

**Decision 088/2006 Mr & Mrs G Bonelle and West Lothian Council**

*Request for minutes of the Social Work Complaints Review Committee*

**Applicant: Mr & Mrs G Bonelle  
Authority: West Lothian Council  
Case No: 200502840  
Decision Date: 30 May 2006**

**Kevin Dunion  
Scottish Information Commissioner**

Kinburn Castle  
Doubledykes Road  
St Andrews  
Fife  
KY16 9DS

## **Decision 088/2006 Mr & Mrs G Bonelle and West Lothian Council**

***Request for notes of Social Work Complaints Review Committee meeting –notes of closed session withheld under sections 30(b)(i) and 30(b)(ii) of the Freedom of Information (Scotland) Act 2002 – prejudice to effective conduct of public affairs***

### **Facts**

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Mr & Mrs Bonelle asked West Lothian Council for a copy of notes taken at a meeting of its Social Work Complaints Review Committee. A copy of the notes taken at the “open” part of the meeting was provided, but the Council withheld the notes taken in “closed session”. The Council justified the withholding of this information on the basis of both parts of section 30(b) of the Freedom of Information (Scotland) Act 2002 (substantial inhibition of the free and frank provision of advice and the free and frank exchange of views for the purposes of deliberation). This decision was upheld on review and Mr & Mrs Bonelle applied to the Commissioner for a decision.

### **Outcome**

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The Commissioner found that West Lothian Council had failed to deal with Mr & Mrs Bonelle’s request for information in accordance with Part 1 of the Freedom of Information (Scotland) Act 2002 (FOISA). In particular, it misapplied section 30(b)(i) and section 30(b)(ii) of FOISA to the information withheld and therefore failed to deal with the application properly in terms of section 1(1) of FOISA.

The Commissioner required West Lothian Council to provide Mr & Mrs Bonelle with the information requested, within 2 months from the date of this decision notice.

## Appeal

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Should Mr & Mrs Bonelle or West Lothian Council wish to appeal against this decision, there is a right of 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

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1. On 27 July 2005, Mr & Mrs Bonelle wrote to West Lothian Council (the Council) requesting a copy of the notes taken by the clerk at a meeting of the Council's Social Work Complaints Review Committee (the Committee) at which a complaint of theirs had been considered.
2. The Council responded to Mr & Mrs Bonelle's request on 26 August 2005, providing a copy of the notes taken during that part of the meeting when the Bonelles and the Council's representatives had been present. The notes were handwritten, but the Council offered to provide a typed transcript if the Bonelles wished: subsequently they requested a transcript, which was provided. The Council refused, however, to provide a copy of the notes taken during the remainder of the meeting (when Mr & Mrs Bonelle and the Council's representatives had been excluded), on the basis that it was exempt from disclosure under section 30(b) of FOISA. The Council argued that disclosure of the remaining notes would be likely to inhibit both the free and frank provision of advice and the free and frank exchange of views for the purposes of deliberation, thus engaging both paragraphs of section 30(b). It cited consultation with councillors, other Committee members and relevant officers of the Council in support of this assertion and considered that the public interest in maintaining the exemption outweighed that in disclosure.
3. Mr & Mrs Bonelle were dissatisfied with the Council's response, seeing no reason why full notes of the meeting should not be released to them. On 6 September 2005, they wrote to the Council seeking a review of its decision.
4. The Council responded to the request for review on 4 October 2005, upholding its earlier decision to withhold the information under both parts of section 30(b). Mr & Mrs Bonelle remained dissatisfied with the information being withheld and applied to me for a decision. I received their application on 11 October 2005 and allocated it to an investigating officer.

