

**Decision 113/2007 Mr Alan Fox and Moray Council**

*Request for copies of documents held by Moray Council relating to a disturbance at a named address.*

**Applicant: Mr Alan Fox  
Authority: Moray Council  
Case No: 200600569  
Decision Date: 16 July 2007**

**Kevin Dunion  
Scottish Information Commissioner**

Kinburn Castle  
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## **Decision 113/2007 Mr Alan Fox and Moray Council**

***Request for all documentation held by Moray Council in relation to a disturbance at a named address– information withheld in terms of section 38(1)(b) of the Freedom of Information (Scotland) Act 2002.***

### **Relevant Statutory Provisions and Other Sources**

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Freedom of Information (Scotland) Act 2002 sections 1(1) (General entitlement); 2 (Effect of exemptions); 38(1)(b) (Personal information)

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 Alan Fox wrote to Moray Council (the Council) to ask it for copies of all documents relating to a disturbance at a named address which are held by the Council. The Council released much of the requested information but withheld 19 documents under section 36(2) of the Freedom of Information (Scotland) Act 2002 (FOISA).

During the investigation the Council identified one further document it wished to withhold, and also rescinded its application of section 36(2) of FOISA and instead relied on the exemption in section 38(1)(b) to withhold the 20 withheld documents. The Commissioner found that the Council dealt with Mr Fox’s request for information in line with Part 1 of FOISA in that the information was exempt in terms of section 38(1)(b).

## Background

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1. Mr Fox has made a series of complaints to the Council about the level of noise generated by one of his neighbours.
2. On 9 January 2006, Mr Fox wrote to the Council to ask it for:
  - Copies of all documents, emails, memos etc relating to the disturbance at a named address, and held by all Moray Council departments including Keith offices.
3. On 6 February 2006, the Council wrote to Mr Fox and provided him with 68 documents, but advised him that it was withholding 19 documents in terms of section 36 of FOISA.
4. On 8 February 2006, Mr Fox wrote to the Council to ask it to review its decision to withhold the documents relating to his request under section 36 of FOISA.
5. On 13 March 2006, the Council wrote to Mr Fox and upheld its original decision to withhold the documents; however it did provide him with one further document which it had redacted.
6. On 14 March 2006, Mr Fox 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 relation to the Council's decision to withhold the information he requested.
7. Mr Fox's application was validated by my Office. This was done by establishing that Mr Fox had made a request for information to a Scottish public authority, and applied to me for a decision only after asking the authority to review its response to that request. The case was then assigned to an investigating officer.

## The Investigation

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8. The investigating officer contacted Mr Fox on 6 April 2006 advising him that a full investigation into his case would now take place.

9. On 24 April 2006, a letter was also sent to the Council giving notice that an application had been received and that an investigation into the matter had begun and inviting comments from the Council as required under section 49(3)(a) of FOISA. The Council was asked to supply my Office with, amongst other items, copies of any information that has been released to Mr Fox (redacted and unredacted).
10. The Council supplied my Office with all of the requested information, including the 19 documents that had been withheld from Mr Fox. During the investigation, the investigating officer contacted Moray Council and requested confirmation that the Council had located all relevant documentation issued or received by its Legal Department in relation to Mr Fox's request.
11. In response to this, the Council provided my Office with further documentation identified during a search of files held by its Legal Department. The Council advised me that of the additional documents it identified as being within the scope of Mr Fox's request, it wished to withhold five documents in terms of section 38(1)(b). The Council also confirmed that of the remaining documents identified in these files, all had previously been released to Mr Fox. On examining the five documents in question, it transpired that four were duplicates of material provided to my Office on 15 May 2006, and already withheld by the Council, and that only 1 document was additional.

#### ***Withheld documents***

12. 20 documents were withheld from Mr Fox; these consisted of emails, file notes, letters and memos.

