

Decision Notice



Decision 091/2008 Mr Allan McLeod and the Northern Joint Police Board

Appendices to a report prepared by the Chief Constable of Central Scotland Police into the management of complaints against Northern Constabulary following its investigation into the death of Kevin McLeod in February 1997

Reference No: 200700890
Decision Date: 7 August 2008

www.itspublicknowledge.info

Kevin Dunion

Scottish Information Commissioner

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Summary

Mr Allan McLeod requested copies of the appendices to the report compiled by Mr Andrew Cameron, Chief Constable of Central Scotland Police from the Northern Joint Police Board (the Board). The Board withheld the information on the basis that it was exempt from disclosure in terms of Part 2 of the Freedom of Information (Scotland) Act 2002 (FOISA).

Following an investigation, the Commissioner found that the Board had been entitled to withhold the information from Mr McLeod. Much of the Commissioner's consideration came down to where the public interest lay in this case. While recognising the interest in this particular case (particularly the interests of the McLeod family), the Commissioner concluded that the public interest in ensuring the operation of an effective justice system outweighed the public interest in disclosure of the information.

Relevant statutory provisions and other sources

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) (General entitlement); 2(1) (Effect of exemptions); section 34(1)(a)(i), (b) and (2)(b) (Investigations by Scottish public authorities and proceedings arising out of such investigations) and 35(1)(g), (2)(a), (b) and (d)(ii) (Law enforcement)

The full text of each of the statutory provisions cited above is reproduced in the Appendix to this decision. The Appendix forms part of this decision.

Decision 003/2007 Mr Allan McLeod and the Northern Joint Police Board:

<http://www.itspublicknowledge.info/applicationsanddecisions/Decisions/2007/200502199.asp>

Background

1. On 19 April 2007, Mr McLeod wrote to the Board, asking for the appendices (Volumes 2, 3 and 4) to the report submitted to the Board on 28 November 2002 by Mr Andrew Cameron, Chief Constable of Central Scotland Police relating to his enquiry into Northern Constabulary's management of complaints against the police made by Mr McLeod and his family following the death of Kevin McLeod in February 2007.



2. The Board responded on 17 May 2007 (the letter was dated 2003, but it is clear that this was simply an administrative error). The Board advised Mr McLeod that it held the information he had requested, but that it considered the information to be exempt from disclosure. The Board considered that eight separate exemptions applied to the information, i.e. the exemptions in sections 30(b)(i) and (ii) and (c), 34(3)(a), 35(1)(g), 36(1), 38(1)(a) and 38(1)(b) of FOISA.
3. On 18 May 2007, Mr McLeod wrote to the Board requesting a review of its decision as he disagreed that all of the information was exempt.
4. The Board notified Mr McLeod of the outcome of its review on 14 June 2007. In its response, the Board advised Mr McLeod that it had identified eight documents within the appendices which were already in the public domain and provided him with copies of these documents. The Board upheld its original decision in relation to the remaining information. Additionally, the Board advised Mr McLeod that it also considered the exemptions in section 34(1) and (2) of FOISA were applicable to the withheld information.
5. However, the Board provided Mr McLeod with letters contained in the appendices to the Report which had been written by or to him, together with any statements in the appendices made by him, on the basis that this information comprises his personal data, which he is entitled to obtain by means of a subject access request under section 7 of the DPA. This information continued to be exempt from disclosure under FOISA. The Board also advised Mr McLeod that, similarly, other members of the McLeod family had the right to access their own personal data by making a subject access request to the Board under section 7 of the DPA.
6. On 20 June 2007, Mr McLeod wrote to the Commissioner, stating that he was dissatisfied with the outcome of the Board's review and applying to the Commissioner for a decision in terms of section 47(1) of FOISA.
7. The application was validated by establishing that Mr McLeod had made a request for information to a Scottish public authority (i.e. to the Board) and had applied to the Commissioner for a decision only after asking the authority to review its response to that request.

Investigation

8. On 22 June 2007, the Board was notified in writing that an application had been received from Mr McLeod and asked to provide the Commissioner with any information withheld from Mr McLeod. The Board responded with the information requested and the case was then allocated to an investigating officer.
9. The investigating officer subsequently contacted the Board providing it with an opportunity to provide comments on the application (as required by section 49(3)(a) of FOISA) and asking it to respond to specific questions. In particular, the Board was asked to justify its reliance on any provisions of FOISA it considered applicable to the information requested.