## The Investigation

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5. Mr & Mrs Bonelle's application was validated by establishing that they had made a valid request for information to a Scottish public authority and had applied to me only after asking the Council to review its response to that request.
6. The investigating officer wrote to the Council on 20 October 2005, informing it that an application had been received and that an investigation had begun. It was asked to comment on Mr & Mrs Bonelle's case and to provide a copy of the information withheld (in typed transcript). It was also asked to provide copies of procedures for the Committee and of the responses to the consultation carried out in relation to the application of the s30(b) exemptions.
7. The Council does not appear to have received the first copy of my request for comment and information and a further copy was sent. It responded in full on 16 December 2005.
8. The Council has given the following reasons for applying the exemptions in section 30(b):
  - a) While there might be little in the content of the 1.5 pages of notes withheld from Mr & Mrs Bonelle which would give the Council cause for concern if released to them, the release of any information from a private discussion session would cause considerable concern to the Council, given the nature of the responses it had received from members of the Committee, other councillors and officers who sat on or advised similar quasi-judicial fora. In particular, the refusal of one lay member of the Committee to sit in future if the notes of private sessions were disclosed highlighted the Council's real concern about the difficulty in recruiting suitable persons should this happen.
  - b) The purpose of the "closed session" of the Committee was to enable the members to seek and receive freely the advice of officers and to discuss their views and opinions freely on the issues to be decided before coming to a final conclusion. Such private discussions enabled the fullest consideration of the issues to be addressed, facilitated the reaching of a final decision based on all the relevant facts, and thus enhanced the quality of the decision-making process. It was reasonable and in accordance with the principles of natural justice and human rights to allow lay people required to adjudicate collectively in quasi-judicial settings to discuss in private the forum's proposed decision and the underlying reasons and to expect that notes of such deliberations remained confidential

- c) The matter considered by the meeting at which the notes were taken was essentially a private one, between the Bonelles and the Council, and not one of wider public interest. On the other hand, it was in the public interest that members of the Committee could obtain free and frank advice from officers and discuss freely their provisional views on a case before reaching final conclusions and it was not in the public interest to undermine or place restrictions on this process or to discourage laypersons from sitting on such committees by requiring notes of private deliberations to be made public.
9. Mr & Mrs Bonelle have argued that it would be in the public interest for the withheld information to be disclosed, as what was discussed in the “closed” part of the meeting appears to have had a direct bearing on their complaint and the outcome of the meeting. To secure adequate scrutiny of the independence of the proceedings and the overall quality of the decision making, it is important that the information be released.

### **The Commissioner’s Analysis and Findings**

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9. In this case, the Council has argued that sections 30(b)(i) and 30(b)(ii) of FOISA both apply to the information withheld. These paragraphs provide respectively that information is exempt if its disclosure under FOISA would, or would be likely to, inhibit substantially (i) the free and frank provision of advice and (ii) the free and frank exchange of views for the purposes of deliberation. The public interest test applies to section 30. This means that even if I find that the information is exempt in terms of section 30(b)(i) or 30(b)(ii), I must order release of the information unless I find that the public interest in maintaining the exemption outweighs the public interest in disclosing the information withheld.
10. Before examining the public interest, however, I must consider whether either of the exemptions claimed is capable of applying to the information in question. As I have explained in a number of previous decisions, for example Decision 017/2006 Mrs X and Angus Council, the main consideration in determining whether this group of exemptions is triggered is not so much whether the information constitutes advice or (as the case may be) an exchange of views – although obviously that will be relevant in the majority of cases – but rather whether the release of the information would, or would be likely to, have the substantially inhibiting effect required for the relevant exemption to apply.

11. In this case, the Council has argued that release of the information would be likely to have the inhibiting effects required to trigger the exemptions. As will be clear from previous decisions, I require authorities to demonstrate a real likelihood that actual harm will occur at some time in the near (certainly the foreseeable) future, not simply that harm is a remote possibility. Also, the harm in question has to take the form of substantial inhibition from expressing advice and/or views in as free and frank a manner as would be the case if disclosure could not be expected to follow. The word “substantial” is important here: the degree to which the person is likely to be inhibited in expressing themselves must of some real and demonstrable significance. I think it also important to bear in mind the terms of subsection (c) of section 30, which covers disclosure which “would otherwise prejudice substantially, or be likely to prejudice substantially, the effective conduct of public affairs”: taking this into account, I would suggest that for the section 30(b) exemptions to apply I should be looking for harm which is significant enough to have a material effect (or at least be likely to have a material effect) on the outcome of the process of which the giving of advice and/or deliberation forms part.
12. In considering the application of any exemption, I must always look at the actual information withheld, not the category of information to which it belongs or the type of situation in which the request has arisen. In other words, I must consider whether the disclosure of that information would, or would be likely to, in all the surrounding circumstances, have the inhibiting effects described in paragraphs (i) and (ii) (or either of them). It cannot necessarily follow from my requiring release of one particular piece of information in particular circumstances that information of that general variety will require to be disclosed routinely in the future.
13. In this context, I note the consultation exercise carried out by the Council in the course of responding to Mr & Mrs Bonelle’s request for information. In considering whether either part of section 30(b) applies to information, it will often be useful to consult those who provide the relevant advice and/or are involved in the relevant deliberations. It may be relevant to extend the scope of such consultation beyond those advisers and decision makers directly involved in the matter to which the information request relates to others involved in similar processes. Authorities do, however, have to recognise that the outcome of such consultation can never be more than indicative and can never provide a substitute for active consideration of the question by the person or entity which is required to respond to it. If the consultation is to be of value, it is also important that the right questions are asked of the consultees.

