

Freedom of Information (Scotland) Act - Update : 5 May 2005

<http://www.scotlandlegislation.hms.gov.uk/legislation/scotland/acts2002/20020013.htm>

[hms.gov.uk/legislation/scotland/acts2002/20020013.htm](http://www.scotlandlegislation.hms.gov.uk/legislation/scotland/acts2002/20020013.htm)

On 17 January we reported:

'January saw the Freedom of Information Act 2002 come into operation.

In general terms, *'a Scottish public authority receiving a request' for information 'must comply promptly; and in any event by not later than the twentieth working day after' receiving the request.*

Given we are aware of internal memos by the barrow load, secret files, correspondence and official and unofficial reports that are held on Shirley we have embarked on a campaign to obtain them under the new Act.

We have written to the Scottish Executive, Strathclyde Police, the Scottish Criminal Records Office, the Association for Chief Police Officers and the Strathclyde Joint Police Board seeking documentary information relating to Shirley's case.

What is clear from the very beginning is that there is considerable scope for reluctant authorities to claim exemption under one or more of the 17 categories of exemption referred to in the Act.

They range from exempting the release of information, *' for the purpose of safeguarding national security.'* to exempting information if it, *' has at any time been held by a Scottish public authority for the purposes of an investigation'* whether a person has committed an offence, should be prosecuted for an offence or having been prosecuted is guilty of the offence.

Particular care appears to have been taken to protect the Lord Advocate, senior Crown Office personnel, government ministers and those involved in the prosecution of crime.

We look forward to seeing how creative the authorities will be in interpreting these exemptions and just how much relevant information is released.

In general the authority has 20 days to respond to our initial request. If we are dissatisfied with their response we have further 40 days to appeal their decision. The authority then has a further 20 days to respond.

The Scottish Information Commissioner will become involved if we cannot reach an agreement with the authorities. Again the Commissioner appears to have fairly broad discretion whether to act or not and only time will tell if the new law results in information being more freely available or if the authorities manage to hide behind its exemptions and qualifications.

Watch this space.'

UPDATE – 12 May 2005

Watch this space indeed.

The reaction of the authorities to our requests has been mixed.

Strathclyde Police have an apparently independent civilian led system in place to assist applicants wishing information. We have found this extremely useful and helpful. We have already received some enlightening information but await the main body next week. As we have said before judgement will be delayed until an assessment is made of what information has been withheld.

The **SCRO** have released little information despite us knowing that there are many letters and reports. What has happened to them remains to be seen and matters are in the hands of Shirley's legal team.

We are still in negotiation with the **Scottish Executive** to obtain the mass of information they should hold. It is clear from their initial response that matters will not be concluded within the statutory period and that they are considering withholding certain information under the claim of privilege or confidentiality. Once again we reserve judgement but fear that in private meetings decisions might be made that owe more to political expediency than freedom of information.

With the **Strathclyde Police Board** however things are much more advanced and they have already handed over many papers relating to Shirley's pension and other financial matters. Release of the main body of information requested – the secret internal report that cleared the SCRO experts of any wrong – has been refused on the grounds **there is no overriding public interest in its release.**

The correspondence in this connection is extremely interesting and is reproduced below in the interests of Freedom of Information and to assist others who might be involved in seeking information.

Correspondence

**Mr Mike Blair
Assistant Clerk
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South Beach Road
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E-mail: iain.mckie2@btinternet.com

11 January 2005.

Dear Mr Blair,

FREEDOM OF INFORMATION (SCOTLAND) ACT 2002

I wish under the terms of the above Act to request a copy of the following documents referred to in the attached letter of 21 March 2002 from Mr Andrew Brown then Chairman of the SCRO Executive Committee.

- The final report of the Investigating Officer to the Scrutiny Committee and all interim reports.

In addition could you also please supply:

- All papers, communications and documents relating to the appointment of the investigating officer including terms of reference, minutes of meetings, letters, memoranda and reports.

