



Scottish Information
Commissioner

**Decision 001/2007 Ms Lynn Fulton and West
Dunbartonshire Council**

*Information about a disputed planning application and claim for
compensation*

**Applicant: Ms Lynn Fulton
Authority: West Dunbartonshire Council
Case No: 200501599
Decision Date: 9 January 2007**

**Kevin Dunion
Scottish Information Commissioner**

Kinburn Castle
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Information relating to a disputed planning decision and a claim for compensation

Relevant Statutory Provisions and other Sources

Freedom of Information (Scotland) Act 2002 sections 1(1) (General entitlement), 10(1) (Time for compliance), 15 (Duty to provide advice and assistance), 21(1) (Review by Scottish public authority), 36(1) and (2) (Confidentiality), 37(1) (Court records, etc.) and 38(1)(b) (Personal information).

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

Facts

Ms Fulton asked West Dunbartonshire Council (the Council) to provide copies of all documentation held in relation to a planning matter at a named property.

After some delay, the Council provided Ms Fulton with some information but withheld other information under the exemptions in section 36(1) and (2) of the Freedom of Information (Scotland) Act 2002 (FOISA).

During the investigation it was found that some information was already in the public domain, and the Council withdrew its reliance on the exemptions cited in relation to those documents. The Council also decided that certain information was exempt under section 38(1)(b) of FOISA rather than section 36(2), and that one document should be withheld under section 37(1). In some cases the Council decided to withdraw its reliance on any exemption in FOISA, and to provide information previously withheld from Ms Fulton.

The Commissioner found that the Council had withheld certain information wrongly under the exemptions contained in sections 38(1)(b), 36(1) and 36(2) of FOISA, and therefore had failed to comply with section 1(1) of FOISA. He also found, however, that the Council had been correct to withhold other information under the exemptions contained in sections 38(1)(b), 36(1), and 37(1) of FOISA.



The Commissioner also found that the Council had breached certain technical provisions of FOISA in dealing with Ms Fulton's request.

Background

1. On 23 March 2005 Ms Fulton contacted West Dunbartonshire Council (the Council) to ask whether compensation had been paid to two neighbours following an investigation by the Scottish Executive into an alleged breach of planning control. She received no reply and on 31 March 2005 sent another email to the Council, repeating the question regarding compensation but also making an explicit request for "All documentation / correspondence within the various files" relating to this matter. She asked to be advised of any documentation she was not allowed to see and the reasons why.
2. After receiving no reply to either request, Ms Fulton repeated her request in an email sent on 20 April 2005. Another email was sent on 28 April 2005, reminding the Council that she had still received no reply. After taking advice from my Office, on 29 April 2005 she asked the Council to conduct a full review.
3. Although Ms Fulton received a phone call regarding her case on 3 May 2005, the Council failed to provide a formal response to her request for a review and on 30 May 2005 Ms Fulton appealed to me for a decision on the matter.
4. The case was allocated to an investigating officer.

The Investigation

5. Ms Fulton's application for a decision was validated after confirming that she had made a written request for information to a Scottish public authority (West Dunbartonshire Council), and had appealed to me only after requesting a review from the authority.



6. On 21 June 2005, the Council was notified of the application made by Ms Fulton and its comments were invited in terms of section 49(3)(a) of FOISA. The Council were informed that the investigation would focus on two separate issues:
 - a) whether Ms Fulton had received all the information to which she was entitled
 - b) the way in which the Council had dealt with her request under FOISA.
7. The Council replied on 24 June 2005. It acknowledged that it had been tardy in replying to Ms Fulton's request, but indicated that it intended to send a full response to her along with documents relating to her request. On 1 July 2005, the Council informed the investigating officer that this had been done.
8. Ms Fulton contacted my Office on 5 July 2005 to say that she was not satisfied with the response from the Council, and to ask for advice on how to proceed.
9. The investigating officer then asked the Council (7 July 2005) to provide the information previously requested on 21 June 2005.
10. The Council replied on 28 July 2005. It had carried out a search which had identified some 117 documents relating to Ms Fulton's request from three files: Legal and Administrative Services file; Planning file; and the Scottish Public Services Ombudsman Complaint, Legal and Administrative Services file. The Council stated that during the search it had become apparent that there should be another Legal and Administrative Services file for potential litigation, but efforts to locate this file had not been successful.
11. The Council provided the investigating officer with copies of all documents withheld from Ms Fulton and a full explanation of the Council's reasoning in applying the exemptions in FOISA.
12. During the investigation Ms Fulton was asked whether it might be possible to exclude any documents relating to her previous complaint to the Scottish Public Services Ombudsman, which had been partly upheld. However, Ms Fulton indicated that she would prefer a complete scrutiny of the Council's decision to withhold information which was covered by the terms of her request. (She later decided that she did not require a copy of the report from the SPSO to be provided, either in draft or in its final form.)
13. It was also established that Ms Fulton did not require copies of any letters written by her or on her behalf, or sent to her from the Council. These were accordingly disregarded when considering the documents withheld from her.



14. During the examination of the documents withheld from Ms Fulton, it was discovered that some were already in the public domain as they had been presented as background papers to reports to Council committees, and were therefore available on request from the Council. This applies to documents B15, B43, C60, C61, C65 and C66. When this was pointed out, the Council acknowledged that these documents should not have been withheld from Ms Fulton and therefore should be released.