14. In this case, the consultees were asked in general terms whether they (and others in a similar position) would feel “substantially inhibited” in the way in which they approached discussions in “closed session” and participated or gave advice in them, if notes taken of those discussions were to be disclosed in future. Perhaps understandably, there was general concern about this prospect. It will be clear, however, from the preceding paragraphs that it is not a prospect that would be heralded simply by disclosure being required in this particular case.
15. I do, however, note the concerns expressed by some of those consulted that disclosure should not prejudice the decision making process or the production of an accurate minute, or leave those involved in these processes open to risk of recrimination. Given a genuine risk of any of these things happening to a material extent, I would agree. I can accept that a real and foreseeable likelihood of any of these outcomes occurring as a consequence of the release of advice or opinions might reasonably be expected to have a substantially inhibiting effect on what was said at a meeting (and in particular on the freedom of expression that can be necessary if all relevant issues are to be aired fully). I must go on, however, to look at the actual circumstances of this case rather than the more hypothetical ones which have been raised (inevitably, given the general nature of the points raised) in response to the consultation.
16. Looking at the notes produced in respect of the closed session of the meeting (i.e. the information withheld from Mr & Mrs Bonelle), I find an exchange of views, clearly for the purposes of deliberation, but nothing obvious in the way of advice. More significantly, there is nothing in the notes which indicates anything being expressed freely or frankly, no indication of disagreement or controversy amongst those engaged in the deliberation, and indeed nothing of the remotest sensitivity. They do not cast any particular light on the decision-making process carried out by the Committee. The character of their content is broadly the same as that of the notes of the “open” part of the meeting, which have been released to Mr & Mrs Bonelle and there is nothing particular in their character which suggests to me that disclosure would be likely to make the process of giving adequate advice or reaching a considered decision more difficult in the future. The Council appears to accept this in its own submissions to me and, as I have indicated above, I must look at the information presented to me and the circumstances of this particular application rather than considering exemptions on a “class” or generic basis. In doing so, I cannot accept the mere fact that the session during which the notes were taken took place in private as indicative of any inhibiting effect as a consequence of disclosure. Nor is it apparent (or claimed by the Council, for that matter) that release at the time when the request was considered would have been particularly inhibiting. In all the circumstances, I cannot accept that the information in question falls within either of the exemptions claimed and therefore cannot uphold their application.

17. As I have determined that the information withheld from Mr & Mrs Bonelle does not fall within the scope of either of the exemptions contained in section 30(b)(i) and section 30(b)(ii) of FOISA, I am not required to go on to consider the application of the public interest test..
18. Finally, I understand the Council's concern that the possibility of notes of "closed sessions" becoming public might make it more difficult for the Council to recruit and retain lay members to sit on quasi-judicial committees and panels such as its Complaints Review Committee, but it does appear to be little more than a possibility and I do not see how it can be relevant to the circumstances of this case as discussed above. I think it would be extremely difficult in any event to draw a firm conclusion from the response of one individual, particularly given that the consultation which raised this possibility appears to have been based on the false premise that disclosure in this case would imply routine disclosure of all such notes in the future. Committee members might take some reassurance from the fact that each case will be considered on its own merits: where I am satisfied that release of any given item of information falls within the scope of either of the section 30(b) exemptions and that the public interest favours the exemption being maintained rather than disclosure, then it should be clear that I will not require the release of that information.

## Decision

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I find that West Lothian Council failed to deal with Mr & Mrs Bonelle's request for information in accordance with Part 1 of the Freedom of Information (Scotland) Act 2002 (FOISA). In particular, it misapplied section 30(b)(i) and section 30(b)(ii) of FOISA to the information withheld and therefore failed to deal with the application properly in terms of section 1(1) of FOISA.

I therefore require West Lothian Council to provide Mr & Mrs Bonelle with the information requested, within 2 months from the date of this decision notice.

**Kevin Dunion**  
**Scottish Information Commissioner**  
**30 May 2006**