- All papers, communications and documents relating to the decisions of the Scrutiny Committee following on from the report or reports of the Investigating Officer including all minutes, letters, memoranda and reports.
- All papers, communications and documents relating to the establishment, work and conclusions of the Scrutiny Committee.
- All papers placed before the Joint Police Board or its individual members in connection with the work of the scrutiny committee.

In addition:

- All papers and documents held by or on behalf of the Joint Police Board or any of its members or officials in relation to the Shirley McKie case and in relation to any claims made by her.

I would like to receive this information by letter post within the statutory period.

I have made a similar request to the Scottish Executive Justice Department and SCRO.

Yours faithfully,

Iain A J McKie

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STRATHCLYDE JOINT POLICE BOARD

Glasgow City Council, City Chambers, Glasgow

Date 6 April 2005 Clerk: George Black

Mr Iain McKie

27 Donnini Court

South Beach Road

Ayr KA71JP

Dear Mr McKie

FREEDOM OF INFORMATION (SCOTLAND) ACT 2002

I refer to my letter of 7 March enclosing information which appears covered by your request and which may be released under the Freedom of Information (Scotland) Act 2002 (The Act”).

I now refer again to the terms of your letter of 11 January 2005.

Firstly I refer to the first four bullet points in your letter in which you request information in respect of an investigatory disciplinary process relating to employees of the Joint Board other than Shirley McKie. Your request is couched in the following terms:

- The final report of the Investigating Officer to the Scrutiny Committee and all interim reports.
- All papers, communications and documents relating to the appointment of the Investigating Officer including terms of reference, minutes of meetings, letters, memoranda and reports.
- All papers, communications and documents relating to the decisions of the Scrutiny Committee following on from the report or reports of the Investigating Officer including all minutes, letters, memoranda and reports.
- All papers, communications and documents relating to the establishment, work and conclusions of the Scrutiny Committee.

In respect of this information Strathclyde Joint Police Board is under two obligations. Firstly the Board, as employer, in terms of the implied condition in the contract of employment owes a duty of confidentiality to employees in respect of their personal employment circumstances including, and in particular, any circumstances surrounding potential disciplinary action being taken against them, Accordingly such information is exempt information in terms of Section 36(1) of the Act and it is not considered that there exists any public interest, as distinct from your own personal interest in this material, such as to outweigh the obligation to preserve the confidentiality for the employees of this material. Secondly the Board is subject to the obligations of the Data Protection Act 1998. The material relates to personal data relating to identifiable individuals and accumulated in connection with potential disciplinary action being taken in regard to them. Release of the information would be a release of data in contravention of the Data Protection principles. Accordingly such information is absolutely exempt information in terms of Section 38(1)(b) of the Act where the first condition referred to in that paragraph is satisfied by virtue of sub-section (2)(a)(i) of that section, and may not be released.

Secondly I refer to the fifth bullet point in your letter in which you request information in the following terms,

- All papers placed before the Joint Police Board or its individual members in connection with the work of the Scrutiny Committee.

All of this material, comprising reports to and minutes of the Board or its sub-committees, has already been provided to you. There was included with this material the "Ad hoc investigation and discipline procedure in relation to consideration of staff related issues arising from the alleged misidentification of fingerprints". This document was provided as it had been appended to a report submitted to a Board Sub-committee. I would draw your attention to this document as it sets out the structures and duties on parties implicit in your second, third and fourth bullet points.

Thirdly I refer to the sixth bullet point in your letter in which you request information in the following terms:

- All papers and documents held by or on behalf of the Joint Police Board or any of its members or officials in relation to the Shirley McKie case and in relation to any claims made by her.

In this connection there has already been provided to you:

(i) copies of all reports presented to and minutes of Strathclyde Joint Police Board or its Sub-committees relating to Shirley McKie or any claims made by her;

(ii) a copy of the Board's file in relation to the appeals taken by Shirley McKie under the Police Pension Regulations; and

(iii) a copy of the Board's file in relation to the application by Shirley McKie to the Board for legal assistance.

