

Decision Notice



Decision 073/2008 Mr Pritam Chita and Dundee City Council

Information relating to a planning application

Reference No: 200601880
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Summary

Mr Chita requested information relating to a specific planning application he had made. Dundee City Council (the Council) released some of the information it held about the application, but withheld other information from him. Following a review, Mr Chita remained dissatisfied and applied to the Commissioner for a decision.

Following an investigation, the Commissioner found that the Council had partially failed to deal with Mr Chita's request for information in accordance with Part 1 of the Freedom of Information (Scotland) Act 2002 (FOISA). While he considered that details of the complaints made about the planning application should not be disclosed under FOISA, he considered that the Council's internal correspondence on this matter should generally be disclosed, as should redacted responses to the complaints.

Relevant statutory provisions and other sources

Freedom of Information (Scotland) Act 2002 (FOISA): sections 1(1) (General entitlement); 2(1) (Effect of exemptions); 30(b) and (c) (Prejudice to effective conduct of public affairs); 35(1)(g), (2)(a) and (c) (Law enforcement) and 38(1)(b), (2)(a)(i) and (b) (Personal information)

The Environmental Information (Scotland) Regulations 2004 (the EIRs): regulation 2(1) (Interpretation – definition of “environmental information”)

The Town and Country Planning (Scotland) Act 1997 (Town and Country Planning Act): sections 71 (Order requiring discontinuance of use or alteration or removal of buildings or works) and 72 (Confirmation by Secretary of State of section 71 orders)

Local Government (Scotland) Act 1973 (the 1973 Act): paragraph 1, 12 and 13 of Part 1 of Schedule 7A

Data Protection Act 1998 (the DPA): section 1(1) (Basic interpretative provisions – definition of “personal data”) and Schedule 1 The data protection principles, Part 1 The principles (the first condition)

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



Background

1. On 2 August 2006, Mr Chita wrote to the Council requesting the following information:
Copies of all documentation and communication, whether electronic or paper based, that in any way discussed or referred to (directly or indirectly), or were in any way associated with or passed comment on, the above planning application [which Mr Chita identified to the Council] and subsequent proceedings, complaints, issues and discussions that relate to it; also minutes of meetings where the application and subsequent proceedings were discussed by any council officials (including elected councillors).

In his request, Mr Chita specified the time period he expected the Council to consider in relation to his request, and suggested that the information would relate in particular to communications involving certain specified officials and councillors.
2. The Council responded on 31 August 2006. In its response, the Council provided Mr Chita with some information which would address his request. It withheld other information which it understood Mr Chita already had, but indicated that it would provide Mr Chita with copies of the information if this was not the case. The Council also relied on exemptions in sections 30, 35 and 38 of FOISA to withhold other information from Mr Chita.
3. Mr Chita wrote to the Council on 30 September 2006, requesting that it review its decision. In particular, Mr Chita drew the Council's attention to his view that it would be in the public interest to release information regarding the process by which a Council withdrew planning permission which had already been granted under delegated powers.
4. The Council notified Mr Chita of the outcome of its review on 1 November 2006, advising him that it had upheld its original decision.
5. On 22 November 2006, Mr Chita wrote to the Commissioner, stating that he was dissatisfied with the outcome of the Council's review and applying for a decision in terms of section 47(1) of FOISA.
6. The application was validated by establishing that Mr Chita 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.



Investigation

7. On 16 January 2007, the Commissioner notified the Council in writing that an application had been received from Mr Chita and invited the Council to comment on the application in terms of section 49(3)(a) of FOISA. The Council was asked to provide copies of the information withheld and to justify its reliance on the exemptions it had claimed. The Council responded with the information requested and the case was then allocated to an investigating officer.
8. The investigating officer subsequently contacted the Council during the investigation, asking it to provide further comments on the application and to respond to specific questions on the application.

Submissions from the Council

9. In its submissions, the Council advised that it held one file of information relating to Mr Chita's planning application, a small part of which had been disclosed to Mr Chita in response to his information request. The Council provided the Commissioner with copies of the information which had been disclosed to Mr Chita, along with copies of the information which had been withheld from him.
10. The Council also advised the Commissioner that it had withheld from Mr Chita certain information contained within its file, as it was of the view that this information (which either originated from Mr Chita or his agent, or had been sent by the Council to Mr Chita or his agent) was information Mr Chita would already have. The Council did indicate, however, that it had invited Mr Chita to let it know if he did not have any of this information and confirmed that it would provide it to him if required. However, it had received nothing from Mr Chita to suggest that he lacked or required this information. Given that Mr Chita did not ask the Council to provide him with this information on either occasion he was offered it, the Commissioner has proceeded on the basis that Mr Chita does not require this information and that this information does not form part of Mr Chita's application to him.
11. In relation to information withheld from Mr Chita, the Council advised that it was relying on the following exemptions under FOISA (not all of the exemptions were applied to every document – see Appendix):
 - Section 30(b)(i) – Prejudice to effective conduct of public affairs (free and frank provision of advice)
 - Section 30(b)(ii) – Prejudice to effective conduct of public affairs (free and frank exchange of views for the purposes of deliberation)
 - Section 30(c) – Prejudice to the effective conduct of public affairs (otherwise than under section 30(a) or (b))
 - Section 35(1)(g) – Law enforcement
 - Section 38(1)(b) – Personal information



12. The Commissioner considers the Council's reliance on these exemptions in FOISA later in this decision notice, in the section on analysis and findings.

