



Scottish Information  
Commissioner

**Decision 066/2007 - Mr Hugh McDerment and the  
Chief Constable of Strathclyde Police**

*Request for a copy of a police report*

**Applicant: Mr Hugh McDerment  
Authority: The Chief Constable of Strathclyde Police  
Case No: 200600227  
Decision Date: 4 May 2007**

**Kevin Dunion  
Scottish Information Commissioner**

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## **Decision 066/2007 – Mr Hugh McDerment and the Chief Constable of Strathclyde Police**

***Police report submitted to the procurator fiscal on 12 May 2005 regarding applicant - Information withheld under section 34(1)(a)(i) of FOISA – Investigations by Scottish public authorities and proceedings arising out of such investigations – section 35(1)(a) and (b) of FOISA – Law enforcement – section 38(1)(b) and 38(2)(a)(i) – personal information.***

### **Relevant Statutory Provisions and other Sources**

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Freedom of Information (Scotland) Act 2002: sections 1(1) (General entitlement); 34(1)(a)(i) (Investigations by Scottish public authorities and proceedings arising out of such investigations); 35(1)(a) and (b) (Law enforcement) and 38(1)(b) and 38(2)(a)(i) and (b) (Personal information)

Data Protection Act 1998: section 1(1) (Basic interpretative provisions) (definition of “personal data”)

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

### **Facts**

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Mr McDerment requested a copy of a report submitted by Strathclyde Police to the Procurator Fiscal on 12 May 2005 regarding himself. The Chief Constable of Strathclyde Police (the Police) refused to disclose the information on the basis that the information was exempt by virtue of sections 34(1)(a)(i), 35(1)(a) and 35(1)(b) and 38(1)(b) of the Freedom of Information (Scotland) Act 2002 (FOISA). Mr McDerment asked the Police to review their decision to withhold the information, but, on review, the Police upheld their initial decision. Mr McDerment applied to the Scottish Information Commissioner for a decision as to whether the Police had complied with FOISA in refusing to provide him with a copy of the report.

The Commissioner found that the Police complied with FOISA in withholding the report from Mr McDerment.



## Background

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1. On 21 July 2005, Mr McDerment asked the Police for a copy of a report submitted to the Procurator Fiscal on 12 May 2005 regarding an alleged incident involving himself.
2. On 10 August 2005, the Police responded to Mr McDerment, refusing to release the report requested by him. The Police argued that the exemptions in sections 34(1)(a)(i); 35(1)(a) and (b) and section 38(1)(b) of FOISA applied to the information. The Police also advised Mr McDerment that they considered that the public interest in withholding the information was greater than the public interest in releasing the information in this case.
3. On 9 September 2005, Mr McDerment asked the Police to review their decision to withhold the information, arguing that he was unaware of the offence he was alleged to have committed and alleged that there were “suspicious” factors relating to him being charged with the offence he was alleged to have committed.
4. The Police carried out a review and, on 13 October 2005, responded to Mr McDerment, upholding their initial response. However, although the Police remained of the view that the information was exempt under FOISA, the Police commented that the initial response should have given Mr McDerment information on his rights to receive information about himself under the Data Protection Act 1998 (the DPA).
5. Mr McDerment remained dissatisfied with the Police’s response. On 26 January 2006, Mr McDerment applied to me for decision as to whether the Police had dealt with his information request in line with FOISA.
6. The case was allocated to an investigating officer. Mr McDerment’s application was validated by establishing that he had made a valid information request to a Scottish public authority and had applied to me only after asking the public authority to review its response to his request.
7. At this time, the investigating officer also wrote to Mr McDerment to ask if he had made a request for his own personal information under the DPA. Mr McDerment replied that he had not done this as he considered that it was more likely that he would receive the information he was looking for under FOISA.



## The Investigation

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8. On 1 March 2006, the investigating officer contacted the Police in terms of section 49(3)(a) of FOISA for their comments on the application and for further information in relation to this case. The Police responded on 9 March 2006.

### Submissions from the Police

9. The Police stated that the report is exempt under section 34(1)(a)(i) as the information is held for the purposes of an investigation into an alleged offence.
10. The Police added that the report was also exempt under section 35(1)(a) and (b) as its disclosure would undermine the expectation that information provided in the course of interviews and evidence gathering would not be disclosed.
11. Finally, the Police added that section 38(1)(b) applied in that the report contained personal data, the release of which would breach data protection principles.
12. The Police also commented that the public interest in disclosing the information is outweighed by that in maintaining the exemptions in sections 34 and 35 (the exemption in section 38(1)(b) is not subject to the public interest test).

