



Scottish Information
Commissioner

Decision 153/2006 – Ms P M Uprichard and Fife Council

Correspondence on proposed upgrade of Lade Braes path

Applicant: Ms P M Uprichard

Authority: Fife Council

Case No: 200600357

Decision Date: 15 August 2006

**Kevin Dunion
Scottish Information Commissioner**

Kinburn Castle
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Decision 153/2006 – Ms Uprichard and Fife Council

Correspondence submitted in consultation on proposed upgrade of Lade Braes to multi-user path status – personal information section 38(1)(b) of the Freedom of Information (Scotland) Act 2002 (FOISA)

Facts

Ms Uprichard asked Fife Council (the Council) to supply her under the Freedom of Information (Scotland) Act 2002 (FOISA) with all letters of comment pertaining to the Lade Braes Consultation (Proposed Upgrade to Multi-User Path).

The Council refused to provide this information on the ground that it was exempt under section 38(1)(b) of FOISA.

Outcome

The Commissioner found that the Council had complied with Part 1 of FOISA and had applied the exemption under section 38(1)(b) correctly in relation to some of the information it withheld from Ms Uprichard.

However, the Commissioner found that the Council had not complied with Part 1 of FOISA, in that it had wrongly applied the exemption under section 38(1)(b) to some of the information requested by Ms Uprichard

The Commissioner required the Council to disclose the correspondence withheld from Ms Uprichard subject to the redaction of personal data.



Appeal

Should either the Council or Ms Uprichard 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.

Background

1. On 24 November 2005, Ms Uprichard asked Fife Council to supply her under the Freedom of Information (Scotland) Act 2002 (FOISA) with all letters of comment and objection pertaining to the Lade Braes Multi-user Path Consultation Exercise.
2. The Council replied by letter (22 December 2005) explaining that the requested letters were not part of a planning process and were not in the public domain. The Council said that the information was exempt under section 38 of FOISA since it contained personal data and to disclose the information would be to breach the data protection principles (section 38(1)(b) of FOISA read in conjunction with section 38(2)(a)(i)). The Council had provided Ms Uprichard (on 14 November 2005) - in response to a request by telephone - with a summary of the results of the consultation (survey, school questionnaire and correspondence). This spreadsheet summary showed for each letter whether the writer was for or against the proposed change in respect of (i) lighting (ii) surfacing (iii) multi-user status and (iv) the scheme as a whole. The spreadsheet provided a single 'general comment' in respect of each letter to convey the essence of that letter.
3. On 15 January 2006, Ms Uprichard wrote to the Council asking it to review its decision, in particular questioning the Council's assertion that the consultation was not part of a decision making process.



4. On 8 February 2006, the Council responded. It said that it had considered the decision quoted by Ms Uprichard in her request for review (Decision 012/2005 - Ms Thorne and Perth and Kinross Council). The Council explained that that decision related to a statutory planning process which included provision for representations. The Council stated that the Lade Braes consultation was intended only for internal use within the Transportation Services Department of the Council. The Council believed that many of the writers considered the letters they sent to be private and confidential and the Council refused to release the information on the ground that it was exempt under section 38(1)(b) of FOISA.
5. On 19 February 2006, Ms Uprichard applied to me for a decision as to whether the Council had dealt with her information request in accordance with Part 1 of FOISA. She requested an investigation of the Council's handling of her request on the grounds that she believed that such letters of comment and objection were always part of the planning process and therefore in the public domain. Ms Uprichard also disputed that the letters were 'personal letters' addressed to a member of the Council, and that the comments were solely for internal use within the Transportation Department.
6. The case was allocated to an investigating officer.

