

Decision Notice



Decision 037/2009 Mr Stephen Stewart of the Daily Record and the Chief Constables of Central, Grampian, Lothian and Borders, Strathclyde and Tayside Police

Payments made to police informants and the reasons for payment

Reference No: 200800345, 200800556, 200800633, 200800635, 200800636
Decision Date: 31 March 2009

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Kevin Dunion

Scottish Information Commissioner

Kinburn Castle
Doubledykes Road
St Andrews KY16 9DS
Tel: 01334 464610



Summary

Mr Stewart, a journalist with the Daily Record, asked the Chief Constables of five Scottish police forces for a breakdown of the total amount paid to informants in the last three financial years and for details of why they were paid. The Police responded by stating that the information was exempt from disclosure under various exemptions in Part 2 of FOISA. Following a review, Mr Stewart remained dissatisfied and applied to the Commissioner for a decision.

Following an investigation, the Commissioner found that the Chief Constables of Central Scotland, Grampian and Tayside Police were entitled to withhold the information from Mr Stewart on the basis that the disclosure of the information would, or would be likely to, prejudice substantially the prevention or detection of crime or the apprehension or prosecution of offenders under section 35 of FOISA. However, the Commissioner came to a different view with regards to the other two forces and ordered the Chief Constables of Lothian and Borders and Strathclyde to disclose the information to Mr Stewart in the form described as Breakdown 1, below. The decision explains why the Commissioner came to different conclusions for different police forces.

Relevant statutory provisions and other sources

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1), 1(6) (General entitlement); 2(1)(b) (Effect of exemptions); 34(1) and 34(3) (Investigations by Scottish public authorities and proceedings arising out of such investigations) and 35(1)(a) and (b) and (2)(a) (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.

UK Information Commissioner's Decision Notice FS50123912 Chief Constable of Northumbria Police (http://www.ico.gov.uk/upload/documents/decisionnotices/2009/fs_50123912.pdf)

HM Inspectorate of Constabulary for Scotland, Annual Report (2007-08) (<http://www.scotland.gov.uk/Resource/Doc/253842/0075219.pdf>)

The Scottish Government, Statistical Bulletin Crime and Justice Series: Recorded Crime in Scotland, 2007/08 (<http://www.scotland.gov.uk/Resource/Doc/239682/0066121.pdf>)



Background

1. On 24 January 2008, Mr Stewart wrote separately to the Chief Constables of Central Scotland, Grampian, Lothian and Borders, Strathclyde and Tayside Police (referred to collectively as “the Police”) requesting the following information:

“...a breakdown of the total amount paid to informants in the last three financial years and details of why they were paid”.
2. The Police responded to Mr Stewart’s requests on dates between 12 and 22 February 2008. In each instance, the Police refused to supply the information on the basis that it was exempt from disclosure under sections 34(3), 35(1) and 39(1) of FOISA.
3. Between the dates of 18 and 22 February 2008, Mr Stewart wrote to the Police requesting reviews of their decisions not to disclose the information to him. Mr Stewart stated that he did not believe that disclosure would hinder the Police’s ability to prevent or detect a crime or prevent successful prosecutions. He also did not believe that an individual would be placed in danger, given that he had not requested any of the personal details of the informants.
4. Responses to Mr Stewart’s requests for review were provided between 7 and 25 March 2008. On review, the Police confirmed that they considered that the information was exempt from disclosure, although they decided that the information was no longer exempt under section 39(1) of FOISA.
5. Between 4 April 2008 and 28 May 2008, Mr Stewart wrote to the Commissioner, stating that he was dissatisfied with the outcome of the reviews which had been carried out by the Police and applying to the Commissioner for decisions in terms of section 47(1) of FOISA.
6. The applications were validated by establishing that Mr Stewart had made requests for information to Scottish public authorities and had applied to the Commissioner for a decision only after asking these authorities to review their response to these requests. Given that the initial requests made by Mr Stewart are identical, the Commissioner decided to conjoin these applications and to issue one single decision notice in relation to all five.

Investigation

7. On 20 June 2008, the Police were notified in writing that applications had been received from Mr Stewart and were asked to provide the Commissioner with the information withheld from Mr Stewart. It was agreed with the Police that a single response to the application would be co-ordinated by the Association of Chief Police Officers in Scotland (ACPOS) on behalf of all five chief constables.



