



Scottish Information  
Commissioner

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

*Report prepared by the Chief Constable of Central Scotland Police  
into the management of complaints against Northern Constabulary  
following its investigation of the death of Kevin McLeod in February  
1997.*

**Applicant: Mr Allan McLeod  
Authority: Northern Joint Police Board  
Case No: 200502199  
Decision Date: 15 January 2007**

**Kevin Dunion  
Scottish Information Commissioner**

Kinburn Castle  
Doubledykes Road  
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## Decision 003/2007: Mr Allan McLeod and the Northern Joint Police Board

***Request for the summary report into Northern Constabulary's handling of complaints about the investigation of Kevin McLeod's death – information withheld under section 30(b)(i), 30(b)(ii) and 30(c) – prejudice to effective conduct of public affairs – section 34(3)(a) and 34(3)(b) – investigations by Scottish public authorities and proceedings arising out of such investigations – section 35(1)(g) – law enforcement – section 36(1) – confidentiality – section 38(1)(b) – personal information***

### Facts

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Mr McLeod asked Northern Joint Police Board (the Board) for a copy of the report compiled by the Chief Constable of Central Scotland Police following his enquiry into Northern Constabulary's management of complaints against them, made by members of the McLeod family. The complaints related to Northern Constabulary's investigation into the death of Kevin McLeod in February 1997.

The Board refused to provide a copy of the report, claiming that the information was exempt from disclosure under the Freedom of Information (Scotland) Act 2002 (FOISA).

### Outcome

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For the most part, the Commissioner did not accept that the arguments put forward by the Board justified withholding the information in the report under the exemptions in sections 30(b)(i), 30(b)(ii) and 30(c) of FOISA (prejudice to effective conduct of public affairs); section 34(3)(a) and 34(3)(b) of FOISA (investigations by Scottish public authorities and proceedings arising out of such investigations); or section 35(1)(g) (read in conjunction with section 35(2)(a), 35(2)(b) or 35(2)(d)(ii)) of FOISA (law enforcement).

However, the Commissioner upheld, in certain cases, the use of exemptions in section 35(1)(g) (law enforcement) and section 36(1) (confidentiality) to withhold information.



The Commissioner found that some personal information in the report could be disclosed without contravening the data protection principles, and that the Board had been wrong to apply the exemption in section 38(1)(b), read in conjunction with section 38(2)(a), to this information. However, this exemption was upheld in relation to other personal information in the report.

## Appeal

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Should either Mr McLeod or the Board wish to appeal against the Commissioner's 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.

## Background

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1. Mr Allan McLeod's nephew, Kevin McLeod, died in unexplained circumstances at Wick Harbour in 1997. The McLeod family made a series of complaints about the investigation carried out by Northern Constabulary. In 2002 the Chief Constable of Central Scotland Police was asked to investigate how the McLeods' complaints had been dealt with by Northern Constabulary. He delivered his report to the Board in 2002.
2. On 3 June 2005 Mr McLeod wrote to the Board asking for a copy of the report from the Chief Constable of Central Scotland Police. His request was refused on 10 June 2005 on the grounds that the information was exempt from disclosure under a number of exemptions in FOISA.
3. Mr McLeod asked for a review of this decision on 14 June 2005, but was again refused access to the information in the Board's reply of 4 July 2005.
4. This reply upheld the decision to withhold the report, citing the following exemptions:
  - Section 30(b)(i), 30(b)(ii) and 30(c) – Prejudice to the effective conduct of public affairs.
  - Section 34(3)(a) and 34(3)(b) – Investigations by Scottish public authorities and proceedings arising out of such investigations
  - Section 35(1)(g), 35(2)(a), 35(2)(b) and 35(2)(d)(ii) – Law enforcement



- Section 38(2)(a)(i) and 38(2)(a)(ii) – Personal information
5. Mr McLeod applied to me for a decision on 5 July 2005. The case was allocated to an investigating officer.

## The Investigation

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6. Mr McLeod's appeal was validated by establishing that he had made a written request for information to a Scottish public authority, and had appealed to me only after requesting a review from the authority.
7. The investigating officer contacted the Board on 28 July 2005. The Board was asked to provide:
- A copy of the report prepared for the Board by the Chief Constable of Central Scotland Police
  - Reasons to support its view that the information in the report was exempt from disclosure under FOISA.
8. The Board was also asked if it had considered whether it might be possible to release the report with the exempt information removed, or whether it believed that all of the information in the report was exempt from disclosure.
9. The Board replied on 19 August 2005, enclosing a copy of the report and explaining in some detail why it considered the whole report to be exempt from disclosure under FOISA under each of the exemptions cited (see paragraph 4 above).
10. During the course of the investigation the Board provided additional clarification and explanation of its reasoning. It also advised that it wished to rely on section 36(1) of FOISA (Confidentiality) in addition to the exemptions cited earlier, but only in relation to those parts of the report referring to legal advice obtained by Northern Constabulary.



## The Commissioner's Analysis and Comments

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### Background to the case

11. Before considering whether the Board was justified in withholding the information in the report under the exemptions cited, I believe it would be helpful to provide some background information about this case.
12. An initial investigation was carried out by Northern Constabulary into the circumstances surrounding Kevin McLeod's death in February 1997. A second investigation was carried out by Northern Constabulary in the summer of 1997, on the basis of new information received. A Fatal Accident Inquiry was then held in 1998, with the Sheriff's report being published in September of that year.
13. During the next two years the McLeod family made several complaints to Northern Constabulary about the way in which the investigation into Kevin's death had been carried out. They became dissatisfied with the way in which their complaints were dealt with, and in March 2001 Mr Hugh McLeod took his complaint to Her Majesty's Chief Inspector of Constabulary (HMCIC).
14. Following correspondence with HMCIC, Northern Constabulary agreed to reconsider their handling of the McLeod family's complaints, and in September 2001 an investigating officer was appointed from Lothian and Borders Police. His interim report, issued in October 2001, suggested that an independent Chief Officer should be asked to reinvestigate the processing of the McLeod family's complaints.
15. HMCIC has no legal authority to review complaints made against Chief Officers. Responsibility for dealing with these is vested in the body exercising the functions of the relevant police authority, in this case the Northern Joint Police Board.
16. The Chief Constable of Northern Constabulary accepted DS Orr's recommendation and in January 2002 (on the Chief Constable's recommendation) the Board appointed Andrew Cameron, Chief Constable of Central Scotland Police, to consider the manner in which Northern Constabulary had investigated the content of complaints received from the McLeod family, including the conduct of the Chief Officers involved.



17. Mr Cameron's report was submitted to the Board in November 2002. The report makes 13 recommendations, most of which deal with procedural matters and the internal structure of Northern Constabulary. However, it was recommended that the Board should consider whether disciplinary or misconduct proceedings should be initiated in respect of certain senior police officers in terms of the Police (Conduct) (Senior Officers) (Scotland) Regulations 1996 and 1999. For the purposes of these Regulations, "a senior officer" means a chief constable, a deputy chief constable or an assistant chief constable, and all references in this decision notice to "a senior officer" or a "senior police officer" should be read accordingly.
18. The Board decided to commence misconduct proceedings in respect of one senior officer. These appear to have reached the stage of a misconduct hearing being arranged but not held, and to have ceased following the early retirement of the senior officer.
19. The investigation into Kevin McLeod's death and subsequent events have been the subject of much media attention, particularly at the time of the Fatal Accident Inquiry and during early 2003, when it was revealed first that a misconduct hearing would be held, and then that the officer concerned had retired early and would not attend the hearing. The initial investigation into Kevin McLeod's death has been the subject of a BBC Frontline Scotland documentary, and has been the subject of several investigative articles in the Scottish press.

#### **Nature of the information withheld**

20. The final report submitted by Mr Cameron to the Board consisted of a report with appendices. Mr McLeod has confirmed that he only wishes to see the Summary Report (Volume 1).
21. The Report is titled "A report of an enquiry into Northern Constabulary's Management of Complaints Against the Police made by members of the McLeod Family of Wick". Mr Cameron's remit involved the investigation of potential misconduct on the part of officers of Chief Officer rank.
22. Mr Cameron's enquiry considered the courses of action taken both by Northern Constabulary as a corporate entity and by individual officers of Chief Officer rank. Mr Cameron was authorised to review both of Northern Constabulary's investigations into the death of Kevin McLeod and to take cognisance of the subsequent Fatal Accident Inquiry, but only to the extent necessary to fully investigate the handling of the McLeod family's complaints.