The Investigation

7. Ms Uprichard's appeal was validated by establishing that she had made a valid information request to a Scottish public authority and had appealed to me only after asking the public authority to review its response to her request.
8. My investigating officer then contacted the Council on 21 February 2006 for its comments on the application and for further information, including copies of the information withheld. The Council responded on 21 March 2006, providing its comments and the following documents:
 - Report to East Area Services Committee - Agenda Item 6 (7 December 2005)(Document A1)
 - Spreadsheet 'Summary of comments received' (Document A2)
 - Copy of email exchange (Document A3),
 - Spreadsheet listing correspondence: numbered 1-91 (Document A4)
 - Copies of 91 pieces of correspondence listed in Document A4
 - Documents titled 'Lade Braes, St Andrews' – document issued for consultation with handwritten comments (Documents A5 and A6)



- Post-it notes with comments retained on file (Document A7)
 - Copy of email from Fife Council employee (Document A8)
 - Standard letter on proposed upgrade (Document A9)
 - Lade Braes User Survey on 16/17 September 2005 - List comments (31 comments) made throughout both days of consultation (Document A10)
 - Tally sheet for analysis of comments (Document A11)
 - Spreadsheet 'Comment Received from Consultation (7 September 2005) (Document A12)
 - Spreadsheet Schools' Questionnaire Analysis – 95 Items (Document A13)
 - Copies of questionnaire sheets (1-96) listed in A13
 - Copies of documents contained in 'Transportation Department' File (Document A14)
 - Correspondence with Ms Uprichard and Review documentation (Documents A15 and A16)
 - Copy of Planning and Regulatory Services Online (PARSOL) Making Information from Planning (Applications and Enforcement) and Building Control Registers and Databases Available on Local authority websites (Document A17)
http://www.parsol.gov.uk/documents/advice_on_planning_registers.pdf
9. As part of the Council's 2005/06 East Area Transportation Works Programme a project had been approved for a feasibility study and associated public consultation exercise "to ascertain public feedback to this type of project". The public consultation exercise (of which the requested information forms part) was carried out by the Transportation Services Department of the Council to gauge public opinion on the introduction of a multi-user cycle/pedestrian path at Lade Braes.
10. The consultation included an exhibition held in St Andrews Town Hall (on 7 September 2005) at which 64 comments were recorded; a questionnaire to parents and guardians of all pupils in two local primary schools (95 completed questionnaires being returned); and a survey of users (pedestrians and cyclists) which was carried out on 16 and 17 September 2005.
11. A report to the East Area Services Committee on 7 December 2005 concluded that there was a significant negative response to the proposal. It noted that a final scheme would be subject to a planning process and it was recommended that the Committee note the consultation, agree that the project did not proceed at this time, and agree to advise SUSTRANS (a sustainable transport charity) and correspondents. This was approved by the Committee.



Submissions from the Council

12. The Council explained that this consultation was not part of a planning process and there was no statutory requirement upon it to gather this information. The consultation was part of a research project initiated by the Council's Transportation Service. The consultation used an anonymous questionnaire, but some members of the public also chose to correspond with Council. The comments did not form 'letters of objection', as described by Ms Uprichard, since there were no statutory considerations involved. As this was not a planning process, there was no requirement to hold the information on a register and it was never placed in the public domain.
13. The Council stated that its intention had been, and was, that letters received would not be recorded or disclosed. The Council stated that the letters had never been available to the public and that the comments had been sought and received within an information gathering exercise, not a decision making process. The Council commented that the East Area Service Committee of Fife Council received the same spreadsheet as Ms Uprichard, not the correspondence, to ensure compliance with the Data Protection Act 1998 (DPA). The Council did not at any time release the identities of those who had chosen to correspond with it.
14. The Council stated that the persons commenting did not give express consent to release the information in their letters, some were marked 'confidential', others as 'addressee only' and the whole exercise had been conducted, by the Council, on the understanding that the letters would not be disclosed. In the circumstances, consent could not be implied.
15. The Council clarified its position: it had applied section 38(1)(b) of FOISA since the letters contained personal data (names, signatures, contact information, biographical details and other information whereby individuals might be identified).
16. The Council quoted my decision – Decision 012/2005 Ms Thorne and Perth and Kinross Council – and distinguished this request from the circumstances of that case (referred to by Ms Uprichard), since in that case the circumstances under which the information had been provided permitted disclosure. In particular, Perth and Kinross Council had advised its correspondents that it might have to disclose the information. In this case there had been no communication indicating possible disclosure.
17. The Council contended that, in the circumstances, release of the personal data would contravene the data protection principles in terms of section 38(1)(b) of FOISA.