So far as I can see under this bullet point there remains only information relating to the action for damages amounting to £750,000 inter alia served by Shirley McKie on the Joint Board. The Board information falls into two categories. Correspondence between the Board and the solicitors appointed by it to defend the action and the adjustments to the action lodged in the Court of Session. So far as the latter category of information is concerned this is information already available to you and as such is absolutely exempt in terms of Section 25(1) of the Act. It also

comprises information contained in a document lodged with a court for the purposes of proceedings in a cause and as such is absolutely exempt in terms of Section 37(1)(a)(i) of the Act. In respect of the former category, that is, correspondence between the Board and the solicitors appointed by it to defend the action, there arises the confidentiality as between client and professional legal adviser and the exception contained in Section 36(1) of the Act applies. It is not considered that the public interest in this material, as distinct from your own personal interest in it, outweighs the obligation to preserve the confidentiality of this material.

As required by Section 19 of the Act I would advise you:

(a) that if you wish to complain about the handling by the Board of your request for information you should do so in writing to the Clerk, Strathclyde Joint Police Board, City Chambers, George Square, Glasgow G1 2DU.

(b) that if you are dissatisfied by the way the Board has dealt with your request you may, in accordance with the provisions of Section 20 of the Act require it to review its actions and decisions in relation to your request; and

(c) of your right, in accordance with the provisions of Section of the Act, to make application to the Scottish Information Commissioner, Kinburn Castle, Doubledykes Road, St Andrew KY16 9DS for a decision whether your request has been dealt with in accordance with Part I of the Act.

If you have any further queries concerning this process please do not hesitate to contact me.

Yours sincerely

MIKE BLAIR

Assistant Clerk

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justicefor shirley@btinternet.com

Your Ref: PB/MB/CW/pb/096

22 April 2005

Dear Mr Blair,

Thank you for your letter of 6 April 2005.

I attach for your information some selective extracts from the **Code of Practice** issued by the Scottish Ministers in relation to Local Authority's implementation of the Freedom of Information (Scotland) Act. This is to challenge what I believe to be an extremely unhelpful response based on an overly legalistic interpretation of the Act that at no point addresses the spirit of the Act.

The main body of information requested was related to the internal report on SCRO commissioned by the Police Board that cleared the experts and supervisors of any wrongdoing.

Your report effectively clears the experts and their supervisors and without one word of public explanation concludes:

- *'That no matters of misconduct or lack of capability have taken place in the work surrounding the ..'(the McKie and Ross marks)*
- *'It is recommended that all four experts be returned to their normal positions at SCRO Fingerprint Bureau without any disciplinary action being taken.'*
- *'It is recommended that the two managers presently placed upon non-operational duties be returned to their full role immediately.'*
- *'In the light of the above findings it is further recommended that no further action be taken in relation to (two names but unrelated officers) concerning their work with..' (Ross print)*

In justifying your decision not to release the report you state that the Board, *'owes a duty of responsibility to employees in respect of their personal employment circumstances including and in particular any circumstances surrounding potential disciplinary action being taken against them.'*

You go on to make the judgement, *'It is not considered that there exists any public interest, as distinct from your own personal interest in this material, such as to outweigh the obligation to preserve the confidentiality for the employees of this material.'*

I have attached for your information a statement of the facts from Shirley's case. All are verifiable and have been independently adduced and individually and collectively clearly point to incompetence at best and criminality at worst within SCRO. It seems to me that the 'public interest' will only be served when the body of evidence that led to the rejection of these public findings is released.

I fail to see how you can seek to argue against 'public interest' and justify withholding the release of a secret report that in clearing SCRO flies in the face of court and enquiry findings and the recommendation of a major police enquiry to prosecute experts within SCRO. I would suggest that as a public body you have a responsibility to the public to provide an explanation for this extraordinary conclusion.

