



Scottish Information
Commissioner

Decision 111/2007 Mr Robert Mathewson and Angus Council

*Request for documents relating to an investigation carried out by
the Council's Planning Department*

Applicant: Mr Robert Mathewson

Authority: Angus Council

Case No: 200601011

Decision Date: 12 July 2007

**Kevin Dunion
Scottish Information Commissioner**

Kinburn Castle
Doubledykes Road
St Andrews
Fife
KY16 9DS



Decision 111/2007 Mr Robert Mathewson and Angus Council

Request for details of an investigation carried out by the Council's Planning Department – information not held – application of sections 35(1)(g) (read in conjunction with sections 35(2)(a) and (c)) - Commissioner upheld Angus Council's response

Relevant Statutory Provisions and Other Sources

Freedom of Information (Scotland) Act 2002 (FOISA): sections 1(1) (General entitlement); 2(1) (Effect of exemptions); 17(1) (Notice that information not held) and 35(1)(g) (read in conjunction with sections 35(2)(a) and (c)) (Law enforcement)

Town and Country Planning (Scotland) Act 1997 section 123(1) (Expressions used in connection with enforcement)

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

Facts

Mr Mathewson requested documents relating to an investigation carried out by Angus Council (the Council). The Council responded, providing him with some information, but stating that it did not hold certain information relating to the investigation. It withheld the remainder of the information, on the basis that it was exempt under FOISA on the basis that release of the information would prejudice substantially its ability to carry out planning enforcement action. Mr Mathewson was dissatisfied with the Council's response and requested a review. The Council carried out a review and upheld its initial response, this time claiming additional exemptions. Mr Mathewson remained dissatisfied and applied to the Commissioner for a decision.

Following an investigation, the Commissioner found that the Council had dealt with Mr Mathewson's request in accordance with Part 1 of FOISA.



Background

1. On 1 March 2006, Mr Mathewson wrote to the Council, requesting information about complaints made about him to the Council's Planning and Roads Departments. He also requested information about the actions taken by the Council relating as a result of these complaints and the outcome of the complaints. In addition, he asked for details of a "false allegation" made by a named individual about him to a named Community Safety Officer employed by the Council.
2. The Council responded to Mr Mathewson's request on 27 March 2006. It informed him, in line with section 17(1) of FOISA, that its Roads Department held no information relating to his request, and that the Council held no recorded information relating to the "false allegation" made against him. However, it notified him that the Council's Planning Department held records of an investigation which it had carried out following a complaint which had been made. It released two of the documents relating to the investigation to Mr Mathewson, but withheld the remainder of the information claiming that it fell under the exemption contained within section 34(1)(a) of FOISA (Investigations by Scottish public authorities and proceedings arising out of such investigations).
3. Mr Mathewson was dissatisfied with the Council's response and wrote to it requesting a review on 4 April 2006. Mr Mathewson considered that the Council had not been fair to him and commented that, while he understood that the Council relied on receiving complaints to bring matters to its attention, complaints should be justified and genuine and not for the purposes of harassment.
4. On 26 April 2006, the Council notified Mr Mathewson of the outcome of its review. The Council upheld its initial response, and in addition to the exemption in section 34(1)(a), advised Mr Mathewson that it was relying on the exemptions in sections 35(1)(a),(b) and (g) (in conjunction with sections 35(2)(a) and (c)) and section 36(2) of FOISA in refusing to disclose the information.
5. Mr Mathewson remained dissatisfied with this response and, on 4 June 2006, wrote to my office, stating that he was dissatisfied with the outcome of the Council's review and applying to me for a decision in terms of section 47(1) of FOISA
6. The application was validated by establishing that Mr Mathewson had made a request for information to a Scottish public authority and had applied to me for a decision only after asking the authority to review its response to that request. The case was then allocated to an investigating officer.



The Investigation

7. On 29 June 2006, the Council was notified in writing that an application had been received by Mr Mathewson and was given an opportunity to comment on the application in terms of section 49(3)(a) of FOISA. In addition, the Council was asked to provide me with specific items of information required for the investigation, including the information which it had refused to disclose to Mr Mathewson. The Council responded within the timescales set out, enclosing the information requested.
8. During the investigation, correspondence took place between the Council and the investigating officer relating to exemptions it had relied on. As a result of that correspondence, the Council withdrew its reliance on the exemptions in sections 34(1)(a) and 35(1)(a) and (b) of FOISA in relation to the information withheld. However, it maintained that sections 35(1)(g) (read in conjunction with section 35(2)(a) and (c)) and section 36(2) of FOISA applied to the information withheld. Later, the Council also stated that some of the information withheld was exempt from disclosure under section 38(1)(b) (Personal information) of FOISA.
9. Mr Mathewson also provided the investigating officer with detailed comments on why he believed release of the information to be in the public interest.
10. The Council released further documentation contained within the record of the investigation to Mr Mathewson during the investigation. Because the Council released those documents to Mr Mathewson, I do not intend to consider them further. Similarly, because the Council withdrew its reliance on the exemptions in sections 34(1)(a) and 35(1)(a) and (b) of FOISA, I do not intend to discuss these in this decision.