Submissions from the applicant

13. In his application to the Commissioner, Mr Chita claimed that the decision by the Council to refer his amended planning approval back to the Council's Development Quality Committee, which subsequently withdrew the planning permission, was extremely rare and unheard of in planning circles. Mr Chita commented that the Council's Director of Planning had approved the original decision, and that in referring the matter back to the Council's Development Quality Committee, the Chief Executive had overruled the advice of the Director of Planning.
14. Mr Chita also argued that the Council's refusal to provide evidence on which the Chief Executive had based this decision (which he believed to have been based not entirely on planning considerations) was contrary to the basic tenets of transparency, openness and accountability under FOISA. In addition, he did not consider the decision to refuse his request for information to have been impartial.
15. Mr Chita has submitted that he believed there to be an overwhelming public interest in determining exactly how and why a legitimately approved planning permission decision could be overturned.

Commissioner's analysis and findings

16. In coming to a decision on this matter, the Commissioner has considered all of the information and submissions that have been presented to him by both Mr Chita and the Council and is satisfied that no matter of relevance has been overlooked.

The information requested by Mr Chita

17. Mr Chita was originally granted planning permission for developments to his property in June 2003. Further planning permission was granted to Mr Chita in February 2006 for the installation of windows, etc. in the garage. This permission was then withdrawn by the Council in June 2006. It is information concerning the decision by the Council to withdraw this planning permission that Mr Chita is seeking.

Timing, etc.

18. Of the documents withheld from Mr Chita, the Commissioner considers that one of these (document 1) falls outwith the scope of Mr Chita's request, as it is outwith the time period specified by Mr Chita in his information request. (The document is dated 27 November 2006 and Mr Chita's request is limited to the period of 1 August 2005 to 31 July 2006.)



19. As noted above, Mr Chita made his information request to the Council on 2 August 2006 and submitted his request for review on 30 September 2006. The Council subsequently carried out a review and advised Mr Chita of the outcome of the review on 1 November 2006. Mr Chita submitted an application to the Commissioner for a decision on 22 November 2006.
20. On 16 November 2006, subsequent to the outcome of the review being issued, but prior to Mr Chita making an application to the Commissioner, a Reporter from the then Scottish Executive Inquiry Reporters Unit held a hearing under section 72 of the Town and Country Planning Act. The Reporter's decision was issued on 17 January 2007.
21. The Reporter's decision (a copy of which was provided to Mr Chita), and which the Commissioner understands to be in the public domain, names certain of the individuals who have complained about Mr Chita as they were parties to the hearing. Indeed, some of the documents which have been withheld from Mr Chita were lodged as productions at the hearing. It is therefore the case that at the time of his application, Mr Chita will have had in his possession some of the information which was withheld from him by the Council, the disclosure of which must be considered as part of the Commissioner's investigation.
22. There are two points to be made about this. Firstly, as has been made clear by the Court of Session, any issue of alleged failure by a public authority to comply with its statutory obligations falls to be determined by the Commissioner as at the date on which the public authority advises the applicant of the outcome of its review.¹ This means that the Commissioner must consider the position as at 1 November 2006 and not at a later date.
23. Secondly, although Mr Chita will now have some of the information which was withheld from him by the Council (such as letters of complaint), the Commissioner has to consider whether this information should be disclosed under FOISA, i.e. into the general public domain, and not to Mr Chita alone.

Possible application of the EIRs

24. Given that the information relates to planning matters, which would normally suggest that information is environmental information, the Commissioner considered whether Mr Chita's request should have been dealt with under the EIRs.
25. During the investigation, the Commissioner asked the Council whether it considered that the information was properly environmental information in line with the definition given in regulation 2 of the EIRs (see Appendix) and whether Mr Chita's request should have been dealt with in line with the EIRs. While the response from the Council was fairly non-committal as to whether the information was or was not environmental information, the Council did provide detailed submissions on the exceptions contained in the EIRs in the event that the Commissioner did decide that the information was environmental information.

¹ Scottish Ministers v Scottish Information Commissioner [2007] SC 330



26. Having considered the information more fully in the light of the definition in regulation 2(1), the Commissioner does not consider that it falls within the definition of environmental information. The information relates to the alteration of an existing building and the Commissioner does not consider, e.g., that it relates to a measure affecting or likely to affect the elements and factors referred to in paragraphs (a) or (b) of the definition of environmental information or that it relates to the state of a built structure inasmuch as it is or may be affected by the state of the elements of the environment referred to in paragraph (a) of the definition or, through those elements, by any of the matters referred to in paragraphs (b) and (c) of the definition.
27. Therefore, the Commissioner concludes that the Council was correct to consider Mr Chita's application under FOISA alone.

Section 35(1)(g) – Law enforcement

28. Under section 35(1)(g) of FOISA, information is exempt information if its disclosure would, or would be likely to, prejudice substantially the exercise by any public authority of its functions for any of the purposes listed in section 35(2) of FOISA. The Council considered that the exercise of two of its functions would, or would be likely to be, substantially prejudiced should information be disclosed, i.e., to ascertain whether a person has failed to comply with the law (section 35(2)(a)) and to ascertain whether circumstances which would justify regulatory action in pursuance of any enactment may exist or arise (section 35(2)(c)).
29. The exemptions contained within section 35 are all qualified exemptions in that they are subject to the public interest test required by section 2(1)(b) of FOISA. In addition, the exemptions can only apply where substantial prejudice would, or would be likely to, occur as a result of the disclosure of the information. There is no definition in FOISA of what is deemed to be substantial prejudice, but the Commissioner considers that for an authority to be able to show that release of the information would, or would be likely to be, substantially prejudicial, it would need to show that there was a real risk or likelihood of actual harm being caused by disclosing the information, at some time in the near (certainly the foreseeable) future, not simply that harm was a remote possibility. The authority would also have to show that the harm caused by such a release would (or would be likely to) be of real and demonstrable significance.
30. When considering the use of the exemption in section 35(1)(g), the Commissioner must therefore consider three separate matters. First of all, he must consider whether the Council has a function in relation to one or more of the purposes mentioned in section 35(2). If he is satisfied that it does, he must go on to consider whether disclosure of the information would, or would be likely to, prejudice substantially the Council's ability to exercise the function(s). Even where he is satisfied that it would, he must go on to consider whether, in all the circumstances of the case, the public interest in disclosing the information is outweighed by that in maintaining the exemption. Unless he finds that it is, he must order release of the information.



