



Scottish Information
Commissioner

**Decision 063/2007 Mr David Keown and West
Dunbartonshire Council**

*Request for information held by West Dunbartonshire Council's Anti
Social Investigation and Support Team*

**Applicant: Mr David Keown
Authority: West Dunbartonshire Council
Case No: 200502335
Decision Date: 3 May 2007**

**Kevin Dunion
Scottish Information Commissioner**

Kinburn Castle
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Decision 063/2007 – Mr David Keown and West Dunbartonshire Council

Request for information held by West Dunbartonshire Council's Anti Social Investigation and Support Team – information exempt from disclosure by virtue of sections 35(1)(g) read in conjunction with s35(2)(a) and s35(2)(c) of the Freedom of Information (Scotland) Act 2002

Relevant Statutory Provisions

Freedom of Information Scotland Act 2002 (FOISA) sections 1(1) (General entitlement); 2(1) (Effect of exemptions) and 35(1)(g) and (2)(c) (Law enforcement).

Antisocial Behaviour etc. (Scotland) Act 2004 section 1 (Antisocial behaviour strategies)

Facts

Mr David Keown requested information held by West Dunbartonshire Council's (the Council's) Anti Social Investigation and Support Team (ASIST) in relation to an ongoing dispute with his neighbours. The Council responded stating that it did not hold some of the information which he requested, and that the remainder of the information was exempt from disclosure under section 36(2) of FOISA (confidentiality).

Mr Keown was dissatisfied with the response he received from the Council and contacted it again requesting that it review its response. On review, the Council upheld its initial response and also stated that the information was exempt under section 35 of FOISA (law enforcement).

Mr Keown remained dissatisfied and applied to the Commissioner for a decision. After investigation, the Commissioner decided that the Council had been correct to withhold the information from Mr Keown.



Background

1. On 2 June 2005, Mr Keown emailed the Council requesting correspondence (including email, fax and handwritten notes) between the ASIST team and three named persons (“person 1”, “person 2” and “person 3”) and between the ASIST team and Murray Young, Solicitors as far as that correspondence related to person 1. Mr Keown also made a more general request for any information held by the Council regarding his “request.”
2. The Council responded on 24 June 2005 and advised Mr Keown that it did not hold any correspondence between its ASIST Team and Murray Young, Solicitors. The Council also advised Mr Keown that it considered the remainder of the information to be exempt under section 36(2) of FOISA.
3. Mr Keown emailed the Council again on 29 June 2005. He did not believe the withheld information to be confidential and asked the Council to conduct a review. Mr Keown did not question the response from the Council that it did not hold any correspondence between the ASIST team and Murray Young, Solicitors and therefore this did not form part of the investigation.
4. The Council carried out a review of its decision and notified Mr Keown of the outcome of the review on 13 July 2005. It upheld its initial findings and additionally claimed that exemptions in section 35 of FOISA (law enforcement) applied to the information.
5. Mr Keown remained dissatisfied and made an application to me for a decision on 19 July 2005. In his application, Mr Keown expressed the view that the information which had been withheld was not confidential in nature.
6. Mr Keown’s application for decision was allocated to an investigating officer and then validated by establishing that Mr Keown had made a valid information request to a Scottish public authority and had appealed to me only after asking the Council to review its response to his request.



Investigation

7. The investigating officer wrote to the Council on 10 August 2005 informing it that an application from Mr Keown had been received and that an investigation into the matter had begun. Comments were sought from the Council in terms of section 49(3)(a) of FOISA. In particular, the investigating officer requested comments on the application of section 35 and 36(2) of FOISA to the information withheld.
8. The Council was also asked to provide copies of all of the information which had been withheld from Mr Keown.
9. The Council responded on 23 August 2005, providing detailed comments and copies of the information which had been withheld. In its letter, the Council set out the background to Mr Keown's information request.
10. Mr Keown and a neighbour have been involved in a long running dispute whilst living in the same four-in-a-block apartment complex. There have been claims and counter claims of harassment and noise disturbance, and the Council investigated a number of those complaints on behalf of the individuals involved. Mr Keown is essentially seeking the Council's records of those investigations.
11. The Council also provided a copy of the guidance notes made available on the ASIST Team's website. The guidance assures those who pass information to the ASIST Team in order to investigate complaints will remain confidential.
12. The Council argued that in investigating the dispute between Mr Keown and his neighbours it was carrying out an investigation which could result in some form of civil law enforcement. In correspondence with my Office, the Council clarified that it wished to rely upon section 35(1)(g) of FOISA, read in conjunction with section 35(2)(a) and (c) of FOISA, to withhold information from Mr Keown.
13. The exemptions in section 35 are subject to the public interest test required by section 2(1)(b) of FOISA. The Council considered that the public interest lay in withholding the information from Mr Keown on the basis that difficulties would arise in carrying out investigations into antisocial behaviour in the future, given that it had assured people that the information would remain confidential. It suggested that if the information were to be disclosed, others would not come forward in future with evidence to support an investigation into antisocial behaviour.



