with regard to the Police and the Police's responses to those actions. Section 38(1)(a) of FOISA states that information is exempt information if it constitutes personal data of which the applicant is the data subject. This is an absolute exemption under FOISA in that it is not subject to the public interest test. I must now consider whether the information within the witness statements given by Mr T, and the documents submitted to the police officer investigating Mr T's complaint fall into this category of information.
36. "Personal data" is defined in section 1(1) of the DPA as:
- "data which relate to a living individual who can be identified –
  - a) from those data, or
  - b) from those data and from other information which is in the possession of or is likely to come into the possession of, the data controller
- and includes any expression of opinion about the individual and any indication of the intentions of the data controller or any other person in respect of the individual."



37. The definition is subject to the interpretation contained in *Durant v Financial Services Authority* [2003] EWCA Civ 1746. In this decision, the (English) Court of Appeal held that if information is to be viewed as personal data, the information has to be biographical in a significant sense, i.e. go beyond the recording of the individual's involvement in a matter or event that has no personal connotations. The individual also has to be the focus of the information, rather than some other person with whom that individual may have been involved. The Court of Appeal summarised these two aspects as information affecting a person's privacy, whether in his personal or family life, business or professional capacity.
38. As mentioned above, the information held within the documents submitted as part of the investigation relate to Mr T, his actions with regard to the Police and the Police's responses to Mr T's actions. In the statements given by Mr T, he describes incidents where he feels that he was mistreated by other officers and the effect it has had on him. I am satisfied that the information is personal data and that Mr T is the focus of the information.
39. The information held within the recommendations which derives directly from the witness statements taken from Mr T and the documents submitted by the Police are, by extension, also personal data as defined by section 1(1) of the DPA. As a result, the information detailed above which Mr T has requested under part 1 of FOISA is exempt from disclosure by virtue of section 38(1)(a) of FOISA.
40. The exemption in section 38(1)(a) is absolute, in that it is not subject to the public interest test. As a result, I am not required to consider whether the public interest would be better served by the information being released or withheld.

#### **Section 38(1)(b)- information relating to a third party**

41. During the investigation into Mr T's allegations, a further 19 witness statements were provided by witnesses to the incidents which Mr T complained about. In the statements, the witnesses give their interpretation of events, in order to ascertain whether the police officers Mr T had complained about had acted improperly.
42. The remit of the investigation carried out in response to Mr T's complaint was to ascertain whether police officers were guilty of improper conduct. I am satisfied that the police officers about whom the complaint was made are the focus of the information contained within the remaining 19 statements. I am also satisfied that the information contained within the remaining witness statements is the personal data of those officers.



43. Third party personal data is exempt from release under section 38(1)(b) of FOISA (read in conjunction with section 38(2)(a)(i)) if the release of the information would breach any of the data protection principles contained in the DPA. The Police have argued that, in this case, to disclose the personal data of third parties would breach the first principle of the DPA. The Police advise me that it would not be possible to release redacted versions of the documents in this case, as the disclosure of any information within the statement would lead to the identification of the individual who had submitted the statement.
44. The first data protection principle will, in most circumstances, be the most relevant principle to consider. This states that the processing of personal data (such as the release of data in response to a request made under FOISA), must be fair and lawful. The Information Commissioner, who is responsible for enforcing the DPA, has provided guidance (Freedom of Information Act Awareness Guidance No 1) on the consideration of the data protection principles within the context of freedom of information legislation. This guidance recommends that public authorities should consider the following questions when deciding if release of information would breach the first data protection principle:
- a) would disclosure cause unnecessary or unjustified distress or damage to the data subject?
  - b) would the data subject expect that his or her information might be disclosed to others?
  - c) has the person been led to believe that his or her information would be kept secret?
45. In this case, it is clear from evidence provided to me, that the witnesses concerned did not consent to the information to be released and had provided the information with the expectation that it would be kept secret. I am satisfied that, in this case, the release of these witness statements would be unfair and would breach the first data protection principle. Having had sight of the statements, I am of the view that redaction to protect the identities of those who had made the statements is in this case impossible.

## Conclusions

46. The issues surrounding whether police forces should release police investigator's recommendations produced under the 1996 Regulations are necessarily complex. In Decision 018/2005, I made it clear that I do not accept that the recommendations should be treated as a class exemption under FOISA. By this, I mean that police recommendations should not be automatically exempt from a request for information under FOISA. However, in this case I do accept that the information requested is exempt from disclosure.



47. I note that in its submissions the Police held that the information requested was exempt by virtue of a total of 10 sections of FOISA. However, it applied all of the sections to all of the information requested. Where authorities have applied multiple exemptions to information requested by applicants, I expect public authorities to state clearly which exemption is being applied to which piece of information.

## **Decision**

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I find that the Chief Constable of Grampian Police (the Police) was correct in finding that the information held within the documents requested by Mr T is exempt from disclosure by virtue of section 35(1)(g) (read in conjunction with section 35(2)(b)), 38(1)(a) and 38(1)(b) of the Freedom of Information (Scotland) Act 2002.

I do not require any action to be taken by the Police as a result of my decision.

**Kevin Dunion**  
**Scottish Information Commissioner**  
**13 March 2006**