### Submissions for the applicant

13. Mr McDerment explained his perception of the events culminating in the alleged offence and sought the report to identify on what basis charges were being brought against him.
14. Mr McDerment provided the investigating officer with a copy of documents relating to his concerns about the Police charges. I have considered the contents of both of these in coming to a decision on this case.



## The Commissioner's Analysis and Findings

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15. This investigation focussed on whether the information within the report was covered by the exemptions claimed by the Police. It did not consider whether Mr McDerment's assertions about the factors relating to the report were correct. That is beyond my remit as Commissioner.

### Consideration of section 34(1)(a)(i) of FOISA

16. I will consider first the use of the exemption in section 34(1)(a)(i) of FOISA by the Police, as that relates most directly to the report which Mr McDerment has asked for. In terms of section 34(1)(a)(i) of FOISA, information is exempt information if it has at any time been held by a Scottish public authority for the purposes of an investigation a public authority has a duty to conduct to ascertain whether a person should be prosecuted for an offence.
17. I have viewed the report in question. It is a report prepared by the Police as respects an alleged incident involving Mr McDerment. This report includes witness details and statements, a police constable's observations and comments and analysis of evidence. I am satisfied that the report falls within the class of information considered exempt under section 34(1)(a)(i) of FOISA.
18. The exemption contained in section 34(1)(a)(i) is a class exemption. This means that there is no harm test contained in the exemption (e.g. there is no test of substantial prejudice in the exemption.) If the information falls within a particular class of information, then it is deemed to be exempt.
19. However, section 34 of FOISA is subject to the public interest test required by section 2(1)(b) of FOISA. This means that, although the information in the report is exempt, it should still be released unless, in all the circumstances of the case, the public interest in disclosing the information is outweighed by the public interest in maintaining the exemption.

### The public interest

20. Advice from the Crown Office and Procurator Fiscal Service states that witness statements and police reports such as this report are not generally made available to any other person on the basis that there would be a risk to the fundamental principle of the presumption of innocence. Were information provided as part of police reports to be released, this may lead to summary justice or trial by media on the assumption that simply because the statement is made, the accused is guilty. Where there is an allegation of wrongdoing this must still be proven with sufficient evidence in order to secure a conviction in criminal proceedings.



21. The police have stated that they must consider the protection of witnesses and victims of crime. I am aware that the witnesses in this case have provided evidence in the expectation that their anonymity will be protected. While it may be possible to honour that anonymity in this report (for example, through redacting names and other personal identifiers), witnesses may have to be re-interviewed and, if the report is released, may be less willing to cooperate or even provide fresh statements.
22. I find this argument persuasive and, given the particular circumstances of this case, I must give due consideration to the practicalities of removing all identifiers of witnesses in order that complete anonymity is preserved.
23. I must however balance this against the public interest consideration submitted by Mr McDerment – that he feels release of the information could indicate evidence of the abuse of power on the part of an employee of a public authority. While the current situation affects him personally in terms of justice to an individual he has concerns that there could be broader implications for the public at large.
24. Having considered the submissions made by both parties, on balance, in this case, I am satisfied that the public interest lies in maintaining the exemption in that the public interest would not be served were the ability of the Police to obtain reliable witness statements or the willingness of witnesses to provide statements jeopardised due to the release of this report.
25. I am therefore satisfied that the Police correctly applied section 34(1)(a)(i) of FOISA and that the balance of public interest lies in maintaining the exemption.

#### **Consideration of section 35(1)(a) and (b) of FOISA**

26. Being satisfied that this report is exempt under section 34 of FOISA and this being a class exemption, I need not consider the exemption claimed by the Police under section 35 of FOISA.

#### **Consideration of section 38(1)(b) / 38(2)(a)(i) of FOISA**

27. Whilst I accept that section 34 of FOISA applies to the report in question and therefore exempts it, and section 35 need not be considered as section 34 is a class exemption; I believe it would be helpful to clarify the position with regard to the exemption the Police have claimed under section 38 of FOISA.
28. Section 38(1)(b), read in conjunction with section 38(2)(a)(i) or 38(2)(b) of FOISA, exempts information if it constitutes personal data and the disclosure of the information to a member of the public (in this case, to Mr McDerment) would contravene any of the data protection principles set down in the DPA. This is an absolute exemption.



