

# Decision Notice



Decision 202/2012 Mr Hugh McLeod and Northern Joint Police Board

Complaint investigation report: information about a named individual

Reference No: 201200327

Decision Date: 12 December 2012

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**Rosemary Agnew**

Scottish Information Commissioner

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## Summary

Mr McLeod requested from Northern Joint Police Board (the Board) a full and unredacted copy of a report into the handling of complaints made regarding the police investigation into the death of his son, Kevin. Disclosure of this report was considered by the Commissioner in an earlier decision. Following a review, which was asked to consider the withholding of information about one (now deceased) individual only, the Board accepted that there had been a change of circumstances since its original consideration of the report and withheld as confidential information which had previously been withheld as the individual's personal data.

Following an investigation, the Commissioner found that the Board had been correct to withhold the information as confidential, in accordance with section 36(2) of FOISA.

## Relevant statutory provisions

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Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) and (6) (General entitlement); 2(1)(a) and (2)(c) (Effect of exemptions); 36(2)(Confidentiality)

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

## Background

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1. On 9 November 2011, Mr McLeod wrote to the Board requesting a full and unredacted copy of the Summary Report (Volume 1) (the Report) submitted to the Board by the former Central Scotland Chief Constable Andrew Cameron, which considered the handling of his family's complaints regarding the police investigation into the death of his son, Kevin.
2. A request for a copy of the Report was previously considered by the Commissioner in *Decision 003/2007 Mr Allan McLeod and Northern Joint Police Board*<sup>1</sup>. As a result of that decision, a copy of the Report was released, subject to the redaction of certain information under sections 35(1)(g) (law enforcement), section 36(1) (confidentiality) and 38(1)(b) (personal information).

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<sup>1</sup> <http://www.itspublicknowledge.info/applicationsanddecisions/Decisions/2007/200502199.asp>



3. The Board responded to Mr McLeod's request on 7 December 2011. While acknowledging that four years had passed since the Commissioner's previous decision, it did not consider there to have been any material change in circumstance which would negate the previous justification for withholding the redacted text. Consequently, the Board sought to refuse the request as repeated under section 14(2) of FOISA.
4. On 16 December 2011, Mr McLeod wrote to the Board requesting a review of its decision. He believed there had been a material change in circumstance which would warrant the Board reviewing the exemptions it had relied upon previously. He highlighted that one individual named in the Report was now deceased and therefore section 38(1)(b) of FOISA could no longer apply to that individual's personal data. Mr McLeod therefore asked the Board to disclose any sentences, paragraphs, recommendations or other details which had been removed or redacted from the Report and which related to that individual.
5. The Board notified Mr McLeod of the outcome of its review on 8 February 2012. The Board accepted that the death of the named individual referred to by Mr McLeod amounted to a change of circumstance which meant that it was inappropriate to apply section 14(2) of FOISA. The Board advised Mr McLeod that it had reviewed the information relating to the deceased individual and now considered that information (originally withheld under section 38(1)(b)) to be exempt in terms of section 36(2) of FOISA.
6. On 21 February 2012, Mr McLeod wrote to the Commissioner, stating that he was dissatisfied with the outcome of the Board's review and applying to the Commissioner for a decision in terms of section 47(1) of FOISA.
7. The application was validated by establishing that Mr McLeod had made a request for information to a Scottish public authority and had applied to the Commissioner for a decision only after asking the authority to review its response to that request. The case was then allocated to an investigating officer.

## Investigation

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8. The Commissioner already held a copy of the Report from the previous investigation. On 2 April 2012, the Board was notified in writing that an application had been received from Mr McLeod. The Board was also given an opportunity to provide comments on the application (as required by section 49(3)(a) of FOISA) and was asked to respond to specific questions. These focused on the requirements of section 36(2) of FOISA, in the context of the information withheld.
9. In its response, the Board sought to rely on the same arguments as it had provided to Mr McLeod's in the outcome of its review. It also provided supporting correspondence from the Chief Constable of Northern Constabulary, confirming the distress he believed would be caused to the deceased individual's family in the event of disclosure.



10. The relevant submissions received from both the Board and Mr McLeod will be considered fully in the Commissioner's analysis and findings below.