Section 35(1)(g) (read with section 35(2)(a) – failure to comply with the law)

31. The Council has relied on the exemption in section 35(2)(a) for withholding the information in all of the documents it has withheld from Mr Chita on the basis that the disclosure of the information would prejudice substantially the Council from carrying out its functions as to ascertaining whether a person has failed to comply with the law.
32. The Council believes that citizens who make complaints on planning matters do not expect to have their identities disclosed to the person about whom they are making the complaint. The Council contend that citizens would be less likely to complain if their identities were to be disclosed, and as the Council relies on citizens to assist it in carrying out its functions by making such complaints, it would not, in its view, be in the public interest to do anything (in particular disclosing their identities) which would dissuade them from doing so. Also, when considering internal Council communications, etc., the Council also argue that it is essential to the operation of local authorities that officers of the local authority are able to give professional advice to other Council officers and Councillors on a confidential basis where appropriate. The Council asserts that release of the withheld information to Mr Chita would go against the ability to do that.
33. In its submissions, the Council advised that the information contained in the withheld documents was gathered for the purpose of the Council's functions under sections 71 and 72 of the Town and Country Planning Act.
34. Having considering the terms of sections 71 and 72 of the Town and Country Planning Act, the Commissioner is satisfied that the Council does indeed have a statutory function in relation to ascertaining whether a person has failed to comply with the law. He is also satisfied that the Council was exercising this function in relation to information requested by Mr Chita.
35. As noted above, although the Commissioner is satisfied that the Council was exercising its functions under the Town and Country Planning Act, he must also be satisfied that the release of the withheld information would, or would be likely to, prejudice substantially the exercise of this function.
36. The information withheld from Mr Chita can be divided into five subcategories of documents:
 - letters and emails of complaint to the Council from third parties regarding Mr Chita's development work
 - internal correspondence within the Council relating to Mr Chita's planning permission
 - letters from the Council responding to communications from complainants
 - a notice to attend a meeting and the document presented at that Council meeting
 - photographs of Mr Chita's property (submitted by third parties)



37. Having reviewed the information withheld from Mr Chita and having considering the submissions made by both the Council and Mr Chita, the Commissioner accepts that in this case the disclosure of documents which constitute complaints to the Council from third parties regarding Mr Chita's development work would, or would be likely to, prejudice substantially the Council from being able to exercise its functions in relation to the Town and Country Planning Act, in respect of ascertaining whether a person has failed to comply with the law. This conclusion also applies to photographs of Mr Chita's property received from complainers, on the basis that the vantage point from which the photographs are taken could identify the location and identity of the complainer. However, he considers that the disclosure of the Council's responses to the complaints would not, or would not be likely to, prejudice substantially the exercise of those functions, provided that the responses are redacted so that information which identifies the complainers is not disclosed.
38. The Commissioner accepts the submissions made by the Council that it relies on complaints being made by third parties in order for it to be made aware of matters that it should take action on. He accepts that those third parties who have corresponded with the Council regarding Mr Chita's developments would not have an expectation that their complaints and personal details and that the disclosure of this information would severely disrupt a valuable source of information to the Council. However, he does not accept that the disclosure of the responses would have the effect of dissuading such individuals from informing the Council of potential issues in future, provided that they are redacted as mentioned above.
39. Nor does the Commissioner accept that disclosure of the information contained in the documents relating to internal correspondence within the Council, the notice to attend the meeting, and the document presented to the Council at the relevant meeting (which is discussed in more detail at paragraph 69 below) would, or would be likely to, prejudice substantially the Council from being able to carry out its functions under the Town and Country Planning Act. The information contained within such documents is of a routine nature and does not, in the Commissioner's view, reveal any matters which would, or would be likely to, cause substantial prejudice to the Council in exercising its functions in future. Furthermore, it is clear that the Council had exercised those functions as they relate to Mr Chita's planning permission and had done so by the time that Mr Chita made his request. In the light of these reasons, the Commissioner cannot uphold the assertion by the Council that disclosure of this information would, or would be likely to, prejudice substantially the exercise by the Council, of its function under the Town and Country Planning Act, in respect of ascertaining whether a person has failed to comply with the law.
40. As the Commissioner is satisfied that some of the information withheld by the Council is exempt in terms of section 35(1)(g) (as read with section 35(2)(a) of FOISA), he is required to consider the application of the public interest test in section 2(1)(b) to this information.
41. However, as the Council has also relied on the exemption in section 35(1)(g) (as read with section 35(2)(c)) of FOISA for withholding this information from Mr Chita, he will go on to consider the application of that exemption, before addressing the public interest test.