23. During the course of his investigation, Mr Cameron endeavoured to address all of the issues of concern raised by the McLeod family in relation to their complaints against Northern Constabulary, including some concerns which warranted further investigation. His report therefore not only contained an analysis of the level and quality of service provided to the McLeods as complainants, but included some consideration of Northern Constabulary's investigation following the discovery of Kevin McLeod's body, and procedures followed by Northern Constabulary in relation to that investigation.
24. The fact that Mr Cameron's investigation was so wide-ranging has implications for my decision regarding the disclosure of the report under FOISA as I have found that, in terms of the exemptions cited, different considerations apply to different types of information within the report.
25. Although the main reason for Mr Cameron's report was to investigate questions of misconduct on the part of senior police officers, much of the information in the report relates to the corporate practices of Northern Constabulary, in relation to the way the McLeod family's complaints were handled and in relation to the way Kevin McLeod's death was investigated. It is sometimes difficult to draw a distinction between corporate and personal failure, where this involves a senior officer with personal responsibility for a particular aspect of Northern Constabulary procedure.
26. When considering disclosure of the information in the report under FOISA, I have tried to treat separately information relating to personal misconduct issues and information relating to corporate procedures and practices. I believe that different arguments apply in each case. However, in practice it has sometimes been necessary to view information about a senior officer's conduct in the context of comment on or analysis of the adequacy of the corporate practices and procedures of Northern Constabulary.
27. I consider that each category of information mentioned above presents different issues when considering whether or not the contents of the report should be disclosed under FOISA. The Board has held the entire contents of the report to be exempt from disclosure under a number of different exemptions, without drawing any distinction between the different types of information the report contains. However, I have found that the arguments the Board has put forward may not apply equally to all the information in the report.

### **Section 38 – Personal information**

28. The Board considered that the report was exempt from disclosure under section 38(1)(b) of FOISA, read in conjunction with section 38(2)(a)(i) and 38(2)(a)(ii).



29. Section 38(1)(b) of FOISA, read in conjunction with section 38(2)(a)(i) exempts from release personal data, the disclosure of which to a member of the public otherwise than under FOISA would contravene any of the data protection principles contained in the Data Protection Act 1998 (the DPA). The DPA defines personal data in section 1(1) as:

“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.”

30. Section 38(1)(b), read in conjunction with section 38(2)(a)(ii) exempts from release personal data if the disclosure of the information to a member of the public otherwise than under FOISA would contravene section 10 of the DPA. This particular exemption is subject to the public interest test required by section 2(1)(b) of FOISA.

### **Section 38(2)(a)(ii)**

30. I will first consider the use of the exemption in section 38(1)(b), read in conjunction with section 38(2)(a)(ii), of FOISA.
31. Under section 10 of the DPA, a notice (commonly known as a Section 10 Notice) can be issued by an individual requiring a data controller to cease, or not to begin, processing personal data about that individual for a specific purpose or in a specified manner if that processing is causing, or is likely to cause, the data subject or another person substantial damage or distress and that damage or distress would be unwarranted.
32. The Board has confirmed that no Section 10 notices have been received in relation to the information in the Report, and therefore I have concluded that the exemption in section 38(1)(b), read in conjunction with section 38(2)(a)(ii), has been wrongly cited by the Board.

### **Section 38(2)(a)(i)**

33. The exemption under section 38(1)(b), read in conjunction with section 38(2)(a)(i), is an absolute exemption in that it is not subject to the public interest test required by section 2(1)(b) of FOISA. In order for a public authority to rely on this exemption it must show that the information which has been requested is personal data for the purposes of the DPA, and that release of the information would contravene any of the data protection principles laid down in the DPA.



34. In this case, the Board has argued that releasing the personal data of individuals would contravene the first data protection principle, which states that personal data shall be processed fairly and lawfully and, in particular, shall not be processed unless at least one of the conditions in Schedule 2 to the DPA is met (and, in the case of sensitive personal data (as defined by section 2 of the DPA), at least one of the conditions in Schedule 3 is also met). In particular, the Board has argued that disclosure would be likely to generate widespread publicity which could cause significant damage or distress to those individuals who provided statements and who thought that the information they provided was given in confidence.
35. I will go on to consider in detail whether the first data protection principle can be met in relation to the different types of personal information contained in the report. However, it may be helpful for me to set out my views on two issues in relation to the compliance with Schedule 2; on one issue in relation to Schedule 3; and, further, to address the question of “lawfulness” at this stage.
36. 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 interests of the data subject.”
37. I must apply a number of tests to establish whether condition 6 supports disclosure of personal data in this case. The first test is whether it can be established that the third party or parties to whom the data would be disclosed has/have a legitimate interest in the processing of the personal data (in this case by disclosure to a member of the public) to which the request relates. The second is whether the processing is *necessary* for the purposes of those legitimate interests. The third is whether that processing can be seen to be unwarranted in this particular case by reason of prejudice to the rights and freedoms or legitimate interests of the data subject. Both competing interests must then be balanced. I consider that the arguments in respect of the first and second tests apply equally to all of the personal data contained in the report and so would like to take this opportunity to address them at this stage.



38. In considering the first test, it seems to me that there is a legitimate and significant interest in disclosing information relating to the interaction of the police with members of the public who have complained about their actions, where questions have been raised about compliance with regulatory procedures. In this case Northern Constabulary was dealing with a bereaved family who had expressed serious and specific concerns about the way in which Northern Constabulary had investigated the death. I believe that both the applicant (who made some of the complaints) and the general public have a legitimate interest in whether or not complaints procedures were followed correctly by a senior officer in this case and find, therefore, that the first test can be fulfilled.
39. With regard to whether disclosure is necessary for the purposes of the legitimate interests identified in paragraph 38 above, I have considered whether these interests might be met equally effectively by any alternative means. In all the circumstances, I have concluded that the legitimate interests in question cannot be met without disclosure of certain of the personal data in the report and therefore that disclosure of these data is necessary for the purposes of the legitimate interests.
40. As mentioned above, I am required to balance Mr McLeod's legitimate interests against those of the various data subjects. My findings in respect of each of the balancing exercises I have carried out are discussed later in this decision notice.
41. I believe it is also helpful for me to go on to consider compliance with Schedule 3 at this stage. I found that a limited amount of personal information in the report is sensitive personal data in terms of section 2 of the DPA. (As a result, a condition in each of Schedule 2 and 3 is required to be met before processing of the information can be considered to be fair and lawful in terms of the first data protection principle.) I find that none of the conditions in Schedule 3 to the DPA can be met in respect of the processing (disclosure) of this sensitive personal information, and therefore find that it is exempt from disclosure under FOISA.



42. In the course of considering compliance with the first data protection principle, I am also required to consider whether processing (in this case by disclosure to a member of the public) of the personal data in question would be lawful. As in relation to the Schedule 2 and 3 issues dealt with above, I consider that the questions of lawfulness are generally the same across all of the categories of personal data contained in Mr Cameron's report. Clearly, processing is not lawful if at least one of the conditions in Schedule 2 (and, in the case of sensitive personal data, at least one of the conditions in Schedule 3) cannot be met. In addition, processing of the kind contemplated in this case will not be lawful if it would contravene any statutory or common law prohibition on disclosure applicable to the information in question. I am satisfied that an obligation of confidentiality would be such a prohibition for the purposes of any analysis of the first principle I am required to undertake.
43. Having considered the personal data in question (with further analysis as required below, in relation to certain of the individual categories of data considered), I am satisfied that, provided that the requirements of condition 6 can be met, there will be no statutory or other prohibition on disclosure and therefore that disclosure under FOISA will, in all the circumstances, be lawful.
44. I will now go on to discuss in more detail the personal data in the report. I first considered which information contained in the Report was, in fact, personal data under the terms of the DPA. I found that the personal data in the Report generally fell into the following categories:
- a) Personal data of the senior police officers whose handling of the McLeod family's complaints was the main subject of this report
  - b) Personal data of other police officers named in the report
  - c) Personal data of some of the witnesses and other individuals named in connection with the investigations into Kevin McLeod's death
  - d) Personal data of witnesses involved in their professional capacity
  - e) Personal data of some of the McLeod family members, with the exception of the applicant, Mr Allan McLeod
  - f) Personal data of Mr Allan McLeod (the reason for separating out Mr Allan McLeod's personal data is discussed in paragraph 92 et seq below)

### ***Personal data of senior police officers***

45. After investigation, Mr Cameron recommended that the Board consider whether there had been misconduct by two senior police officers.