## Commissioner's analysis and findings

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11. In coming to a decision on this matter, the Commissioner has considered all of the withheld information and the submissions made to her by both Mr McLeod and the Board, and is satisfied that no matter of relevance has been overlooked.
12. A summary of the background to Mr McLeod's request and the nature of the information withheld are set out in paragraphs 11 – 22 (inclusive) of *Decision 003/2007 Mr Allan McLeod and the Northern Joint Police Board* and therefore will not be repeated here.
13. In *Decision 003/2007*, the previous Commissioner ordered the release of a redacted version of the report. As indicated above, the Commissioner accepted the withholding of certain information under sections 35(1)(g)(law enforcement), 36(1) (confidentiality) and section 38(1)(b) (personal information) of FOISA. This decision considers the withholding of elements of this information relating to a specific officer, now deceased, accepted in *Decision 003/2007* as being properly withheld under section 38(1)(b) of FOISA.
14. Section 38(1)(b) only applies in relation to personal data and data can only be personal if it relates to a **living** individual (section 1(1) of the Data Protection Act 1998). As a consequence, once a person has died, information relating to him/her is no longer considered to be personal data and the exemption in section 38(1)(b) of FOISA can no longer apply. In dealing with Mr McLeod's request, the Board sought to rely on section 36(2) of FOISA.

### Section 36(2) – Confidentiality

15. The exemption (which is set out in full in the Appendix) contains a two- stage test, both parts of which must be fulfilled before it can be relied upon. The first is that the information must have been obtained by a Scottish public authority from another person. "Person" is defined widely and means another individual, another Scottish public authority or any other legal entity, such as a company or partnership.

*Was the information obtained by a Scottish public authority from another person?*

16. In most cases, it is relatively simple to determine whether the information has been obtained from a third party. In this instance, in order to determine the source of the information, we must look at the context in which the Report was created.
17. Mr Andrew Cameron, former Chief Constable of Central Scotland Police, was appointed by the Board to conduct an investigation to consider the manner in which Northern Constabulary had investigated complaints received from the McLeod family. Mr Cameron's report was submitted to the Board in November 2002.



18. Given the independent nature and purpose of the Report, the Commissioner is satisfied that the withheld information was obtained by the Board from a third party, whether directly from Mr Andrew Cameron or more indirectly (as evidence) from the individual to whom it relates.
19. Given that the Commissioner has accepted that the information was obtained by the Board from a third party, she must go on to consider whether disclosure of the information would constitute an actionable breach of confidence.

*Would disclosure of the information constitute an actionable breach of confidence?*

20. The second part of the test is that disclosure of the information by the public authority must constitute a breach of confidence actionable either by the person who gave the information to the public authority or by any other person. The Commissioner takes the view that “actionable” means that the basic requirements for a successful action must appear to be fulfilled.
21. Generally, there are considered to be three main requirements which must be met before a claim for breach of confidence can be established to satisfy the second element to this test. These are:
  - a. the information must have the necessary quality of confidence;
  - b. the public authority must have received the information in circumstances which imposed an obligation on it to maintain confidentiality and
  - c. unauthorised disclosure must be to the detriment of the person who communicated the information.

*Necessary quality of confidence*

22. For information to have “the necessary quality of confidence”, it must be information which is not a matter of public knowledge. The information must have the basic attribute of inaccessibility. The Commissioner is satisfied in the circumstances, despite the widespread media coverage relating to the subject matter of this request, that the specific withheld information is not common knowledge and could not readily be obtained by Mr McLeod through any other means. Consequently, she is satisfied that this information has the necessary quality of confidence.

*Obligation to maintain confidentiality*

23. The second part of this test is whether the public authority is subject to an obligation to maintain confidentiality in respect of the information. This obligation can either be “express” or “implied”. An implied obligation of confidentiality can arise as a result of the relationship between the parties or the particular circumstances in which information has been obtained.



24. The Board considered the withheld information to be in the nature of information about disciplinary or related matters. As such, it argued – particularly in relation to more junior officers – there would be a reasonable expectation that the information would be held in confidence rather than being disclosed. The Board advised that no misconduct hearing had taken place following the production of the Report, and such a hearing would have been the only circumstances in which a witness providing a statement might have believed the information would become more widely available. Even that would not have involved dissemination beyond the environment of the hearing.
25. The Board noted that the statements provided to Mr Cameron for the purposes of his investigation were marked as confidential. It also noted that FOISA was not in place at the time of the investigation.
26. Given the context in which, and the purpose for which, the withheld information was collected, the Commissioner is satisfied that it was obtained (from the deceased individual) subject to an implied obligation of confidentiality. As with previous decisions<sup>2</sup> – and as recognised by the Information Tribunal Decision in the case of *Bluck v Information Commissioner and Epsom and St Helier University NHS Trust EA/2006/0090*<sup>3</sup> – the duty of confidence can exist even after the death of the person from whom the information was obtained: an action for breach of confidence could be taken by the personal representatives of that person.
27. In all the circumstances, the Commissioner accepts that a duty of confidence is owed to the deceased individual's personal representatives – and potentially to that individual's surviving relatives more widely. In reaching this conclusion, the Commissioner recognises, in the light of the case law which has developed in relation to article 8 of the European Convention on Human Rights following the introduction of the Human Rights Act 1998 (much of which was considered in the *Bluck* decision cited above), that the concept of what should be considered confidential has broadened. The key question, whatever the nature of the relationship between those providing and receiving the information at the time it was provided, is whether the person claiming the obligation of confidentiality has a reasonable expectation, in all the circumstances, that the information should be considered private. Given the nature of the information under consideration in this case, the Commissioner believes it reasonable that the surviving relatives of the deceased should have such an expectation.