14. In other correspondence exchanged between my Office and the Council it also raised the possibility that, as much of the information which it held was personal in nature, it could be considered to be exempt under section 38(1)(b) of FOISA.

The Commissioner's Analysis and Findings

Section 35(1)(g) – Law Enforcement

15. 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 its following purposes would be substantially prejudiced should the information be disclosed:
 - (a) to ascertain whether a person has failed to comply with the law; and
 - (c) to ascertain whether circumstances which would justify regulatory action in pursuance of any enactment exist or may arise.
16. Although the Council have chosen to cite two possible functions listed in section 35(2) of FOISA, having examined the information I am satisfied that its contents fall more easily within the function described within section 35(2)(c) of FOISA. I will therefore concentrate my analysis on the application of section 35(1)(g) read in conjunction with section 35(2)(c).
17. As noted above, the exemption in section 35(1)(g) of FOISA is subject to the public interest test. This means that, when considering the use of section 35(1)(g), I must consider three separate matters in all. First of all, I must consider whether the Council has a function in relation to ascertaining whether circumstances which would justify regulatory action in pursuance of any enactment exist or may arise. If I am satisfied that it does, I must go on to consider whether release of the information would prejudice substantially the Council's ability to exercise this function. Even if I am satisfied that release of the information would prejudice substantially the Council's ability to exercise this function, I must go on to consider whether, in all the circumstances of the case, the public interest would be better served by the information being released or by the information being withheld. If I find that the public interest would be better served by the information being released, then I must order release of the information.



18. The information requested relates to a long running dispute between Mr Keown and his neighbour. Mr Keown has, in essence, requested the Council's records, following complaints which had been raised with its ASIST team, about the situation of its investigation into what, if any, action it could take to resolve the dispute between the neighbours.
19. In its submissions to me, the Council stated that in terms of section 1 of the Antisocial Behaviour etc. (Scotland) Act 2004 (the 2004 Act) the Council has a duty to devise strategies to tackle anti social behaviour. It argued that neighbourhood disputes came within the scope of that legislation and noted that the duty given to local authorities under section 1 of the 2004 Act originally derived from section 19 of the Crime and Disorder Act 1998, which gave local authorities the power to apply for an antisocial behaviour order (section 19 of was repealed by the 2004 Act).
20. The information requested by Mr Keown comprises of records the Council holds of its attempts to mediate between Mr Keown and his neighbour, and also its investigation into whether it had the power to take further action under either the Crime and Disorder Act 1998 or the 2004 Act. I am therefore satisfied that the Council has a function in terms of section 35(1)(c) of FOISA.
21. I will now go on to consider whether disclosure of the information requested would prejudice substantially the Council in exercising that function.
22. The information withheld can be divided into 4 subcategories of documents:
 - a) Statements made to the Council in support of its investigation and correspondence relating to those statements
 - b) Other correspondence submitted by third parties in support of the Council's investigation
 - c) Correspondence with the Council relating to its investigation
 - d) Internal correspondence relating to the Council's investigation
23. The Council argues that to disclose the information contained within subcategory (a) would be to breach the expectations of confidentiality which those who gave statements have of the Council. It provided me with evidence to show that it had assured those people who had given statements that what they said would be kept confidential. The Council commented that if information relating to statements (which are made voluntarily) were to be released, trust in the Council's ability to keep such statements confidential would be broken. As a result individuals may not agree to make such statements in the future and the Council would be unable to rely on such methods to gather evidence in the course of its investigations into antisocial behaviour and neighbourhood disputes.