Section 35(1)(g) (read with section 35(2)(c) – ascertaining whether regulatory action is justified)

42. The Council relied on largely the same arguments as those set out at paragraph 32 above for relying on this exemption. The Council has also advised that Council officers who provide advice to other Council officers, or elected members, regarding whether circumstances exist which would justify regulatory action being taken, would not expect that their advice or views would be disclosed to the person whose conduct was at issue and that if this information were to be disclosed then they would be inhibited from giving that advice or views in future.
43. The Commissioner is satisfied that the Council has a statutory function in relation to ascertaining whether circumstances which would justify regulatory action in pursuance of an enactment exist or may arise under the Town and Country Planning Act. He is also satisfied that the Council was exercising this function in relation to information that has been requested by Mr Chita.
44. Having reviewed the information withheld from Mr Chita under this exemption and having considered the submissions made by the Council and Mr Chita, the Commissioner accepts, for the same reasons as detailed at paragraph 38 above, that release of the documents which comprise of complaints to the Council, photographs of Mr Chita's property would, or would be likely to, prejudice substantially the Council's ability to exercise its functions in respect of determining whether circumstances which would justify regulatory action in pursuance of the Town and Country Planning Act exist or may arise. However, he does not accept that the disclosure of redacted responses from the Council would have such an affect, again for the reasons set out above.
45. For the same reasons as the Commissioner has set out at paragraph 39 above, he does not accept that release of the information contained in the documents which relate to internal communications within the Council, the notice to attend the meeting and the supporting document, would, or would be likely to, prejudice substantially the Council in exercising its statutory functions. It is apparent from the documents withheld that any action that the Council could take which would be deemed to be appropriate regulatory action had been taken by the time that Mr Chita made his request. As a result, he does not uphold the Council's reliance on the exemption in section 35(1)(g) as read with section 35(2)(c) in respect of those documents.
46. As the Commissioner is satisfied that some of the information is exempt under section 35(1)(g), he is required to consider the application of the public interest test required by section 2(1)(b) to this information.

Public interest test

47. The Commissioner considers that there is a general public interest in scrutinising the processes by which local authorities carry out their functions. This ensures that the local authority is accountable and transparent in its actions. However, this general public interest in disclosure has to be weighed against other issues.



48. Mr Chita clearly has an interest in receiving the information he has asked for, given that it relates to development work to his property. Mr Chita has made it clear in his application to the Commissioner that, in his view, the refusal by the Council to provide evidence on which the Council's Chief Executive based his decision is contrary to the basic tenets of transparency, openness and accountability under FOISA. Mr Chita is also concerned that the decision to refuse his request for information was not impartial.
49. Mr Chita believes that there is an overwhelming public interest in determining exactly how and why a legitimately approved planning permission decision can be overturned.
50. The Council has considered the withheld information against a list of illustrative factors contained in the version of the Commissioner's briefing on the application of the public interest test which existed at the time of Mr Chita's request. The Council has concluded that on balance the public interest in disclosure is outweighed by that in maintaining the exemptions.
51. The Council comments that disclosure of the information would not enhance the scrutiny of the decision making process or improve accountability or participation. The Council has also indicated that disclosure of the requested information would not contribute to the administration of justice or the enforcement of law, and that release would not, in its view, contribute to ensuring that a public authority with regulatory responsibilities is adequately discharging its functions.
52. The Council has also argued that, given that the matter was considered at a hearing by a Reporter (see paragraph 20 et seq above), the public interest in this matter has already been addressed by the involvement of the Reporter.
53. As has already been indicated, while it is clear that Mr Chita has an interest in receiving the documents withheld by the Council, it is not just Mr Chita's interest that the Commissioner must take into account when considering the public interest test in section 2(1)(b) of FOISA, but the wider public interest.
54. The Commissioner accepts the view expressed by Mr Chita that there is a public interest in understanding why the Council overturned planning permission which had already been granted, particularly, given that this is not a common occurrence. However, the Commissioner takes the view that the disclosure of the information which he does not consider to be exempt under section 35 would satisfy this public interest.
55. The Commissioner accepts that the individuals who wrote to the Council regarding Mr Chita's development work would not expect that their personal details would be disclosed into the public domain, and may be discouraged from providing information as a result. As the Council relies on this type and source of information to carry out its functions, this would not be in the public interest. He therefore agrees with the Council that, in all the circumstances of the case, the public interest in disclosing the letters of complaints, the photographs of Mr Chita's property and those parts of the responses from the Council to the complainers which identify the complainers is outweighed by the public interest in maintaining the exemption in section 35(1)(g) (as read with both section 35(2)(a) and section 35(2)(c)), as to do so is likely to deter individuals from giving such information to the Council in future.



56. A summary of the Commissioner's findings on section 35(1)(g) is set out in the Schedule of documents attached to this Decision. The Schedule forms part of this Decision.
57. As noted above, the Council has also applied other exemptions to the information which it withheld from Mr Chita. Where the Commissioner has already found that information is exempt (and has decided that the exemption should be maintained), he will not go on to consider whether any of the other exemptions cited by the Council apply to that information.

Section 30(b) and (c) – Prejudice to the effective conduct of public affairs

58. As with section 35, the exemptions in section 30(b) and (c) of FOISA are qualified exemptions, in that they are subject to the public interest test required by section 2(1)(b) of FOISA.
59. In order for the Council to be able to rely on the exemptions laid down in section 30(b) of FOISA it would have to show that the disclosure of the information would, or would be likely to, inhibit substantially the free and frank provision of advice (section 30(b)(i)) or the free and frank exchange of views for the purposes of deliberation (section 30(b)(ii)).
60. As the Commissioner has made clear in previous decisions, he considers that the standard to be met in applying these tests is high. The chief consideration is not whether the information constitutes advice or opinion, but whether disclosure of the information would, or would be likely to, inhibit substantially the provision of advice or exchange of views. The Commissioner takes the view that in this context "inhibit" means to restrain, decrease or suppress the freedom with which advice is given, and opinions or options are expressed.
61. When considering the application of these exemptions, each request must be considered on a case by case basis, taking into account the effects anticipated from the release of the particular information involved. E.g., this would involve considering:
 - the nature of the information
 - the subject matter of the information
 - the manner in which advice or exchange of views are expressed
 - the timing of the release (releasing information while a decision is being reached and on which further views are being sought may be more substantially inhibiting than once a decision has been reached)
62. Section 30(c) of FOISA exempts information which would otherwise prejudice substantially, or be likely to prejudice substantially, the effective conduct of public affairs. The use of the word "otherwise" in this section highlights that the type of prejudice which must occur (or be likely to occur) for this particular exemption to apply must differ from the inhibitions covered by sections 30(a) and (b).