46. The names of the officers concerned have never been confirmed by the Board, although Press reports have included the names of certain individuals assumed to be the senior officers concerned.
47. I accept that the names and job titles of these senior officers are their personal data, given that the data relates to them and that they can be identified from that information. For this reason, I also accept that Mr Cameron's conclusions about these senior officers' conduct are also their personal data.
48. In the circumstances, I do not consider that revealing the names of the two senior officers would be unfair in terms of the first data protection principle contained in the DPA. Firstly, as noted above, the information is public knowledge already despite the lack of official confirmation from the Board. I note that the identities of officers holding senior rank are routinely made publicly available in information about Northern Constabulary. Secondly, the officers involved held very senior rank within Northern Constabulary. The Information Commissioner, who is responsible for enforcing and regulating the DPA throughout the United Kingdom, has issued guidance ([Freedom of Information Awareness Guidance No.1](#)) which states:
- "...the more senior a person is, the less likely it will be that to disclose information about him or her acting in an official capacity would be unfair."
49. I have considered questions of lawfulness at paragraphs 42 and 43 above and I do not consider it necessary to add anything on these matters at this point.
50. As noted previously, one of the conditions in Schedule 2 must also be capable of being complied with before I can consider the processing of this personal data to be fair and lawful. I have set out above my reasoning for finding that Mr McLeod has legitimate interests regarding this information and why the processing is necessary for the purposes of his legitimate interests.
51. Against this, I have considered the legitimate interests of the two senior officers (the data subjects) in preserving their privacy, but given the seniority of their positions and the fact that their names are already publicly associated with the matter, I have found that disclosure of this information would not be unwarranted by reason of prejudice to their rights and freedoms or legitimate interests.



52. The report details the conclusions reached by Mr Cameron after investigating acts of potential misconduct by these two officers. As noted previously, I accept that these conclusions constitute the officers' personal data. In deciding whether or not information about his conclusions should be exempt under section 38(1)(b) of FOISA, read in conjunction with section 38(2)(a)(i), again I must consider whether disclosure of the information would be fair and lawful in terms of the first data protection principle of the DPA. This, of course, states that personal data must be processed fairly and lawfully, and in particular shall not be processed unless one of the conditions in Schedule 2 is met. (Given that I do not consider that any of the information is sensitive personal data, I am not required to consider Schedule 3.)
53. I first considered whether disclosure would be fair. I accept that the officers whose conduct forms the subject of Mr Cameron's report would have expected his findings not to be widely disclosed. The statements provided to Mr Cameron from the officers (through the solicitor acting for Northern Constabulary) were marked as confidential, and there was no freedom of information legislation in place at the time of Mr Cameron's investigation.
54. However, I have found that there are other factors to take into account in determining whether disclosure would be fair, such as the seniority of the officers; the fact that they were acting in an official and not a private capacity; and the nature of the potential misconduct under investigation, which does not involve allegations of criminality. It is also relevant that Mr Cameron's conclusions were not entirely based on witness statements, but on his own assessment of whether established procedures or best practice had been followed.
55. The Information Commissioner has issued guidance (Data Protection Technical Guidance: access to information about public authorities' employees) on disclosure of personal information about employees. His view is that public sector employees working in an official capacity should, depending on their seniority and the nature of their jobs, expect to be identified in relation to their professional activities and (if sufficiently senior) subject to greater levels of public scrutiny than those in more junior roles: this helps to ensure greater levels of accountability for senior staff. He has also indicated that, in assessing fairness, the first and paramount consideration must be the consequences that disclosure (as a form of processing) would have for the interests of the data subject.
56. Of necessity, Mr Cameron's report focuses on the question of whether Northern Constabulary's procedures for recording and managing complaints from the public were followed by the responsible senior officer: in this report I shall refer to the officer with substantive responsibility for this area as "Officer 1" and the officer who covered the area for a period as "Officer 2".



57. The police have extensive powers at their disposal and I believe it is in the public interest that they can be seen to be accountable for their actions and to respond appropriately to complaints about those actions, especially those inferring misconduct.
58. I have taken the view that disclosure of information from the investigation into Officer 1's conduct would, in general, not be unfair where the report examines whether police procedures were followed or comments on the adequacy of police practice. If there were failings in the way Northern Constabulary dealt with complaints, these should not be withheld from the public. I have also found that the parts of the report which consider the adequacy of actions taken by senior police officers should also be made available. Although it is known that one of the senior officers was required to face misconduct proceedings, I take the view that Mr Cameron's conclusions and recommendations in relation to each instance of potential misconduct are personal information relating to the senior officers which it would be unfair to disclose.
59. It is important to emphasise that the information in Mr Cameron's report should not be taken as the final verdict on whether or not Officer 1 was responsible for acts or omissions amounting to misconduct on any of the matters considered. Although it was reported that one of the senior officers was to face a misconduct hearing, it was not publicly known on which matters Mr Cameron considered that there might be a case to answer. The final decision to accept or reject Mr Cameron's recommendations rested with the Board (which would have been required to follow a specific quasi-judicial process in dealing with potential misconduct), and it is not publicly known on what grounds the Board decided to implement misconduct proceedings.
60. I have concluded that it would be unfair to disclose Mr Cameron's views and recommendations on whether or not the Board should consider misconduct proceedings on each matter considered, as these might be taken to indicate a conclusion which was never tested at a misconduct hearing. I have therefore decided that Mr Cameron's views on whether or not there was a misconduct case to consider should be withheld under section 38(1)(b) of FOISA. This does not prevent the disclosure of information relating to his investigation of police practice and procedure: I consider that it would be fair to disclose such information, even if this identifies any failings on the part of Officer 1.



61. I have reached a different view regarding Mr Cameron's investigation and recommendations regarding Officer 2. I do not consider that it would be fair to disclose the personal data of this officer (with the exception of his name). Firstly, the potential misconduct under investigation was of a different nature, and did not relate directly to Northern Constabulary's engagement with the public. Secondly, the potential misconduct related closely to an incident involving another officer, which was the subject of a report to the Procurator Fiscal and disciplinary proceedings. Disclosure in this case would therefore reveal personal data relating to other individuals in circumstances that would contravene the first data protection principle of the DPA, which requires disclosure to be fair. A small amount of this information is sensitive personal data, which cannot be disclosed unless one of the conditions in Schedule 3 to the DPA is met: as stated previously, I have not found that any of the conditions in Schedule 3 can be met in this case.
62. With regard to Officer 1, I must consider whether disclosure of personal data would be lawful as well as fair. I would refer to paragraphs 42 and 43 above for further analysis of questions of lawfulness.
63. In my decision 056/2006 (MacRoberts and City of Edinburgh Council) I described the three main requirements of an actionable breach of confidence, all of which must be fulfilled:
- the information must have the necessary quality of confidence;
  - the public authority must have received the information in circumstances from which an obligation on the authority to maintain confidentiality could be inferred; and
  - there must be a disclosure which has not been authorised by the person who communicated the information but which would cause damage to that person.
64. Having considered the matter, and taking account of what I have said at paragraphs 42 and 43 above, I do not believe that disclosure of the personal data relating to Officer 1, as described above, would be unlawful. In his report, Mr Cameron does not directly discuss the statement of Officer 1 (which was marked "confidential"), or quote from it. Instead he used information provided by other parties and examined the relevant correspondence and records in order to form his conclusions. Officer 1's actions and decisions are largely a matter of record, through entries in the Force Complaints Register or in the letters sent to the McLeods and other parties.



65. I have already stated that I consider Mr Cameron's conclusions about potential misconduct to be personal information which is exempt from disclosure under section 38(1)(b) of FOISA. I do not accept that the other personal information relating to Officer 1 has the quality of confidence required in order for an actionable breach of confidence to be brought, as it is clearly based on records of activities for which he was professionally responsible. I can identify no other reason why the processing should be unlawful.
66. In reaching my view on this matter I have also taken into account that there will not now be any misconduct hearing involving Officer 1.
67. As mentioned in paragraph 34 above, one of the conditions in Schedule 2 must also be capable of being complied with before I can consider the processing of this personal data to be fair and lawful. I have set out above my reasoning for finding that Mr McLeod has legitimate interests regarding this information and why the processing is necessary for the purposes of those legitimate interests.
68. Against this I have considered the possible harm or distress that might be experienced by Officer 1, if disclosure was to result in renewed media attention into the case. However, I consider it likely that any distress caused will now be of a lesser degree than would have been the case if the officer was still in the police service. I have also considered that Officer 1 has already been publicly associated with the question of misconduct over this matter, although again it is important to stress that this was never tested at a misconduct hearing.
69. In all the circumstances, I have found that the legitimate interests of the applicant and of the general public outweigh the interests of Officer 1 in this matter. I do not regard disclosure as being unwarranted by reason of prejudice to Officer 1's rights, freedoms or legitimate interests, and therefore find that condition 6 of Schedule 2 of the DPA permits disclosure of his personal data in relation to the issue of police handling of complaints from the public in this case, provided disclosure is in all other respects fair and lawful.