The Commissioner's Analysis and Findings

15. I will first consider whether the Council fully complied with FOISA in dealing with Ms Fulton's request.
16. Ms Fulton made four requests for information by email (as described in paragraphs 1 and 2 above) without receiving any written reply apart from acknowledgements from the Council's webmaster, who seems to have made considerable efforts to secure a reply for Ms Fulton from the Council solicitor dealing with her case. This solicitor contacted Ms Fulton by phone following her request of 23 March, but was unable to provide her with the information she required on that occasion.
17. Following advice from my Office, Ms Fulton requested a review of the way in which the Council had handled her request. Again, she was contacted by phone by the Council solicitor, who informed her that she would receive the information she had requested. However, in a follow-up email (May 11, 2005) Ms Fulton noted that she had not received anything.
18. I accept that there it may be both legitimate and helpful to follow up a written request for information with a phone call to clarify the request or to suggest a different way of approaching the issue. However, FOISA clearly requires a Scottish public authority either to provide the information requested by the applicant or, where appropriate, to issue a refusal notice (section 16), a notice that the information is not held (section 17), or a notice in terms of section 18, within 20 working days of receiving the request or (where appropriate) notice of the information required and requested by it to clarify the request.



19. In this case, the Council failed to comply with sections 10(1) and 21(1) of FOISA in that it did not respond either to Ms Fulton's request for information or to her request for review within the relevant periods of 20 working days specified in those sections. It failed either to provide the information requested in accordance with section 1(1) of FOISA, or to give Ms Fulton appropriate notice in terms of sections 16, 17 or 18. Its failure to comply with the procedures and timescales laid down in Part 1 of FOISA has contributed to the general distrust with which Ms Fulton now regards the Council. I also consider that the Council, insofar as it did communicate with Ms Fulton prior to her application to me, was in breach of section 15 of FOISA, which requires a public authority to provide advice and assistance to an applicant, so far as it is reasonable to expect it to do so.
20. The Council acknowledged that in dealing with Ms Fulton's request the officer concerned failed to follow the Council's own procedures for answering information requests under FOISA. The Council provided me with an assurance that it would take the necessary steps to ensure that all departments, including Legal and Administrative Services, were aware of their obligations in terms of FOISA, and that it would identify where further training was required.
21. The Council has now provided a detailed description of the training and guidance that was made available to staff in the months following Ms Fulton's request, which included further guidance to the officer who had initially dealt with her request. I am now satisfied that the Council has taken steps to provide its staff with ongoing support and advice in dealing with FOI requests, and I therefore do not require any further remedial action from the Council in relation to its failure to deal with Ms Fulton's request in the manner laid down by FOISA.

Information withheld from Ms Fulton

22. As noted above, the Council provided Ms Fulton with a number of documents but withheld others on the grounds that they were exempt from disclosure under FOISA. I will now consider whether Ms Fulton has been provided with all the information to which she is entitled, under the terms of her request and according to the provisions of FOISA.
23. The documents identified as exempt from disclosure were divided into three bundles:
 - A – Papers from the Legal and Administrative Services File held by one of the Council's solicitors
 - B – Papers held by the Planning Department
 - C – Papers held by Legal and Administrative Services concerning correspondence between that department and other Council departments regarding the involvement of the Scottish Executive and the Scottish Public Services Ombudsman in the planning dispute.



24. Each bundle has been further subdivided into subject areas, which I will refer to as groups, e.g. Bundle A Group 1. The Council has given reasons why each group of documents is believed to be exempt from disclosure and why (where relevant) it is in the public interest to uphold the exemption.
25. I will consider each bundle and the groups of documents within it in turn.

Bundle A Group 1

26. Bundle A Group 1 consists of communications from the Council's solicitors to staff in other Council departments seeking legal guidance regarding the planning issue at the address in question. This includes a memo of instructions, referrals for legal guidance from other departments, and draft communications and discussion notes. The Council has claimed that such information is exempt from disclosure as this type of communication is legally privileged and therefore meets the criteria laid down in section 36(1) of FOISA:

"Information in respect of which a claim to confidentiality of communications could be maintained in legal proceedings is exempt information".
27. The Council has argued that it would adversely affect the ability of the Council to obtain appropriate and relevant legal guidance and to allow it to exercise its duties effectively if this type of legal guidance was fully open to public scrutiny, and that therefore disclosure would not be in the public interest.
28. For the most part, I accept that the exemption in section 36(1) of FOISA applies to the documents listed in Bundle A Group 1. The exceptions are A20, which is an administrative memo seeking comments on factual findings; and A68, which is a letter describing certain administrative arrangements. In these instances I do not accept that a claim to confidentiality of these communications could be maintained in legal proceedings. I require the Council to release these documents to Ms Fulton. I also note the Council's agreement to release document A16 from this bundle.
29. I accept that the remaining documents in Bundle A Group 1 are exempt from disclosure under section 36(1) of FOISA, subject to the public interest test laid down in section 2(1)(b) of FOISA. As I have noted in a previous decision (023/2005), the courts have long recognised the strong public interest in maintaining the right to confidentiality of communications between legal adviser and client on administration of justice grounds. Many of the arguments in favour of maintaining confidentiality of communications were discussed in a House of Lords case, *Three Rivers District Council and others v Governor and Company of the Bank of England* (2004) UKHL 48.



30. There will always be a strong public interest in maintaining the right to confidentiality of communications between legal adviser and client. As a result, I am likely only to order the release of such communications in highly compelling cases.
31. In this case I consider that there is insufficient public interest in the contents of the documents to overturn the exemption in section 36(1), and I uphold the decision to withhold the information.

Bundle A Group 2

32. Bundle A Group 2 consists of documents created by one of the Council solicitors, including notes from telephone calls and summaries of the case file with his own opinions and suggestions. Many of the documents are hand-written notes.
33. The Council has argued that it is part of a solicitor's functions to make notes and to consider options available to the Council, and that these documents were not intended to be subject to public scrutiny. As the documents include suggestions, options and legal guidance from the solicitor, the Council takes the view that legal professional privilege applies to these documents and that they would therefore be exempt from disclosure under the exemption in section 36(1) of FOISA.
34. After examining the documents I accept that the exemption in section 36(1) can be applied to all the information withheld, subject to the public interest test. I have not identified any strong public interest in the disclosure of these specific communications and notes made by a public official in the course of his job and conclude that the public interest in disclosure of the information is outweighed by the public interest in the maintenance of the exemption. I therefore uphold the Council's decision to withhold the documents in Bundle A Group 2 under section 36(1) of FOISA.