10. The Board responded by providing detailed submissions on the exemptions it considered applicable to the withheld information and the documents to which it considered each exemption applied. In addition to the exemptions previously cited in correspondence with Mr McLeod, the Board also indicated that it was applying the exemption in section 36(2) of FOISA to certain information.
11. During the course of the investigation, clarification was sought and received from the Board on its application of the exemptions previously cited. At this point, the Board also indicated that, should its arguments in relation to section 35(1)(g) not be accepted by the Commissioner, these arguments should be considered in relation to section 35(1)(a) and (b).
12. Further submissions and representations were also sought and received from Mr McLeod, particularly his views on the public interest arguments in favour of disclosure of the information in this case.
13. Following correspondence with Mr McLeod, it was agreed that information which had already been made available to him or was already in his, or his family's, possession would be discounted from the investigation and decision.

Commissioner's analysis and findings

14. In coming to a decision on this matter, the Commissioner has considered all of the information and the submissions that have been presented to him by both Mr McLeod and the Board and he is satisfied that no matter of relevance has been overlooked.

Background to the case

15. Before considering whether the Board was justified in withholding the information in the report under the exemptions cited, it would be helpful to provide some background information about this case.
16. An initial investigation was carried out by Northern Constabulary into the circumstances surrounding Kevin McLeod's death in February 1997. A second investigation was carried out by Northern Constabulary in the summer of 1997, on the basis of new information received. A Fatal Accident Inquiry was then held in 1998, with the Sheriff's report being published in September of that year.
17. During the next two years, the McLeod family made several complaints to Northern Constabulary about the way in which the investigation into Kevin's death had been carried out. They became dissatisfied with the way in which their complaints were dealt with and, in March 2001, Mr Hugh McLeod, Kevin's father, complained to Her Majesty's Chief Inspector of Constabulary (HMCIC).



18. Following correspondence with HMCIC, Northern Constabulary agreed to reconsider its handling of the McLeod family's complaints and, in September 2001, an investigating officer was appointed from Lothian and Borders Police. His interim report, issued in October 2001, suggested that an independent Chief Officer should be asked to reinvestigate the processing of the McLeod family's complaints.
19. The Chief Constable of Northern Constabulary accepted the recommendation and, in January 2002 (on the Chief Constable's recommendation), the Board appointed Andrew Cameron, Chief Constable of Central Scotland Police, to consider the manner in which Northern Constabulary had investigated the content of complaints received from the McLeod family, including the conduct of the Chief Officers involved.
20. Mr Cameron's report was submitted to the Board in November 2002. The report is entitled "A report of an enquiry into Northern Constabulary's Management of Complaints against the Police made by members of the McLeod Family of Wick".
21. The final report submitted by Mr Cameron to the Board consisted of four volumes. The Summary Report (volume 1) was the subject of a previous decision by the Commissioner *Decision 003/2007 Mr Allan McLeod and the Northern Joint Police Board*, as a result of which the Board, as directed by the Commissioner, disclosed a redacted version of the Summary Report.
22. This decision addresses the information contained within volumes 2 – 4 of the Report, which consist of witness statements and appendices to the Report.

Consideration of section 35(1)(g)

23. 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 (as defined by the Freedom of Information Act 2000) or Scottish public authority (as defined by FOISA) of its functions for any of the purposes listed in section 35(2) of FOISA. The Board considered that the exercise of three of its functions would, or would be likely to be, substantially prejudiced should the information in the appendices to the report be disclosed, i.e. to ascertain whether a person has failed to comply with the law (section 35(2)(a)), to ascertain whether a person is responsible for conduct that is improper (section 35(2)(b)) and to ascertain a person's fitness or competence in relation to any profession or other activity which the person is, or seeks to become, authorised to carry on (section 35(2)(d)(ii)). The Board has applied the exemption in section 35(1)(g) to all of the information contained in the appendices to the report.



