



Scottish Information
Commissioner

**155/2007 David Leslie and the Chief Constable of
Northern Constabulary**

Death of William MacRae

**Applicant: David Leslie
Authority: Chief Constable of Northern Constabulary
Case No: 200600050
Decision Date: 27 August 2007**

**Kevin Dunion
Scottish Information Commissioner**

Kinburn Castle
Doubledykes Road
St Andrews
Fife
KY16 9DS



Decision 155/2007 David Leslie and the Chief Constable of Northern Constabulary

Request for all documents, reports and relevant material concerning any investigation by Northern Constabulary into the death of William MacRae – refused under various exemptions – upheld by Commissioner

Relevant Statutory Provisions and Other Sources

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) (General entitlement); 2 (Effect of exemptions); 25 (Information otherwise accessible); 34(2)(b)(ii) (Investigations by Scottish public authorities and proceedings arising out of such investigations); 38(1)(b) (Personal information); 39(1) (Health, safety and the environment).

Data Protection Act 1998 (the DPA) sections 1(1) (Basic interpretative provisions); 2 (Sensitive personal data); schedules 1 (The data protection principles: the first principle); 2 (Conditions relevant for purposes of the first principle: processing of any 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

Mr David Leslie emailed Northern Constabulary requesting all documents, reports and relevant material concerning any investigations by Northern Constabulary into the death in April 1985 of William MacRae. Northern Constabulary responded, advising Mr Leslie that the information was otherwise accessible via the Northern Constabulary Publication Scheme, citing section 25(1) of FOISA. Mr Leslie requested a review of Northern Constabulary's decision because he believed that not all the information was disclosed under the Publication Scheme. Northern Constabulary responded to Mr Leslie's request for review advising that other information was held but that this was exempt information, citing various exemptions within FOISA, and would not be released. Mr Leslie was dissatisfied with the response he received from Northern Constabulary and applied to the Scottish Information Commissioner for a decision in order to obtain the documents which had been withheld from him.

Following an investigation, the Commissioner found that generally Northern Constabulary had dealt with Mr Leslie's request for information in line with Part 1 of FOISA.

Background

1. On 29 October 2005 Mr David Leslie emailed Northern Constabulary requesting all documents, reports and relevant material concerning any investigations by Northern Constabulary into the death in April 1985 of William MacRae.
2. On 31 October 2005 Northern Constabulary responded, advising Mr Leslie that the information was otherwise accessible via the Northern Constabulary Publication Scheme, citing section 25(1) of the Freedom of Information (Scotland) Act 2002 (FOISA).
3. On 30 November 2005 Mr Leslie requested a review of the decision taken by Northern Constabulary because he believed that not all the information was disclosed under the Publication Scheme.
4. On 8 December 2005 Northern Constabulary contacted Mr Leslie again and elaborated on the earlier response. This advised that not all the information relating to Mr Leslie's request had been disclosed and concluded by citing various exemptions to justify not releasing that information.



5. On 21 December 2005 Northern Constabulary formally responded to Mr Leslie's request for review, confirming that more information was held and that it was exempt information, as advised in the letter of 8 December.
6. Mr Leslie was dissatisfied with the response he received from Northern Constabulary and, on 4 January 2006, the Scottish Information Commissioner received an application for a decision in order to obtain the documents which had been withheld from him.
7. The case was allocated to an investigating officer and the application validated by establishing that Mr Leslie had made a request for information to a Scottish public authority and had applied to me for a decision only after asking the authority to review its response to his request.

The Investigation

8. On 17 January 2006, the investigating officer wrote to Northern Constabulary, giving notice that an appeal had been received and that an investigation into the matter had begun and inviting comments, as required under section 49(3)(a) of FOISA.
9. By 17 May 2006 the Investigating Officer received all the appropriate evidence and submissions from Northern Constabulary.

Submissions from the Police

10. Northern Constabulary advised that, following a previous request for information, the Police had published various documents on the Northern Constabulary website under the Publication Scheme. This information was claimed as exempt information under section 25(1) of FOISA.
11. Northern Constabulary advised that, in addition to the information already published on the website, the following items had not yet been released:-
 - 1) Book of photographs of deceased;
 - 2) List of thirty four witnesses and thirty two witness statements;
 - 3) Post Mortem report;
 - 4) Newspaper cuttings;
 - 5) Six documents relating to the investigation.