Bundle A Group 3

35. The documents in Bundle A Group 3 have been withheld under section 38(1)(b) of FOISA. Section 38(1)(b), read in conjunction with section 38(2)(a)(i), allows a public authority to withhold information if it is personal data as defined by the Data Protection Act 1998 (the DPA) and disclosure would contravene any of the data protection principles contained in Schedule 1 of the DPA. This is an absolute exemption in terms of section 2(2) of FOISA and therefore there is no requirement to consider the public interest in relation to information withheld under this exemption.



36. The Council has described the documents in this group as correspondence between a Council solicitor and one of Ms Fulton's neighbours (Mr A). The documents include telephone attendance notes, rough notes, letters and memos. The Council considers that the information in these documents is personal data relating to Mr A, disclosure of which would breach the first data protection principle. I note the Council's agreement to release documents A1 and A9 from this bundle.
37. Given the definition of personal data contained in section 1(1) of the DPA (i.e. data relating to a living individual who can be identified either from those data alone or from those data combined with other information in the possession of or likely to come within the possession of the data controller) and bearing in mind the gloss placed on that definition by the Court of Appeal in the case of *Durant v Financial Services Authority* [2003] EWCA 1746 (i.e. that the information must be biographical in respect of the individual concerned to a significant extent and must have that individual as its focus, in short that it must affect the individual's privacy), I am satisfied that all the information in this group is Mr A's personal data.
38. For the information in this group to be processed (in this case by disclosure) in accordance with the first data protection principle, that processing would require to be fair and lawful. In particular, at least one of the conditions in Schedule 2 of the DPA must be met before processing can be said to be fair and lawful and, if the data is sensitive personal data within the meaning of section 2 of the DPA (for example, information about a person's physical or mental health), one of the conditions in Schedule 3 of the DPA must also be met.
39. I am satisfied that none of the information in this group is sensitive personal data. Therefore, I am required to consider the conditions in Schedule 2 only and not those in Schedule 3. The only Schedule 2 condition which appears to be relevant is condition 6, which requires that the processing be
- “...necessary for the purposes of legitimate interests pursued by the data controller or the third party or parties to whom the data are disclosed, except where the processing is unwarranted in any particular case by reason of prejudice to the rights and freedoms or legitimate interests of the data subject.”



40. I must apply a number of tests to establish whether condition 6 supports disclosure of personal data in any given case. The first test is whether it can be established that the third party or parties to whom the data would be disclosed has/have a legitimate interest in the processing of the personal data (in this case by disclosure to a member of the public) to which the request relates. The second is whether the processing is *necessary* for the purposes of those legitimate interests. The third is whether that processing can be seen to be unwarranted in this particular case by reason of prejudice to the rights and freedoms or legitimate interests of the data subject. Both competing interests must then be balanced. I consider that the arguments in respect of the first and second tests apply equally to all of the personal data contained in the report and so would like to take this opportunity to address them at this stage.
41. I take the view that there is a general legitimate interest in disclosure of information which enhances scrutiny of decision-making processes and thereby improves accountability and participation. This is of particular importance in the planning system, where decisions tend to affect others beyond those immediately concerned in a particular development and must be seen to be taken in a fair, open and transparent manner. Ms Fulton had a particular legitimate interest as a neighbour of the property where the breach of planning control was alleged to have taken place.
42. It does not follow necessarily, however, that disclosure of the personal data would be necessary for the purposes of the legitimate interests identified above. It is important to bear in mind that the exemption under section 38(1)(b), read in conjunction with section 38(2)(a)(i), is not subject to the public interest test (although similar considerations may apply when assessing legitimate interests for the purposes of condition 6) and a presumption in favour of disclosure does not apply when this exemption is being considered. The sole consideration is whether disclosure would contravene any of the data protection principles. In this case, I am considering the first principle and the conditions which must be met before it can be complied with, and the relevant condition here (the sixth) requires not only a legitimate interest in disclosure but also that it be necessary for disclosure to take place before that legitimate interest can be met. If the legitimate interest has been, or can reasonably be, met by alternative means not involving the disclosure of the personal data in question, then it will be unlikely that disclosure is necessary for the purposes of that legitimate interest.
43. The information withheld from Bundle A Group 3 records Mr A's intentions regarding a particular course of potential action. I have concluded that although Ms Fulton has a legitimate interest in the decision-making process followed by the Council in relation to the decking at the neighbouring property, her interest does not extend to information about her neighbour's dealings with the Council over this particular matter.



44. From Mr A's perspective, his name and address have already been made public in connection with the planning appeal through Committee minutes and associated papers. However, the substance of the information withheld in Bundle A Group 3 has not been fully disclosed in documents already publicly available. I accept that Mr A would have expected his discussions with the Council to remain private, except where they concerned matters which would be part of a public planning process or business likely to be discussed at a Council committee meeting. Therefore, I take the view that prejudice to Mr A's rights, freedoms or legitimate interests would weigh against disclosure.
45. In assessing and balancing the legitimate interests in this case, I have taken into account that Ms Fulton has already received the Scottish Public Services Ombudsman's report regarding her complaint against the Council, which contains a detailed account of events relating to the breach of planning control at her neighbour's property.
46. In all the circumstances, having considered and balanced the relevant legitimate interests, I have concluded that condition 6 cannot be met in relation to the information in Bundle A Group 3. Therefore, I accept that the information is Mr A's personal data, disclosure of which would contravene the first data protection principle. I agree with the Council's decision to withhold this information under the exemption in section 38(1)(b) of FOISA, read in conjunction with section 38(2)(a)(i).
47. The Council did not include documents A43-A44 or A61 in any particular group and has agreed that they can be disclosed.