24. The exemptions contained within section 35 are all qualified exemptions in that they are subject to the public interest test required by section 2(1)(b) of FOISA. In addition, the exemptions can only apply where substantial prejudice would, or would be likely to, occur as a result of the disclosure of the information. There is no definition in FOISA of what is deemed to be substantial prejudice, but the Commissioner considers that for an authority to be able to show that disclosure of the information would, or would be likely to be, substantially prejudicial, it would need to show that there was a real risk or likelihood of actual harm being caused by disclosing the information at some time in the near (certainly the foreseeable) future, not simply that harm was a remote possibility. The authority would also have to show that the harm caused by such a release would (or would be likely to) be of real and demonstrable significance.
25. When considering the use of the exemption in section 35(1)(g), the Commissioner must therefore consider three separate matters. First of all, he must consider whether the Board has a function in relation to one or more of the purposes mentioned in section 35(2). If he is satisfied that it does, he must go on to consider whether disclosure of the information would, or would be likely to, prejudice substantially the Board's ability to exercise the function(s). Even where he is satisfied that it would, he must go on to consider whether, in all the circumstances of the case, the public interest in maintaining the exemption outweighs that in disclosure of the information. Unless he finds that it is, he must order release of the information.
26. The Commissioner is satisfied that the functions identified above are functions of the Board, as laid down in the Police (Conduct) (Senior Officers) (Scotland) Regulations 1996 and 1999 and further described in Police Circular 10/1999. The Commissioner also accepts that the purpose of Mr Cameron's investigation was to assist the Board in exercising those functions, in relation to the conduct of the senior police officers responsible for the way in which the McLeod family's complaints were handled.
27. The Board noted that the Commissioner has upheld the application of this exemption widely in relation to the Summary Report considered in *Decision 003/2007* and restricted disclosure to very limited circumstances.
28. The Board argued that such limited circumstances would not arise in relation to the information contained in the appendices which contain the original source materials including full statements provided by all witnesses to the enquiry Team. The Board argues that it is vital that both police and other witnesses are not inhibited or discouraged from providing information to a police investigation with complete candour.
29. It has also been suggested by the Board that it is not possible to rule out further investigations into the death of Kevin McLeod and it would therefore be inappropriate to take any steps (e.g. by disclosing the information under consideration) which might prejudice any future investigations.
30. In considering the Board's application of this exemption, the Commissioner wishes to restate the position outlined in *Decision 003/2007* where he noted, at paragraph 131, that he accepted the general position behind the arguments put forward by the Board in relation to the future inhibition of witnesses following disclosure of statements.



31. The Commissioner also considers the information in this case to be closely analogous to that under consideration in *Decision 038/2006 Mr T and the Chief Constable of Grampian Police*. In that decision, at paragraph 28, he accepted that police officers must be able to make comprehensive and unreserved statements to assist with the processes of law and order and 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.
32. The Commissioner has also concluded that, in relation to civilian witnesses, there would not have been an expectation that statements to the inquiry would be made public. The Commissioner also considers the position adopted by him in *Decision 003/2007* to still be compelling. There, at paragraph 139, he noted that witnesses would not have expected their statements to Mr Cameron's enquiry to be made public, and that it would be unfair now to expose them to public examination on their recollections outside the judicial process.
33. In the current case, the Commissioner has concluded that the disclosure of verbatim witness statements, both oral and written, would be likely to have an inhibiting effect on future witnesses, may deter witnesses in future investigations from coming forward and, consequently, would, or would be likely to, cause substantial damage to the ability of the police to fully investigate the matters described in section 35(2)(a), (b) and (d)(ii). As a result, he is satisfied that the disclosure of the verbatim witness statements is exempt in terms of section 35(1)(g) of FOISA.
34. Additionally, the Commissioner considers that a number of other documents within the appendices, which do not comprise witness statements, fall within the ambit of this exemption. In particular, there are a number of reports and correspondence relating to various aspects of the investigation which include the opinion, views and recommendations of police officers and other professionals. Having considered the content of these documents, the Commissioner has concluded that these opinions and views are essential in reaching a decision as to the contents and the outcome of the inquiry. The Commissioner considers that individuals must be free to express these views and opinions with candour, in the knowledge that they will not be disclosed. To do so would inhibit such candour and would, or would likely to, prejudice substantially the exercise of the functions listed in section 35(2)(a), (b) and (d)(ii). As such, he considers that the disclosure of these other documents is exempt under section 35(1)(g) of FOISA.

The public interest test

35. The exemption in section 35(1)(g) is subject to the public interest test required by section 2(1)(b) of FOISA. This means that, even although the Commissioner is satisfied that the disclosure of the information would, or would be likely to, prejudice substantially the exercise of the functions by the Board of its functions in terms of section 35(1)(g) of FOISA, he must still order the information to be disclosed unless he is satisfied that, in all the circumstances of the case, the public interest in maintaining the exemption outweighs that in disclosure of the information.