I would remind you what the code of practice says, *'in relation to most exempt information, the information should only be withheld if the public interest in withholding it is greater than the public interest in releasing it'*

It is clear to me that the public interest can only be served by releasing the report.

The public has a right to know on what basis the other findings were dismissed and what evidence led the enquiry to recommend allowing the experts to return to jobs where they would be adducing and preparing evidence that could lead to people being charged with crimes and incarcerated.

I am requesting access to the evidence, thought processes, procedures and enquiry processes behind the enquiry decision. The identities of the individuals are secondary although they are already in the public arena. In any case as the enquiry totally cleared them of any wrongdoing I must assume that there is nothing detrimental to any of them contained in the report.

In addition I believe it is quite improper of you to state, *'It is not considered that there exists any public interest, as distinct from your own personal interest in this material, such as to outweigh the obligation to preserve the confidentiality for the employees of this material.'*

The code clearly states:

*'Staff should also be aware that, in giving assistance, an applicant's reasons for requesting the information are not relevant. Applicants should not be given the impression that they are obliged to disclose the nature of their interest **or that they will be treated differently if they do so. (my emphasis)***

How can you then in making your decision not to release the report weigh the public interest against my interest – an interest that should be irrelevant to your decision?

Many 'public interest' questions arise that can only be answered by access to the report.

- Were the findings of the three month long official police enquiry ordered by ACPOS and the Lord Advocate and the findings of other enquiries that found the SCRO experts culpable taken into consideration by the report's authors?
- How could the Police recommend prosecution of the experts on the one hand and a disciplinary enquiry find no evidence of any wrongdoing?
- Given that the secret findings were so at odds with other published enquiries and that similar secret enquiries might be held in future is it important that the public is aware of the procedures adopted, enquiries made and evidence heard?
- Does failing to release the findings of a secret internal report commissioned by the Police Board threaten a miscarriage of justice against my daughter?
- Given that the Shirley McKie case has been such a high profile case for 8 years and she has had to face numerous open court and public enquiries into her actions have her human rights been violated by this refusal to openly show on what basis this enquiry made its recommendations?
- Why has the report not been released to the Police Board members in whose name it was commissioned given that its contents and findings could have such far reaching effects for Shirley McKie and any other employees of the authority enquired into in the future?
- Should any report that appears to reject the findings of court, police and public enquiries be kept secret?

I maintain that it is clearly in the public interest for this report to be released to me and that should this continue to be refused the Strathclyde Police Board are acting against the word and spirit of the Freedom of Information (Scotland) Act 2002.

I consider your refusal to release information because of your obligations under the Data Protection Act falls because of the public interest argument and because any information on individuals that can legitimately be refused can be blanked out.

Little if any of the information gathered for this enquiry comes from the personal or others files held previously by the Authority and was in fact new material gathered specifically for the discipline enquiry. I fail to see how confidentiality can be claimed when the specific remit of the enquiry is to ascertain if discipline offences have been committed.

I would also advise you that in general terms I appeal your other refusals to release information relating to the ongoing action for damages. There seems to me an overriding need to have some

degree of clarity about how the Board's decisions have been and are being made and this will only occur if all documentation is released.

In conclusion I feel obliged to express my amazement that amongst all the documentation supplied there is not one copy e-mail. I absolutely refuse to believe that in this electronic age no e-mails concerning my daughter have been exchanged. This fact only serves to deepen my belief that the Authority is not being open with me and far from seeking to assist my Freedom of Information rights I suspect that they are being deliberately sabotaged.

If this proves to be wrong I will be only too pleased to withdraw and apologise.

Please review all of your actions and decisions in relations to my requests and be assured I will be making application to the Commissioner complaining about your handling of my request should you maintain your present stance.

Yours sincerely,

Iain A J McKie

APPENDICES:

Selected Extracts: 'Code of Practice on the discharge of functions by public authorities under the Freedom of Information (Scotland) Act 2002.'