### **Conclusion**

70. I support the Board's decision to withhold the information in Recommendations 1 – 7 in section 1 of Mr Cameron's report and other information in the report which reveals or implies the content of those Recommendations. I do not accept, however, that the data protection principles would be contravened by disclosure of other personal data relating to Officer 1, or that the exemption in section 38(1)(b) applies to such information. Other exemptions have been applied to this information which I will consider later in this decision notice.



71. I have accepted that, with the exception of his name, personal data relating to Officer 2 should be withheld as disclosure would breach the first data protection principle of the DPA.

***Personal data of other police officers named in the report***

72. It was not within Mr Cameron's remit to investigate allegations of misconduct below the rank of a senior officer, but his investigation of the way in which the McLeod family's complaints were dealt with necessarily included consideration of the actions of other officers.
73. As discussed previously, the first data protection principle prohibits the disclosure of personal data unless it is fair and lawful to do so and in particular unless one of the conditions in Schedule 2 (and, where relevant, Schedule 3) of the DPA can be met.
74. On the question of lawfulness, I would refer to my analysis at paragraphs 42 and 43 above. Provided disclosure can be justified by reference to the Schedule 2 and (where relevant) Schedule 3 conditions, I am satisfied that there no prohibitions on disclosure which would operate to make it unlawful.
75. A small amount of the information relating to other police officers is sensitive personal data, which cannot be disclosed unless one of the conditions in Schedule 3 to the DPA is met. As stated previously, I have not found that any of the conditions in Schedule 3 can be met in this case.
76. However, I take the view that the disclosure of other personal data relating to the police officers is permitted by condition 6 in Schedule 2 of the DPA, which allows processing (in this case, disclosure) where necessary for the purposes of legitimate interests. I have set out above my reasoning for finding that Mr McLeod has legitimate interests regarding this information and why the processing is necessary for the purposes of those legitimate interests. Against those interests I have considered the interests of the data subjects (the police officers) in preserving their privacy.
77. In deciding whether or not it would be fair to disclose personal data relating to the police officers named in Mr Cameron's report I have taken account of the guidance previously cited from the Information Commissioner on disclosure of employees' personal data, particularly with regard to the seniority of the officer, the extent to which the data is already in the public domain, and the sensitivity of the information.



78. In 1998 a Fatal Accident Inquiry was held into the circumstances of Kevin McLeod's death. The Sheriff's Determination (report) on that inquiry names some of the police officers involved in the investigation of the death; the Determination is a document which is publicly available. I have therefore taken the view that it would not be unfair to disclose the names of police officers who are named in the Sheriff's Determination or any information about their actions which was included in that document. Given that their names are already in the public domain, I take the view that these officers cannot expect that their names will not be released, particularly given that the information relates to their professional rather than personal life.
79. I have also found that it would not be unfair to disclose references to other named police officers below the rank of a senior officer where these form part of a narrative of activity which carries no inference of wrong-doing or failure.
80. In the light of my analysis in the preceding paragraphs, I am satisfied that there is no basis for inhibiting the exercise of the legitimate interest in disclosure of the information described in paragraphs 78 and 79 above by reason of the rights, freedoms or legitimate interests of the data subjects (police officers below the rank of a senior officer) and therefore, on balance and having considered all relevant questions of fairness and lawfulness, conclude that disclosure of that information would be in accordance with the first data protection principle.
81. In some instances I have found that information relating to these officers' actions and views should be withheld, on the grounds that disclosure would be unfair and would contravene the first data protection principle. As noted above, the report contains criticism of some officers, but it was not within Mr Cameron's remit to carry out a formal investigation of potential misconduct below the rank of a senior officer. I believe that it would be unfair to disclose information about individual officers in relation to potential misconduct which is not the subject of Mr Cameron's report and is not fully examined within it. This has led me to withhold most of the information in section 7 of the report, along with a significant portion of section 9.

***Personal data of witnesses and other individuals named in the report***

82. As discussed earlier, the report contains information about the circumstances surrounding Kevin McLeod's death and the two investigations carried out by Northern Constabulary. A number of references are made to named individuals, in connection with their personal or professional involvement with the case.



83. In relation to civilian witnesses or members of the public named in connection with the case, I found that Mr Cameron's report usually contained additional biographical information which would help to identify a named individual; for example, place of work or residence. I am satisfied that this information constitutes the personal data of the individual, and therefore that disclosure of this personal information should only take place where this would not contravene any of the data protection principles.
84. Once again, my principal concern here relates to the first data protection principle. On the question of lawfulness of processing, I would refer once again to the analysis in paragraphs 42 and 43 above: as in relation to other categories of data in this case, I am satisfied that (provided disclosure can be justified by reference to the Schedule 2 and (where relevant) Schedule 3 conditions) there are no prohibitions on disclosure which would operate to make it unlawful.
85. In several instances personal information about certain of these individuals has already been made publicly known, through the Sheriff's Determination from the Fatal Accident Inquiry referred to in paragraph 78, which is publicly available. I have taken the view that, in general, it would be fair to disclose personal information which is already a matter of public record, and that the disclosure of personal information relating to these matters is permitted by condition 6 in Schedule 2 of the DPA, which allows processing (in this case, disclosure) for the purposes of legitimate interests. I have set out above my reasoning for finding that Mr McLeod has legitimate interests regarding this information and why the processing is necessary for the purposes of those legitimate interests. Given that this information is (quite legitimately) in the public domain, I am satisfied that there is no basis for inhibiting the exercise of the legitimate interest in disclosure of the information described in this paragraph by reason of the rights, freedoms or legitimate interests of the data subjects and therefore, on balance and having considered all relevant questions of fairness and lawfulness, conclude that disclosure of that information would be in accordance with the first data protection principle.
86. In other instances the information has not been made generally known in published accounts or discussions of the case, and in deciding whether disclosure would be fair, I have considered factors such as the interests and expectations of the data subject, the sensitivity of the information, and whether the information relates to the individual's professional or private life.



87. Where I have found that disclosure would be fair in the instances described in paragraph 86, I have also found that disclosure would meet condition 6 of Schedule 2. I have set out above my reasoning for finding that Mr McLeod has legitimate interests regarding this information and why the processing is necessary for the purposes of those legitimate interests. I am satisfied that disclosure would be fair to the data subject and can identify no relevant prohibition on disclosure. In these instances, therefore, I am satisfied that there is no potential prejudice to rights, freedoms or legitimate interests of the data subject which would weigh against Mr McLeod's (and the wider public's) legitimate interest in information that provides clarification about the investigation into Kevin McLeod's death, or his legitimate interest in information which relates to the interaction of the police with members of the public who have complained about their actions.
88. In several previous decisions I have expressed the view that the identities of witnesses should generally be protected in order to prevent witnesses in future cases from being unduly inhibited. In this case there is the added consideration that the cause of Kevin McLeod's death has never been finally established, and there is still speculation that he may have been murdered. The McLeod family continue to campaign for further investigation into Kevin's death. I have therefore decided that, irrespective of data protection considerations, the names of civilian witnesses or members of the public otherwise connected with the case should generally (where they have not become public through the Fatal Accident Inquiry process) be withheld under the "law enforcement" exemption in section 35(1)(g) of FOISA, read in conjunction with section 35(2)(a) and 35(2)(b). A full consideration of the application of this exemption, including the public interest test, is found later in this decision notice.