The Commissioner's Analysis and Findings

11. In coming to a decision on this matter, I have considered all of the information and the submissions presented to me by both Mr Mathewson and the Council and I am satisfied that no matter of relevance has been overlooked. In coming to a decision on this matter I have considered the following aspects of Mr Mathewson's application: (i) whether the Council holds further information relating to the request and (ii) the application of section 35(1)(g) (read in conjunction with sections 35(2)(a) and (c)) of FOISA to the information withheld.



Whether further information relating to Mr Mathewson's request is held by the Council

12. In its responses to Mr Mathewson, the Council maintained that its Roads Department held no further information relating to his requests and that it held no recorded information relating to a "false allegation" made against Mr Mathewson.
13. As Mr Mathewson has indicated that he is dissatisfied with the responses which he has received from the Council in his application to me, I must investigate whether the Council was correct to state that it did not hold some of the information requested.

The Council's Roads Department

14. In its submissions, the Council stated that it had sent Mr Mathewson's request for information to the Road Department's Information Officer. The Officer checked the correspondence database, "ACCESS" line calls and spoke with appropriate managers and staff. He concluded that the department had no knowledge of any complaints made against Mr Mathewson or of subsequent investigations carried out by the Council. The Council also provided me with correspondence which showed that these searches had been carried out.
15. I am satisfied that the Council carried out an adequate search to ascertain whether its Roads Department held any information relating to Mr Mathewson's requests. From examination of the documentation withheld, it is clear that the record of complaints made against Mr Mathewson is held solely within the Council's Planning Department. Therefore, I can conclude that the Council's Roads Department hold no information in relation to Mr Mathewson's request.

Allegations made against Mr Mathewson

16. In its response to Mr Mathewson, the Council stated that it held no information relating to allegations made against Mr Mathewson to the Community Safety Officer in question. The Council explained that the Community Safety Officer had formed an impression that an allegation had been made and had subsequently led Mr Mathewson to believe that an allegation had been made, but that the Officer had later revised his opinion.
17. In its submissions, the Council provided evidence to show that it had carried out a search for recorded information held relating to such an allegation made against Mr Mathewson. Having considered the submissions from the Council, I have concluded that the Council holds no recorded information relating to such an allegation made against Mr Mathewson, and was correct to inform him that this was the case.



Section 35(1)(g) – Law Enforcement

18. As noted above, the Council has refused to disclose a number of documents to Mr Mathewson on the basis of the exemption contained in section 35(1)(g) of FOISA. This exempts information if its disclosure would, or would be likely to, prejudice substantially the exercise by a public authority of its functions for any of the purposes listed in section 35(2) of FOISA. The Council considered that the 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.
19. The exemption in section 35(1)(g) of FOISA is subject to the public interest test required by section 2(1)(b) of FOISA. This means that, when considering the use of section 35(1)(g) in this case, 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 a person has failed to comply with the law or in determining 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, or would be likely to, prejudice substantially the Council's ability to exercise either or both of these functions. Even if I am satisfied that release of the information would, or would be likely to, prejudice substantially the Council's ability to exercise either or both of these functions, I must go on to consider whether, in all the circumstances of the case, the public interest in maintaining the exemption outweighs that in disclosure of the information. If I find that the public interest does not lie in the maintenance of the exemption, then I must order release of the information.
20. The information in question relates to a dispute between Mr Mathewson and another individual about a business which Mr Mathewson operates from his home. As a result of the complaint, the Council investigated whether Mr Mathewson's business constituted a breach of planning control. Mr Mathewson has, in essence, requested the Council's records of the investigation following the complaints which had been raised with its Planning Department.



21. In its submissions to me, the Council stated that one of its functions, in line with Part VI of the Town and Country Planning (Scotland) Act 1997 (the 1997 Act), is to determine whether there has been a breach of planning control which would necessitate enforcement action. The Council noted, in particular, that section 123(1) of the 1997 Act provides that carrying out development without the required planning permission or failing to comply with any condition or limitation subject to which planning permission has been granted constitutes a breach of planning control.
22. As noted above, the information requested by Mr Mathewson comprises records of the Council's investigation into whether he had failed to comply with the 1997 Act as a result of his business activities. I am therefore satisfied that the Council has a function in respect of both of the purposes mentioned in sections 35(2)(a) and (c) of FOISA.
23. I will now go on to consider whether disclosure of the information requested would, or would be likely to, prejudice substantially the Council in exercising either or both of those functions.
24. The Council argues that to disclose the information in question would be to breach the expectations of confidentiality held by those who contributed to the Council's investigations. It provided me with evidence to show that it had assured third parties that what they said would be kept confidential. Further to this, the complainant has made it clear during correspondence with the Council on the matter that they wish details about their complaint to remain confidential.
25. I accept that if correspondence between the Council and complainants relating to such complaints were to be released, trust in the Council's ability to keep such statements confidential would be broken. I also accept that statements and evidence provided voluntarily are essential to the Council in investigating possible breaches of planning control. If statements, evidence and correspondence were to be released, 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 order to carry out its functions under the 1997 Act.
26. It is important to note here the difference between disclosing information about a complaint only to the person complained of and releasing information about complaints made through FOISA. In this case, the complainant stated during the course of the investigation that he did not mind if Mr Mathewson knew his identity (although he did not want details of the complaint released). FOISA does not release information only to the person who requests it. It compels authorities to put information in the public domain. I cannot compel the Council to release the information which Mr Mathewson has requested to him alone. I must determine whether the information should be made public.