Bundle B Group 1

48. The documents in this group (B1, B2, B3 and B6-B7) were described as documents which could be disclosed. I require the Council to provide copies of these documents to Ms Fulton.

Bundle B Group 2

49. The documents in this group include communications between the Planning Department and Mr A and his solicitor. The Council has recognised that the correspondence was created while carrying out one of its public functions in terms of planning requirements, but considers that this information is Mr A's personal data and that it cannot be disclosed in conformity with the data protection principles in the DPA. Accordingly the Council has withheld the documents in this group under the exemption in section 38(1)(b) of FOISA, read in conjunction with section 38(2)(a)(i), on the basis that disclosure would be contrary to the first data protection principle.



50. After further consideration and consultation with the Scottish Executive Inquiry Reporters Unit, the Council agreed that documents B21-B22 and B44-B61 should be released. These documents related to an appeal to the Scottish Ministers.
51. In evaluating the Council's arguments in relation to the other information in this group, I have applied the considerations set out in paragraphs 37-42 above to determine whether the information is personal data and whether disclosure would contravene the first principle. Once again, I have identified no sensitive personal data within the information and condition 6 appears to be the only Schedule 2 condition relevant in the circumstances.
52. As noted above in paragraph 41, I take the view that there is a general legitimate interest in disclosure of information which enhances scrutiny of decision-making processes within the planning system, and consider that Ms Fulton had a particular legitimate interest as a neighbour of the property where the breach of planning control was alleged to have taken place.
53. The information withheld from Bundle A Group 2 relates to the planning process within the Council and Mr A's planning appeal. I consider that Ms Fulton has a legitimate interest in this information, but must also consider whether disclosure of the information from these documents would be necessary for the purposes of those interests.
54. I found that the information withheld from Bundle A Group 2 provided some detail about the processes followed by the Council and Mr A during a course of action which had a significant impact upon Ms Fulton's daily life. On the other hand, I think it questionable whether they added anything significant to information already available on this matter and would question whether disclosure would be necessary for the purposes of Ms Fulton's legitimate interests.
55. Against this, I considered whether Mr A had legitimate interests which would outweigh Ms Fulton's interests in disclosure of the information. In my view, he would not have had any reasonable expectation that the information would be disclosed and, on balance, I am satisfied that his legitimate interest in this information being withheld outweighs any legitimate interest in disclosure which required to be met. I took into account the fact that the Council has already accepted that the appeal to the Scottish Ministers (Document B44-B61) should be disclosed, and that it is public knowledge that an appeal was lodged by Mr A.
56. As I am not satisfied that disclosure would meet one of the conditions in Schedule 2 of the DPA, I must accept that this information is exempt under section 38(1)(b) of FOISA and uphold the decision of the Council to withhold documents B8, B23 and B31 under that exemption.



57. The Council has stated that documents B9-B12 and B13 disclose Mr A's intentions regarding his private garden, and constitute personal data which it would be unfair to disclose because these documents were not written with the intention of general circulation.
58. I accept that information relating to a private individual's proposals for their own domestic property may be their personal data. The name and address of Mr A are, however, already public knowledge from the planning application and appeal, and his proposed alterations are detailed in these documents for the purposes of obtaining planning consent, which is business likely to be discussed at a Council committee meeting. It would have been surprising if Mr A, as the applicant for that planning consent, had not expected some or all of the details submitted to be discussed in a public forum and recorded in the relative minute. In any event, I cannot accept that information submitted by the applicant for the purposes of a planning application can (save in exceptional circumstances, which do not appear to arise here) be provided to the planning authority with any expectation that it will remain outwith the public domain. Therefore, I cannot accept that this information should be withheld under section 38(1)(b) of FOISA.
59. I accept that B9 and B13 contain some personal data in the form of telephone numbers and the name of Mr A's wife. I find that it would contravene the data protection principles to make this information public, as disclosure would not meet any of the conditions of Schedule 2 of the DPA. I therefore require the Council to redact this information before supplying Ms Fulton with copies of documents B9-B12 and B13.

Bundle B Group 3

60. The documents in this group are letters between some of Mr A's neighbours, the Provost and the Council. The letters were exchanged after objections had been raised about the planning decision affecting Mr A. The Council originally took the view that the information had been provided in confidence to the Council and was exempt from disclosure under section 36(2) of FOISA. However, after discussion with my Office, the Council chose to rely upon section 38(1)(b) to justify the decision to withhold the information in these documents.
61. In evaluating the Council's arguments in relation to the information in this group, I have again applied the considerations set out in paragraphs 37-42 above to determine whether the information is personal data and whether disclosure would contravene the first principle. Once again, condition 6 appears to be the only Schedule 2 condition relevant in the circumstances and I have identified no sensitive personal data within the information (with the exception of some information in document B35-B36, considered later in relation to duplicate document C97-C98 from Bundle C Group 4).



62. I have accepted that Ms Fulton has a legitimate interest in the information withheld, for the reasons stated in paragraph 52 above.
63. The Council has referred to two of my previous decisions to support the use of the exemption in section 38(1)(b). In the cases of Mr Roy J Miller and Stirling Council (044/2006) and Ms P M Uprichard and Fife Council (153/2006) I considered whether personal information of members of the public who had made known their views about certain planning matters should be disclosed. In both cases I upheld the decision to withhold any information which could lead to the identification of individuals, including information about the location of their homes in relation to the subject of the planning application or consultation.
64. However, I believe the circumstances of this case are different from the two cases cited above. In this case the complaints related to a planning application and appeal which had been through the public process of consideration and approval by the Council. During that process a certain amount of information about the people objecting to the application had become public knowledge. In the two cases cited in the previous paragraph, the members of the public who had raised complaints or objections had done so outside the public planning process.
65. The Council has found that one of the documents withheld, B43, was a letter referred to in a Director's report to the Planning Committee and made available to the Committee when considering the relevant planning application. As it formed part of the documentation for a planning application, this information would have been accessible from the Council and the Council acknowledges that it should be provided under FOISA. I require the Council to provide Ms Fulton with a copy of the letter.
66. B43 contains some personal data about one of the neighbours which the Council has sought to withhold in document B27-B28 in this group: however, as the information has now been shown to be already in the public domain, it is unlikely that disclosure of the information would contravene the first data protection principle, which requires processing to be fair and lawful. I have therefore found that B27-B28 contains no personal information which should be exempt under section 38(1)(b) of FOISA, and require the Council to provide Ms Fulton with a copy.
67. The Council originally relied upon the exemption in section 36(2) of FOISA to withhold document B29, and did not subsequently state that its position in that respect had changed. However, during the investigation the Council did advise my Office that it had revised its view and could now, if required, disclose the letter provided that it was recognised that this did not set a precedent for the disclosure of any letter sent to the Council on behalf of a local resident.



