



Scottish Information  
Commissioner

**Decision 083/2007 Mr Colin Kennedy and Argyll  
and Bute Council**

*Information relating to a property*

**Applicant: Mr Colin Kennedy  
Authority: Argyll and Bute Council  
Case No: 200503131  
Decision Date: 29 May 2007**

**Kevin Dunion  
Scottish Information Commissioner**

Kinburn Castle  
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## Decision 083/2007 Mr Colin Kennedy and Argyll and Bute Council

***Request for information regarding a property – some information provided but other information withheld under a variety of exemptions – public authority agreed that additional information should be released during the investigation – Commissioner found the remaining information to be exempt in terms of section 38(1)(b) of FOISA***

### Relevant Statutory Provisions and Other Sources

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Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) (General entitlement) and 38(1)(b) and (2) (Personal information).

Environmental Information (Scotland) Regulations 2004 (EIRs), regulations 2(1) (definition of “environmental information”) (Interpretation) and 11(3) (Personal data)

Data Protection Act 1998 (DPA) sections 1(1) (definition of “personal data”) (Basic interpretative provisions), Schedule 1, Part 1, paragraph 1 (the first data protection principle) and Schedule 2 condition 6(1) (Conditions relevant for purposes of the first principle: processing of any personal data).

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

### Facts

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Mr Kennedy requested information concerning a property from Argyll and Bute Council (the Council). The Council responded by providing some relevant information, but withholding other information under the terms of the exemptions in sections 30 and 35 of FOISA. Mr Kennedy was not satisfied with this response and asked the Council to review its decision. The Council carried out a review and, as a result, notified Mr Kennedy that it had upheld its decision to withhold information under the terms of sections 30 and 35 of FOISA. The Council also indicated that it had also judged that exemptions contained in section 34 of FOISA applied to the information withheld. The Council also confirmed that it had judged that the public interest in maintaining the exemptions outweighed the public interest in the disclosure of the information. Mr Kennedy remained dissatisfied and applied to the Commissioner for a decision.



In the course of the Commissioner's investigation, the Council indicated that it would no longer seek to withhold the majority of the information it had initially withheld from Mr Kennedy. As a result, the Commissioner did not consider whether this information had been correctly withheld under the terms of Part 1 of FOISA.

With respect to the remaining items, the Council continued to maintain that the information concerned was exempt from disclosure. The Commissioner found that each of these documents was exempt from disclosure under the terms of section 38(1)(b) of FOISA and that the Council had acted in accordance with Part 1 of FOISA by withholding the remaining items.

## Background

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1. On 26 August 2005, Mr Kennedy, the owner of a specific property which is occupied by a tenant emailed the Council requesting copies of:  
  
*“all any and every last scrap of information held by Argyll and Bute Council Planning Department, Building Control department, environmental health department/ public safety department in relation to all and every aspect of the [specified] property dating from June 2001 to the minute you process this request.”*
2. The Council responded to Mr Kennedy's request in a letter dated 28 September 2005. This enclosed a number of relevant items but confirmed that other information held in a planning enforcement file and an internal memorandum had been withheld from Mr Kennedy.
3. With respect to the planning enforcement file, the Council indicated that a prohibition on disclosure of such information was contained under “the new Building (Scotland) Act”, presumably referring to the Building (Scotland) Act 2003. The Council did not, however, indicate that given such prohibition, this information had been judged exempt under section 26(a) of FOISA (which exempts from release information the disclosure of which is prohibited by other legislation). At this stage, the Council did not explicitly rely on any other exemption in FOISA to exempt the contents of the planning enforcement file from release.



