



Scottish Information  
Commissioner

**Decision 049/2007 Ms Helen Doyle and the Chief  
Constable of Strathclyde Police**

*Information relating to a police investigation*

**Applicant: Ms Helen Doyle  
Authority: Chief Constable of Strathclyde Police  
Case No: 200600643  
Decision Date: 12 March 2007**

**Kevin Dunion  
Scottish Information Commissioner**

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## **Decision 049/2007 Ms Helen Doyle and the Chief Constable of Strathclyde Police**

***Information relating to a police investigation – information withheld under sections 34 and 35 of FOISA – Commissioner upheld Strathclyde Police decision that the information requested was exempt under section 34(1)(a)(i)***

### **Relevant statutory provisions and other sources**

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Freedom of Information (Scotland) Act 2002 (FOISA) sections 2(1) (effect of exemptions); 34(1)(a)(i) (investigations by Scottish public authorities and proceedings arising out of such investigations); 35(1)(a) and (b) (Law enforcement).

The text of each of these provisions is reproduced in the Appendix to this decision. The Appendix forms part of this decision.

### **Facts**

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Ms Doyle requested copies of two letters that were held by the Chief Constable of Strathclyde Police (Strathclyde Police) in relation to an investigation concerning the leasing of a property. Strathclyde Police refused to supply these letters on the grounds that the information was exempt from disclosure under sections 34(1)(a)(i), 35(1)(a) and 35(1)(b) of FOISA, and that the public interest in maintaining these exemptions outweighed the public interest in disclosure of the information.

Strathclyde Police upheld this decision following an internal review.

Following an investigation, the Commissioner found that Strathclyde Police had correctly applied the exemption in section 34(1)(a)(i) to the information requested. Having also concluded that, in all the circumstances of the case, the public interest in maintaining the exemption outweighed the public interest in disclosing the information, he found that Strathclyde Police had acted in accordance with Part 1 of FOISA in refusing to disclose the letters to Ms Doyle. He did not, however, uphold Strathclyde Police's reliance on the exemptions in section 35.



## Background

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1. On 29 November 2005, Ms Doyle wrote to Strathclyde Police in relation to an ongoing complaint concerning the leasing of a property. This dispute had prompted a complaint of criminal activity which was investigated by Strathclyde Police in 2004, and a report subsequently submitted to the Procurator Fiscal. Ms Doyle's letter requested copies of two letters held within Strathclyde Police file on this matter.
2. Strathclyde Police responded to this request in a refusal notice dated 5 January 2006. This stated that the information requested was held for the purposes of an investigation conducted for the purposes of ascertaining whether a person should be prosecuted for an offence, and so was exempt under section 34(1)(a)(i) of FOISA. It also stated that the information was exempt under section 35(1)(a) and (b) because disclosure would, or would be likely to, prejudice substantially the prevention and detection of crime and the apprehension or prosecution of offenders. Strathclyde Police confirmed that, having considered the public interest, they had concluded that the public interest in maintaining these exemptions outweighed the public interest in disclosure of the information. Therefore, Ms Doyle's request was refused in full.
3. Ms Doyle requested a review of Strathclyde Police's decision in a letter dated 7 February 2006. In this she contended that the exemptions cited by Strathclyde Police had been wrongly applied.
4. Strathclyde Police advised Ms Doyle of the outcome of its review in a notice dated 9 March 2006. This confirmed that the Strathclyde Police review panel had upheld the initial decision without modification.
5. Ms Doyle then wrote to my Office on 25 April 2006, making an application for a decision by me. Her application stated that she believed that the information she had requested should be made available. She provided a range of background information about the dispute surrounding a property, and explained that she believed that the Strathclyde Police file on this matter contained false evidence.
6. Ms Doyle's application for decision was allocated to an investigating officer and then validated by establishing that Ms Doyle had made a valid information request to a Scottish public authority under FOISA and had appealed to me only after asking Strathclyde Police to review their response to her request.



## Investigation

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7. The investigating officer wrote to Strathclyde Police on 10 June 2006, advising that Ms Doyle's application had been received and an investigation into the matters raised had begun. Strathclyde Police were invited to comment on the case in terms of section 49(3)(a) of FOISA.
8. Strathclyde Police were also asked to supply copies of the two letters requested by Ms Doyle and background information to inform my investigation. Strathclyde Police's response to this request was received on 13 July 2006.
9. All points raised in the submissions from both parties have been taken into account even if they are not specifically referred to in this decision.

## The Commissioner's analysis and findings

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10. Strathclyde Police have stated that the two letters requested by Ms Doyle are exempt from disclosure under the terms of both section 34(1)(a)(i) and section 35(1)(a) and (b) of FOISA. I will consider these exemptions in turn.

### Section 34 – investigations by Scottish public authorities

11. Section 34(1)(a)(i) provides that information is exempt information where 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.
12. Strathclyde Police have supplied evidence to my Office that confirms that the two letters requested by Ms Doyle were held by Strathclyde Police for the purposes of an investigation into allegations of criminality. Strathclyde Police have provided a copy of the report submitted to the Procurator Fiscal on this matter, which confirms that both letters were provided to the Procurator Fiscal along with the investigating officer's report.
13. As the police have a duty to investigate allegations of criminal activity, I am satisfied that the information requested by Ms Doyle is exempt information for the purposes of section 34(1)(a)(i).



14. The exemption in section 34(1)(a)(i) is a qualified exemption, which means that its application is subject to the public interest test contained in section 2(1)(b) of FOISA. Before going onto consider the public interest as it relates to the information under consideration, I will first consider Strathclyde Police submissions on the application of the exemptions in section 35(1)(a) and (b).