68. I have made it clear in previous decisions that the question of whether an exemption should be upheld must always be considered on a case by case basis. In this case, I believe that by indicating that the document could be released, albeit with conditions attached, the Council has provided confirmation that the information did not possess the necessary quality of confidence required in order for the exemption in section 36(2) of FOISA to apply. (This requirement is discussed in more detail in paragraph 78 below.) I require the Council to supply Ms Fulton with a copy of document B29.
69. Document B31 has already been considered at paragraph 56 above.
70. The Council has stated that letter B32-B34 could be disclosed with the redaction of personal data relating to one of the neighbours. As I have not found the personal data in that letter to be in the public domain already, I have upheld the Council's position with regard to this document, and require it to be provided to Ms Fulton after redacting details of the recipient and information in paragraph 8 which may lead to the identification of the recipient.
71. Document B35-B36 is an unannotated version of C97-C98, considered below under Bundle C Group 4.

Bundle B Group 4

72. The documents in this group are described as in-house legal advice between the Council's Planning Department and Legal and Administrative Services. The Council considers this information exempt under section 36(1) of FOISA (confidentiality of communications).
73. I have upheld the Council's decision to withhold three of the documents in this group under section 36(1), as they clearly contain requests and responses regarding legal advice, and I have identified no public interest in disclosure of the information strong enough to outweigh the maintenance of the exemption. The documents in question are B24, B25-B26 and B39-B40.
74. I do not accept that the exemption in section 36(1) should have been applied to documents B14 and B37, which are covering notes or memos relating to administrative matters and not confidential in nature. I therefore require the Council to provide Ms Fulton with copies of these documents.

Bundle B Group 5

75. The documents in this group are letters exchanged between the Scottish Executive and the Council regarding Mr A's planning appeal. The Council has withheld them under the exemption in section 36(2) of FOISA (actionable breach of confidence).



76. This exemption allows public authorities to withhold information obtained from another person (or public authority) if its disclosure to the public would constitute an actionable breach of confidence. The exemption is not subject to the public interest test.
77. In order for information to be withheld under this exemption, an authority must first be able to show that the information was obtained from another person, and then show that disclosure of the information would constitute an actionable breach of confidence
78. There are three main requirements which must be met before a claim for breach of confidentiality can be established. These are:
- a) the information must have the necessary quality of confidence;
 - b) the public authority must have received the information in circumstances which imposed an obligation on the authority to maintain confidentiality; and
 - c) there must be a disclosure which has not been authorised by the person who communicated the information but which would cause damage to that person.
79. All the documents are of an administrative nature and I do not accept that they have the necessary quality of confidence required for the exemption in section 36(2) to apply. When consulted by the Council, the Scottish Executive Inquiry Reporters Unit confirmed that documents provided as part of an appeal would generally be made available to the public. It is therefore public knowledge that an appeal was brought to the Scottish Ministers.
80. I therefore do not accept that documents B17, B18 and B19-B20 should be withheld under the exemption in section 36(2) of FOISA, and require the Council to provide copies to Ms Fulton. I note that the Council has agreed to release document B21-B22 to Ms Fulton.

Bundle C Group 1

81. The documents in Bundle C belong to the file of papers relating to Ms Fulton's own complaint against the Council where these fell within the scope of her FOI request. The Council did not consider any documents in the file which did not mention or have direct reference to the terms of her request. Bundle C Group 1 consists of requests for in-house legal guidance on dealing with the Planning Appeal and the investigation by the Scottish Public Services Ombudsman, together with responses from Council solicitors.



82. The Council has withheld these documents under the exemption in section 36(1) (confidentiality of communications). It believes that disclosure of legal guidance would have an adverse effect on the operations within the Council and that in order to carry out the functions of the Council it is necessary for Council officials to take legal guidance without this being subject to full public scrutiny for each development or decision made in the course of daily business.
83. Section 36(1) exempts information from disclosure if it is information in respect of which a claim to confidentiality of communications could be maintained in legal proceedings. One type of communication covered by this exemption is communications between legal adviser and client. For the exemption to apply to this particular type of communication, certain conditions must be fulfilled. For example:
- The information withheld must relate to communications with a legal adviser. This clearly includes communications with solicitors, and would also include communications with Counsel (although there was no involvement of Counsel in this case).
 - The legal adviser must be acting in his/her professional capacity and the communications must occur in the context of his/her professional relationship with his/her client
 - The privilege does not extend to matters known to the legal adviser through sources other than the client or to matters in respect of which there is no reason for secrecy
 - The privilege does not extend to communications which relate to fraud or the commission of an offence
84. I have upheld the Council's arguments in respect of three documents (C47-C48 (of which C49-C50 is a duplicate), C81 (which duplicates document B24 (above) in any event) and C82-C83), accepting that the information in these documents is exempt under section 36(1) and that there is insufficient public interest in their contents to outweigh the strong public interest in maintaining the exemption.