### ***Personal data of witnesses involved in their professional capacity***

89. Where a witness (other than a police officer, for reasons discussed above) is identified in the report in connection with their professional duties, I have generally found that it would be fair and lawful to disclose their identity and their factual comments. This is in line with guidance from the Information Commissioner, and includes information relating to, or received from, MPs and MSPs. Again, I have found that the disclosure of personal information relating to these matters is permitted by condition 6 in Schedule 2 of the DPA. I have set out above my reasoning for finding that Mr McLeod has legitimate interests regarding this information and why the processing is necessary for the purposes of those legitimate interests. As the information in question does no more than record the involvement of the individuals concerned, without any obvious controversy, in matters relating to the subject matter of the investigation or the investigation itself, as part of their respective professional responsibilities, I have been unable to identify any legitimate interest of the data subjects which would prevent disclosure.



90. Where the reported comments of such a witness include the personal data of a third party and where I consider, in line with the tests set out above, that disclosure of the personal data would contravene the data protection principles laid down in the DPA, I have found that such information should be withheld under section 38(1)(b) of FOISA.

### ***Personal data of McLeod family members***

91. The members of the McLeod family named in the report have all given written consent to the release of any personal data about themselves which it might contain, should my decision be to disclose the information in the report. This satisfies condition 1 in Schedule 2 of the DPA, and as I can identify no other reason why disclosure of the personal data relating to these individuals would, in the circumstances, be either unfair or unlawful, I do not consider that the exemption in section 38(1)(b) of FOISA can be upheld in relation to this information.

### ***Personal data of Mr Allan McLeod***

92. Section 38(1)(a) of FOISA exempts information from disclosure if it is personal data of which the applicant is the data subject. This is an absolute exemption and therefore is not subject to the public interest test. Consequently, although the Board did not cite this exemption, I cannot order the Board to disclose under FOISA the limited information in the report relating to Mr Allan McLeod. I take the view that the Board ought to have dealt with that element of Mr McLeod's request in accordance with the relevant provisions of the DPA, and in particular should only have withheld any of the personal data about Mr McLeod appearing in the report if and to the extent that it was entitled to do so in terms of the DPA.
93. Although it is open to Mr McLeod to make a subject access request for information from the report which is his personal information, I hope that the Board will accept that his initial request constituted a valid subject access request under section 7 of the DPA and will provide him with that information along with the other information I have ordered to be released.
94. Since the question of Mr McLeod's right to access this personal data is governed by the DPA, it is the Information Commissioner responsible for data protection matters throughout the UK who will have the authority to deal with any complaint Mr McLeod wishes to make in relation to this matter.

### **Information withheld under other exemptions**

95. The Board considers that the information in the report is exempt from disclosure under sections 30(b), 30(c), 34(3) and 35(1)(g) (read in conjunction with section 35(2)(a), 35(2)(b) and 35(2)(d)). The Board has stated that each exemption applies to the entire contents of the report.



96. The arguments used by the Board regarding each of these exemptions are very similar, and are based on the same conclusions about the effect of disclosing the information in the report. I shall consider the application of each exemption in turn, but first it may be helpful to summarise the Board's reasons for wishing to withhold the information.
97. The Board has commented that it views the report as a frank assessment by one Scottish police force of another force's handling of complaints and internal structure. Mr Cameron was given access to a wide array of documents to enable him to carry out the fullest investigation possible, so that any appropriate recommendations could be made. Mr Cameron's investigation and the recommendations in his report went further than the original brief, which was to examine the way in which the McLeods' complaints had been handled: he found it was also relevant to consider policing procedures, particularly in respect of the first investigation into Kevin McLeod's death, and internal structure and communications within Northern Constabulary.
98. The Board has taken the view that Mr Cameron's investigation was therefore conducted in a way which attempted to gain a full picture of all events surrounding the handling of the investigation into the death of Kevin McLeod. The opinions and comments made throughout the investigation report were clearly intended to be helpful and constructive, with a view to achieving best practice in the future. However, the Board considers that if future investigating officers believed that their opinions might be made widely available, they would not feel free to consider matters that were not strictly necessary in terms of the investigator's remit.
99. In the Board's view, such a full investigation and report were possible only because the report was believed to be confidential: however potentially damaging the comments in the report might be, it was thought that these could be made in an open and frank manner without the risk of adverse publicity to Northern Constabulary.
100. The Board therefore considers that disclosure of the contents of the report would affect both the manner in which future investigations are carried out, and the manner in which investigating officers report their findings and make recommendations. This in turn would prejudice the Board's ability to invite independent assessment without being concerned that any recommendations made would be the subject of critical comment in the media.



## Application of exemptions

101. As stated previously, I have found Mr Cameron's report to contain several different types of information on a range of issues. It might be expected that disclosure would have different consequences or implications depending upon the type of information in question. However, the Board has stated that each exemption cited applies to all the information within the report, a point of view which it confirmed in correspondence with the investigating officer.

## Prejudice to effective conduct of public affairs

### *Section 30(b)*

102. Section 30(b)(i) and 30(b)(ii) of FOISA allow information to be withheld if its disclosure under FOISA would, or would be likely to, inhibit substantially the free and frank provision of advice or the free and frank exchange of views for the purposes of deliberation, respectively. In applying these exemptions the chief consideration should not be whether the information constitutes advice or opinion, but whether the release of the information would or would be likely to have the effect set out in the statute – i.e. inhibit substantially the free and frank provision of advice or the free and frank exchange of views for the purposes of deliberation.
103. As noted above, the Board considers that the disclosure of any of the information from Mr Cameron's report would, or would be likely to, have a substantially inhibiting effect on future investigating officers, who would no longer feel able to express their views freely or frankly, for the purposes of deliberation, without the fear of attracting adverse publicity and would be likely to confine any investigation to the immediate issue at hand.
104. The question of whether or not the quality of a future investigation might be adversely affected by the disclosure of information in this case is considered later in this decision notice under the exemption in section 30(c) of FOISA.
105. The test to apply in considering the exemptions in section 30(b)(i) and 30(b)(ii) is not whether the information withheld in the current case was provided as advice or was part of a free and frank exchange of views, but whether disclosure here would, or would be likely to, have a substantially inhibiting effect on the free and frank provision of advice or exchange of views in comparable situations in future. Before discussing this question, I would like it to be noted that the disclosure of information in one case should not be taken to mean that information in a similar case would require to be disclosed. As I have made clear in other decision notices, each case must be considered separately.



106. As noted previously, I have found that the investigator's report contains different kinds of information. Consideration is given to matters of police procedure and to the circumstances of Kevin McLeod's death as well as the question of misconduct among certain senior officers. It seems to me that the exemptions in section 30(b)(i) and 30(b)(ii) cannot be seen to be equally relevant to all the information in the report.
107. For instance, information about the police's performance is regularly published through other channels. Inspection and audit of the way in which a public authority carries out its functions is an accepted feature of modern public life, and constructive criticism is generally accepted by professionals as a positive (if sometimes painful) process by which a body can improve its standard of performance. Mr Cameron's report is not unique in examining and commenting upon issues relating to the performance of the police. All Scottish police forces are regularly the subject of reports from HMIC, which comment on good practice and identify areas in which improved performance is required. These reports are available on the Scottish Executive's website.
108. I have also found some similarities between the nature of the investigating officer's report in this case, as it relates to police practice and procedure, and that of the recent report by Dr Jean Herbison into the circumstances surrounding the death of five year-old Danielle Reid. Dr Herbison's report, published by the Highland Child Protection Committee, examines the course of action taken by Northern Constabulary (among other agencies) and makes recommendations. Again, this report was made publicly available.
109. The fact that other reports are made publicly available should not be taken as conclusive evidence that reports of this nature can never be withheld – public authorities are free to choose to release information even if they could not be obliged to do so under FOISA, as long as disclosure is not otherwise prohibited by another enactment. However, the fact that other reports are released affects whether police authorities, and the authors of and contributors to reports into such authorities' procedures and conduct, can reasonably expect such reports to be kept confidential. By extension, this affects whether it would be reasonable for me to conclude that disclosure would inhibit substantially the free and frank provision of advice or the free and frank exchange of views for the purposes of deliberation.