12. Northern Constabulary had applied the following exemptions to the items listed above:

Item 1: sections 34(2)(b)(ii); 35(1)(c); 39(1).

Items 2 and 5: sections 26(a); 30(c); 34(2)(b)(ii); 34(3)(b); 35(1)(c); 36(1); 38(1); 39(1).

Item 3: sections 30(c); 34(2)(b)(ii); 34(3)(b); 35(1)(c); 39(1).

Item 4: no section of FOISA was cited but Northern Constabulary expressed concern that there may be a breach of copyright were it to release the information.

13. Northern Constabulary confirmed that two witness statements were missing but could offer no explanation as to why this was the case.

The Commissioner's Analysis and Findings

14. In coming to a decision on this matter, I have considered all of the information and the submissions that have been presented to me by both Mr Leslie and Northern Constabulary and I am satisfied that no matter of relevance has been overlooked.
15. Rather than discuss the exemptions claimed by Northern Constabulary in isolation, I shall conduct my analysis of the exemptions in relation to each the items numbered 1 – 5, as listed in paragraph 11 above.

Item 1: Book of photographs of the deceased

16. This item comprises post-mortem photographs of the deceased, including bullet damage to the deceased. Northern Constabulary have claimed exemptions under sections 34(2)(b)(ii), 35(1)(c) and 39(1) of FOISA. I will consider these exemptions in detail below.

Consideration of section 34(2)(b)(ii)

17. Under section 34(2)(b)(ii) of FOISA, information is exempt information if it has been held at any time by a Scottish public authority for the purposes of any investigation (other than an ongoing Fatal Accident Inquiry) being carried out for the purpose of making a report to the procurator fiscal as respects the cause of death of a person.



18. This exemption applies in perpetuity to information falling under its scope. This means that even if the information is no longer part of an ongoing investigation or a report to the procurator fiscal, it will remain exempt.
19. Further, section 34(2)(b)(ii) is a so-called “class exemption” which means that any information falling within the above definition will qualify for the exemption. This is distinct from prejudice-based exemptions where it is necessary that disclosure of the information in question would, or would be likely to, have a specified prejudicial effect.
20. I am informed (and accept) that these photographs were taken under the instructions of a pathologist, himself performing a post-mortem examination under the instructions of the procurator fiscal at Inverness to establish the cause of death of Mr MacRae.
21. Clearly these photographs are information held for the purpose of reporting the cause of a death to the procurator fiscal. As such I am satisfied that they are covered by the exemption.
22. However, section 34 of FOISA is still subject to the public interest test laid down in section 2(1)(b) of FOISA. This means that, although the photographs are exempt, they will still require to 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.

Public interest test

23. It might be argued that the maintenance of the convention of confidentiality in respect of evidence submitted to the procurator fiscal as respects the cause of death of a person is in the public interest. My understanding of this convention is that it ensures that proper procedure is followed and that the justice system is not undermined or circumvented. Northern Constabulary added that it would be an unnecessary and unpleasant experience for relatives of the deceased to have the pictures circulated in the public domain.
24. As I understand it, the fact that Mr MacRae died due to a bullet wound to the head is not in dispute. The cause of death has been widely reported in the news media. How the bullet wound was *sustained* is apparently a much more contentious point. It is argued that the release of the photographs may contribute to that element of the debate, which could be in the public interest.



25. However, as I also understand it, expert forensic or pathological knowledge would be required before the photographs themselves could be interpreted. Whether that subsequent interpretation would offer particular insight or fresh perspective into how the bullet wound was sustained is debatable. I am not convinced that the general public would be better informed as to how the bullet wound was sustained by the release of these particular photographs. I do not consider that there is sufficient public interest in overturning the convention of protecting this sort of information on the mere *potential* that these photographs could reveal something new.
26. I am therefore persuaded that Northern Constabulary correctly applied the exemption under section 34(2)(b)(ii) of FOISA to the book of photographs of the deceased and that on balance the public interest favours the maintenance of that exemption.