8. The Police responded, supplying an indication of the information withheld, and the case was then allocated to an investigating officer.
9. The investigating officer subsequently contacted the Police, giving them an opportunity to provide comments on the applications by Mr Stewart (as required by section 49(3)(a) of FOISA) and asking them to respond to specific questions.
10. The Police made formal submissions on 29 August 2008 and 22 December 2008. In both submissions the Police offered a briefing session to the Commissioner in order to explain the complexities surrounding the information in question. A further submission was made by the Police on 28 January 2009, to address issues raised by a decision of the UK Information Commissioner (ICO) which considered similar subject matter (FS50123912).
11. A meeting was subsequently held between the Commissioner and representatives of the Police on 12 February 2009. The comments made by the Police during the meeting form part of the submissions made by the Police and have been taken into account by the Commissioner in coming to this decision.

Commissioner's analysis and findings

12. In coming to a decision on this matter, the Commissioner has considered an indicative sample of the withheld information and all of the submissions made to him by both Mr Stewart and the Police and is satisfied that no matter of relevance has been overlooked. However, given the sensitivity of the subject matter, the Commissioner would note that it is not appropriate for all of the submissions made by the Police to be set out in detail in this decision.

Interpretation of Mr Stewart's requests and the scope of the investigation

13. As set out in paragraph 1, Mr Stewart sought "...a *breakdown* of the total amount paid to informants in the last three financial years and details of why they were paid" (emphasis added).
14. As the term "breakdown" was considered to be ambiguous, the Police were asked to explain how they had interpreted Mr Stewart's request. The Police acknowledged that there could be a multitude of breakdowns, but explained that they looked specifically at the following three levels in order to carry out the relevant tests set out in FOISA:

Breakdown 1: Annual totals of payments to informants and a generic reason for payment of reward.

Breakdown 2: Annual payments to informants and a division of the reasons for payments into generic crime types.

Breakdown 3: Details of individual payments including the amount/type of reward provided and offence specific details of the information/assistance provided.



15. During the course of the investigation, Mr Stewart was also asked to describe the type of breakdown he envisaged receiving as a result of his request. In response, Mr Stewart detailed that he sought an annual total of the payments alongside general details of what they were paid for.
16. The Commissioner is satisfied that this correlates with the Police's description of Breakdown 1. It was therefore agreed that the scope of this investigation would be limited to considering whether information about the annual totals of payments to informants and generic reasons for payment of reward (over the previous three financial years) should be disclosed.
17. In light of this clarification, the Commissioner concluded that the level of information under consideration would not lead to the identification of any individual. The Police agreed that this was the case. The Commissioner therefore asked the Police to confirm the exemptions they wished to apply in relation to Breakdown 1.
18. In response, the Police confirmed that the exemptions to be applied to this level of information were those contained in sections 34(1) and (3) and 35(1)(a) and (b) of FOISA.

Background information

19. Within their initial submissions, the Police provided background information on the use of Covert Human Intelligent Sources (CHIS), referred to throughout this decision as informants.
20. The use of informants has developed over many years, from relatively unstructured relationships to a highly regulated process, subject to both legislative control and external scrutiny. Over the years, the relationship between a police officer and an informant has progressed from being a one to one relationship which remained confidential between the two individuals involved, to the position today where informants are regarded as important force assets in providing vital information and intelligence in a highly controlled environment. However, the identity of the informant is closely guarded and known only to very few individuals in the force. A register is maintained containing the real identity of the informants, their pseudonyms and details of all contacts with, and rewards provided to, each informant. This register is classified as a SECRET document under the Government Protective Marking Scheme and is accessible to a very small number of police officers who have been vetted to the required National Force Vetting standard.
21. The legislation governing the use of informants is the Regulation of Investigatory Powers (Scotland) Act 2000 (RIPSA). In addition, the Scottish Ministers have issued a Code of Practice under section 24(1) of RIPSA and each force has a Policy and Standard Operating Procedure in place.
22. The nature of the management structure of informants therefore ensures that very few police officers are aware of the identity or involvement of informants in any particular policing operation. The Police have submitted that this degree of secrecy is fundamental to the safe and effective operation of informant activity.



23. The Police have a duty of care towards the informants they manage. Issues of security, integrity and confidentiality are, the Police explained, seamlessly woven together in the management regime. They are fundamental to the professional standards without which the CHIS system could not remain viable. Where, through neglect or deliberate act, harm results from a failure to honour confidentiality, the Police explained that a sustainable case for damages is likely to occur.
24. The information Mr Stewart has asked for is held by the forces in question within the comprehensive records they maintain for each informant. It is centrally held in a specialist unit dedicated to the management of informants. The Police consider that the release of any financial information, even annual totals of rewards paid to informants, will cause harm to the effective use of resources by the Police.