63. As the Commissioner has stated in previous decisions, he expects any public authority citing this exemption to show what specific harm would be caused to the conduct of public affairs by disclosure of this information. Any damage caused by release of this information would have to be real or very likely, not hypothetical. The harm caused must be significant and not marginal.
64. The Council relied on the exemptions in sections 30(b)(i), 30(b)(ii) and 30(c) of FOISA for withholding the information in the documents which relate to internal communications within the Council, the notice to attend the meeting, the document which was laid before those Council officials and Councillors who attended the meeting, i.e. documents 2 to 4, 9 to 11, 22, 30 to 32 and 53.
65. The Council provided combined submissions in support of its reliance on the exemptions in sections 30(b)(i), 30(b)(ii) and 30(c) of FOISA to the Commissioner. The Commissioner will consider the Council's reliance on the exemptions in sections 30(b)(i) and 30(b)(ii) of FOISA first.

Sections 30(b)(i) and 30(b)(ii)

66. Having taken into account the submissions made by the Council, together with the contents of information withheld, the Commissioner is not satisfied that disclosure of the information would, or would be likely to, inhibit substantially either the free and frank provision of advice or the free and frank exchange of views for the purposes of deliberation.
67. It is clear from reading the information contained within the above documents that the exchanges which are recorded are of a routine nature and relate to the work of Council staff in their professional roles. They do not reveal any comments which are particularly sensitive or controversial. Any action available to the Council regarding Mr Chita's planning permission had been taken prior to Mr Chita submitting his information request.
68. The Commissioner cannot accept that release of this information 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 in relation to this matter. Disclosure of this information would not inhibit Council officers from recording such information and communications in future given that this is the role that they have been employed to carry out by the Council. For them to refuse to provide or record this advice in future would be contrary to this role.



69. In its submissions, the Council was particularly concerned about the “confidential advice note” attached to document 53. Under the Local Government (Scotland) Act 1973, as amended by the Local Government (Access to Information) Act 1985, local authorities are permitted to restrict the publication of information if that information falls within Part 1 of Schedule 7A of the 1973 Act. In this case, the advice note was considered to be exempt under paragraph 1, 12 and 13 of Schedule 7A (see Appendix). However, it is not the case that information which has been restricted under the 1973 Act is automatically exempt under FOISA – as has happened here, local authorities must consider whether any of the FOISA exemptions apply to the information if they wish to withhold it. Having considered the content of this advice note, the Commissioner takes the view that the information contained within it simply interprets the relevant sections and provisions of the Town and Country Planning Act in setting out the options which are available to the Council regarding Mr Chita’s planning permission and that there is nothing noted here that a reasonable person, on a fair reading of the appropriate legislation, would not be able to ascertain. In addition, looking at the conditions, the Commissioner considers that any concerns about paragraph 1 have been dealt with by the redaction of much of the personal data in the information. There is nothing to suggest that instructions have been sought, etc. from counsel in line with paragraph 12 and any proposals to take action under paragraph 13 was public knowledge by the time of Mr Chita’s information request. As such, the Commissioner does not consider that either of the exemptions in section 30(b)(i) or (ii) would apply to this note.

Section 30(c)

70. As noted above, the Council provided the same submissions in support of its reliance on the exemption in section 30(c) as it did for the exemptions in section 30(b). Given the use of the word “otherwise” in section 30(c), it is difficult to see how the same arguments can be relied on. In any event, having considered the submissions made by the Council regarding its reliance on the exemption in section 30(c) of FOISA, together with the information contained in the documents, the Commissioner does not agree that release of this information would, or would be likely to, prejudice substantially the effective conduct of public affairs, for the same reasons that he does not consider the exemptions in section 30(b) to apply. It is clear that the information is specific to the matters concerning Mr Chita’s planning permission and a decision has been taken by the Council on this matter prior to Mr Chita submitting his request for information. Given that the circumstances of the case, are by the Council’s own admission, so rare, it is difficult to see how disclosure of the information would, or would be likely to, substantially prejudice Council officials and elected members from discussing and considering a planning application, or potential breach of the conditions attached to planning permission in future. The Commissioner cannot, therefore, uphold the Council’s reliance on the exemption in section 30(c) of FOISA.
71. The exemptions in sections 30(b) and (c) of FOISA are subject to the public interest test required by section 2(1)(b) of FOISA. However, given that the Commissioner is not satisfied that any of the exemptions apply, he is not required to go on to consider the public interest test.