*Unauthorised disclosure which would cause detriment*

28. The final requirement is that unauthorised disclosure of the information would be to the detriment of the parties which provided the information.

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<sup>2</sup> See, for example, Decision 029/2008 Mrs G and Aberdeen City Council <http://www.itspublicknowledge.info/applicationsanddecisions/Decisions/2008/200700962.asp> or Decision 150/2012 Mr M and South Lanarkshire Council Decision 029/2008 <http://www.itspublicknowledge.info/applicationsanddecisions/Decisions/2012/201200836.asp>

<sup>3</sup> [http://foiwiki.com/foiwiki/info\\_tribunal/DBFiles/Decision/i25/mrspbluckvinformationcommissioner17sept07.pdf](http://foiwiki.com/foiwiki/info_tribunal/DBFiles/Decision/i25/mrspbluckvinformationcommissioner17sept07.pdf)



29. The damage need not be substantial and, indeed, could follow from the mere fact of unauthorised use or disclosure in breach of confidence. As with the duty of confidence, and for the reasons set out above, the Commissioner considers it appropriate in the circumstances to take into consideration damage to the surviving relatives of the deceased individual.
30. The Commissioner has been provided with submissions from the Board as to the potential distress that could be experienced by the surviving relatives, should the information be disclosed. These submissions are entirely consistent with evidence the Commissioner has considered and accepted previously in relation to information about officers of Northern Constabulary involved in the McLeod case.
31. The Commissioner is satisfied, on the basis of submissions received from the Board, that there is potential for damage or distress to be caused to surviving relatives by the release of the withheld information, which would be unauthorised. The Commissioner is therefore satisfied that disclosure of the information would be actionable.

#### *Public interest*

32. As stated above, if the conditions of section 36(2) are fulfilled, an absolute exemption is created. However, it is generally accepted in common law that an obligation of confidence cannot apply to information the disclosure of which is necessary in the public interest. The law of confidence recognises that there is strong public interest in ensuring that people respect confidences and the burden of demonstrating that a failure to maintain confidentiality would be in the public interest is therefore a heavy one. However, in certain circumstances the public interest in maintaining confidences may be outweighed by the public interest in the disclosure of certain information.
33. The Commissioner recognises the strong personal interest of Mr McLeod, as a parent of Kevin McLeod, in the withheld information. However, this does not equate to a significant public interest, particularly given the significant amount of information which has already been placed into the public domain on the matter of Kevin McLeod's death and subsequent events.
34. In this instance, the Commissioner does not recognise an overwhelming public interest which would justify the release of confidential information into the public domain.
35. The Commissioner is therefore satisfied that the Board acted in accordance with Part 1 of FOISA in withholding the information requested by Mr McLeod under section 36(2) of FOISA.

## **DECISION**

The Commissioner finds that Northern Joint Police Board complied with Part 1 of the Freedom of Information (Scotland) Act 2002 in responding to the information request made by Mr McLeod.

Decision 202/2012  
Mr Hugh McLeod  
and Northern Joint Police Board



## **Appeal**

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Should either Mr McLeod or Northern Joint Police Board wish to appeal against this decision, there is an appeal to the Court of Session on a point of law only. Any such appeal must be made within 42 days after the date of intimation of this decision notice.

**Margaret Keyse**  
**Head of Enforcement**  
**12 December 2012**



## Appendix

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### Relevant statutory provisions

#### Freedom of Information (Scotland) Act 2002

##### 1 General entitlement

- (1) A person who requests information from a Scottish public authority which holds it is entitled to be given it by the authority.

...

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

##### 2 Effect of exemptions

- (1) To information which is exempt information by virtue of any provision of Part 2, section 1 applies only to the extent that –

- (a) the provision does not confer absolute exemption; and

...

- (2) For the purposes of paragraph (a) of subsection 1, the following provisions of Part 2 (and no others) are to be regarded as conferring absolute exemption –

...

- (c) section 36(2);

...

##### 36 Confidentiality

...

- (2) Information is exempt information if-

- (a) it was obtained by a Scottish public authority from another person (including another such authority); and

- (b) its disclosure by the authority so obtaining it to the public (otherwise than under this Act) would constitute a breach of confidence actionable by that person or any other person.