29. The Police have submitted that the report in question is personal data as defined by the DPA. Specifically, the Police claim that the information relates to third parties: names, addresses and dates of birth of witnesses. The Police have indicated that, if the information were to be released to a third party, then this would contravene the first and second data protection principles.
30. In order to determine whether the report contains personal data, I have referred to the definition of personal data contained in section 1(1) of the DPA (the definition is contained in the Appendix).
31. Having considered the definition of personal data contained in section 1(1) of the DPA, I agree that the information about the third parties contained in the report is their personal data.
32. The first data protection principle states that personal data should be processed fairly and lawfully and, in particular, shall not be processed unless at least one of the conditions in Schedule 2 of the DPA (and, in the case of sensitive personal data), at least one of the conditions in Schedule 3 of the DPA) are met.
33. In my view the witnesses who provided the statements and their personal details would have had no expectation that the information recorded about them would be released to a third party. As such, I agree that it would be unfair of the Police to release this information to Mr McDerment. Given that I have found that the release of the information would be unfair, I am required to find that the release of the information would breach the first data protection principle.
34. I am satisfied that the report contains personal data of witnesses and the release of that information would be unfair. It is therefore exempt in terms of section 38(1)(b) of FOISA.
35. However, I must also consider the nature of the information and the particular circumstances surrounding the request for the report.

***Is the applicant the data subject – should section 38(1)(a) of FOISA apply?***

36. The information requested is, by-and-large, a report about *Mr McDerment* and refers to an offence alleged to have been committed by *him*. In my view, the Police should also have considered the report under section 38(1)(a) of FOISA.
37. Section 38(1)(a) of FOISA exempts information if it constitutes personal data of which the applicant (i.e. Mr McDerment) is the data subject.





38. Examining the information which has been withheld from Mr McDerment, it is clear that the information comprises a report which has information concerning Mr McDerment as its focus. The report relates to actions allegedly undertaken by Mr McDerment in the personal / private sphere of his life. The report clearly identifies Mr McDerment as the subject of the report and I am satisfied that the report constitutes personal data of which Mr McDerment is the data subject.
39. As such, the more appropriate mechanism for access to this information would have been the DPA. My investigating officer suggested that Mr McDerment make a subject access request for the report using the DPA but he felt FOISA offered a better chance of receiving details.
40. DPA also permits the applicant direct access to the report without the obligation on part of the Police to release the report into the public domain. This is an important distinction as, for me to order release of this report, would establish the right for anyone to gain access to it. While I feel sure Mr McDerment would like to know the circumstances surrounding the charges of the alleged offence through access to the report, I feel certain that he would be less keen on the breach of his privacy were the report to be generally released. This, in effect, would also legitimise the public interest arguments made by the Police in that the Police have a duty to protect the accused and ensure that the proper mechanisms of justice are adhered to.
41. Having read the report, I am satisfied that the report contains personal data about third parties as well as information about Mr McDerment. As such the information is personal data as defined by the DPA and subject to section 38(1)(a) as well as section 38(1)(b) of FOISA.
42. I am therefore satisfied that the police correctly applied section 38 of FOISA to the information requested.
43. Mr McDerment is, of course, perfectly entitled to make a subject access request to the Police for the report under the terms of the DPA .





## **Decision**

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I find that the Chief Constable of Strathclyde Police dealt with Mr McDerment's request for information in accordance with Part 1 of FOISA, in that he correctly applied section 34(1)(a)(i) and 38(1)(b) of FOISA to the information withheld.

## **Appeal**

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

**Kevin Dunion**  
**Scottish Information Commissioner**  
**4 May 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.

##### **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

##### **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

##### **38 Personal information**

- (1) Information is exempt information if it constitutes-
  - (a) personal data of which the applicant is the data subject;
  - (b) personal data and either the condition mentioned in subsection (2) (the "first condition") or that mentioned in subsection (3) (the "second condition") is satisfied;

(...)
- (2) The first condition is-
  - (a) in a case where the information falls within any of paragraphs (a) to (d) of the definition of "data" in section 1(1) of the Data Protection Act 1998 (c.29), that the disclosure of the information to a member of the public otherwise than under this Act would contravene-
    - (i) any of the data protection principles

...
  - (b) in any other case, that such disclosure would contravene any of the data protection principles if the exemptions in section 33A(1) of that Act (which relate to manual data held) were disregarded.



## Data Protection Act 1998

### 1 Basic interpretative provisions

- (1) In this Act, unless the context otherwise requires –
- “personal data” means data which relate to a living individual who can be identified –
- (a) from those data, or
  - (b) from those data and other information which is in the possession of, or is likely to come into the possession of, the data controller, and includes any expression of opinion about the individual and any indication of the intentions of the data controller or any other person in respect of the individual