Section 38(1)(b)

72. The Council has also relied on the exemption in section 38(1)(b) (as read with section 38(2)(a)(i)) of FOISA in relation to a number of documents (see the attached Schedule of documents). However, given that the Commissioner has already found the information withheld under section 38(1)(b) to be exempt under another exemption for all the documents except document 17, he is only required to go on to consider this particular document.
73. In order for the Council to be able to rely on this exemption, it must be able to show that the information is personal data, the disclosure of which to a member of the public (i.e. into the public domain) would contravene any of the data protection principles contained in the DPA.
74. The definition of personal data is contained in section 1(1) of the DPA (see the Appendix).
75. The Commissioner considers that only a small amount of the information contained in document 17 – i.e. the names of the individuals referred to in the first and second paragraphs of the document – is personal data and assumes that the Council did not require to rely on this exemption in relation to the entirety of document 17. The individuals in question can clearly be identified from the data and the data relates to those individuals. (From the Council's submissions it is, quite correctly, not intending to apply the exemption in section 38(1)(b) to the names of the Council officials also referred to in the document.)
76. In its submissions, the Council argued that disclosure of the information under FOISA (i.e. into the public domain) would breach the first data protection principle. This 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, at least one of the conditions in Schedule 3 is met. (The Commissioner is satisfied that the personal data in question does not fall within the definition of sensitive personal data contained within section 2 of the DPA.)
77. The Council argues that disclosure would cause unnecessary or unjustified distress to the data subjects and that the data subjects have no expectations that this information might be disclosed into the public domain. The Council has also submitted that it that it has never suggested to them that the information would be kept anything other than secret. The Council therefore argues that the disclosure of this personal data would be unfair.
78. In this case, the Commissioner agrees with the arguments put forward by the Council that disclosure of the names of the individuals in question would be unfair. As noted earlier in the decision, whilst it is possible that Mr Chita is aware of the identities of the individuals, what the Commissioner must consider is the fairness – or otherwise – of the disclosure of the information into the public domain. Moreover, it is the fairness of the disclosure of the information at the time that the Council carried out the review of Mr Chita's request which must be considered, i.e. before the hearing took place.
79. As the Commissioner is satisfied that the disclosure of the names of the individuals would be unfair, he is not required to go on to consider whether disclosure would otherwise be unlawful or whether one of the conditions in Schedule 2 can be met.



80. Document 17 should therefore be released to Mr Chita, subject to the redaction of the names of the individuals in the first and second paragraphs of the document.

DECISION

The Commissioner finds that Dundee City Council (the Council) only partially complied with Part 1 of the Freedom of Information (Scotland) Act 2002 (FOISA) in responding to the information request made by Mr Chita.

The Commissioner finds that by withholding information in the documents relating to complaints made to the Council, the photographs of Mr Chita's property and parts of the communications from the Council and the complainants, the Council complied with Part 1.

The Commissioner also finds that by withholding limited information in document 17 from Mr Chita on the basis of the exemption in section 38(1)(b), the Council complied with Part 1.

However, the Commissioner finds that the Council was wrong to rely on the exemptions in sections 30(b)(i), (b)(ii) and (c) and section 35(1)(g) for withholding information from Mr Chita and now requires the Council to disclose information to Mr Chita as set out in the attached Schedule of documents.

He requires the Council to disclose these documents to Mr Chita within 45 days of the date of intimation of this Decision.

Appeal

Should either Mr Chita or the Council 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.

Kevin Dunion
Scottish Information Commissioner
30 June 2008



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.



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 2002 (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;
- ...
- (c) to ascertain whether circumstances which would justify regulatory action in pursuance of any enactment exist or may arise;
- ...

38 Personal information

- (1) Information is exempt information if it constitutes-
- ...
- (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
- ...



- (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.

The Environmental Information (Scotland) Regulations 2004

2 Interpretation

- (1) In these Regulations –

...

"environmental information" has the same meaning as in Article 2(1) of the Directive, namely any information in written, visual, aural, electronic or any other material form on

-

- (a) the state of the elements of the environment, such as air and atmosphere, water, soil, land, landscape and natural sites including wetlands, coastal and marine areas, biological diversity and its components, including genetically modified organisms, and the interaction among these elements;
- (b) factors, such as substances, energy, noise, radiation or waste, including radioactive waste, emissions, discharges and other releases into the environment, affecting or likely to affect the elements of the environment referred to in paragraph (a);
- (c) measures (including administrative measures), such as policies, legislation, plans, programmes, environmental agreements, and activities affecting or likely to affect the elements and factors referred to in paragraphs (a) and (b) as well as measures or activities designed to protect those elements;
- (d) reports on the implementation of environmental legislation;
- (e) costs benefit and other economic analyses and assumptions used within the framework of the measures and activities referred to in paragraph (c); and
- (f) the state of human health and safety, including the contamination of the food chain, where relevant, conditions of human life, cultural sites and built structures inasmuch as they are or may be affected by the state of the elements of the environment referred to in paragraph (a) or, through those elements, by any of the matters referred to in paragraphs (b) and (c);

...



Town and Country Planning (Scotland) Act 1997

71 Order requiring discontinuance of use or alteration or removal of buildings or works

- (1) If, having regard to the development plan and to any other material considerations, it appears to a planning authority that it is expedient in the interests of the proper planning of their area (including the interests of amenity) –
 - (a) that any use of land should be discontinued or that any conditions should be imposed on the continuance of a use of land, or
 - (b) that any buildings or works should be altered or removed,
they may by order –
 - (i) require the discontinuance of that use, or
 - (ii) impose such conditions as may be specified in the order on the continuance of it, or
 - (iii) require such steps as may be so specified to be taken for the alteration or removal of the buildings or works,
as the case may be.
- (2) An order under this section may grant planning permission for any development of the land to which the order relates, subject to such conditions as may be specified in the order.
- (3) Section 65 shall apply in relation to any planning permission granted by an order under this section as it applies in relation to planning permission granted by the planning authority on an application made under this Part.
- (4) The planning permission which may be granted by an order under this section includes planning permission, subject to such conditions as may be specified in the order, for development carried out before the date on which the order was submitted to the Secretary of State under this section.
- (5) Planning permission for such development may be granted as to have effect from-
 - (a) the date on which the development was carried out, or
 - (b) if it was carried out in accordance with planning permission granted for a limited period, the end of that period.