36. The Commissioner will therefore go on to consider the public interest test as it applies to the information which he has found to be exempt in terms of section 35(1)(g) of FOISA.
37. In its submissions, the Board argued that it is vital that both police and other witnesses are not inhibited or discouraged from providing information to a police investigation with complete candour. Whilst the Board recognises that there can be a legitimate public interest in the disclosure of such information in terms of police accountability, it submitted that such interests do not prevail against the strong public interest in disclosing information where doing so would prejudice the purposes identified above.
38. In his submissions to the Commissioner, Mr McLeod argued that the whole body of documents (within the appendices) represented a matter which it is very much in the public interest to disclose. Mr McLeod pointed out that the circumstances of the case had attracted strong media interest and public support for the family in the previous 11 years and that, consequently, the Board should be seen to deal with the case in an open and accountable way. Mr McLeod also referred to the November 2007 report by the Police Complaints Commissioner for Scotland (the PCCS) which investigated the manner in which Northern Constabulary had dealt with his family's complaints (the report can be viewed at <http://www.pcc-scotland.org/GetFile.aspx?ItemId=53>). Mr McLeod pointed to the critical nature of the PCCS's report and considered that this contributed to the public interest in disclosure of the information.
39. The Commissioner has considered the general arguments in favour of disclosure of information of this type. For example, release of the information could hold Northern Constabulary accountable for the quality of its investigation into alleged misconduct and would allow public debate with regard to its investigations into alleged misconduct against its officers and its dealings with members of the public. Additionally, release of the information may assist the complainants in this case in understanding more fully the circumstances surrounding their complaint.
40. The Commissioner has also considered the counterarguments in favour of maintaining the exemption in this case. For example, there would be an expectation that the information provided in the course of investigations would not be disclosed to a third party, other than in the course of criminal proceedings or proceedings under the Conduct Regulations. Additionally, disclosure could be harmful to future investigations of this nature if witnesses felt inhibited from cooperating fully with investigations through fear that their evidence, statements or opinions would be routinely disclosed. This would impact upon the future investigation of such complaints and the ability of the police to investigate them effectively.



41. The Commissioner has noted the position which he adopted in *Decision 018/2005 Mr Robert Bennett and the Chief Constable of Grampian Police*, where he concluded that he will consider the public interest in releasing police reports on a case by case basis, but that arguments based on the public interest in disclosure will have to be specific and strongly persuasive to allow him to conclude that particular police reports should be released. Having weighed up the arguments in this case and, and notwithstanding the issues raised by Mr McLeod, the Commissioner has concluded that the public interest arguments in favour of withholding the information are strong and, on balance, should prevail. Consequently, the Commissioner is satisfied that the Board was justified in withholding the information to which section 35(1)(g) has been correctly applied

Consideration of section 34

42. The Board has applied the exemptions in section 34(1)(a)(i) and (b) of FOISA to all of the information contained in the appendices to the report. Additionally, the Board has applied the exemptions in section 34(2)(b) to some of the documents.
43. Section 34(1)(a)(i) of FOISA provides that information is exempt information if it has at any time been held by a Scottish public authority 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.
44. Section 34(1)(b) of FOISA provides that information is exempt information if it has at any time been held by a Scottish public authority for the purposes of an investigation, conducted by the authority, which in the circumstances may lead to a decision by the authority to make a report to the procurator fiscal to enable it to be determined whether criminal proceedings should be instituted.
45. Section 34(2)(b) provides that information is exempt if held at any time by a Scottish public authority for the purposes of an investigation (other than for the purposes of an inquiry instituted under the Fatal Accidents and Sudden Deaths Inquiry (Scotland) Act 1976), being carried out by virtue of a duty to ascertain, or for the purpose of making a report to the procurator fiscal as respects, the cause of death of a person.
46. All three of these are class-based exemptions. This means that if information falls within the descriptions set out above, the Commissioner is obliged to accept it as exempt. There is no harm test; the Commissioner is not required or permitted to consider whether disclosure would substantially prejudice an interest or activity, or otherwise to consider the effect of disclosure. However, the exemptions are all subject to the public interest test required by section 2(1)(b) of FOISA.
47. The Commissioner is satisfied that the documents under consideration contain, or reflect, information which has been held by Northern Constabulary for the purposes of an investigation which it had a duty to conduct. The Commissioner is satisfied that the purposes of these investigations include all three of those that are relevant for the purposes of the exemptions in section 34(1)(a)(i) and (b) and (2)(b).