85. C97-C98 is a duplicate of document B35-B36 with the addition of manuscript notes, and has also been withheld under the exemption in section 38(1)(b) (discussed under Bundle C Group 4 below). The exemption in section 36(1) has been applied to the manuscript notes alone. It is clear that the notes were made by the recipient of the letter (not a lawyer) while preparing his response. I do not accept that the notes can be withheld under section 36(1): they were not made by one of the Council's legal advisers and do not constitute legal advice or a request for legal advice. While the letter appears to have been passed to the Council's legal advisers for comment, the notes do not appear to have been made with that request for comment in mind. I have therefore found that the notes were wrongly withheld under this exemption. The remainder of the document is considered later in this decision notice.
86. I have found that most of the other documents in this group are administrative correspondence with the Scottish Executive about the enforcement of a section 71 Discontinuance Order, a matter which was reported to and approved by the Council's Planning Committee in public session. I do not accept that the letters in documents C39-C41 should be exempt under section 36(1), dealing as they do with issues of planning enforcement, the outcome of which is a matter of public record. Similarly, document C74 is a piece of administrative correspondence relating to Mr A's planning appeal and therefore I cannot accept that it is exempt under section 36(1). I therefore require the Council to provide Ms Fulton with a copy of document C41. Documents C39, C40 and C74 have also been withheld under section 36(2) and the Council's arguments regarding the application of that exemption are considered below under the heading "Bundle C Group 2".
87. I have also rejected the Council's argument that the exemption in section 36(1) of FOISA should apply to document C75, a fax cover sheet with contents of an administrative nature, and I require the Council to provide a copy of this document to Ms Fulton.

Bundle C Group 2

88. The documents in this group are described as communication with the Scottish Executive in relation to a Planning Appeal made by Mr A. The Council considered that these documents were exempt from disclosure under section 36(2) of FOISA, on the grounds that the correspondence was confidential to Mr A's interests. The Council acknowledged that under the appeal process third parties with a relevant interest would have access to some of the information, but would not have received the documents retained here. Earlier in this decision notice I have described the conditions required for the exemption in section 36(2) to apply (see "Bundle B Group 5").



89. In responding to an information request under FOISA it is important to distinguish between “documents” and “information”. Although the document C39 may not have been made available to other parties previously, the information contained in the letter has been made public in the minutes of the Planning Committee of 3 March 2004 and in the report submitted to that Committee by the Director of Economic, Planning & Environmental Services. I therefore do not accept that the information has the quality of confidence required for a sustainable claim of confidentiality and consequently do not accept that the exemption in section 36(2) applies to this information. I require the Council to provide Ms Fulton with a copy of document C39.
90. I have found the same difficulties in accepting the Council’s argument that documents C40, C74, C84 and C85 should be withheld under section 36(2) of FOISA. Again, the substance of the information is already in the public domain, and I do not believe that it can be demonstrated that the information has the necessary quality of confidence to provide grounds for an actionable breach of confidence. In any event, it is difficult to see what detriment Mr A would suffer now from the release of the information in these letters.
91. Documents C92-C93 and C88 are letters to Mr A from the Planning and Building Control department of the Council, communicating its decision regarding planning consent. The condition specified in these letters was later appealed by Mr A. I do not accept that the information in these letters would provide Mr A with grounds for a breach of confidence action if disclosed.
92. I therefore require the Council to provide Ms Fulton with copies of C40, C74, C84, C85, C88 and C92-C93.

Bundle C Group 3

93. The documents in this group consist mostly of letters to and from Ms Fulton. As she has now confirmed that she does not require copies of this correspondence, I will not consider whether the Council’s arguments for withholding this information under FOISA were valid.
94. The one remaining document in this group, C102-C103, outlines the conditions upon which planning permission was granted. This information is in the public domain, having been the subject of public reporting to and consideration by the Council’s Planning Committee. Although the letter also makes reference to Ms Fulton’s feelings about the decision, these are already a matter of public record through local press coverage of the matter. I therefore do not accept that disclosure of this letter would provide Ms Fulton with grounds for an actionable breach of confidence, as argued by the Council in applying the exemption in section 36(2) of FOISA; the information does not now (and did not at the time of Ms Fulton’s request) possess the necessary quality of confidence (see “Bundle B Group 5” above). I require the Council to supply Ms Fulton with a copy of document C102-C103.



Bundle C Group 4

95. The documents in this group are described as confidential correspondence between another neighbour and the Council, and were initially withheld under the exemption in section 36(2) of FOISA. During the course of the investigation the Council revised its position, and relied instead upon section 38(1)(b) of FOISA to withhold personal information in these documents.
96. In evaluating the Council's arguments in relation to the information in this group, I have again applied the considerations set out in paragraphs 37-42 above to determine whether the information is personal data and whether disclosure would contravene the first principle.
97. Document C97-C98, a letter of complaint to the Council, is a duplicate of document B35-B36 with the addition of some handwritten notes from a Council official. The handwritten notes have already been discussed in this decision notice – see Bundle C Group 1 above. I have found that the letter contains some information relating to the author which meets the definition of “sensitive personal data” in section 2 of the DPA: disclosure of this information is dependent upon one of the conditions in Schedule 3 of the DPA being met (in addition to one of the conditions in Schedule 2).
98. Having considered the conditions contained in Schedule 3, I am satisfied that none of them can be met. As a result, I find that the release of the sensitive personal information in this letter would breach the first data protection principle, and it should therefore be exempt from disclosure under section 38(1)(b) of FOISA.
99. Document C97-C98 contains other personal information which falls outside the definition of “sensitive personal data”. In deciding whether this personal information should be disclosed, I must first consider whether any of the conditions in Schedule 2 of the DPA are met. Once again, condition 6 appears to be the only Schedule 2 condition relevant in the circumstances.
100. I found that disclosure would be necessary for the purpose of Ms Fulton's legitimate interests, as described in paragraph 41 of this decision notice, and therefore condition 6 of Schedule 2 was met. The letter expresses another local resident's views about an aspect of the planning process. In themselves, these views would not add significantly to Ms Fulton's understanding of the reasons behind the Council's decision and the process it followed, but when taken together with the notes made by a Council official on the points raised in the letter (which I have determined are not exempt from disclosure – see paragraph 85 above), the document provides additional explanation of the Council's position on this element of the planning process (which would not be obtainable by alternative means).