- (6) Where the requirements of an order under this section will involve the displacement of persons residing in any premises, it shall be the duty of the planning authority, in so far as there is no other residential accommodation suitable to the reasonable requirements of those persons available on reasonable terms, to secure the provision of such accommodation in advance of the displacement.
- (7) In the case of planning permission granted by an order under this section, the authority referred to in sections 58(1)(b) and 59(5) is the planning authority making the order.
- (8) The previous provisions of this section do not apply to the use of any land for development consisting of the winning or working of minerals or involving the deposit of refuse or waste materials except as provided in Schedule 8, and in that Schedule –
 - (a) Part I shall have effect for the purpose of making provision as respects land which is or has been so used, and
 - (b) Part II shall have effect as respects the registration of old mining provisions.

72 Confirmation by Secretary of State of section 71 orders

- (1) An order under section 71 shall not take effect unless it is confirmed by the Secretary of State, either without modification or subject to such modifications as he considers expedient.
- (2) Where a planning authority submit an order to the Secretary of State for his confirmation under this section, they shall serve notice-
 - (a) on the owner of the land affected,
 - (b) on the lessee and the occupier of that land, and
 - (c) on any person who in their opinion will be affected by the order.
- (3) The notice shall specify the period (which must not be less than 28 days from the date of its service) within which any person on whom it is served may require the Secretary of State to give him an opportunity of appearing before and being heard by a person appointed by the Secretary of State for the purpose.
- (4) If within that period such a person so requires, the Secretary of State shall, before confirming the order, give such an opportunity both to that person and to the planning authority.
- (5) Where an order under section 71 has been confirmed by the Secretary of State, the planning authority shall serve a copy of the order on the owner, the lessee and occupier of the land to which the order relates.



Local Government (Scotland) Act 1973

Schedule 7A: Access to Information: Exempt Information

Part 1: Descriptions of exempt information

- 1 Information relating to a particular employee, former employee or applicant to become an employee of, of a particular office holder, former office-holder or applicant to become an office-holder under, the authority.
...
- 12 Any instructions to counsel and any opinion of counsel (whether or not in connection with any proceedings) and any advice received, information obtained or action to be taken in connection with -
 - (a) any legal proceedings by or against the authority, or
 - (b) the determination of any matter affecting the authority,(whether, in either case, proceedings have been commenced or are in contemplation.)
- 13 Information which, if disclosed to the public, would reveal that the authority proposes -
 - (a) to give under any enactment a notice under or by virtue of which requirements are imposed on a person; or
 - (b) to make an order or direction under any enactment.

Data Protection Act 1998

1 Basic interpretative provisions

- (1) In this Act, unless the context otherwise requires –

...

“personal data” means data which relate to a living individual who can be identified –

- (a) from those data, or
- (b) from those data and other information which is in the possession of, or is likely to come into the possession of, the data controller,

and includes any expression of opinion about the individual and any indication of the intentions of the data controller or any other person in respect of the individual;



Schedule 1 The data protection principles

Part 1 The principles

1. Personal data shall be processed fairly and lawfully and, in particular, shall not be processed unless -
 - (a) at least one of the conditions in Schedule 2 is met, and
 - (b) in the case of sensitive personal data, at least one of the conditions in Schedule 3 is also met.



Schedule of documents

Please note that “n/c” indicates that the exemption was not considered.

Doc No	Description of document	Exemption (s) applied to document	Exemption(s) upheld?	Public Interest in maintaining exemption?	Details of release
1	Email dated 27 November 2006 at 16:50hrs	Outwith the scope of the request.			
2	Fax cover sheet (undated)	s.30(b)(i)	No		Release in full
		s.30(b)(ii)	No		
		s.30(c)	No		
		s.35(1)(g)	No		
3	Email dated 27 June 2006 at 12:28hrs	s.30(b)(i)	No		Release in full
		s.30(b)(ii)	No		
		s.30(c)	No		
		s.35(1)(g)	No		
4	Note indicating motion for Development Quality Committee dated 12 June 2006	s.30(b)(i)	No		Release in full
		s.30(b)(ii)	No		
		s.30(c)	No		
		s.35(1)(g)	No		



Doc No	Description of document	Exemption (s) applied to document	Exemption(s) upheld?	Public Interest in maintaining exemption?	Details of release
5	Letter dated 25 May 2006	s.35(1)(g) s.38(1)(b)	Partial n/c	Yes	Release subject to redaction of name and address of recipient and salutation
6	Letter dated 25 May 2006	s.35(1)(g) s.38(1)(b)	Partial n/c	Yes	Release subject to redaction of name and address of recipient and salutation
7	Letter dated 25 May 2006	s.35(1)(g) s.38(1)(b)	Partial n/c	Yes	Release subject to redaction of name and address of recipient and salutation
8	Letter dated 25 May 2006 to Mr Chita	Information deemed not to be part of application – see paragraph 10			
9	Email dated 25 May 2006 at 13:01hrs	s.30(b)(i) s.30(b)(ii) s.30(c) s.35(1)(g)	No No No No		Release in full
10	Email dated 24 May 2006 at 15:35hrs	s.30(b)(i) s.30(b)(ii) s.30(c) s.35(1)(g)	No No No No		Release in full



Doc No	Description of document	Exemption (s) applied to document	Exemption(s) upheld?	Public Interest in maintaining exemption?	Details of release
11	Notes relating to amendments to garage	s.30(b)(i) s.30(b)(ii) s.30(c) s.35(1)(g)	No No No No		Release in full
12	Letter dated 18 April 2006	Information deemed not to be part of application – see paragraph 10			
13	Letter dated 18 April 2006	s.35(1)(g) s.38(1)(b)	Partial n/c	Yes	Release subject to redaction of name and address of recipient and salutation
14	Letter dated 18 April 2006	s.35(1)(g) s.38(1)(b)	Partial n/c	Yes	Release subject to redaction of name and address of recipient and salutation
15	Letter dated 18 April 2006	s.35(1)(g) s.38(1)(b)	Partial n/c	Yes	Release subject to redaction of name and address of recipient and salutation
16	Letter dated 8 April 2006	Already provided to Mr Chita by the Council			