48. Having considered the information withheld and the submissions received from the Board, the Commissioner is therefore satisfied that the Board correctly applied one or more of the exemptions in sections 34(1)(a)(i) and (b) and (2)(b) to much of the information contained within the appendices.

The public interest test

49. The Board has adopted the same arguments in relation to the public interest test for this exemption as those it relied on in relation to section 35. In particular, it reiterated its opinion that there is a very strong public interest in ensuring the effective investigation and detection of crime and in not disclosing information which would substantially prejudice the purposes of section 34.
50. The Board recognised that whilst there may be a degree of public interest in disclosure in terms of public accountability and greater scrutiny of police actions, such public interest is considered not to prevail in this case when balanced with the strong public interest in ensuring an effective criminal justice system and in ensuring that the investigation and detection of criminal activities is not undermined.
51. Mr McLeod made general submissions in relation to the public interest which are summarised above. Mr McLeod considers that the refusal by the Board to disclose this information is contrary to openness and accountability. Mr McLeod referred to the publication of previous reports regarding the case and considered that these had highlighted police failings. Mr McLeod pointed out that the revelation of previous police failings had been acknowledged by the police itself to the extent that the Chief Constable of Northern Constabulary had implemented procedural changes as a consequence.
52. The Commissioner acknowledges that there is a compelling argument for maintaining the exemptions contained in section 34 where they are applied to police reports, even where the information concerned no longer relates to ongoing investigations or proceedings. It is of considerable public interest that individuals remain willing to co-operate with the criminal justice system by providing witness statements and other assistance to the police in the course of their investigations. The Commissioner is satisfied that such willingness would be diminished if, for example, witness statements were to be disclosed routinely under the terms of FOISA.
53. Even so, it may be in the public interest to order the information to be disclosed, if the public benefits in release outweigh the negative consequences of release. However, the Commissioner considers that Mr Cameron's investigation could not have been carried out had there been any suggestion that witness statements and the other information gathered in the course of the inquiry would be put into the public domain.
54. Having considered the substance, nature and context of the withheld information and the arguments presented by both Mr McLeod and the Board, the Commissioner has concluded that the public interest in maintaining the exemptions outweighs that in disclosure in this instance.



55. In its wider submissions, the Board commented that Mr McLeod's interests have already been met and satisfied by the disclosure of the redacted version of Mr Cameron's Summary Report which was the subject of *Decision 003/2007*. The Commissioner has a certain amount of sympathy with this view and while he understands the very personal reasons Mr McLeod has for wanting all of the background material to the report to be made public, the Commissioner must consider the wider public interest issues. As part of this, the Commissioner has considered the very negative effects on any future criminal investigation in the event that new information comes to light about the untimely death of Kevin McLeod.

Other exemptions

56. Having upheld the application of exemptions in sections 34 and 35 as set out above, the Commissioner has found that one or more of the exemptions considered above was correctly applied to all of the information withheld in this case. Having reached this conclusion, he has not gone on to consider the application of any other exemptions in relation to those documents.

DECISION

The Commissioner finds that the Northern Joint Police Board (the Board) was entitled to withhold the information sought by Mr McLeod under Part 2 of the Freedom of Information (Scotland) Act 2002 (FOISA) and that the Board accordingly dealt with Mr McLeod's request in accordance with Part 1 of FOISA.

Appeal

Should either Mr McLeod or the Board 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
7 August 2008



Appendix

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

- (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
 - ...
 - (b) an investigation, conducted by the authority, which in the circumstances may lead to a decision by the authority to make a report to the procurator fiscal to enable it to be determined whether criminal proceedings should be instituted; or
- (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.

35 Law enforcement

- (1) Information is exempt information if its disclosure under this Act would, or would be likely to, prejudice substantially-
...
 - (g) the exercise by any public authority (within the meaning of the Freedom of Information Act 2000 (c.36)) or Scottish public authority of its functions for any of the purposes mentioned in subsection (2);
- (2) The purposes are-
 - (a) to ascertain whether a person has failed to comply with the law;
 - (b) to ascertain whether a person is responsible for conduct which is improper;
 - ...
 - (d) to ascertain a person's fitness or competence in relation to-
...
 - (ii) any profession or other activity which the person is, or seeks to become, authorised to carry on;