4. With respect to the internal memorandum, the Council stated that this set out a synopsis concerning the relevant property in relation to Building Control and planning matters. The Council explained that the purpose of the memorandum was to determine whether any form of legal action should be taken. The Council specified that this memo was exempt from disclosure under the terms of sections 30 (prejudice to the effective conduct of public affairs and section 35 (law enforcement) of FOISA. The Council did not specify which of the exemptions within these sections had been judged to apply. However, it did confirm that it had judged that the public interest in maintaining the exemptions in sections 30 and 35 of FOISA outweighed the public interest in the disclosure of the information.
5. On 10 October 2005, Mr Kennedy wrote to the Council requesting a review of its decision. In particular, Mr Kennedy indicated that he believed that there was significant public interest in the disclosure of the information he had requested, and so he believed that all relevant information should be disclosed.
6. On 7 November 2005, the Council wrote to notify Mr Kennedy of the outcome of its review. The Council confirmed that it no longer believed any prohibition on disclosure in the Building (Scotland) Act 2003 (or any associated exemption in FOISA) to apply to any of the information withheld. However, the Council confirmed that it had upheld its decision to withhold the information contained in the planning enforcement file and the internal memo under the following exemptions: sections 30(b)(i), 30(b)(ii), 30(c), 35(1)(g) [read in conjunction with section 35(2)(a) and (c)], 35(1)(h) [read in conjunction with section 35(2)(a) and (c)], 34(1)(a)(i), 34(1)(b) and 34(4). The Council also confirmed its view that the public interest in maintaining these exemptions outweighed the public interest in the disclosure of the information withheld.
7. On 13 November 2005, Mr Kennedy wrote to my office, stating that he was dissatisfied with the outcome of the Council's review and applying to me for a decision in terms of section 47(1) of FOISA. Once again, Mr Kennedy stated that he wished to access every scrap of paper relating to the property concerned.
8. The case was allocated to an investigating officer and the application validated by establishing that Mr Kennedy had made a request for information to a Scottish public authority and had applied to me for a decision only after asking the authority to review its response to that request.



## The Investigation

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### Scope of the investigation

9. Before going on to describe my investigation and findings in relation to Mr Kennedy's application for decision, it is helpful to comment on the limited scope of this decision.
10. Mr Kennedy is the landlord and owner of the property to which his request relates, which is occupied by a tenant. His information request was made in the context of an ongoing dispute between himself and the tenant of his property.
11. As a landlord, Mr Kennedy is entitled to access certain information relating to his property from the Council, but I wish to be clear that any such entitlement is not the same as the entitlement to access information provided by FOISA.
12. Mr Kennedy's information request indicated that he wished to invoke his entitlement as a landlord to access information with respect to the property concerned, but also that he wished to request information under FOISA.

### Investigation process

13. The investigating officer wrote to the Council on 13 December 2005, notifying it that an application had been received from Mr Kennedy and that an investigation into the matters raised had begun. The Council was invited to comment on the case in terms of section 49(3)(a) of FOISA. The Council was also asked to provide copies of all documents (a total of 50) withheld in response to Mr Kennedy's request and further background information to inform my investigation.
14. The Council's response was provided on 23 January 2006. This provided copies of all documents withheld and general submissions on the application of exemptions to these. The investigating officer subsequently sought clarification from the Council on a number of occasions to establish which exemptions were being applied to each item, and also to better understand the circumstances of the case.



15. The investigating officer also noted that a number of the documents under consideration contained personal data relating to third parties other than Mr Kennedy. She noted that, although the Council would commonly provide information relating to the relevant property (and the activities of its tenants) to Mr Kennedy in his capacity as landlord, my investigation was required to consider whether the information withheld should be made available generally under the terms of FOISA. The Council was therefore invited to consider whether the exemption in section 38(1)(b) of FOISA applied to this information.
16. The Council was also asked whether it had considered responding to Mr Kennedy's request under the terms of the EIRs, which provide a separate set of rules with regard to the disclosure of environmental information, as defined within the EIRs.
17. In the course of the investigation, the Council indicated that it had not considered whether it should respond to Mr Kennedy's request for information in terms of the EIRs at the time of handling the request. However, it noted that it had now considered this point, and that it did not believe there would be any particular benefit to Mr Kennedy or the Council in processing the request under EIRs.
18. In the course of the investigation, the Council also indicated that it no longer wished to withhold the majority of the information that it had initially withheld. The Council noted that the circumstances surrounding the dispute over the property had changed in the intervening period, and that it no longer felt that it was appropriate to withhold information from Mr Kennedy.
19. By the end of the investigation, the Council sought only to withhold 9 items from Mr Kennedy, which I will refer to according to their original numbering in the Council's schedule. These are:

Document	Exemptions applied
7	Section 38(1)(b)
16	Section 38(1)(b)
17	Sections 38(1)(b), 34(1)(a), 36(2)
20	Section 38(1)(b)
28	Section 34(1)(a)
32	Sections 38(1)(b), 34(1)(a)



33	Sections 38(1)(b), 34(1)(a)
34	Sections 38(1)(b), 34(1)(a)
35	Section 34(1)(a)

20. The documents that the Council still wishes to withhold are all contents of the planning enforcement file relating to the property concerned. They include internal and external correspondence and reports. I will consider the Council's submissions on the application of the relevant exemptions in my findings below.