Doc No	Description of document	Exemption (s) applied to document	Exemption(s) upheld?	Public Interest in maintaining exemption?	Details of release
17	Fax cover sheet dated 31/03/06	s.30(b)(i) s.30(b)(ii) s.30(c) s.35(1)(g) s.38(1)(b)	No No No No Yes		Release subject to redaction of names in first and second paragraphs
18	Letter dated 23 March 2006	s.35(1)(g) s.38(1)(b)	Partial n/c	Yes	Release subject to redaction of name and address of recipient and salutation
19	Letter of complaint re Mr Chita's garage dated 27 March 2006	Already provided to Mr Chita by the Council			
20	Letter dated 25 March 2006	Already provided to Mr Chita by the Council			
21	Letter dated 30 March 2006	s.35(1)(g) s.38(1)(b)	Partial n/c	Yes	Release subject to redaction of name and address of recipient, salutation and paragraphs 2 and 3
22	Email and attachments dated 30 March 2006 at 10.19 hrs	s.30(b)(i) s.30(b)(ii) s.30(c) s.35(1)(g)	n/c n/c n/c Yes	Yes	Withhold



Doc No	Description of document	Exemption (s) applied to document	Exemption(s) upheld?	Public Interest in maintaining exemption?	Details of release
23	Letter dated 23 March 2006	Already provided to Mr Chita by the Council			
24	Draft of letter (undated)	s.35(1)(g) s.38(1)(b)	Partial n/c	Yes	Release subject to redaction of name and address of recipient and words 10-15 (inclusive) in paragraph 4
25	Letter dated 7 March 2006	Already provided to Mr Chita by the Council			
26	Letter dated 27 February 2006	s.35(1)(g) s.38(1)(b)	Yes n/c	Yes	Withhold
27	Letter dated 3 March 2006	s.35(1)(g) s.38(1)(b)	Partial n/c	Yes	Release subject to redaction of name and address of recipient, salutation and paragraph 3
28	Letter dated 26 February 2006	Already provided to Mr Chita by the Council			
29	Letter dated 3 February 2006	Information deemed not to be part of application – see paragraph 10			



Doc No	Description of document	Exemption (s) applied to document	Exemption(s) upheld?	Public Interest in maintaining exemption?	Details of release
30	Email dated 28 February 2006 at 16.36 hrs	s.30(b)(i) s.30(b)(ii) s.30(c) s.35(1)(g)	No No No No		Release in full
31	Letter dated 21 February 2006	s.30(b)(i) s.30(b)(ii) s.30(c) s.35(1)(g)	No No No No		Release in full
32	Fax cover sheet dated 24 February 2006	s.30(b)(i) s.30(b)(ii) s.30(c) s.35(1)(g)	No No No No		Release in full
33	Letter dated 20 February 2006	Information deemed not to be part of application – see paragraph 10			
34	Letter dated 9 February 2006	Information deemed not to be part of application – see paragraph 10			
35	Various photographs	s.35(1)(g)	Yes	Yes	Withhold



Doc No	Description of document	Exemption (s) applied to document	Exemption(s) upheld?	Public Interest in maintaining exemption?	Details of release
36	Email dated 21 December 2005 at 09.54 hrs	Information deemed not to be part of application – see paragraph 10			
37	Letter dated 12 December 2005	s.35(1)(g) s.38(1)(b)	Yes n/c	Yes	Withhold
38	Email dated 17 November 2005 at 08.17 hrs	Information deemed not to be part of application – see paragraph 10			
39	Letter dated 6 April 2004	Information deemed not to be part of application – see paragraph 10			
40	Letter and enclosures dated 1 July 2003	Information deemed not to be part of application – see paragraph 10			
41	Letter (undated)	Information deemed not to be part of application – see paragraph 10			
42	Various photographs	s.35(1)(g)	Yes	Yes	Withhold
43	Letter dated 18 April 2003	s.35(1)(g) s.38 (1)(b)	Partial n/c	Yes	Release subject to redaction of name and address of recipient



Doc No	Description of document	Exemption (s) applied to document	Exemption(s) upheld?	Public Interest in maintaining exemption?	Details of release
44	Letter dated 14 April 2003	s.35(1)(g) s.38(1)(b)	Yes n/c	Yes	Withhold
45	Letter dated 10 April 2003	Information deemed not to be part of application – see paragraph 10			
46	Letter dated 10 April 2003	s.35(1)(g) s.38(1)(b)	Partial n/c	Yes	Release subject to redaction of name and address of recipient
47	Letter dated 2 April 2003	s.35(1)(g) s.38(1)(b)	Yes n/c	Yes	Withhold
48	Letter dated 26 March 2003	Information deemed not to be part of application – see paragraph 10			
49	Letter dated 26 March 2003	Information deemed not to be part of application – see paragraph 10			
50	Letter dated 1 April 2003	Information deemed not to be part of application – see paragraph 10			



Doc No	Description of document	Exemption (s) applied to document	Exemption(s) upheld?	Public Interest in maintaining exemption?	Details of release
51	Various photographs	s.35(1)(g)	Yes	Yes	Withhold
52	Copy of application for planning permission	Information deemed not to be part of application – see paragraph 10			
53	Notice of requirement to attend a meeting of the development quality committee on 12 June 2006, dated 5 June 2006	s.30(b)(i) s.30(b)(ii) s.30(c) s.35(1)(g)	No No No No		Release in full