110. In any event, there are of course differences between these reports and Mr Cameron's account of his investigation. Mr Cameron names names, and focuses much more on the actions of individual officers. But I do not accept that disclosure in this case would, or would be likely to, inhibit substantially an officer from making similar recommendations in future. Mr Cameron himself considered that it was inevitable that concerns warranting further investigation would surface during an investigation such as his. Even if it was accepted that, for whatever reason, a future investigating officer might feel inclined to limit the scope of his inquiries in order to avoid creating information which might be disclosed under FOISA, I believe that this could be overcome by direction from the commissioning authority.
111. I accept that publicity is likely to follow any release of information from Mr Cameron's report. Northern Constabulary has already attracted considerable publicity through its actions in relation to Kevin McLeod's death and it seems likely that any future investigation of a similar case would also result in media attention and comment. However, I am not persuaded that the fear of adverse publicity would have, or would be likely to have, the substantially inhibiting effect on the investigating officer envisaged by the Board. As I mentioned above, I believe that if such inhibition was anticipated it could be overcome by positive direction from the Board when the remit for the investigating officer was agreed. It is also appropriate to point out that the investigating officer in such cases will be a senior officer from another police force (only a Chief Constable from another force can investigate allegations relating to the conduct of an officer of the rank of Assistant Chief Constable or above) and such an individual would be unlikely to be so inhibited by fears of adverse publicity.
112. I therefore do not accept the arguments put forward by the Board for withholding the contents of the report under the exemptions in section 30(b)(i) and section 30(b)(ii). My own view is that, if the information was disclosed, future investigating officers would certainly be aware that information from their own reports might be required to be disclosed, and that it is likely that this would be borne in mind. However, I am not convinced that the inhibition that would or would be likely to occur would be of a substantial nature. Other factors would come into play: for instance, the investigating officer's own commitment to a high quality public service; the increasing recognition that public officials are required to be accountable for their actions, particularly at senior level; the importance of ensuring that individual complaints are subject to fair and rigorous consideration; and the desire of the commissioning authority to obtain an objective assessment of standards of performance.
113. The exemptions in section 30(b)(i) and 30(b)(ii) are both subject to the public interest test required by section 2(1)(b) of FOISA. However, given that I have not upheld the use of either of these exemptions, I am not required to go on to consider the public interest test or the submissions made by the Board in relation to the public interest.



### **Section 30(c)**

114. Section 30(c) of FOISA allows a public authority to withhold information if its disclosure under FOISA would “prejudice substantially, or be likely to prejudice substantially, the effective conduct of public affairs”. In this case, as previously noted, the Board has argued that disclosure of the report would be likely to prevent any future investigation by any police force in Scotland into matters concerning another police force from being conducted on a voluntary basis with such wide parameters. This would ultimately prejudice the ability of police forces to invite independent assessment of their internal systems and procedures without being concerned that any conclusions and recommendations would become the subject of media comment and analysis. Release of this report would therefore impact on the ability of the force to conduct its affairs effectively by seeking adverse comment from independent sources on its internal structures and conduct.
115. The Board’s arguments in respect of the section 30(c) exemption contain several assumptions which should be examined before accepting that this exemption should be upheld.
116. The first assumption is that if criticism of a police force’s internal systems, procedures or conduct were to be made public, this would hinder it from inviting and securing independent assessment of those matters. I am not persuaded that this would be the consequence of disclosure. As noted previously in this decision notice, to some extent police forces are already operating in such an environment: criticism of their performance and procedures is already published in the form of reports from HMIC.
117. Secondly, the Board has also described the investigation undertaken by Mr Cameron as “voluntary”. Certainly, the Chief Constable of Northern Constabulary’s recommendation to the Board that an investigation should be carried out by an independent and external body was simply a recommendation, on which the Board was under no obligation to act: regulation 5 of the Police (Conduct) (Senior Officers) (Scotland) Regulations 1999 make it clear that where a complaint “does not contain sufficient particulars to determine whether there is a reasonable inference that an act or omission of a senior officer amounts, or may amount, to misconduct [as was the case here], the police authority *may* take such steps as it considers reasonable to obtain further particulars” (my emphasis).



118. The preliminary enquiries into the above issues would normally be carried out by the authority itself. In conducting these enquiries and deciding whether to take action, I believe that a police authority would take seriously its obligations as a public body regarding public responsibility and accountability, and would recognise the public interest in dealing with professional misconduct if it has (or appears to have) occurred. It seems to me that these issues would carry more weight with an authority than its fears about adverse publicity. I therefore find it unlikely that releasing Mr Cameron's report would, or would be likely to, cause a police authority to refuse to investigate an issue where it had a discretion to do so. In the absence of such an effect, I do not accept that substantial prejudice to public affairs would or would be likely to result from release of the report.
119. Where the police authority considers that it may reasonably be inferred that any act or omission which was committed or made, or is alleged to have been committed or made, by a senior officer may amount to misconduct, the 1999 Regulations require it to appoint an investigating officer (i.e. a Chief Constable from another force) to investigate the matter. It may be argued that the co-operation of the relatively small community of Scottish Chief Constables in this process is voluntary, but then the whole process of governance of policing in Scotland depends on the largely voluntary co-operation of Chief Constables, police authorities and the Scottish Executive. Taking my conclusions in relation to the application of section 30(b) into account, I should be most surprised if the professionalism of Chief Constables and their commitment to the effective working of this relationship (and the overall effectiveness of the Scottish police service) did not take precedence over any concerns they might have about the outcomes of their investigations becoming public.
120. Section 30(c) exempts information the disclosure of which under FOISA "would otherwise prejudice substantially, or be likely to prejudice substantially, the effective conduct of public affairs". The word "otherwise" shows that the exemption was intended to apply to situations other than those covered by the exemptions in section 30(b)(i) and 30(b)(ii). I have already considered, in relation to the exemption in section 30(b), whether an investigating officer is, or is likely to be, substantially inhibited from widening the scope of an inquiry, and decided that there are insufficient grounds to accept the assertion that any such inhibition would be substantial. I am therefore content that, in the absence of such inhibition, release of the information would not, and would not be likely to, cause substantial prejudice to the effective conduct of public affairs.
121. I therefore do not accept the Board's argument that the information in the report is exempt under section 30(c) of FOISA.



122. The exemption in section 30(c) is subject to the public interest test required by section 2(1)(b) of FOISA. However, given that I have not upheld the use of this exemption, I am not required to go on to consider the public interest test or the submissions made by the Board in relation to the public interest.

### **Section 35 – Law enforcement**

123. Section 35 allows a public authority to withhold information if its disclosure under FOISA would, or would be likely to, prejudice substantially certain activities relating to law enforcement. In terms of section 35(1)(g), this includes the exercise by any Scottish public authority of its functions for any of the purposes mentioned in section 35(2). The Board believes disclosure would, or would be likely to, prejudice substantially the exercise of its functions for the following purposes mentioned in section 35(2):

- 35(2)(a) – to ascertain whether a person has failed to comply with the law
- 35(2)(b) – to ascertain whether a person is responsible for conduct which is improper
- 35(2)(d)(ii) – to ascertain a person's fitness or competence in relation to any profession or other activity which the person is, or seeks to become, authorised to carry on.

124. I am satisfied that the functions identified above are indeed functions of the Board, as laid down in the Police (Conduct) (Senior Officers) (Scotland) Regulations 1996 and 1999 and further described in Police Circular No. 10/1999. I also accept that the purpose of Mr Cameron's investigation was to assist the Board in exercising those functions, in relation to the conduct of the senior police officers responsible for the way in which the McLeod family's complaints were dealt with.

### ***Information provided by police witnesses – withheld under section 35(1)(g)***

125. The Board has argued that disclosure of the information in Mr Cameron's report would, or would be likely to, prejudice substantially its ability to exercise those functions in future by inhibiting colleagues from being open in future investigation interviews. According to the Board, misconduct may therefore not be uncovered, and this is of particular concern in a case such as this where the most senior officers in the police force are the subject of the investigation.



126. The implication is that if the information in the report were to be disclosed, police officers would be less likely to provide frank statements to future investigating officers. The question of whether, and to what degree, police officers would be inhibited from participating in future investigations into alleged misconduct is therefore key to the Board's application of the exemption in section 35(1)(g).
127. The Board has stated that police officers participating in Mr Cameron's investigation would have done so in the expectation that their views would be treated confidentially. No misconduct hearing took place following the production of Mr Cameron's report and such a hearing would have been the only circumstances in which a witness providing a statement might have believed that the information would become more widely available. Even at a misconduct hearing an officer who was the subject of misconduct proceedings would only be entitled to have sight of statements taken in relation to the particular allegations which had been made, and the statements would not be made available to any other party or further reported.
128. The test required by the exemption in section 35 is whether any inhibition on the part of officers giving statements in a future investigation would, or would be likely to, prejudice substantially the Board's ability (or Northern Constabulary's ability) to exercise its functions for any of the three purposes identified in section 35(2)(a), 35(2)(b) and 35(2)(d)(ii) of FOISA.
129. There are a number of important points to note in relation to information in Mr Cameron's report which came from the statements of police officers. The first is that Mr Cameron frequently summarises the information provided to him instead of quoting verbatim from statements, so that the report provides an overview of the evidence along with his conclusions. It is not always possible to attribute information in his report to any individual officer. The second point to note is that the police officers' statements generally provide factual evidence about police practice and procedures during and after the investigation into Kevin McLeod's death, rather than evidence relating to the potential misconduct of individual police officers.
130. Where both these factors come into play, my judgement is that disclosure of the information is not likely to cause police witnesses in similar cases to be substantially inhibited from providing similar statements. In the absence of such inhibition, there would in my view be no substantial prejudice (or likelihood of such prejudice) to the Board's functions for the purposes set out in section 35(2)(a), 35(2)(b) and 35(2)(d)(ii) of FOISA. Information to which both of the above factors apply should therefore be disclosed.