Section 35(1)(a) and (b) Law enforcement

25. Section 35(1)(a) exempts information the disclosure of which would, or would be likely to, prejudice substantially the prevention or detection of crime. As the Commissioner's guidance on this exemption highlights, the term 'prevention or detection of crime' is wide ranging, encompassing any action taken to anticipate and prevent crime, or to establish the identity and secure prosecution of persons suspected of being responsible for crime. This could mean activities in relation to a specific (anticipated) crime or wider strategies for crime reduction and detection, and could also include information which is received from an informant.
26. Section 35(1)(b) exempts information the disclosure of which would, or would be likely to, prejudice substantially the apprehension or prosecution of offenders. As the Commissioner's guidance also states, there is likely to be a considerable overlap between information relating to 'the apprehension or prosecution of offenders' and that relating to 'the prevention or detection of crime'. The Commissioner considers, however, that 'apprehension or prosecution of offenders' has a narrower scope, relating to all aspects of the process of identifying, arresting or prosecuting anyone suspected of being responsible for unlawful activity. Again, this term could refer to the apprehension and prosecution of specific offenders, or to more general techniques (such as investigative processes used, information received or guidance given) and strategies designed for these purposes.
27. Authorities seeking to rely on these exemptions need to show that disclosure would, or would be likely to, prejudice substantially the relevant activities. They should be able to demonstrate that the risk of harm being caused by disclosing the information in question is real or very likely, not simply a remote possibility. The harm caused, or likely to be caused, must be of some real and demonstrable significance, not simply marginal, and it would have to occur, or be likely to occur, in the near (certainly the foreseeable) future, rather than in some unspecified distant time. Authorities should therefore consider disclosing information unless it would (or would be likely to) cause real, actual and significant harm.



28. In this instance, the Police applied the exemptions in both section 35(1)(a) and (b) to the information requested by Mr Stewart. The Police explained that the information and assistance provided by an informant can be used either to pursue an investigation in order to prepare a case for submission to the Procurator Fiscal or, dependent on circumstances, be used to disrupt criminal activity. Accordingly, the Police submitted, both exemptions would be applicable in the case of investigations intended to result in a report being submitted to the Procurator Fiscal, whereas section 35(1)(a) would be relevant to an investigation where disruption of criminal activity was the intention. However, the Police also highlighted that an investigation originally intended to result in the submission of a report to the Procurator Fiscal can, for a variety of operational reasons, actually result in the criminal activity being disrupted. As a result, the Police considered that both exemptions were relevant in the present cases.
29. The Police argued that disclosure of the information requested by Mr Stewart, even at the Breakdown 1 level is, or is likely to be, a substantial threat to the prevention and detection of crime in Scotland. In making this claim, the Police referred the Commissioner to the “United Kingdom Threat Assessment of Serious Organised Crime” published by the Serious Organised Crime Agency (SOCA) in 2006:
- “3.18 Serious organised criminals gather intelligence on the activities of their rivals and vulnerabilities of potential victims, in order to protect their criminal enterprises and identify opportunities. They value, in particular, information on law enforcement operations, intentions, techniques and capability.”*
- (http://www.soca.gov.uk/assessPublications/downloads/threat_assess_unclass_250706.pdf)
30. The Police submitted that information about informant operations falls into the categories of “techniques and capability” referred to in the above excerpt from the SOCA publication. Whilst the Police recognised that the SOCA threat assessment deals with the higher level of criminality, they argued that knowledge about law enforcement activity is a valuable commodity across the criminal spectrum.
31. With specific reference to Breakdown 1, while the Police recognised that there are large differences between the geographic areas and populations covered by the five forces, they argued that the information could be used to create a crude analysis of the extent of informant activity between the forces. The Police also submitted that the figures convey year on year differences, from which various conclusions about the level of informant activity could be inferred.
32. It was argued that the cumulative effect of the provision of this information over time in relation to a single force would impact on the prevention or detection of crime in that force area. However, the Police also submitted that what was of particular concern is the impact that such information would have when forces are compared against each other. The Police referred to the ‘mosaic effect’ and argued that the effect of disclosing information in response to Mr Stewart’s requests would be to provide a very large proportion of informant mosaic in a single set of requests.