The Commissioner's Analysis and Findings

18. Of the information which the Council holds in respect of the consultation, the correspondence listed in Document A4 falls within Ms Uprichard's request. Document A3 contains an email from a member of the public which makes comment on the consultation process, and the Council accepted this document would be covered by the request. Document A5 is also a piece of correspondence containing comments on the proposed upgrade, as is Document A6: the Council accepted both would be covered by the request. I accept that all of these are letters (or the equivalent of letters) containing comments and/or objections pertaining to the Lade Braes consultation and therefore consider documents A3, A5, and A6 – and those listed in A4 – to be within the scope of Ms Uprichard's request. None of the remaining documents held by the Council fall within the description of information requested by Ms Uprichard.
19. Under section 38(1)(b) of FOISA (read in conjunction with section 38(2)(a)(i)), information is exempt information if it constitutes personal data and the disclosure of the information to a member of the public otherwise than under FOISA would contravene any of the data protection principles contained in the DPA.
20. In this case, I understand from the Council's submissions that it believes the release of the information would breach the first data protection principle, which 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 (of the DPA) is met and, in the case of sensitive personal data, at least one of the conditions in Schedule 3 (again, of the DPA) is also met.
21. I am therefore required to consider two matters: firstly, whether the information which the Council refused to supply to Ms Uprichard is personal data and, if so, whether the release of the information to Ms Uprichard would breach the first data protection principle.
22. This particular exemption is an absolute exemption. It is not subject to the public interest test contained in section 2(1) of FOISA.



Is the information personal data?

23. "Personal data" is defined in section 1(1) of the DPA as "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."
24. Each piece of correspondence (listed in Document A4) identifies by name the person commenting, and includes an address (or email address) and sometimes a telephone number. Whilst the body of some letters and emails provide biographical detail about the writer, usually in the context of their views about the consultation, in the most part this type of information is absent from the letters. In my view, the information withheld contains personal data. The correspondence contains personal data, for example name, address, telephone numbers, signatures and it is possible to identify living individuals from these data. Documents A3 and A5 also contain the same examples of personal data. Document A6 does not contain personal data and does not fall within this exemption: consequently, it should be disclosed.
25. In respect of email correspondence, I note that the Information Commissioner (ICO) has stated (Data Protection Act 1998; Legal Guidance at 2.2.3) that many email addresses are personal data especially where the email address clearly identifies a particular individual. This Guidance is found at:
- <http://www.ico.gov.uk/documentUploads/Data%20Protection%20Act%201998%20Legal%20Guidance.pdf>
- Having considered the emails in question, I accept that the email addresses of the correspondents are personal data.
26. The Council stated that, in addition to letters containing signatures, names and contact information, there were factors such as the way in which the letter was written (handwriting and references to aspects of the locality) which meant that there was a high probability that individuals could be identified. I do not accept that individuals could, in this instance, be identified by handwriting, nor by the style of the letter. However, I accept that some contextual information, for example references to habits in respect of the locality, may allow a living individual to be identified and as such may be personal data.
27. I must now go on to consider whether the release of the information which is personal data would breach any of the data protection principles. As mentioned above, in this case, the Council has argued that release of the information would breach the first data protection principle.



Would the release of the information breach the first data protection principle?

28. The first data protection principle states that personal data must be processed fairly and lawfully and, in particular, shall not be processed unless at least one of the conditions in Schedule 2 of the DPA is met and, in the case of sensitive personal data, at least one of the conditions in Schedule 3 is also met. (I have considered the definition of “sensitive personal data” in section 2 of the DPA and do not consider that any of the information sought by Ms Uprichard falls into this category.) In this case, the Council is of the opinion that the release of the information would be unfair as the persons responding to the consultation would have no expectation that the information would be released.
29. The Council referred me to Document A17 and, in particular, paragraphs 7-9 of Appendix 1 of that document. These paragraphs deal with lawfulness in respect of the processing of personal data, and in particular in respect of publishing planning applications on the web. I accept that this is relevant to this situation, despite the fact that the Council emphasises that this is not a planning application (and although wider considerations may be relevant to publication on the web, for example the eighth data protection principle). The Guidance highlights the questionable lawfulness of putting personal data (email address, telephone number, and signature) on the internet.
30. The Council document inviting views (text within Document A5) does not indicate that any views would be released or would remain confidential. It states:

‘Any comments you have on the proposals are welcome.’
31. The Council made the point in its review that much of the correspondence was addressed by name to either the Transport Planner or Area Transportation Plan Team Leader of the Council. I accept Ms Uprichard’s point that this does not make the correspondence personal, in the sense of being private. The letters were addressed by name because the Transport Planner or Plan Leader was identified in the documents (for example, Document A9) which invited comments from interested parties.