Consideration of section 39(1)

27. Under section 39(1) of FOISA, information is exempt information if its disclosure would, or would be likely to, endanger the physical or mental health or safety of an individual. Section 39 is a qualified exemption and therefore subject to the public interest test.
28. Northern Constabulary argued that, as the photographs would be placed in the public domain through their release under FOISA, by their content and nature there was great potential to cause general alarm and distaste among the public. However, more specifically, Northern Constabulary identified their concern for the deceased's next-of-kin.
29. Section 39(1) of FOISA requires that the physical or mental health or safety of an individual be, or would likely to be, endangered. In this instance I do not consider that "the public" is sufficiently refined to be considered "an individual." However, I do accept that specifically identified groups, consisting individuals who may be affected can be considered "individuals" for the purposes of section 39(1).
30. Therefore, I am inclined to accept Northern Constabulary's argument that the next-of-kin of Mr MacRae would be individuals whose mental health would, or would be likely to be, endangered by the release of these photographs.
31. Having taken account of the content and context of the photographs, I am satisfied that the release of the information would, or would be likely to, endanger the mental health of an individual and that the information is therefore exempt in terms of section 39(1) of FOISA.



32. Given that I have decided that the information is exempt in terms of section 39(1), I must now apply the public interest test in terms of section 2(1)(b) of FOISA and go on to consider whether, in all the circumstances of the case, the public interest in disclosing the information is outweighed by that in maintaining the exemption.

Public interest test

33. I am cognisant of the fact that there is public interest in the matter of Mr MacRae's death. Since his death in 1985 there has been intense speculation in the press and other public forums about how Mr MacRae died. My role as Commissioner is not to comment upon these theories. It is to judge where the balance of the public interest lies in maintaining the exemption or ordering release of the information.
34. Mr MacRae's death was a high-profile incident that attracted considerable media attention. There is every reason to suppose that there would be renewed interest both among the media and various theorists who have a view on the cause of Mr MacRae's death. I would expect that responsible news editors would treat the material with sensitivity and take due regard of public taste in deciding the use of the images in any reportage. However, I must also consider that release of these images under FOISA is, in effect, release into the public domain. This opens the pictures to being published by less discriminating sources and thereby presents the real possibility of placing great mental stress upon the deceased's family.
35. I do not consider that the public interest is served by placing these post-mortem images, almost certain to be upsetting to the deceased's surviving relatives, into the public domain.
36. Although I have considered them separately, I find that the application of sections 34(2)(b)(ii) and 39(1) of FOISA create a compelling case for withholding these post-mortem photographs of the deceased.

Consideration of remaining exemptions

37. Having concluded that the requested information is exempt from release under sections 34(2)(b)(ii) and 39(1) of FOISA, I am not required (and do not intend) to consider the remaining exemptions claimed by Northern Constabulary for the same information.



Items 2 and 5: List of 34 witnesses and 32 witness statements; Six documents relating to the investigation

List of witnesses

38. This item comprises two pages of closely typed text. The text comprises details of witnesses in relation to Mr MacRae's death and subsequent investigation. These are numbered 1 to 34.

Witness statements

39. Northern Constabulary has provided me with 32 witness statements. Two witness statements are missing but Northern Constabulary could offer no explanation as to why this was the case.

Six documents

40. Northern Constabulary advised that there were six documents not previously released that were statements. These provide background evidence rather than relating directly to finding Mr MacRae in his car or his subsequent death.

Exemptions claimed by Northern Constabulary

41. Northern Constabulary have claimed exemptions under sections 26(a); 30(c) 34(2)(b)(ii) and 34(3)(b); 35(1)(c); 36 and 38(1) of FOISA in withholding this information. Northern Constabulary did not distinguish which exemptions applied to which numbered entry so it was assumed that the exemptions cited were for each and every numbered entry on the list and witness statement.

Consideration of section 34(2)(b)(ii)

42. Northern Constabulary claimed that the list of witnesses and their respective statements were exempt information because they were held by Northern Constabulary for the purpose of an investigation for the purpose of making a report to the procurator fiscal as respects the cause of death of a person.
43. As mentioned previously, section 34 (2)(b)(ii) of FOISA applies in perpetuity to information falling under its scope and is a "class exemption" - it is enough that information falls within the above definition to qualify for it.
44. Having viewed the list and the witness statements, I am satisfied that they are held by Northern Constabulary for the purposes of investigating the death of Mr MacRae. I am further satisfied that this information was gathered for the purposes of making a report to the procurator fiscal as respects the cause of death of Mr MacRae.



45. The exemption in section 34(2)(b)(ii) is a qualified exemption, which means that its application is subject to the public interest test contained in section 2(1)(b) of FOISA.