33. During the meeting between the Commissioner and representatives of the Police on 12 February 2009, the Police described the difficulty they faced in obtaining witness statements, particularly in areas of non-cooperation, and the high reliance they place on covert intelligence in relation to particular crime types.
34. The Police explained that, prior to RIPSA, informants were volunteers, whereas informants are now actively recruited, with a low success rate, and selected by the Police because of the information they may have or may have access to.
35. The Police were concerned, firstly, about the perception of confidentiality offered to informants and the potential that disclosure would undermine the confidence informants or potential informants have of the system and, secondly, about the variances in payments between forces from which inferences could be drawn by the criminal fraternity. The Police suggested that variances in payments between forces would allow the criminal fraternity to identify areas of low investment which they would then target.
36. The Commissioner does not accept the premise of this particular argument, firstly, because no evidence has been submitted to substantiate this particular argument and, secondly, because he considers that opportunities presented in a particular area would be the primary consideration for the criminal fraternity, rather than the level of investment in the use of informants.
37. However, in addition, the Police argued that 'spikes' in payments could be correlated with a specific event in a particular force area. It was argued that this effect would be accentuated in smaller forces, where a 'spike' in payments could potentially be connected with an unusual criminal event in that force area, leading to inferences being drawn that an informant was involved in that particular incident. Within their submission of 28 January 2009, the Police explained that a single high reward payment in a small force area would be associated with a very serious crime, of which there are likely to have been relatively few in a small force area. It was acknowledged that while this information would not point directly at the informant, when this is coupled with information in possession of the criminals involved, the spike in force payments for that year could prove to be the final piece in the jigsaw.
38. The Police explained that in a larger force with greater expenditure on informant rewards, one single large payment would make less of an impact on the annual total. The Police concluded that the detrimental effect of releasing a force total was likely to increase as the size of the force reduces, when considering the possibility of an informant being identified or the involvement of an informant in a particular exercise.
39. In order to substantiate the arguments made by the Police, the Commissioner queried the timing of payments to informants and how such payments are assessed. The Police subsequently explained to the Commissioner how payments work in practice.



40. The Commissioner has considered all of the arguments put forward by the Police and is satisfied that the information withheld from Mr Stewart generically relates both to the prevention or detection of crime and the apprehension or prosecution of offenders. However, as noted above, when relying on any of the exemptions in section 35(1), it is not enough for a public authority to show that the information which has been withheld relates to any of the functions or activities listed. It is necessary for the public authority to demonstrate that disclosure of this particular information would, or would be likely to, prejudice substantially the relevant function or activity.
41. The Commissioner has considered the submissions very carefully. He is not persuaded by the arguments put forward by the Police which suggest that variances in payments between the forces would allow the criminal fraternity to target areas of lower investment or indeed the 'mosaic' effect in general. As stated above, the Commissioner has received no evidence to that effect and considers that a range of factors would be taken into account by criminal enterprises when targeting an area, with the primary concern being the opportunities available rather than the history of payments made to informants.
42. The Commissioner notes that variances in annual payments, year-on-year, could be as a result of a number of variables e.g. an increased number of informants or an increase in payments across the board. However, the Commissioner recognises that smaller forces would have difficulty in masking any extraordinary payments which may undermine the perception of confidentiality in the process that informants currently have of the system.
43. After considering the illustrations presented by the Police, the Commissioner accepts that in a smaller force areas, an extraordinary payment could indeed (rightly or wrongly) be linked with a specific event or the disruption of criminal activity (knowledge of which would be limited to the criminal enterprise), from which inferences could be drawn about informant activity. As acknowledged by the Police, the risk is decreased where there is a large force where the ability to 'mask' an extraordinary payment is increased.
44. The Commissioner therefore accepts that disclosure of even Breakdown 1 in relation to smaller forces, and the resultant ability of criminal organisations to infer from this information informant activity, would impact on the perception of confidentiality that each informant is guaranteed. The Commissioner recognises the impact which that would have on the Police's ability to recruit informants in these areas and the consequent impact on the flow of information.
45. As a result, the Commissioner accepts that disclosure of Breakdown 1 by smaller forces would, or would be likely to, prejudice substantially both the prevention or detection of crime and the apprehension or prosecution of offenders.
46. However, he does not accept that the same harm would, or would be likely to, result in disclosure of the information in relation to larger forces, whose larger budget head and crime statistics would allow them to mask any potential spikes in payments.