131. However, having made these points about the information in Mr Cameron's report, I should make it clear that I accept the general principle behind the arguments put forward by the Board in relation to the future inhibition of witnesses following disclosure of statements. In a previous decision (038/2006, Mr T and the Chief Constable of Grampian Police), I said:

"A report prepared under the 1996 Regulations [which relate to the conduct of officers below the rank of a senior officer] includes the investigator's opinion on the matter under investigation and can offer advice for consideration by the Police on recommended action for dealing with the allegations. The Police have argued that it is essential that officers providing such advice are not inhibited from being frank and candid by fear of reprisal and that the Police are able to take a decision on the basis of the best available advice.

"I accept that police officers must be able to make comprehensive and unreserved statements to assist with the processes of law and order. I further accept that it is likely that if such reports were routinely disclosed, this would have the effect of inhibiting officers' and witnesses' comments and, as a result, would substantially prejudice the ability of the Police to exercise their function of investigating whether a police officer is responsible for conduct which is improper."

132. In this case, I have decided that where Mr Cameron provides substantial verbatim excerpts from witness statements, these should be withheld in order to prevent inhibition of future witnesses. This applies to the witness statements of other professionals as well as police officers. I accept that disclosure of this type of information would, or would be likely to, inhibit future witnesses from giving full and frank statements, which in turn would, or would be likely to, prejudice substantially the ability of the police to fully investigate the matters described in section 35(2)(a), 35(2)(b) and 35(2)(d)(ii).
133. The exemption in section 35(1)(g) is subject to the public interest test required by section 2(1)(b) of FOISA. This means that, even if the exemption applies, I must order release of the information unless, in all the circumstances of the case, the public interest in disclosing the information is outweighed by that in maintaining the exemption.
134. The Board stated that it accepted that there may be circumstances in which the public interest may require disclosure of information such as reports concerning the conduct of individual police officers and related witness statements. However, it submitted that this was not such a situation. The Board advanced the same public interest arguments in respect of the exemptions in sections 30 and 35, without distinguishing between each exemption. One such argument was the public interest in ensuring that individuals felt able to provide information to a police investigation with complete candour: the public interest would not be served if the disclosure of information would inhibit the detection of wrongdoing in the future.



135. There is a strong public interest in ensuring that the police are not prevented from fully investigating such matters, which in my judgement outweighs the public interest in disclosure of the full contents of these witness statements. As such, I do not consider that the verbatim excerpts from witness statements should be released.
136. However, I consider that disclosure of the conclusions drawn from that evidence would not necessarily produce the same inhibiting effect, especially where the evidence given relates to general or factual questions about police practice and procedure rather than issues of personal misconduct for individual officers. I have not accepted that such information should be exempt under section 35(1)(g), believing that the potential for inhibition of future witnesses would be much reduced in relation to the disclosure of information from statements which is reported in summary, rather than transcribed in detail; which may not be attributable to any one officer; and which does not bear directly on the question of misconduct of any individual officer.
137. I accept that disclosure of information from Mr Cameron's report may be taken as a warning that information from future investigations might also require to be disclosed, and that this would be likely to be borne in mind when evidence is given by witnesses. However, I hope I have made it clear that any such decision would not be routine, and would only require to be taken after careful consideration of the particular circumstances of a case. I believe this assurance should go some way towards minimising inhibition among participants in future investigations.
138. Given that I have not upheld this particular use of the exemption in respect of information which is not a substantial verbatim extract from a witness statement, I am not required to go on to consider the public interest test or the submissions made by the Board in relation to the public interest.

***Information provided by civilian witnesses – withheld under section 35(1)(g)***

139. I take the view that in weighing up the likely effect of disclosure of information, different considerations apply in relation to information provided by civilian witnesses than to information supplied by police witnesses. I have decided that the only information from civilian witnesses which should be disclosed is information which is already publicly available through the Sheriff's Determination following the FAI or other sources. I do not accept that the exemption in section 35(1)(g) can apply to information of which the substance has already been made public as part of an open judicial process. However, I accept that in relation to civilian witnesses, any information provided to Mr Cameron's inquiry which was not already publicly known should generally not be disclosed. Witnesses would not have expected their statements to Mr Cameron's inquiry to be made public, and it would be unfair now to expose them to public examination on their recollections outside the judicial process.



140. I consider that disclosure of their recollections (insofar as not in the public domain already) would be likely to deter civilian witnesses in any future investigation from coming forward or from providing full and frank statements to a similar inquiry, and that this would, or would be likely to, prejudice substantially the ability of Northern Constabulary to ascertain whether a person had failed to comply with the law or was responsible for conduct which was improper. I therefore accept that the exemption in section 35(1)(g), read in conjunction with section 35(2)(a), 35(2)(b) and 35(2)(d)(ii), applies to this information.
141. Given that I have upheld the use of these exemptions in this case, I am required to go on to consider the public interest test set out in section 2(1)(b) of FOISA and consider whether, in all the circumstances of the case, the public interest would be better served by the disclosure of the information or the maintaining of the exemption. The public interest arguments submitted by the Board are as outlined in paragraph 134 above. I take the view that there is a strong public interest in disclosure of information which evaluates the adequacy of the practices and procedures followed by the police. However, I believe that in this case it is generally possible to satisfy this public interest without disclosing information taken verbatim from witness statements. I have therefore found that there is a greater public interest in maintaining the exemption in section 35(1)(g) in relation to information taken directly from civilian witness statements.

***Potential inhibition of an investigating officer – information withheld under section 35(1)(g)***

142. I have already considered (in relation to the exemptions in section 30(b)(i) and 30(b)(ii)) the Board's argument that the investigating officer in similar cases would be likely to be so inhibited by the prospect of his findings being disclosed at a future date that his report would be less full and frank than would otherwise have been the case. If this was a real possibility it could be argued that this would prevent the Board from fulfilling its law enforcement functions. However, as noted previously, I do not consider that disclosure of the information in Mr Cameron's report would have such an effect.



143. It is important to stress that a decision to withhold or disclose information in one case should not necessarily be taken as an indication that I will routinely reach a similar conclusion in other cases. I have already referred to my decision 038/2006, where I accepted that if investigating officers' reports were routinely to be released, this would have the effect of inhibiting officers' comments and, as a result, would or would be likely to prejudice substantially the ability of Northern Constabulary to exercise their function of investigating whether a police officer is responsible for conduct which is improper. There are complex issues to consider in each decision involving disclosure of a police investigator's recommendations: these issues will differ from case to case, and I intend to assess each case brought to me against its own circumstances.
144. In this case I am not persuaded that disclosure of Mr Cameron's findings and comments would or would be likely to prejudice substantially the Board's ability to commission and obtain reports of this nature, by inhibiting future investigators from presenting a full and frank assessment of the case. My conclusions in paragraph 112 apply. The misconduct investigation in this case involved senior police officers and was conducted by a Chief Constable from another police force; I believe that the seniority of the investigating officer strengthens his ability to assess matters rigorously and impartially and means that he would not, or would not be likely to be, inhibited from being frank and candid in his report or recommendations because of fear of reprisal or other consequences. In the absence of such inhibition, there would in my view be no substantial prejudice to the Board's functions for the purposes set out in section 35(2)(a), 35(2)(b) and 35(2)(d)(ii) of FOISA.
145. Given that I have not upheld the use of this exemption in relation to this particular information, I am not required to go on to consider whether the public interest lies in the release of the information or the maintenance of the exemption in terms of section 2(1)(b) of FOISA.