Public interest test

46. Northern Constabulary have noted that there is a public interest in providing accountability in relation to the efficiency and effectiveness of the Force or its officers, and that disclosure of the information under consideration could contribute to the quality and accuracy of public debate surrounding the death of Mr MacRae.
47. Mr Leslie has asserted that releasing the statements would clarify the official version of events and that members of the public constantly make statements which are read out in public courtrooms or which lead them to be called to give evidence in person and this has not affected the Police's ability to take witness statements now, nor would it in the future.
48. However, Northern Constabulary have identified a number of public interest considerations favouring the maintenance of the exemption in section 34(2)(b)(ii). In particular, Northern Constabulary noted 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.
49. I am aware that many of the theories surrounding the death of Mr MacRae suggest, at best, incompetence on the part of Northern Constabulary in its handling of the incident and the aftermath, or, at worst, a cover-up of something more sinister or illegal.
50. On the one hand I accept that in many cases it may be helpful to gain access to evidence such as the witness statements in order to understand how and why a public authority arrived at its conclusions, especially where that authority's conclusions have been challenged.
51. On the other hand I have generally taken the view that there is a strong case not to interfere with the assurances and confidence with which witness statements are given to the police in the expectation that they will be used only as part of the formal investigative/ judicial process.



52. There exists the very real prospect that witnesses, aware that every nuance or interpretation of their statements might be interpreted as evidence of either their own or someone else's wrongdoing, would be more reticent in providing full statements to the police if they believed that they might be used for other purposes or indeed released into the public domain. I am of the view that it is in the public interest that police forces are able to take comprehensive and unreserved statements from the public to assist with investigating deaths and making reports to the procurator fiscal.
53. There may be a case for departing from the general non-disclosure position if, having seen the information, I believe that release will demonstrably be in the public interest. However, if it is not apparent to me that such a case can be made – even if there may be a *potential* public interest in release – then that is unlikely to be justified where there is the more obvious risk of harm to the public interest through the inhibition of potential witnesses.
54. In balancing these competing interests, I am in the position of being able to read the information in question, consider the submissions from both the public authority and the applicant and as a consequence make an informed judgement as to whether release would illuminate or amplify the case made by critics and so be in the public interest.
55. Returning to this case, I am satisfied, having read the witness statements, that there is no such increased illumination or demonstrable public interest apparent that would persuade me that the release of these statements would be in the public interest.
56. While it is true that witness statements are from time to time read out in open court, I consider this to be a far cry from the police unilaterally releasing witness's statements (which have not necessarily been subject to due process in court) into the public domain.
57. Even were I to accept that all witnesses have an expectation that their entire, unedited statements would, ultimately, be made public (and, for the record, I do not believe that to always be the case), I would also feel it necessary to consider the fairness and method of that release.



58. Where witnesses' evidence is heard in open court, it is done (generally orally but occasionally by way of sworn written statements) under strict rules and conditions. In my view, to release untested, verbatim statements into the public domain is likely to be unfair to those to whom the statements relate. Corroboration, cross examination and the legal testing of evidence are essential components of the justice system. Were these established principles of justice not to be adhered to (through the wholesale release of witness statements), there might be a form of summary justice established whereby the mere fact of a witness providing a statement in relation to some alleged offence or wrongdoing would be considered proof of that offence or wrongdoing.
59. If I accept that statements can be routinely disclosed, I must also accept that this can be done under circumstances potentially unfair to both the witness and any accused. This could have the effect of not only inhibiting witnesses' statements, but also putting into doubt whether witnesses will consent to provide statements at all.
60. There is significant public interest in maintaining public willingness to co-operate with the police through providing witness statements, and this willingness might well be compromised if witness statements were lightly or routinely released under FOISA.
61. I consider that it is generally in the public interest that witness statements are protected to a degree in order that the greater public interest – maintenance of the principles behind a fair and effective justice system – is maintained. I also consider that it is in the public interest that the police are able to gather witness statements in the course of their inquiries without those supplying them fearing that they will be disclosed at a later date as a matter of course.
62. Given this wider consideration, and having read the information and detecting no reason apparent to me within the information withheld to consider otherwise, I find that the public interest in maintaining the exemption in section 34(2)(b)(ii) of FOISA outweighs the competing public interest in disclosure of the witness statements.