### **Section 35 – law enforcement**

15. Strathclyde Police have submitted that the two letters requested by Ms Doyle are also exempt under the terms of section 35(1)(a) and (b). These exemptions apply where disclosure of information would, or would be likely to, prejudice substantially the prevention or detection of crime, and the apprehension or prosecution of offenders respectively. These exemptions are both also qualified, and so are subject to the public interest test contained in section 2(1)(b) of FOISA.
16. Strathclyde Police have noted that in the course of an investigation such as the one relevant to this case, police interview and gather evidence from any person who may be in a position to assist them; in this case, the parties to the correspondence requested by Ms Doyle. Strathclyde Police stated that there was an acceptance that the information so gathered would not be disclosed to a third party other than in the course of criminal proceedings. Strathclyde Police asserted that to do so would undermine this expectation and might deter victims or witnesses from reporting matters to the police. Strathclyde Police submitted that this would be likely to prejudice substantially both the investigation and detection of crime and the apprehension or prosecution of offenders.
17. Although there is no definition of the term “substantial prejudice” within FOISA, it is my view that in order for a public authority to be able to rely on the exemptions in sections 35(1)(a) and (b), it would have to show that the risk of damage from disclosure the information was real or likely, not hypothetical. The harm caused or likely to be caused must be significant, not marginal, and it would have to occur in the near future and not in some distant time.
18. I have considered Strathclyde Police’s comments in relation to the documents under consideration in this case. I note that these do not contain any direct witness statements or comments upon on the allegations that were investigated by Strathclyde Police. The parties to the correspondence had not reported any alleged crime, but had supplied documentation to support the police investigation following a report made by another party.
19. The letters under consideration therefore provide evidence that informed the police investigation, but their original purpose was quite different, forming exchanges between professionals on matters surrounding the property that was later the subject of the allegations under investigation.



20. In this context, I find I am sceptical of Strathclyde Police's assertion that disclosure of these letters may deter victims and witnesses in general from reporting matters to the police. In the circumstances, I do not find that Strathclyde Police have demonstrated that disclosure of these particular documents would be likely to prejudice substantially their efforts to either prevent or detect crime (section 35(1)(a)) or the apprehend or prosecute offenders (section 35(1)(b)). I have concluded that these exemptions were wrongly applied to this information.

### **Consideration of the public interest**

21. As set out above, I have concluded that Strathclyde Police have correctly applied the exemption in section 34(1)(a)(i) to the letters requested by Ms Doyle. I have concluded that the exemptions in sections 35(1)(a) and (b) do not apply in this instance and therefore am not required to consider the public interest in relation to them.
22. Having reached this conclusion, I must now go on to consider whether, in all the circumstances of the case, the public interest in maintaining the exemption in section 34(1)(a)(i) outweighs the public interest in disclosure of the information. If the two are evenly balanced, the presumption should always be in favour of disclosure. Information should only be withheld where the public interest in doing so outweighs that in disclosure.
23. FOISA contains a presumption that transparency on the part of public authorities is also in the public interest. Also in favour of disclosure, Strathclyde Police have noted that there is a public interest in providing access to justice, and that disclosure of the information under consideration would allow greater understanding of the action taken by the police in response to allegations of criminality in this case.
24. Ms Doyle has provided detailed submissions to my Office on the background to this case, and these have made clear that her request for information forms part of her wider pursuit of justice around the matters concerning the leasing of the property concerned.
25. However, Strathclyde Police have identified a number of public interest considerations favouring the maintenance of the exemption in section 34(1)(a)(i). In particular, they noted that the nature of the criminal investigation undertaken by the police favours non-disclosure; that the interests of third parties that assisted the police in the investigation might be compromised by disclosure, and that disclosure could make it more difficult for the police to gather information in future.



26. While I do not accept that the disclosure of the letters under consideration would be likely to prejudice substantially the prevention or detection of crime, or the apprehension or prosecution of offenders, I do find each of the points set out in paragraph 25 to be relevant to the consideration of the public interest in this case.
27. I note, for example, that one of the letters under consideration would attract legal privilege. As such, I would assume that it was passed to Strathclyde Police with an expectation of confidentiality. Were Strathclyde Police to disclose this type of information after gathering it in the course of a criminal investigation, individuals might well be less likely to actively assist such investigations in future.
28. It is in the public interest that the police are able to gather relevant information and documentation in the course of their inquiries without those supplying it fearing that it will be disclosed at a later date. Given this wider consideration, I find that the public interest in maintaining the exemption in section 34(1)(a)(i) of FOISA outweighs the competing public interest in disclosure of the two letters requested to Ms Doyle.
29. I have therefore concluded that Strathclyde Police acted in accordance with the requirements of Part 1 of FOISA in withholding this information.

## Decision

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I have found that the Chief Constable of Strathclyde Police (Strathclyde Police) acted in accordance with the requirements of the Freedom of Information (Scotland) Act 2002 (FOISA) in its response to Ms Doyle's request for information.

In particular, I have found the two letters under consideration to be exempt from disclosure under the terms of section 34(1)(a)(i) of FOISA, and that the public interest in maintaining this exemption outweighs the public interest in the disclosure of the information.

However, I do not find that the exemptions in sections 35(1)(a) and (b) of FOISA apply to this information.

I do not require any action to be taken in response to this decision.



## **Appeal**

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

**Kevin Dunion**  
**Scottish Information Commissioner**  
**12 March 2007**





## APPENDIX

### Relevant Statutory Provisions Freedom of Information (Scotland) Act 2002:

#### 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; or

#### 35 Law enforcement

(1) Information is exempt information if its disclosure under this Act would, or would be likely to, prejudice substantially-

- (a) the prevention or detection of crime;
- (b) the apprehension or prosecution of offenders;