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

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21. Before going onto consider whether the Council has correctly withheld the information listed in paragraph 19, I will first address two preliminary matters – the scope of the information request, and the question of whether Mr Kennedy's request should have been handled under the terms of the EIRs.

#### **Scope of the information request**

22. At a number of points in my investigation, the Council has indicated that it does not consider that certain of the items it had initially identified as falling under the scope of Mr Kennedy's request for information are actually covered by his request. This request is reproduced in paragraph 1 of this decision, and the Council has never disputed that it is a valid request for the purposes of FOISA.
23. I note that this request is extremely wide in its scope, in that it seeks "every last scrap of paper" held by a number of Council departments, in relation to all and every aspect of the property concerned, over the period specified. I have considered the Council's comments on the scope of the request and considered each document to determine whether I agree with the Council's assessment of the limited relevance some of these.
24. I agree with the Council that item 14 does not relate to any aspect of the property concerned. Therefore I agree that this does not fall under the scope of Mr Kennedy's information request.





25. With respect to the 49 other items that were withheld from Mr Kennedy, I cannot accept the Council's submissions as to the limited relevance of some of these to the request. In each case, I am satisfied that these relate in some way to the property concerned.
26. As the Council has indicated that it no longer wishes to rely upon any exemption in FOISA to continue to withhold items 1, 2, 3, 4, 5, 6, 8, 9, 10, 11, 12, 13, 15, 18, 19, 21, 22, 23, 24, 25, 26, 27, 29, 30, 31, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, and 50, these documents should now be provided to Mr Kennedy.
27. I should note, however, that I am aware that the Council has taken this approach at least partly in the light of Mr Kennedy's position as owner and landlord of the property concerned. I wish to note that I do not presume that, while the Council is willing to disclose this information to Mr Kennedy, it would not choose to rely upon exemptions in FOISA to withhold some or all of these documents should a subsequent request be received from another person who had no direct interest in the property concerned.
28. Given the Council's changed stance with respect to these documents, I have not found it necessary to reach a judgement on whether it would have been obliged to disclose these items under the terms of FOISA, had it chosen to continue to rely upon the exemptions that it had originally cited.

### **Handling of Mr Kennedy's request and the EIRs**

29. The Council has indicated to me in the course of my investigation that it did not consider responding to Mr Kennedy's information request under the terms of the EIRs rather than FOISA. Although it did consider this point following prompting by my office, the Council stated that it did not believe such consideration would benefit either of the parties to the case.
30. The definition of environmental information is contained in regulation 2 of the EIRs, and is reproduced in the appendix to this decision. For information falling under the scope of this definition, any request to access it should be handled under the EIRs.
31. In this case, it is clear to me that the vast majority of the information concerned relates to planning, building control and environmental health issues around the property concerned. Such information is generally likely to fall under the scope of the definition of environmental information, and in this case, I believe it to be quite clearly environmental information under one or more of parts (a), (c) or (f) of regulation 2.
32. In these circumstances, the Council should have recognised the information concerned as environmental information and applied the EIRs when considering its response, rather than FOISA.





33. I would strongly urge the Council (and public authorities more generally) to ensure that staff handling information requests are familiar with the terms of EIRs as well as FOSIA, and that they are able to properly identify those requests that should be considered under the EIRs.
34. In this case, however, I have considered the Council's handling of Mr Kennedy's request in the terms of FOISA that the Council has submitted to me. In taking this approach, I have noted the Council's point that consideration under EIRs at this point would not benefit either of the parties to the case.
35. I have considered whether the outcome of this case, had it been considered under the terms of EIRs would have been different from that set out in this decision, and I am satisfied that it would not. On the basis that my consideration under FOISA will not have any detrimental consequences for Mr Kennedy, I have taken the view that in the particular circumstances of this case, it is appropriate for me to consider the submissions as made by the Council throughout.