Consideration of section 38(1)(b)

63. The exemption under section 38(1)(b), read in conjunction with section 38(2)(a)(i) (or, as the case may be, section 38(2)(b)) is an absolute exemption.
64. In order for the public authority to be able to rely on this exemption it would have to show that the information which has been requested is personal data for the purposes of the Data Protection Act 1998 (DPA) and that release of the information would breach any of the data protection principles contained in Schedule 1 to the DPA.



65. In this case, Northern Constabulary indicated that to release of items 2 and 5 would breach the first data protection principle, which states that the processing of data must be fair and lawful. In particular, they argued that the processing of the information would be unfair.
66. In considering the application of this exemption, I first have to establish whether the information sought by Mr Leslie is personal data as defined in section 1(1) of the DPA (see Appendix).
67. Having viewed the information, I am satisfied that in this case the information withheld by Northern Constabulary is personal data. The list of statements contains the names, ages, occupations and addresses of witnesses. In the statements, the witnesses give this same information and their interpretations of events and provide their own observations, opinions and views in order to assist the police investigation into the cause of death of Mr MacRae.
68. The first data protection principle requires that personal data shall be processed fairly and lawfully and, in particular, that it shall not be processed unless at least one of the conditions in Schedule 2 (to the DPA) is met. It also requires that, in the case of sensitive personal data, at least one of the conditions in Schedule 3 to the DPA must also be met (in addition to at least one Schedule 2 condition) before processing can be fair and lawful. Having considered the definition of sensitive personal data in section 2 of the DPA, I am satisfied that the personal data in question is not sensitive personal data and therefore that I am not required to consider whether any of the conditions in Schedule 3 can be met.
69. As mentioned above, section 38(1)(b), read in conjunction with section 38(2)(a)(i), exempts from release personal information unless at least one of the conditions in Schedule 2 of the DPA can be met. Condition 6 of Schedule 2 to the DPA allows information to be processed (in this case, disclosed) where:

The processing is necessary for the purposes of legitimate interests pursued by the data controller or by the third party or parties to whom the data are disclosed, except where the processing is unwarranted in any particular case by reason of prejudice to the rights and freedoms or legitimate interest of the data subject.
70. I am of the view that Mr Leslie has a legitimate interest with regard to the release of the information, in that, as a journalist, he has a legitimate interest in terms of reporting a story of interest to the public. In addition, I also consider that there is a wider legitimate interest in terms of assuring the general public that the investigation into Mr MacRae's death was comprehensive and conducted appropriately.



71. On the other hand, the persons to whom the information held by Northern Constabulary relates have legitimate interests in being able to give evidence and expecting to be able to do so without their personal information then being disclosed. As Northern Constabulary have stated in their submissions to my Office, this information was collected solely for the purpose of investigating Mr MacRae's death, and, because a bullet wound was discovered, potentially prosecuting an offence. Northern Constabulary have asserted that the individuals in question would have had no reasonable expectation that the information would be processed for any purpose other than those related directly to furthering that investigation. Rather, they would expect, reasonably in the circumstances, that it would be held only for that purpose and held in confidence. I am satisfied with this argument and therefore that those persons have a strong legitimate interest in the information not being disclosed.
72. In all the circumstances of this case, having weighed the competing interests in disclosure and in the privacy of the individuals concerned, I am satisfied on balance that disclosure is unwarranted by virtue of the rights, freedoms and legitimate interests of the individuals to whom the information relates and therefore that condition 6 cannot be met. Noting in particular that the individuals to whom the information relates have not consented to disclosure of the information, I can identify no other condition in Schedule 2 which might be relevant to the processing of the information withheld. I am satisfied, therefore, that release of this information would amount to unfair (and possibly unlawful) processing and therefore that the exemption under section 38(1)(b) of FOISA applies to the information.

Consideration of remaining exemptions

73. Having concluded that the requested information is exempt from release under sections 34(2)(b)(ii) and 38(1)(b) of FOISA, and am not required (and do not intend) to consider the remaining exemptions claimed by Northern Constabulary for the same information.

Two Statements unaccounted for

74. As mentioned previously, Northern Constabulary submitted that two of the 34 statements could not be accounted for.
75. However, the investigating officer pursued the matter of the unaccounted for statements and, on the basis of the submissions provided by Northern Constabulary, I am satisfied that Northern Constabulary do not hold these two statements.