101. Against this, I must consider the interests of the author of the letter in their personal data remaining private. The letter was originally sent to a number of Councillors and Council officials involved with planning control. The Council has argued that this does not mean that the author would consent to its general disclosure under FOISA.
102. The letter in document C97-C98 was a complaint about a planning decision, rather than an objection to a planning application of the type which would normally be open for public inspection. However, it is generally accepted that the planning process is intended to be a public one, and there is nothing in the letter to indicate that the author expected its contents to be treated confidentially. I have therefore found that the author's rights, freedoms or legitimate interests would not prevent disclosure of the letter and that, on balance, disclosure would be in accordance with condition 6.
103. I can identify no other reason why disclosure would be in contravention of the first principle. In all the circumstances, I conclude that it would be both fair and lawful to disclose the remaining personal information in the letter, with the exception of the author's name and address, which should be removed.
104. I require the Council to provide Ms Fulton with a redacted version of document C97-C98, removing points 2(c), 2(d), and the first sentence of the following paragraph. This decision also applies to document B35-B36 from Bundle B Group 3, which is an unannotated version of C97-C98.
105. With the exception of C97-C98 I have identified no other documents in Bundle C Group 4 which contain sensitive personal data.
106. The Council has argued that the entire contents of document C90-C91 should be exempt under section 38(1)(b) of FOISA, as removal of the personal information within it would cause the sense of the document to be lost.
107. The exemption in section 38(1)(b) can only apply to personal data, as defined in the DPA. I found that the letter contains a mixture of personal data and some general comments relating to the planning application in question and the planning system. I must therefore consider whether disclosure of the personal data in the letter would contravene any of the data protection principles, in order to establish whether this information should be withheld under section 38(1)(b) of FOISA. Once again, the Council has argued that it would contravene the first principle.



108. As noted previously, the Council has acknowledged that document B43 was used as a background paper to a Director's report to a Council Committee, and as such should be accessible under FOISA. Some of the personal data in document C90-91 appears in document B43. Although I accept that C90-C91 was not written with general disclosure in mind, but was part of a private citizen's ongoing correspondence with a Council official over a matter causing them concern, I cannot accept that it would be unfair or unlawful to withhold information from C90-C91 which was effectively in the public domain by the time of Ms Fulton's request. I do not understand there to have been any objection to the disclosure in document B43 at any time.
109. I have therefore decided that C90-C91 should be disclosed, after removing the following personal data which is not already in the public domain and which I accept that it would be unfair to disclose (the subjects having no reasonable expectation that it would be):
- Point 2, third sentence
Point 4
Point 5
110. Document C94-96 is a duplicate of document B32-34, and as such has been considered in paragraph 70 of this decision notice.

Bundle C Group 5

111. The documents in this group are described as having been generated during the investigation of a complaint made by Ms Fulton against the Council, and have been withheld under the exemption in section 36(2) of FOISA. I have described the requirements for this exemption applying earlier in this decision, under the heading "Bundle B Group 5".
112. The documents in this group all concern a matter which is now effectively in the public domain: the office of the Scottish Public Services Ombudsman (SPSO) has confirmed that final reports into complaints brought to them are now available through their publication scheme. The Ombudsman's decision was also noted in minutes of the Council's Planning Committee in September 2004. The documents comprise letters exchanged between the Council and the SPSO or her predecessor, the Commissioner for Local Administration in Scotland, in which comments are sought and provided on Ms Fulton's complaint and on the Ombudsman's summary and draft report on the matter.
113. Firstly, I must note that some of the information in this group of documents was not "obtained" by the Council but was generated by it (information in documents C36-C38, C44-C46 and C78-C80), and therefore does not fall within the scope of the exemption.



114. None of the letters carries any confidentiality statement or marking, and it was known that the information communicated would inform the Ombudsman's final report on the matter, which is now in the public domain. However, the SPSO has commented that it has a duty of confidentiality to the complainant throughout the complaints handling process, and would not release any details of the complaint until after the final report is published. Although the draft investigation report would be released to the complainant, the SPSO would not make drafts generally accessible. It considered that the final report superseded any previous drafts, and that draft reports and other documentation in the complaint file would continue to be considered confidential to the complainant and the authority concerned.
115. Ms Fulton must be deemed to have waived any claim to confidentiality on her own behalf: she has been made aware that any information supplied under FOISA effectively enters the public domain and has raised no objection to this happening. The limited information about Mr A which is included in the documents is already in the public domain through the Planning Committee minutes and background papers. Details of Ms Fulton's complaint to the SPSO have now been published in the Ombudsman's final report (which identifies the Council but not Ms Fulton), along with an account of the Council's actions in relation to the case.
116. Having considered the information from the perspective of the Council, I cannot identify anything possessing the necessary quality of confidence and therefore cannot accept that the disclosure of any of it would be capable of giving rise to a breach of confidence action on the Council's part.
117. In the circumstances, I do not accept that the information in Bundle C Group 5 has the necessary quality of confidence, or that it is the subject of a subsisting obligation of confidentiality owed to any person. Further, I have not found that disclosure of the information in the documents in this group would now cause damage to any person.
118. I therefore have not found that the information in Bundle C Group 5 meets the requirements for a breach of confidentiality action to be brought, as outlined under "Bundle B Group 5" above. I do not accept that this information should have been withheld under the exemption in section 36(2) of FOISA, and therefore require the Council to provide Ms Fulton with copies of documents C36-C38, C44-C46, C51, C52-C55, C78-C80 and C86-C87. Ms Fulton has confirmed that she does not require a copy of the Ombudsman's decision itself (C15-C35).