- The Ministers, 'consider that the Act will assist in fostering greater openness and transparency across the Scottish public sector'.
- They go on to say, 'the information should only be withheld if the public interest in withholding it is greater than the public interest in releasing it'.
(2(1)(b))
Staff should also be aware that, in giving assistance, an applicant's reasons for requesting the information are not relevant. Applicants should not be given the impression that they are obliged to disclose the nature of their interest or that they will be treated differently if they do so.
- 'Where the authority considers that substantial prejudice would result from disclosure of the requested information, it will still be required to consider the **public interest** in making the material available. The "public interest" has been described as something that is of serious concern or benefit to the public not merely of individual interest. It has also been stated that public interest does not mean "of interest to the public" but "in the interest of the public". The term is not defined in the Act and may change over time and according to the circumstances of each situation.'
- 'It is difficult to set out a definitive list; however, amongst the factors which may inform a decision about the public interest are:- (edited)
 - the general public interest that information is accessible i.e. whether disclosure would enhance scrutiny of decision-making processes and thereby improve accountability and participation;
 - whether disclosure would contribute to the administration of justice and enforcement of the law including the prevention or detection of crime or the apprehension or prosecution of offenders;'

- *whether disclosure would contribute to ensuring that any public authority with regulatory responsibilities is adequately discharging its functions;*
 - *whether disclosure would ensure fairness in relation to applications or complaints, reveal malpractice or enable the correction of misleading claims;*
 - *whether disclosure would contribute to a debate on a matter of public interest'*
- *'In deciding whether a disclosure is in the public interest, authorities should not take into account:*
 - *possible embarrassment of government or other public authority officials.'*

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'Shirley McKie : Statement of Facts – March 2005.

- **January 1997.** Detective Constable Shirley McKie, a murder enquiry officer, is accused of leaving her fingerprint in the home of murder victim Marion Ross having been instructed not to enter the house. She denies that the fingerprint is hers. The case against David Asbury suspected of the murder depends almost entirely on fingerprint evidence as identified by the same Scottish Criminal Records Office (SCRO) experts who claimed Shirley had left a print in the house.
- **February 1997.** In the face of continual accusations of lying from her superiors Shirley goes off sick. Over the following months and years is depressed and suffers panic attacks. Still on medication, in counselling and seeing a psychologist.
- **February to May 1997.** Subjected to over 12 interviews with senior Police officers and the Procurator Fiscal all seeking to convince Shirley she was wrong. Visited at home given flowers, wine and chocolates and suggested she might like to change her story. Clear that unless she admits she was in the murder house fingerprint evidence in the case against David Asbury will be in doubt. Treated in a bullying and oppressive manner and shunned by colleagues.
- **July 1997.** Professor Colin Espie one of Scotland's foremost Clinical Psychologists, at the request of the Police, reports on Shirley's state of mind, *'First, (that) she was psychologically normal; and second (that) she was telling the truth.'* When he phoned Strathclyde Police Medical Officer he said. *'What if the fingerprint experts are wrong?'* The Professor was told that *"this was regarded as an 'unthinkable' explanation, because of its implications."*
- **March 1998.** Shirley arrested in her own home in a "dawn raid" Watched by police officers doing the toilet, showering and dressing, Taken to Ayr Police Office, 'strip searched' and then locked up in Glasgow. Charged with perjury. Refused legal assistance by Police to fight case. Decision overturned on appeal to the Local Authority.
- **May, 1999.** Shirley unanimously cleared of charges of Perjury. American Defence experts prove SCRO identification was wrong. Prosecution forensic evidence presented by a scenes of crime officer proves that the mark could not have been left by Shirley over the period stated. Lord Johnston states. *"Shirley McKie.....personally I would like to extend to you my respect for the obvious courage and dignity which you have shown throughout this nightmareI very much hope you can put it behind you. I wish you all the best."*
- **December 1999.** Shirley discharged from Police on medical grounds. Successfully fights Police decision not to give her full pension.
- **January 2000.** 14 Lothian and Borders Experts write to the Justice Minister: *'At best the apparent 'misidentification' is a display of gross incompetence by not one but several experts within the bureau. At worst it bears all the hallmarks of a conspiracy of a nature unparalleled in the history of fingerprints.'*
- **June 2000.** Minister for Justice Jim Wallace makes an emergency statement to the Scottish Parliament in the light of an interim report on SCRO. Apologises to Shirley and confirms that the print was not hers.