Item 3: Post-mortem report

Consideration of section 34(2)(b)(ii)



76. Northern Constabulary has claimed that the post-mortem report is exempt information because it was held by Northern Constabulary for the purpose of making a report to the procurator fiscal as respects the cause of death of a person.
77. Having viewed the post-mortem report I am satisfied that it is held by Northern Constabulary for the purposes of investigating the death of Mr MacRae. As the report was requested by the procurator fiscal in Inverness, I am satisfied that this information was gathered for the purposes of making a report to the procurator fiscal as respects the cause of death of Mr MacRae.
78. I am therefore satisfied that Northern Constabulary has applied section 34(2)(b)(ii) of FOISA correctly.
79. The exemption in section 34(2)(b)(ii) is a qualified exemption, which means that its application is subject to the public interest test contained in section 2(1)(b) of FOISA.

Public interest test

80. Northern Constabulary submitted that the release of the post-mortem report would not be in the public interest as it would jeopardise the personal affairs of third parties. In particular, Northern Constabulary identified Mr McRae's next-of-kin and surviving relatives as individuals likely to be affected by the stress and unpleasantness of the release of such information and having details printed in the media. Northern Constabulary also added that fair treatment to the reputation of the deceased would suggest that non-disclosure would be in the public interest.
81. I note guidance issued by the Crown Office and Procurator Fiscal Service (*Criminal Proceedings and Fatal Accident Inquiries: Information for Bereaved Relatives*) states that a copy of the post mortem report may only be provided to persons with a legitimate interest in the circumstances of the death.
82. The Crown Office suggests that among those with a legitimate interest are the next-of-kin, solicitors acting for the deceased or next-of-kin, insurance companies and the Criminal Injuries Compensation Authority. It does not appear to consider journalism a sufficient legitimate interest.
83. In the circumstances I consider that there would have to be compelling evidence of the public interest being in favour of release before I would consider the public interest to lie in acting contrary to that guidance.
84. Mr Leslie submitted that Mr MacRae's death was high profile and has been the subject of vast conjecture. In his opinion, therefore, the release of information in relation to the death is in the public interest.



85. I am not convinced that the notoriety or celebrity of a particular individual's demise marks the release of that individual's post-mortem report as being more in the public interest. Neither do I accept that there is necessarily a correlation between the conjecture or controversy relating to an individual's death and the public interest in relation to information about that person's death. While it may be of interest to the public to know more about the death of Mr MacRae (and in high-profile cases I accept that the *public appetite* for these details will certainly be more acute), that is a wholly distinct matter from the release of the post-mortem report being in the *public interest*.
86. I am also aware that the then Lord Advocate, Lord Fraser of Carmyllie, did, in fact, discuss Mr McRae's case in a letter to the Member of Parliament, Sir Nicholas Fairbairn, dated 11 April 1990. This document is in the public domain but, briefly put, the Lord Advocate indicated that he was satisfied with the post-mortem examination findings and that, taking into account the other evidence gathered by the police as well as witness statements, the "irresistible inference to be drawn... is that Mr MacRae took his own life." Lord Fraser concluded that further investigation, including a Fatal Accident Inquiry, would serve no public interest.
87. So whilst it may be that the post mortem information may be of benefit to those who have a different view, I am not convinced that the public benefit in release is demonstrated or that any such public interest in release would outweigh the likely harm to the public interest. Bearing all these matters in mind, I am persuaded by Northern Constabulary that the public interest, in this case, lies in maintaining the exemption of information under section 34(2)(b)(ii).

Consideration of remaining exemptions

88. As I have concluded that the requested information is exempt from release under sections 34(2)(b)(ii) of FOISA, I am not required (and do not intend) to consider exemptions claimed by Northern Constabulary under sections 30(c); 34(3)(b); 35(1)(c) and 39(1) of FOISA.

Item 4: Newspaper cuttings

89. Northern Constabulary advised that it had maintained a file of newspaper cuttings in relation to the case and subsequent reports in relation to Mr MacRae's death.
90. Northern Constabulary advised that it initially had concerns about the potential breach of copyright in releasing copies of cuttings to Mr Leslie. Northern Constabulary did not apply any exemptions to the information.