27. While I can understand that those who have been complained about naturally have an interest in accessing information about that complaint, there are dangers involved in putting such information in the public domain as a result of releasing information under FOISA. If individuals believe that information which they have supplied voluntarily would be routinely made public, then they would be much more unwilling to contact the Council about such matters and I consider that the Council's ability to determine whether planning control has been breached would, or would be likely to, be prejudiced substantially.
28. Having taken the above factors into account, I conclude that disclosure of the information in question would, or would be likely to, prejudice substantially the Council's ability to exercise its functions in relation to the purposes listed in sections 35(2)(a) and (c) of FOISA.
29. As I am satisfied that the information in question is exempt under section 35(1)(g), 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

30. There is a general public interest in scrutinising the processes by which local authorities carry out their functions. This ensures that local authorities are accountable and transparent in their actions.
31. Mr Mathewson clearly has an interest in accessing these documents. The dispute involves him and therefore the information held by the Council relating to the dispute does 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.
32. However, the investigation carried out by the Council in this case deals with breaches of planning control. It is also the case that there has been a breakdown in the relationship between Mr Mathewson and the complainant which has led to the complaint being made. Having examined the documents withheld, it is clear to me that the matters raised by the complaint are emotive and sensitive to those involved. It is also clear that the Council also was attempting to mediate between the parties to a certain extent. I am satisfied that it is in the public interest that the Council can investigate these complaints and mediate as fully as possible without fear of disclosure of the documents escalating the dispute between the two parties.



33. The Council has argued that if it were to disclose information given to it in confidence then in future it would not be able to rely on individuals voluntarily giving it information which it could use to pursue its investigations into breaches of planning control.
34. 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 to a certain extent 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 may not carry so much weight. However, it is clear that the investigation into whether Mr Mathewson had breached planning control had concluded only a short time before he made his request, and it is also clear that he felt the matters raised by the complaint made were ongoing at the time of his request. It follows that the documents held in relation to that complaint would still be very sensitive to those involved. In general, I find that there is a public interest in ensuring that information given voluntarily to local authorities in investigating these types of complaints made by members of the public should be allowed to remain private to ensure that Councils can rely on such information in the future.
35. As noted above, I accept that Mr Mathewson has an interest in accessing the documentation withheld by the Council. However, I must consider the wider public interest in this case.
36. In essence, the information requested here relates to an investigation into a very localised issue. 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.
37. From weighing up the arguments outlined above, I am satisfied that the public interest would be better served by the exemption being maintained. I therefore find that the Council correctly applied section 35(1)(g) read in conjunction with section 35(2)(a) and (c) of FOISA to the information requested and that in this case the public interest lies in favour of maintaining the exemption.

Consideration of the remaining exemptions

38. The Council also relied on section 36(2) (Confidentiality) to withhold the information from Mr Mathewson and, during the investigation, argued that section 38(1)(b) (Personal information) of FOISA applied to four of the documents withheld. However, as I have found that the information in its entirety is exempt from disclosure under section 35(1)(g) (read in conjunction with section 35(2)(a) and (c)) of FOISA, I am not required to go on to consider the other exemptions.



Decision

I find that Angus Council acted in accordance with Part 1 of the Freedom of Information (Scotland) Act 2002 (FOISA) in responding to the information request made by Mr Mathewson. I find that the information withheld from Mr Mathewson is exempt in terms of section 35(1)(g) (read in conjunction with sections 35(2)(a) and (c)) of FOISA and that the public interest lies in the maintenance of the exemption.

Appeal

Should either Mr Mathewson or Angus 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 of receipt of this decision notice.

Kevin Dunion
Scottish Information Commissioner
12 July 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.

17 Notice that information is not held

- (1) Where-
- (a) a Scottish public authority receives a request which would require it either-
 - (i) to comply with section 1(1); or
 - (ii) to determine any question arising by virtue of paragraph (a) or (b) of section 2(1),if it held the information to which the request relates; but
 - (b) the authority does not hold that information,
- it must, within the time allowed by or by virtue of section 10 for complying with the request, give the applicant notice in writing that it does not hold it.



35 Law enforcement

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

Town and Country Planning (Scotland) Act 1997

123 Expressions used in connection with enforcement

- (1) For the purposes of this Act-
 - (a) carrying out development without the required planning permission, or
 - (b) failing to comply with any condition or limitation subject to which planning permission has been granted,constitutes a breach of planning control.