47. The Commissioner has considered the population, number of police officers, budget size and the crime rates in the relevant areas, as reported in HM Inspectorate of Constabulary for Scotland's Annual Report (2007-08) and in the Statistical Bulletin Crime and Justice Series: Recorded Crime in Scotland, 2007/08 (30 September 2008). These publications indicate that 61% of the total crimes and offences recorded in Scotland in 2007/08 occurred in Lothian and Borders Police and Strathclyde Police force areas combined. Lothian and Borders and Strathclyde also received 64.5% of the total police grant awarded by the Scottish Government in 2007/08 (figures obtained from Police Circular No: 6/2007 <http://www.scotland.gov.uk/Resource/Doc/1101/0051171.pdf> indicative of the level of budget available to these particular forces).
48. As a result, the Commissioner has come to the view that the information requested by Mr Stewart and which is held by the Chief Constables of Central Scotland, Grampian and Tayside is exempt from disclosure under both sections 35(1)(a) and 35(1)(b) of FOISA. However, he has also come to the view that the information held by the Chief Constables of Lothian and Borders and Strathclyde Police is not exempt under either of these exemptions, on the basis that the size of these forces would mask any spikes in payment and would not allow inferences to be drawn about informant activity in those areas.
49. The exemptions in section 35(1)(a) and 35(1)(b) are subject to the public interest test required by section 2(1)(b) of FOISA. This means that, although the Commissioner is satisfied that the disclosure of the information held by the Chief Constables of Central Scotland, Grampian and Tayside would, or would be likely to, prejudice substantially the prevention or detection of crime and the apprehension or prosecution of offenders, 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.
50. The Commissioner will therefore go on to consider the public interest test as it applies to the information withheld by the Chief Constables of Tayside, Central and Grampian Police.

The Public Interest Test

51. As stated above, when determining the scope of this investigation, the Commissioner and the Police concluded that disclosure of the information in question would not lead to the identification of individuals. Consequently, the Commissioner, although noting all of the arguments on the public interest arguments submitted by the Police, has primarily taken into account those arguments which do not concern the consequences of identification of the individual.
52. When considering the public interest in favour of disclosure, the Police acknowledged that disclosure could increase accountability where the information relates to the efficiency and effectiveness of a force or its officers. It was recognised that disclosure could raise public awareness and debate, contributing to more accurate public debate, allowing the opportunity to correct speculation and falsehoods. Lastly, the Police recognised that disclosure would enlighten members of the public as to the approximate amounts of money spent by a police force on informants.



53. When considering the public interest in maintaining the exemption, the Police submitted that the current or future law enforcement role of a force may be compromised by the release of the information, i.e. where the prevention or detection of crime or the apprehension or prosecution of offenders may be hindered as a result of the release of information. The Police identified that there may be occasions where the release of information relating to public safety may not be in the public interest. They argued that public safety is of paramount importance to policing purpose and must be considered in respect of every release. They submitted that release of this information may adversely affect wider public safety if the criminal fraternity or non-law abiding individuals are provided with any degree of tactical advantage over the Police.
54. The Police suggested that the disclosure of the information would deter the public from providing information to the Police and commented that there is a need to protect the flow of information from informants and the public, to allow all to have confidence that their information will be treated sensitively and appropriately. The Police argued that if the relationship between the Police and members of the public or informants were impeded, it would become increasingly difficult for the Police to gather the information they need to perform their public service functions. Disclosure, the Police argued, would impact on the ability of police forces to gather valuable intelligence; the resultant hindrance in the flow of intelligence from informants would require the adoption of more expensive, and potentially less effective, methods of gathering intelligence.
55. In balancing the public interest arguments, the Police recognised the accountability of public bodies in Scottish society, which, they submitted, is a fact underscored by the levels of scrutiny and oversight to which the police and other law enforcement agencies are already subject. For example, the use of informants is regularly inspected by the Office of the Surveillance Commissioner.
56. The Police concluded that the disclosure of the information sought could significantly compromise the future law enforcement role of the police service (and other agencies) and, in turn, put at risk the safety of the individuals and the greater general public. In particular, the Police argued that the release of the information requested is likely to dissuade individuals from acting as informants as disclosure would impact detrimentally on the bond of confidentiality that currently exists. Furthermore, the Police argued that the information would provide criminals and criminal groups with a valuable insight into police coverage and capabilities which would have far-reaching consequences in relation to the effective investigation of criminal activity. Accordingly, the Police concluded that the balance of public interest fell in favour of non-disclosure.
57. The Commissioner recognises that there is a public interest in improving accountability in the spending of public funds and that disclosure would contribute to public debate on the use of informants.
58. However, the Commissioner also accepts that disclosure of information, from which the involvement of informants in a particular operation could be inferred, is likely to undermine the confidential nature of the relationship and thus discourage the retention of current informants and hinder the recruitment of informants.