24. I accept that Council officers must be able to rely on comprehensive and unreserved statements to assist with the processes of its investigations made into such matters. I further accept that it is likely that if such statements were routinely disclosed, this would have the effect of inhibiting officers' and witnesses' comments and, as a result, would substantially prejudice the ability of the Council to exercise their function of investigating neighbourhood disputes and antisocial disputes.
25. Further, I accept that this argument extends to correspondence between third parties and the Council relating to neighbourhood disputes, and also correspondence received by third parties relating to such disputes and subsequently passed to the Council to aid it in investigating the matter. Again, all such information is submitted to the Council voluntarily, with an expectation of confidence attached to it. There is a substantial risk that, should information of this nature be disclosed, the Council would not be able to rely on submissions of this type in future. I am of the view that disclosure of this type of information is likely to prejudice substantially the ability of the Council to exercise its function in investigating neighbourhood disputes and antisocial behaviour.
26. Additionally, I accept that the Council must be able to discuss in a candid manner the actions it takes in investigating such matters. Given that the nature of the disputes and complaint which the Council investigates are likely to be extremely sensitive and deal with emotive issues, I am of the view that routine disclosure of internal discussions on those issues may well inhibit Council officers from recording those discussions.
27. Having taken the above factors into account, I conclude that disclosure of the information in question would be likely to prejudice substantially the Council's ability to exercise its functions in relation to ascertaining whether circumstances which would justify regulatory action in pursuance of any enactment exist or may arise. As I am satisfied that the information in question is exempt under section 35(1)(g) of FOISA I will now go on to consider the public interest test required by section 2(1)(b) of FOISA and whether, in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information..

The Public Interest

28. There is a general public interest in scrutinising the processes by which local authorities carry out their functions. This ensures that that the local authority is accountable and transparent in its actions.



29. Mr Keown clearly has an interest in accessing these documents. The dispute involves him and therefore the information held by the Council relating to the dispute would by necessity also contain information relating to him. It could be argued that he should be able to access all of those documents in order to ensure that he has access to the information in order to make informed judgements about the case. It is also important that he should be able to satisfy himself that the Council is investigating the dispute fully and without prejudice.
30. However, the investigation carried out by the Council in this case deals with the very sensitive issue of neighbourhood disputes and it is in the public interest that the Council can investigate these and mediate as fully as possible.
31. The Council has argued that if it were to disclose information given to it in confidence as part of its investigations then in future it would not be able to rely on individuals voluntarily giving it information which it could use to pursue its investigations.
32. It should be noted here that the validity of the argument (at least in relation to the section 35(1)(g) exemption) used by the Council rests on the age of the investigation. If the documents requested dealt with an investigation which has been concluded for quite some time, then the sensitivity of the information would decrease and the Council's argument would not carry so much weight. However, it is clear that the neighbourhood dispute in this case was still ongoing at the time Mr Keown made his application to me and so documents held in relation to that dispute would still be very sensitive to those involved. Disclosure of the information requested could result in the escalation of conflict between those involved in the dispute. There is a public interest in ensuring that information given voluntarily to local authorities investigating neighbourhood disputes should be allowed to remain private to ensure that Councils can rely on such information in the future.
33. As noted above, I accept that Mr Keown has substantial interest in accessing the documentation withheld by the Council. However, I must consider the wider public interest in this case.
34. In essence, the information requested here is about a very localised and specific neighbourhood dispute. Apart from the more general reasons of why it may be in the public interest for authorities to disclose information of this nature to the public, I can see no reason why it would serve the interests of the public for information relating to this investigation in particular to be released.



35. From weighing up the arguments outlined above, I am satisfied that disclosure of the information requested would not be in the public interest. I find that the Council correctly applied section 35(1)(g) read in conjunction with section 35(2)(c) of FOISA to the information requested, that in this case the public interest lies in favour of withholding the information and, accordingly, that the exemption should be maintained.

Consideration of the remaining exemptions

36. The Council also relied on sections 36(2) and 38(1)(b) to withhold the information from Mr Keown. However, as I have found that the information in its entirety is exempt from disclosure under section 35(1)(g) read in conjunction 35(2)(c) of FOISA, I am not required to go on to consider the other exemptions.
37. There may be information which, while exempt in terms of FOISA, Mr Keown has a right to access under the Data Protection Act 1998 as it is personal information which relates to him. Mr Keown may therefore wish to consider making a subject access request for his own personal information to the Council.

Decision

I find that West Dunbartonshire Council (the Council) was correct in withholding the information which Mr Keown requested on the basis that it is exempt from disclosure under section 35(1)(g) read in conjunction with section 35(2)(c) of the Freedom of Information (Scotland) Act 2002 (FOISA). I have also found that the public interest lies in maintaining the exemption.