#### **Section 38(1)(b) – personal data**

36. The Council has indicated that it considers items 7, 16, 17, 20, 32, 33 and 34 to be exempt from disclosure under the terms of section 38(1)(b), read in conjunction with section 38(2)(a)(i) and also read in conjunction with 38(2)(a)(ii). (The Council did not make any comments as to whether it considered the personal data in question to be structured – in which case the exemption in section 38(1)(b) read in conjunction with section 38(2)(a)(i) would be relevant, or whether it considered that the personal data was unstructured – in which case the exemption in section 38(1)(b) read in conjunction with section 38(2)(b) would be relevant. However, given that the conditions in section 38(2)(a)(i) and section 38(2)(b) are identical in effect, I do not consider it necessary to take this particular point further.)
37. This exemption applies where the information concerned is personal data (in most cases it will be the personal data of a person other than the requestor) and disclosure in response to the request would
  - a) Contravene one or more of the data protection principles [section 38(2)(a)(i) or section 38(2)(b)] or
  - b) Contravene section 10 of the Data Protection Act 1998 (DPA) [section 38(2)(a)(ii) or section 38(2)(b)].
38. Having considered the documents listed above, I am satisfied that in each case, these documents contain personal data, in this case relating to individuals other than Mr Kennedy. Each of these documents contains personal data relating to the tenants of the property concerned. Items 32, 33, and 34 also contain personal data relating to another third party.



39. In order to determine whether the exemption in section 38(1)(b) applies to these items, I must go onto consider whether either of the conditions set out in paragraph 38 above is met.

### **Would disclosure breach any data protection principle?**

40. I now turn to consider whether section 38(1)(b) applies on the basis that disclosure of personal data would contravene one or more of the data protection principles set out in the DPA.
41. The Council has indicated that it believes that disclosure 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 is met and, in the case of sensitive personal data, at least one of the conditions in Schedule 3 is also met.
42. I have considered the content of the documents concerned in the light of the conditions set out in schedule 2 of the DPA. The only condition I consider to be relevant in this case is condition 6(1). This condition allows processing (in this case by disclosure) to take place where it is necessary for the purposes of legitimate interests pursued by the third party or parties to whom the information is 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.
43. Mr Kennedy, as the owner of the property concerned, has a legitimate interest in the oversight of this property. He has also indicated that he believes there to be a wider public interest in the disclosure of the information he has requested.
44. More generally, I accept that there is a legitimate interest in the scrutiny of public bodies' conduct in relation to their regulatory functions, such as in relation to planning and building control. Disclosure in this case would allow Mr Kennedy and others to do so more effectively and fully.
45. I have considered each of the documents listed in paragraph 36 in order to consider the balance between Mr Kennedy's legitimate interests and those of the data subjects. These documents contain personal information about these individual's lives that go beyond simply their involvement with matters surrounding the property concerned. I have judged that in each case, disclosure to Mr Kennedy would be an unwarranted intrusion into the private lives of the individuals concerned. Therefore, I do not believe the test in condition 6(1) to be met. Consequently, I must find that the release of the information to Mr Kennedy would breach the first data protection principle.



46. In reaching this judgement, I would note that rights exist separately from FOISA to provide for landlords to be kept informed by planning authorities of matters affecting their land. As such, it can be argued that Mr Kennedy's legitimate interests in this respect are already provided for through such access, and that further disclosure under FOISA is not necessary (for the purposes of condition 6(1)) to serve this purpose.
47. I realise that his rights outside FOISA do not entitle Mr Kennedy to access "every scrap of paper" that concerns his property, and so he can not use this entitlement to seek all of the information under consideration in this case. Nonetheless, in considering this matter under FOISA, I must be mindful of the legitimate interests and right to privacy of data subjects alongside those of individuals who might have an interest in matters affecting those data subjects' lives.
48. Therefore, I have concluded that the Council correctly applied the exemption in 38(1)(b) to the documents listed in paragraph 36 on the basis that, under section 38(2)(a)(i), disclosure would contravene the first data protection principle. The Council therefore acted in accordance with Part 1 of FOSIA in withholding these from Mr Kennedy.
49. However, I have also concluded that the exemption in section 38(1)(b) applies to documents 28 and 35 (i.e. the documents the Council did not apply the exemption in section 38(1)(b) to) for the same reasons as the documents listed in paragraph 37 because I also believe that these contain personal data relating to third parties, and that their disclosure under FOISA would breach of the first data protection principle. I have therefore concluded that all information that the Council still wishes to withhold is exempt from disclosure under section 38(1)(b) of FOISA.
50. In reaching this conclusion, I have found that section 38(1)(b) applies more widely to the information under consideration than the Council's submissions had indicated to my Office. I have, exceptionally, taken this approach because I believe that disclosure of these two documents, and particularly of document 35, would have led to a serious breach of the first data protection principle.
51. I am surprised in this case that the Council did not identify documents 28 and 35 as containing personal data relating to the tenant of the property concerned. I would urge authorities to consider carefully whether personal data relating to third parties is contained within information requested under FOISA, and to be aware of the need to balance individuals' rights to privacy (protected by both the DPA and Article 8 of the European Convention on Human Rights) with the rights of members of the public to access information held by public authorities.