59. The Commissioner, although recognising the ability to inform public debate, considered that the primary public interest in favour of disclosure is the accountability of the expenditure of public funds. This is countered with the public interest in protecting the Police's ability to maintain their relationship with informants and potential informants, a valuable source of intelligence. With specific reference to the small forces, the Commissioner is satisfied that, in all the circumstances of the case, the public interest in disclosing the information is outweighed by that in maintaining the exemptions. He therefore concludes that the Chief Constables of Central Scotland, Grampian and Tayside Police were entitled to withhold the information from Mr Stewart on the basis of the exemptions in sections 35(1)(a) and 35(1)(b) of FOISA.

Section 34 – Investigations by Scottish public authorities, etc

60. As noted above, the Police also argued that the information sought by Mr Stewart was exempt from disclosure under sections 34(1)(a) and section 34(3) of FOISA. As the Commissioner has already concluded that the information held by the Chief Constables of Central Scotland, Grampian and Tayside Police is exempt under section 35(1)(a) and 35(1)(b), he will only consider the application of these exemptions in relation to the information held by the Chief Constables of Lothian and Borders and Strathclyde Police.
61. The exemptions in sections 34(1)(a), as set out in full in the Appendix, are described as "class-based" exemptions. This means that if information falls within the description set out in the exemption, 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, or would be likely to, prejudice substantially an interest or activity, or otherwise to consider the effect of disclosure in determining whether the exemption applies. The exemptions are, however, subject to the public interest test contained in section 2(1)(b) of FOISA.
62. In order for section 34(1)(a)(i) or (ii) to apply, the Commissioner needs to consider the following questions:
- a) Has the information been held by a Scottish public authority at any time?
 - b) Was the information held for the purposes of an investigation?
 - c) Was the investigation one which the authority had a duty to conduct? and
 - d) Was the information gathered to ascertain whether:
 - i. a person should be prosecuted for an offence (34(1)(a)(i))? or
 - ii. where a person has been prosecuted for an offence, whether he or she is guilty of it (34(1)(a)(ii))?
63. The Commissioner is satisfied that the information in question is held by the Chief Constables of Lothian and Borders and thus by a Scottish public authority. He must now consider whether the information in question is held for the purposes of an investigation.



64. The Police commented that the use of informants is normally linked to an 'investigation' as defined by section 34(1)(a) or (b). However, they explained that, under section 17(1)(b) of the Police (Scotland) Act 1967, the duties of a police constable specifically include:

where an offence has been committed (whether within or outwith the police area for which the police force is maintained) to take all such lawful measures, and make such reports to the appropriate prosecutor, as may be necessary for the purpose of bringing the offender with all due speed to justice

65. Accordingly, the Police concluded that the section 34(1)(a) exemption was the most appropriate in relation to investigations undertaken by police officers, given the statutory duty set out in section 17(1)(b) of the 1967 Act. On the occasions where an investigation will be designed to disrupt or prevent criminal activity, rather than report those involved to the Procurator Fiscal, the Police submitted that the section 34(3) exemption will apply (this exemption is considered in more detail below).
66. The Police explained that the fact that an informant has been involved in an investigation will not necessarily be apparent to the officers involved in the operational activity associated with criminal investigations. The information or assistance provided by an informant is regarded by the Police as intelligence rather than evidence, and management processes ensure that there is no direct crossover between intelligence and operational activity.
67. When considering whether the information is or was held for the purposes of an investigation, the Commissioner has taken the view that the word 'information' in section 34(1) relates to the information actually requested by Mr Stewart, i.e. to the collated annual totals of payments made to informants and a generic reason for payment of the rewards.
68. The Commissioner takes the view that this information is recorded for accounting purposes and is sufficiently far removed from any particular investigation to fall outwith the scope of this exemption. Indeed, as the Police explain, the information or assistance provided by an informant is regarded as intelligence rather than evidence, and management processes ensure that there is no direct crossover between intelligence and operational activity. This separation of functions adds further weight to the premise that collated, annual totals of payments etc. are not held *for the purposes of* a relevant investigation. The Commissioner does not dispute that *individual* payments could be linked to a particular investigation. However, the collation of this data, whose primary (and possibly only function) is for accounting purposes, cannot fall within the scope of this exemption. In reaching this conclusion, the Commissioner has considered how the primary function of these figures could in any way assist an investigation or disruption of crime.
69. Given that the Commissioner has found that the information in question is not held for the purposes of an investigation, he must find that the information held by the Chief Constables of Lothian and Borders and Strathclyde Police is not exempt under section 34(1)(a) of FOISA.