Missing information

119. The Council acknowledged that there should have been another file held within Legal and Administrative Services, containing papers relating to potential litigation. However, despite searches carried out in July 2005 and again in April/May 2006, the file could not be located. The Council detailed the searches carried out and the personnel involved, and I accept that reasonable efforts have been made to locate the missing information.
120. One document relating to the matter was retrieved during the search, but was withheld under section 37(1) of FOISA: section 37(1) exempts information if it is contained in a document lodged with a court for the purposes of proceedings in a cause or matter. The document retrieved was a draft of an Initial Writ raised by the Council, which was served on the defender in the action. I accept that the information in the document is exempt under section 37(1) of FOISA, as it was included in the Initial Writ lodged by the Council at the Sheriff Court for the purposes of proceedings there. As section 37(1) is an absolute exemption in terms of section 2(2)(d) of FOISA, there is no requirement to consider the public interest in relation to this information.

Agreement to disclose certain information

121. During the investigation certain documents were identified which the Council agreed could be released without further consideration in this decision notice. The documents in question are:

A1; A9; A16; A43-44; A61; B1; B2; B3; B6-B7; B15; B21-B22; B44-B61; B43; C60; C61; C65; C66
122. Other documents originally withheld from Ms Fulton are available through the Council's publication scheme, and should now be provided to her:

C1-C5; C10-C14



Summary of information to be provided to Ms Fulton

123. In addition to the documents listed in paragraphs 121 and 122 above, I have found that the following documents should now be disclosed to Ms Fulton, for the reasons previously given in this decision notice:

A20; A68

B9-12 (with redaction); B13 (with redaction); B14; B17; B18; B19-20; B27-28; B29; B32-34 (with redaction); B35-36 (with redaction); B37

C36-38; C39; C40; C41; C44-46; C51; C52-55; C74; C75; C78-80; C84; C85; C86-87; C88; C90-91 (with redaction); C92-93; C97-98 (with redaction); C102-103

Decision

I find that West Dunbartonshire Council (the Council) partially failed to comply with Part 1 of the Freedom of Information (Scotland) Act 2002 (FOISA) by wrongly withholding some of the information within the scope of Ms Fulton's request under the exemptions contained in section 38(1)(b), section 36(1) and section 36(2) of FOISA. In doing so, it failed to comply with section 1(1) of FOISA.

I find that the Council acted in accordance with Part 1 of FOISA in withholding some information under the exemptions contained in section 38(1)(b), section 36(1), and section 37(1) of FOISA.

I require the Council to disclose the information withheld (as detailed in paragraphs 121 - 123 above), after redacting exempt information as specified, within 45 days of receipt of this letter.

I also find that the Council failed to comply with sections 10(1) and 21(1) of FOISA in that it did not respond to either Ms Fulton's request for information or her request for review within the relevant periods of 20 working days specified in those sections. It failed either to provide the information requested in accordance with section 1(1) of FOISA, or to give Ms Fulton appropriate notice in terms of sections 16, 17 or 18, and also failed to comply with its duty to advise and assist Ms Fulton in terms of section 15. In all of these respects, it failed to deal with Ms Fulton's request in accordance with Part 1 of FOISA. I do not require the Council to take any action in respect of these breaches of technical provisions of FOISA.



Appeal

Should either Ms Fulton or West Dunbartonshire Council wish to appeal the 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

9 January 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.

10 Time for compliance

(1) Subject to subsections (2) and (3), a Scottish public authority receiving a request which requires it to comply with section 1(1) must comply promptly; and in any event by not later than the twentieth working day after-

(a) in a case other than that mentioned in paragraph (b), the receipt by the authority of the request; or

(b) in a case where section 1(3) applies, the receipt by it of the further information.

15 Duty to provide advice and assistance

(1) A Scottish public authority must, so far as it is reasonable to expect it to do so, provide advice and assistance to a person who proposes to make, or has made, a request for information to it.

(2) A Scottish public authority which, in relation to the provision of advice or assistance in any case, conforms with the code of practice issued under section 60 is, as respects that case, to be taken to comply with the duty imposed by subsection (1).

21 Review by Scottish public authority

(1) Subject to subsection (2), a Scottish public authority receiving a requirement for review must (unless that requirement is withdrawn or is as mentioned in subsection (8)) comply promptly; and in any event by not later than the twentieth working day after receipt by it of the requirement.

(...)



36 Confidentiality

(1) Information in respect of which a claim to confidentiality of communications could be maintained in legal proceedings is exempt information.

(2) Information is exempt information if-

(a) it was obtained by a Scottish public authority from another person (including another such authority); and

(b) its disclosure by the authority so obtaining it to the public (otherwise than under this Act) would constitute a breach of confidence actionable by that person or any other person.

37 Court records, etc.

(1) Information is exempt information if it is contained in-

(a) a document-

(i) lodged with, or otherwise placed in the custody of, a court for the purposes of proceedings in a cause or matter;

(ii) served on, or by, a Scottish public authority for the purposes of such proceedings; or

(iii) created by a court or a member of its administrative staff for the purposes of, or in the course of, such proceedings; or

(b) a document-

(i) lodged with, or otherwise placed in the custody of, a person conducting an inquiry or arbitration, for the purposes of that inquiry or arbitration; or

(ii) created by such a person for such purposes,

and a Scottish public authority holds the information solely because it is contained in such a document.

(...)



38 Personal information

(1) Information is exempt information if it constitutes-

- (a) personal data of which the applicant is the data subject;
- (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;
- (c) personal census information; or
- (d) a deceased person's health record.

(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
 - (ii) section 10 of that Act (right to prevent processing likely to cause damage or distress); and
- (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.