Appeal

Should either the Council or Mr Keown wish to appeal against this decision, there is an appeal to the Court of Session on a point of law only. Any such appeal must be made within 42 days of receipt of this notice.

Kevin Dunion
Scottish Information Commissioner
3 May 2007



APPENDIX

Relevant Statutory Provisions

Freedom of Information (Scotland) Act 2002

1 General entitlement

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

2 Effect of exemptions

- (1) To information which is exempt information by virtue of any provision of Part 2, section 1 applies only to the extent that –
 - (a) the provision does not confer absolute exemption; and
 - (b) in all the circumstances of the case, the public interest in disclosing the information is not outweighed by that in maintaining the exemption.

35 Law enforcement

- (1) Information is exempt information if its disclosure under this Act would, or would be likely to, prejudice substantially –
 - (...)
 - (g) the exercise by any public authority (within the meaning of the Freedom of Information Act 2000 (c.36)) or Scottish public authority of its functions for any of the purposes mentioned in subsection (2);
 - (...)
- (2) The purposes are –
 - (...)
 - (a) to ascertain whether circumstances which would justify regulatory action in pursuance of any enactment exist or may arise

Antisocial Behaviour etc. (Scotland) Act 2004



1 Antisocial behaviour strategies

- (1) Each local authority and relevant chief constable shall, acting jointly, prepare a strategy for dealing with antisocial behaviour in the authority's area.
- (2) Each local authority shall publish the strategy.
- (3) The strategy shall in particular-
 - (a) set out an assessment of the extent of occurrences of antisocial behaviour in the authority's area;
 - (b) set out an assessment of the types of antisocial behaviour occurring in the authority's area;
 - (c) specify arrangements for consulting community bodies and other persons (including in particular young persons) in each part of the authority's area in which there are (or are likely to be) occurrences of antisocial behaviour, about how to deal with antisocial behaviour in the part;
 - (d) specify the range and availability in the authority's area of any services-
 - (i) for persons under the age of 16 years; and
 - (ii) for persons generally,which are designed to deal with antisocial behaviour occurring there, the consequences of such behaviour or the prevention of such behaviour;
 - (e) in so far as not specified under paragraph (d), specify the range and availability in the authority's area of any services for-
 - (i) victims of antisocial behaviour;
 - (ii) persons who witness occurrences of antisocial behaviour; and
 - (iii) the provision of mediation in relation to disputes arising from antisocial behaviour; and
 - (f) make provision about-
 - (i) how the authority and the relevant chief constable are to co-ordinate the discharge of their functions in so far as they may be discharged in relation to antisocial behaviour in the authority's area;
 - (ii) the exchange of information relating to such behaviour between the authority and the relevant chief constable;



- (iii) the giving by the authority and the relevant chief constable of information of that kind to such other persons as appear to the authority and the chief constable to have an interest in dealing with antisocial behaviour and the receipt by the authority and the chief constable of information of that kind from those other persons; and
 - (iv) the exchange of information relating to antisocial behaviour among such other persons as are mentioned in sub-paragraph (iii).
- (4) The local authority and the relevant chief constable-
 - (a) shall keep the strategy under review; and
 - (b) may from time to time revise the strategy.
- (5) If a strategy is revised under subsection (4), the local authority shall publish the revised strategy.
- (6) In preparing, reviewing and revising the strategy, the local authority shall consult-
 - (a) the Principal Reporter;
 - (b) registered social landlords which provide or manage property in the authority's area; and
 - (c) such community bodies and other persons as the local authority considers appropriate.
- (7) In considering which persons to consult, the local authority shall seek to include those who are representative of persons adversely affected by antisocial behaviour.
- (8) Each local authority and relevant chief constable shall, in discharging functions under this section and in implementing a strategy as published under it, have regard to any guidance issued by the Scottish Ministers about those matters.
- (9) Before issuing any such guidance, the Scottish Ministers shall consult such persons as they see fit.
- (10) For the purposes of subsection (1), the Scottish Ministers may by directions require such persons as appear to them to hold information relating to antisocial behaviour to supply-
 - (a) such information as may be specified in the direction; or
 - (b) information of a description specified in the direction, to a local authority and relevant chief constable.
- (11) In this section-
 - "community bodies" has the meaning given by section 15(4) of the Local Government in Scotland Act 2003 (asp 1); and
 - "relevant chief constable", in relation to a local authority, means the chief constable for the police area which is wholly or partly within the area of the authority.