32. Of the responses received by the Council, only one document indicates that the writer wishes it to be confidential (it states “Confidential and addressee only”). No other document indicates that the views expressed should be kept confidential. Some use language that could be indicative of the expectation that the view will be disclosed. For example, there is language like ‘register’ and ‘record’ and numerous letters are copied to other persons (to councillors, MSPs, MPs, St Andrews Preservation Trust, etc), all to my mind suggesting that the intent is not that they be confidential. A person reading certain letters could find evidence that the writer did not intend that the terms of their letter be confidential. However, I accept that a writer may have had an expectation that their opinion be disclosed, whilst not having the expectation that their personal data be disclosed.
33. According to guidance from the Information Commissioner (“Freedom of Information Awareness Guidance 1”, which can be viewed at <http://www.ico.gov.uk/documentUploads/AG%201%20personal%20info.pdf>), the assessment of fairness includes looking at whether the third party would expect that his/her information might be disclosed to others and/or whether the third party would expect that his/her information would be kept private.
34. In paragraph 32 (above), I said that none of the correspondence, with the exception of except one email, indicates that the writer wishes it be kept confidential. However, I do not accept that this lack of an indication of confidentiality by the respective writers is equivalent to consent (in the sense of Schedule 2 of the DPA) to disclosure of personal data. I am satisfied that there is no expectation on the part of the writers that their personal data would be made public and consequently am satisfied that disclosure of the personal data of the correspondents would not be fair and lawful (in the sense of Schedule 1 of the DPA), nor would any of the conditions within Schedule 2 (of the DPA) be met by such processing.
35. To conclude, I am not satisfied that it would be fair for the letters to be disclosed in their entirety. In the circumstances, I find that the release of the information in its entirety to Ms Uprichard under FOISA would not be fair and would infringe the first data protection principle. Therefore, I must find that that information is exempt in terms of section 38(1)(b) of FOISA.



36. However, I believe that some of the information withheld can be released. Removal of the personal data from the letters will permit Ms Uprichard to see the comments in the language in which they were expressed, but without being able to link them to an identifiable living individual. Consequently, I require the Council to release to Ms Uprichard all the letters that comprise the correspondence listed in Document A4 with the personal data redacted (i.e. redaction of any name, address, telephone number, email address, fax number, and any detail within the documents which will identify the person). So, for example, if a writer provides any description of themselves (such that they could be identified) in terms of habits or location relative to the Lade Braes, this could constitute personal data and should be redacted. I also require the Council to release documents A3 and A5 with similar redaction of any personal data.
37. The effect of this decision should not be to restrict authorities in carrying out consultations of this kind. This particular consultation allowed people to contribute opinions on the proposal and allowed the Council to assess feelings for the proposal and weigh arguments for and against. However, an authority considering such a consultation should indicate clearly that any information it received it may have to disclose under FOISA.
38. I require the Council to provide to Ms Uprichard:
- A copy of each of the items of correspondence listed in A4 subject to redaction of personal data
 - A copy of Document A3 subject to redaction of personal data
 - A copy of Document A5 subject to redaction of personal data
 - A copy of Document A6



Decision

I find that Fife Council (the Council) partially failed to comply with Part 1 of the Freedom of Information (Scotland) Act 2002 (FOISA) by failing to provide Ms Uprichard with the requested material and by relying on the exemption contained in section 38(1)(b) to withhold information from Ms Uprichard. In doing so, it failed to comply with section 1(1) of FOISA.

I require the Council to disclose the information withheld (as detailed above), subject to the redactions specified (as detailed above) within 45 days of receipt of this letter.

Kevin Dunion
Scottish Information Commissioner
15 August 2006