52. I would also note that, had this case been considered under the terms of the EIRs, this same information would have been exempt from disclosure under the terms of regulation 11(2), read in conjunction with regulation 11(3)(a)(i), whose effect is identical to the terms of section 38(1)(b) of FOISA, read in conjunction with section 38(2)(a)(i).
53. Having judged the items listed in paragraph 37, along with documents 28 and 35 to be exempt from disclosure, I will not consider whether the Council correctly applied any other exemptions to these items.

## **Decision**

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I find that Argyll and Bute Council (the Council) complied with Part 1 of the Freedom of Information (Scotland) Act 2002 (FOISA) in withholding documents 7, 16, 17, 20, 28, 32, 33, 34, and 35 from Mr Kennedy.

I have concluded that these items are exempt from disclosure under section 38(1)(b) of FOISA.

Had this case been considered under the terms of the Environmental Information (Scotland) Regulations 2004, the same information would have been exempt from disclosure under the identical terms of regulation 11(2).

## **Appeal**

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

**Kevin Dunion**  
**Scottish Information Commissioner**  
**29 May 2007**



## Appendix

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### 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.

##### 38 Personal information

- (1) Information is exempt information if it constitutes-  
...
  - (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;  
....
- (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.

....



(5) In this section-

"the data protection principles" means the principles set out in Part I of Schedule 1 to that Act, as read subject to Part II of that Schedule and to section 27(1) of that Act;

## **Environmental Information (Scotland) Regulations 2004**

### **2 Interpretation**

(1) In these Regulations –

[...]

"environmental information" has the same meaning as in Article 2(1) of the Directive, namely any information in written, visual, aural, electronic or any other material form on -

- (a) the state of the elements of the environment, such as air and atmosphere, water, soil, land, landscape and natural sites including wetlands, coastal and marine areas, biological diversity and its components, including genetically modified organisms, and the interaction among these elements;
- (b) factors, such as substances, energy, noise, radiation or waste, including radioactive waste, emissions, discharges and other releases into the environment, affecting or likely to affect the elements of the environment referred to in paragraph (a);
- (c) measures (including administrative measures), such as policies, legislation, plans, programmes, environmental agreements, and activities affecting or likely to affect the elements and factors referred to in paragraphs (a) and (b) as well as measures or activities designed to protect those elements;
- (d) reports on the implementation of environmental legislation;
- (e) costs benefit and other economic analyses and assumptions used within the framework of the measures and activities referred to in paragraph (c); and



- (f) the state of human health and safety, including the contamination of the food chain, where relevant, conditions of human life, cultural sites and built structures inasmuch as they are or may be affected by the state of the elements of the environment referred to in paragraph (a) or, through those elements, by any of the matters referred to in paragraphs (b) and (c);

## 11 Personal data

...

- (2) To the extent that environmental information requested includes personal data of which the applicant is not the data subject and in relation to which either the first or second condition set out in paragraphs (3) and (4) is satisfied, a Scottish public authority shall not make the personal data available.
- (3) The first condition is-
  - (a) in a case where the information falls within paragraphs (a) to (d) of the definition of "data" in section 1(1) of the Data Protection Act 1998 that making the information available otherwise than under these Regulations 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; in all the circumstances of the case, the public interest in making the information available is outweighed by that in not doing so; and
  - (b) in any other case, that making the information available otherwise than under these Regulations would contravene any of the data protection principles if the exemptions in section 33A(1) of the Data Protection Act 1998 (which relate to manual data held by public authorities) were disregarded.





## **Data Protection Act 1998**

### **1 Basic interpretative provisions**

(1) In this Act, unless the context otherwise requires –

...

“personal data” means 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

### **Schedule 1: The data protection principles**

#### **Part 1: The principles**

1. Personal data shall be processed fairly and lawfully and, in particular, shall not be processed unless –
  - (a) at least one of the conditions in Schedule 2 is met, and
  - (b) in the case of sensitive personal data, at least one of the conditions in Schedule 3 is also met.

...

#### **Schedule 2: Conditions relevant for purposes of the first principle: processing of any personal data**

...

- 6 (1) The processing is necessary for the purposes of legitimate interests pursued by the data controller or by 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.