91. It should be noted by Northern Constabulary that information which is third party copyright may be released in response to a FOI request without breaching the Copyright, Designs and Patents Act 1988 (CDPA) as a result of The Freedom of Information (Scotland) Act 2002 (Consequential Modifications) Order 2004 which was made by the UK Parliament.
92. However, I note that Northern Constabulary informed Mr Leslie that it held these and invited him to attend Police Headquarters in order to view them.
93. As such I am satisfied that there was no deliberate attempt to deny Mr Leslie his rights under FOISA and that Northern Constabulary took reasonable steps to provide Mr Leslie with access to the cuttings. However, given that there is no impediment or exemption which prevents release of the press cuttings, I require Northern Constabulary to provide Mr Leslie with a copy of the cuttings
94. I do not intend to consider this item further other than to add that it would be germane for Northern Constabulary to update its publication scheme and website to include these cuttings, and give consideration as to whether they are available for inspection only.

Decision

I find that the Chief Constable of Northern Constabulary generally complied with Part 1 of the Freedom of Information (Scotland) Act 2002 (FOISA) in responding the information request made by Mr Leslie.

I find that the Chief Constable of Northern Constabulary was justified in applying sections 34(2)(b)(ii), 38(1)(b) and 39(1) in withholding the information requested and therefore complied with Part 1 of FOISA.

I do not require further action from the Chief Constable of Northern Constabulary In relation to items 1,2, 3 and 5, above.

I require the Chief Constable of Northern Constabulary to provide Mr Leslie with a copy of the press cuttings and to update his publication scheme to reflect the fact that item 4, newspaper cuttings, are held by the force.



Appeal

Should either Mr Leslie or the Chief Constable of Northern Constabulary 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
27 August 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.

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.

25 Information otherwise accessible

(1) Information which the applicant can reasonably obtain other than by requesting it under section 1(1) is exempt information.

(2) For the purposes of subsection (1), information-

(b) is to be taken to be reasonably obtainable if-

(i) the Scottish public authority which holds it, or any other person, is obliged by or under any enactment to communicate it (otherwise than by making it available for inspection) to; or

members of the public on request, whether free of charge or on payment.

(3) For the purposes of subsection (1), information which does not fall within paragraph (b) of subsection (2) is not, merely because it is available on request from the Scottish public authority which holds it, reasonably obtainable unless it is made available in accordance with the authority's publication scheme and any payment required is specified in, or determined in accordance with, the scheme.



34 Investigations by Scottish public authorities and proceedings arising out of such investigations

- (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
 - (ii) for the purpose of making a report to the procurator fiscal as respects, the cause of death of a person.
- (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.

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; or
 - (ii) section 10 of that Act (right to prevent processing likely to cause damage or distress); and
 - (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.



39 Health, safety and the environment

(1) Information is exempt information if its disclosure under this Act would, or would be likely to, endanger the physical or mental health or the safety of an individual.

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

Sensitive personal data.

2. In this Act "sensitive personal data" means personal data consisting of information as to-

- (a) the racial or ethnic origin of the data subject,
- (b) his political opinions,
- (c) his religious beliefs or other beliefs of a similar nature,
- (d) whether he is a member of a trade union (within the meaning of the Trade Union and Labour Relations (Consolidation) Act 1992),
- (e) his physical or mental health or condition,
- (f) his sexual life,
- (g) the commission or alleged commission by him of any offence, or
- (h) any proceedings for any offence committed or alleged to have been committed by him, the disposal of such proceedings or the sentence of any court in such proceedings.



SCHEDULE 1

THE DATA PROTECTION PRINCIPLES

PART I

THE PRINCIPLES

1. Personal data shall be processed fairly and lawfully and, in particular, shall not be processed unless-

- (a) at least one of the conditions in Schedule 2 is met, and
- (b) in the case of sensitive personal data, at least one of the conditions in Schedule 3 is also met.

2. Personal data shall be obtained only for one or more specified and lawful purposes, and shall not be further processed in any manner incompatible with that purpose or those purposes

SCHEDULE 2

CONDITIONS RELEVANT FOR PURPOSES OF THE FIRST PRINCIPLE: PROCESSING OF ANY PERSONAL DATA

1. The data subject has given his consent to the processing.

[...]

6. - (1) The processing is necessary for the purposes of legitimate interests pursued by the data controller or by the third party or parties to whom the data are disclosed, except where the processing is unwarranted in any particular case by reason of prejudice to the rights and freedoms or legitimate interests of the data subject.