Section 34(3) – confidential sources

70. The Police applied the exemption in section 34(3) of FOISA to the information withheld from Mr Stewart.
71. The questions which must be considered in relation to section 34(3) are as follows:
- Was the information obtained or recorded by the authority for the purposes of an investigation (other than such investigations as are mentioned in section 34(1))?
 - Is/was the investigation carried out by virtue of Her Majesty's prerogative or under statutory powers?
 - Was the investigation carried out for one or more of the purposes listed in section 35(2) of FOISA? and
 - Does the information relate to the obtaining of information from confidential sources?
72. The Police submitted that the information obtained with the use of informants can be used in connection with an investigation designed to both detect and prevent criminal activity. Informants report on a variety of criminal activity and, depending on the nature of the crime, the risk to the public and the capability of controlling a situation, a decision may be made to disrupt the criminal activity rather than to obtain further evidence to support the submission of a report to the Procurator Fiscal. The Police explained that, in such instances, the nature of the investigation – the prevention of crime – would not fit the criteria contained in section 34(1) but would fit the criteria in section 34(3).
73. In making their submissions, the Police referred to the Commissioner's *Decision 057/2007 Mrs Lilian Gordon and the Chief Constable of Grampian Police*. In that case, the Commissioner took the view that the purpose of section 34(3) was not to protect information gathered from confidential sources, or necessarily the confidentiality of the source itself, but to be about information relating to the obtaining of information.
74. In this instance the Commissioner notes that the information sought by Mr Stewart does not make any reference to a specific investigation. As detailed above in paragraph 68 the Commissioner is of the view that the information, in its collated form, is sufficiently detached from a specific investigation for it to fall within the scope of this exemption. In reaching this conclusion, the Commissioner notes that the information does not divulge details as to how the information is gathered, how informants are recruited or how information obtained from confidential sources is transmitted.
75. The Commissioner therefore concludes that the information held by the Chief Constables of Lothian and Borders and Strathclyde is not exempt under section 34(3) of FOISA.



DECISION

The Commissioner finds that the Chief Constables of Central Scotland, Grampian and Tayside Police were entitled to withhold the information in question from Mr Stewart on the basis that it is exempt from disclosure under Part 2 of FOISA. As a result, he does not require them to take any further action in response to this decision notice.

However, he finds that the information held by the Chief Constables of Lothian and Borders and Strathclyde were not entitled to withhold the information from Mr Stewart on the basis that it is not exempt under Part 2 of FOISA. He also finds that, in withholding the information from Mr Stewart, the Chief Constables of Lothian and Borders and Strathclyde failed to comply with Part 1 of FOISA, and in particular with section 1(1) of FOISA. He therefore requires them to provide Mr Stewart with the information requested, in the form described as Breakdown 1, by 15 May 2009.

Appeal

Should either Mr Stewart wish to appeal against these decisions, or should any of the Chief Constables named in this decision notice wish to appeal against the Commissioner's decision in relation to the information request made to their force by Mr Stewart, 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
31 March 2009



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.

...

- (6) This section is subject to sections 2, 9, 12 and 14.

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 –

...

- (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
- (ii) prosecuted for an offence is guilty of it;
- (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

...



- (3) Information held by a Scottish public authority is exempt information if-
 - (a) it was obtained or recorded by the authority for the purposes of investigations (other than such investigations as are mentioned in subsection (1)) which are, by virtue either of Her Majesty's prerogative or of powers conferred by or under any enactment, conducted by the authority for any purpose specified in section 35(2); and
 - (b) it relates to the obtaining of information from confidential sources.

...

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;

...

- (2) The purposes are-
 - (a) to ascertain whether a person has failed to comply with the law;

...