- **June 2000.** Police Major Inquiry team, under Deputy Chief Constable of Tayside, established to investigate the case and to consider possible criminal prosecution of those responsible. Report recommends prosecution of SCRO experts. Lord Advocate refuses to take action.
- **August 2000.** Her Majesty's Chief Inspector of Constabulary Report concludes: *'the mark was not made by Shirley McKie. It is (the independent experts) view that decision could have been reached at an early point in the comparison process.'* Strong criticisms made of SCRO and 25 recommendations and 20 suggestions made to improve performance.
- **May 2001.** Left with no further options Shirley raises actions for damages against Strathclyde Police and the Scottish Ministers, who – after much debate and delay – accept vicarious responsibility for SCRO.
- **2001 – present.** A number of international fingerprint conferences in various countries feature discussion on what is now known as the “Scotch Botch”. SCRO officers responsible are suspended, re-instated cleared of wrongdoing by an internal enquiry and no disciplinary action is taken against them.
- **February 2002.** The Lord Advocate Colin Boyd states, *'The BBC Frontline Scotland programme on the case of Shirley McKie..... helped uncover what where at best serious defects in the analysis of fingerprinting at the Scottish Criminal Records Office and forced the authorities, including myself, to act to ensure that such a case would not happen again.'*
- **May 2002.** Statement by World Experts.171 experts from 18 countries including 26 USA states agree that the SCRO is wrong in their identification of Shirley's fingerprint. Hundreds of other experts from across the world join in the condemnation of SCRO via the internet.
- **August 2002.** David Asbury Conviction Quashed: The Crown offers no evidence at the appeal and accepts that *'The fingerprint evidence was unreliable'*
- **Sept. 2002.** Petition to the Scottish Parliament by 4 world renowned experts seeks an enquiry into Openness and Accountability within SCRO. To date no action has been taken.
- **Sept. 2002** New witnesses traced who are prepared to testify that: *'In 1997 5 SCRO experts disagreed with identification. This information was hidden. The Police Major Enquiry Team established by ACPOS and the Lord Advocate recommended SCRO experts and possibly others face criminal prosecution.'* This information, though known to the Lord Advocate, was hidden from Shirley and her legal team. Lord Advocate refuses to act against the SCRO.
- **December 2003.** Scottish Ministers criticised for their case by Lord Wheatley in a detailed judgement which refutes most of the Executive's arguments. Wheatley allows the case against the Ministers to go to a civil hearing and indicates dissatisfaction with the Minister's position on key issues including the attempt to claim that the print was Shirley's – despite the apology from Jim Wallace and the clear statement in the HMCIC report.
- **February 2004.** Scottish Ministers lodge an appeal against the Wheatley judgement at the last possible minute. Appeal is eventually withdrawn.
- **March 2004.** Strathclyde Joint Police Board commence attempt to recover costs of their case from Shirley threatening her with bankruptcy and the loss of her house. Over £13,000 in costs eventually paid by an anonymous donor.
- **May 2004.** General Assembly of the Church of Scotland calls on the Scottish executive to treat Shirley with justice.
- **September 2004.** New technology from USA proves yet again that SCRO identification was wrong.
- **December 2004.** After Scottish Ministers appeal is withdrawn a 5 week civil hearing in the Court of Session, Edinburgh is set to start on 6 February 2006.