### **Section 34(3) – Investigations by Scottish public authorities**

146. The Board also applied the exemption in section 34(3) of FOISA to the information in the report. This exemption has four strands to it:
- (i) The information must have been obtained or recorded for the purposes of an investigation;
  - (ii) The investigation must have been carried out by virtue of Her Majesty's prerogative or under statutory powers;
  - (iii) The investigation must have been conducted by the authority for any of the purposes listed in section 35(2) of FOISA; and
  - (iv) The information must relate to the obtaining of information from confidential sources.



147. I accept that that information in the report, and the investigation carried out by Mr Cameron, meet the criteria laid down in points (i) – (iii) above. The power to conduct the investigation is derived from the Police (Conduct) (Senior Officer) (Scotland) Regulations 1996 and 1999, and the Police (Conduct) (Scotland) Regulations 1996. The Board has stated, and I have accepted, that this type of investigation fulfils the purpose laid down in section 35(2)(c) of FOISA:
- ”to ascertain whether circumstances which would justify regulatory action in pursuance of any enactment exist or may arise;”
148. For the exemption in section 34(3) to apply, however, the information withheld must relate to the obtaining of information from confidential sources. The Board has argued that it is essential that those giving statements in the course of such investigations must not be inhibited in any way in providing information which could result in disciplinary action being taken against officers, and that information gained during the course of this investigation was understood to be given in confidence by those interviewed. The Board has also expressed the view that the investigating officer may not have been so explicit or fulsome in expressing his opinions had he been aware that the report might be made freely available.
149. However, I take the view that the purpose of section 34(3) is not to protect information gathered from confidential sources, or necessarily the confidentiality of the source itself. It concerns information relating to the obtaining of information from those sources. This is clear from the wording of the section itself, which states that information is exempt if it “**relates to the obtaining of** information from confidential sources” (my emphasis). FOISA could, but does not, state that information is exempt if it was obtained from a confidential source, or if it would disclose the identity of a confidential source. In other words, information is exempt if it is about the process of gathering the information - in other words, if it is “about how such information is gathered, how informants are recruited and how information obtained from confidential sources is transmitted” (from my briefing “Section 34: Investigations by Scottish Public Authorities”, available on my website).
150. The contents of the report do not discuss or reveal the process of obtaining information for Mr Cameron’s inquiry.
151. I therefore do not accept that the information in Mr Cameron’s report is exempt from disclosure under section 34(3) of FOISA.
152. The exemption in section 34(3) is subject to the public interest contained in section 2(1)(b) of FOISA. However, given that I have not upheld the use of this exemption by the Board, I am not required to go on to consider the public interest test or the submissions made by the Board in relation to the public interest.



### **Section 36(1) - Confidentiality**

153. The Board applied this exemption to parts of the report which refer to legal advice given to Northern Constabulary by their solicitor.
154. Section 36(1) exempts information from disclosure if it is information in respect of which a claim to confidentiality of communications could be maintained in legal proceedings. One type of communication covered by this exemption is communications between legal adviser and client. For the exemption to apply to this particular type of communication, certain conditions must be fulfilled. For example:
- The information withheld must relate to communications with a legal adviser. This clearly includes communications with solicitors, and would also include communications with Counsel (although there was no involvement of Counsel in this case).
  - The legal adviser must be acting in his/her professional capacity and the communications must occur in the context of his/her professional relationship with his/her client
  - The privilege does not extend to matters known to the legal adviser through sources other than the client or to matters in respect of which there is no reason for secrecy
  - The privilege does not extend to communications which relate to fraud or the commission of an offence
155. Having examined the information withheld under section 36(1), I accept that it was advice provided by a solicitor to her client.
156. I have given some consideration to whether there are, in fact, reasons to keep the information secret. However, I accept that as the information was not communicated to Mr McLeod, this may be taken to indicate that Northern Constabulary, as client, considered that it should be kept confidential. I have therefore accepted that the information is covered by the exemption in section 36(1).
157. The exemption in section 36(1) is a qualified exemption, which means that the application of this exemption is subject to the public interest test set out in section 2(1)(b) of FOISA. Where a public authority finds that this exemption applies to the information that has been requested, it must go on to consider whether, in all circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information. If the two are evenly balanced, the presumption should always be in favour of disclosure.



158. As I have noted in a previous decision notice (033/2006, Mr O'Donnell and East Dunbartonshire Council), the courts have long recognised the strong public interest in maintaining the right to confidentiality of communications between legal adviser and client on administration of justice grounds. Many of the arguments in favour of maintaining confidentiality of communications were discussed in a House of Lords case, *Three Rivers District Council and others v Governor and Company of the Bank of England* (2004) UKHL 48. I accept that there will always be a strong public interest in maintaining the right to confidentiality of communications between legal adviser and client. The views I expressed in decision 033/2006 form the basis of the argument advanced by the Board to support the view that the public interest in upholding the exemption outweighs the public interest in disclosure of the information withheld under section 36(1) of FOISA.
159. In this case I believe there are other public interest considerations to take into account. The complaint made by Mr McLeod in this instance was of a particularly serious nature. It is evident that, in choosing to investigate the issue, Mr Cameron regarded it as a matter of concern that the question raised by Mr McLeod had not been answered as it could have been through disclosure of information provided by the solicitor to her client.
160. It can be argued that there is a public interest in disclosing the substance of the information the solicitor provided, as this would address one of the McLeod family's concerns about the initial investigation into Kevin McLeod's death. However, I have found that the matter is explained adequately in other parts of Mr Cameron's report, which are not subject to the exemption in section 36(1). I believe that disclosure of this other information would satisfy the public interest as outlined above without requiring disclosure of exempt information.
161. In the circumstances I have therefore decided that the public interest in maintaining the right to confidentiality of communications between solicitor and client outweighs the public interest in disclosing the sections of the report that have been withheld under section 36(1), and I have upheld the Board's use of this exemption.



## Decision

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I find that the Northern Joint Police Board (the Board) failed to comply with Part 1 of FOISA by wrongly withholding information requested by Mr McLeod under the exemptions in sections 30(b)(i), 30(b)(ii), 30(c), 34(3) of FOISA.

I find that for the most part the Board was also wrong to withhold the information under the exemptions in section 35(1)(g) of FOISA, read in conjunction with section 35(2)(a), 35(2)(b) and 35(2)(d)(ii), but I have decided that the Board was right to withhold the names of civilian witnesses under section 35(1)(g) of FOISA, read in conjunction with section 35(2)(a) and 35(2)(b). I also uphold the use of this exemption to withhold excerpts from witness statements.

I uphold the Board's decision to withhold some information in the report under section 36(1) of FOISA.

I find that some personal data in the report is exempt from disclosure under section 38(1)(b) of FOISA, read in conjunction with section 38(2)(a)(i). However, I have concluded that some personal information can be disclosed without breaching the data protection principles in the Data Protection Act 1998, and in such instances I have found that the exemption in section 38(1)(b) does not apply.

I found that the exemption in section 38(1)(b), read in conjunction with section 38(2)(a)(ii), was wrongly cited by the Board in relation to the information withheld.

In withholding information which was not exempt, the Board failed to deal with Mr McLeod's request in accordance with section 1(1) of FOISA.

I have provided the Board with a copy of the report in question indicating the information which should be withheld or disclosed in line with my decision. I require the Board to provide Mr McLeod with a copy of the information to be disclosed within 45 days of receipt of this decision notice.

**Kevin Dunion**  
**Scottish Information Commissioner**  
**15 January 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.

##### 30 Prejudice to effective conduct of public affairs

Information is exempt information if its disclosure under this Act-

(...)

(b) would, or would be likely to, inhibit substantially-

(i) the free and frank provision of advice; or

(ii) the free and frank exchange of views for the purposes of deliberation; or

(c) would otherwise prejudice substantially, or be likely to prejudice substantially, the effective conduct of public affairs.

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

(...)



- (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 of either 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-

(...)

(g) the exercise by any public authority (within the meaning of the Freedom of Information Act 2000 (c.36)) or Scottish public authority of its functions for any of the purposes mentioned in subsection (2);

(2) The purposes are-

(a) to ascertain whether a person has failed to comply with the law;

(b) to ascertain whether a person is responsible for conduct which is improper;

(...)

(d) to ascertain a person's fitness or competence in relation to-  
(...)

(ii) any profession or other activity which the person is, or seeks to become, authorised to carry on;

### **36 Confidentiality**

(1) Information in respect of which a claim to confidentiality of communications could be maintained in legal proceedings is exempt information.



### **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.