#### ***Submissions from the Council***

13. In its submissions to my Office, the Council stated that it had withheld the documents from Mr Fox in terms of section 36(2) and section 38(1)(b) of FOISA. However, after further communication with my Office and identification of an additional document, the Council asserted that it wished to withhold all 20 documents solely in terms of section 38(1)(b) of FOISA.
14. The Council argued that the documents referred to the personal information of the occupant of the named address, and that its release into the public domain would contravene the first principle of the Data Protection Act 1998 (DPA).
15. The Council also asserted that, even with heavy redaction, the withheld documents would reveal the personal information of an individual and would therefore breach the DPA.

### ***Submissions from Mr Fox***

16. Mr Fox submitted that he was unhappy with the response from the Council and he queried whether all the withheld documents needed to be withheld in their entirety.
17. Mr Fox also asserted that he did not believe that the Council had released all of the information it held in relation to the request.

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

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18. In coming to a decision on this matter, I have considered all of the information and the submissions that have been presented to me by both Mr Fox and the Council and I am satisfied that no matter of relevance has been overlooked.
19. In his submissions to my Office, Mr Fox queried whether all of the information relating to his enquiry had been released by the Council, and specifically he referred to a structural survey which was mentioned in the documents disclosed by the Council but which was not released to him. During communications with the Council, my investigating officer established that the Council was willing to disclose the structural survey to Mr Fox but it had determined that it was outwith the scope of his request as it was undertaken before he was a tenant in his current address. I accept the Council's arguments in relation to the structural survey and I am satisfied that it does not need to be disclosed in response to Mr Fox's request.

### ***Application of the 38(1)(b) exemption***

20. Section 38(1)(b), read in conjunction with section 38(2)(a)(i) or (2)(b) exempts personal data if the release of the information would breach any of the data protection principles set out in Schedule 1 of the DPA.

21. In this case, the Council argued that information in question was personal data and that the release of the information would breach the first data protection principle. The Council went on to assert that if it disclosed this information it would be open to prosecution under the DPA. The Council also submitted that information was obtained from this individual on the basis that it would not be made public.
22. I must now consider whether the information requested by Mr Fox was correctly withheld.
23. In considering this exemption, I am required to consider two separate matters: firstly, whether the information under consideration is personal data and, if so, whether the release of the information to Mr Fox would indeed breach the first data protection principle.
24. It must be borne in mind that this particular exemption is an absolute exemption. This means that it is not subject to the public interest test contained in section 2(1)(b) of FOISA.

***Is the information under consideration personal data?***

25. “Personal data” is defined in section 1(1) of the DPA as “data which relate to a living individual who can be identified from those data, or 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.”
26. Mr Fox requested copies of all documentation held by the Council in relation to a disturbance at a named address. Having considered the nature of the documentation in this case, I am satisfied that the material in question constitutes the personal data of the occupant of the named address, in that it is biographical in nature and would lead to the identification of the individual concerned. I am also satisfied that the occupant of the named address is the focus of the information and therefore that this information comes fully within the definition laid down in section 1(1) of the DPA. Now I must consider whether the release of the information to Mr Fox would breach any data protection principles.

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

27. The Council has submitted that disclosure of the requested documents would breach the first data protection principle, which states that personal data shall be processed fairly and lawfully and, in particular, shall not be processed unless at least one of the conditions in Schedule 2 of the DPA is met, and, in the case of sensitive personal data, at least one of the conditions in Schedule 3 is also met.

28. I have considered the definition of “sensitive personal data” in section 2 of the DPA and do not consider that any of the information sought by Mr Fox falls into this category.
29. According to guidance from the Information Commissioner, who is responsible for overseeing and regulating the DPA (“Freedom of Information Awareness Guidance 1”, which can be viewed at <http://www.ico.gov.uk/documentUploads/AG%201%20personal%20info.pdf>), the assessment of fairness includes looking at whether the third party would expect that his/her information might be disclosed to others and/or whether the third party would expect that his/her information would be kept private.
30. In my view, documentation that is held by a public authority in relation to complaints made about an occupant of a named address is normally held in the expectation that it will be used for a limited purpose only. Individuals who are subject to complaints made about them by a third party would not expect the public authority who received the complaints to release the circumstances of their case into the public domain as a matter of course.
31. With regard to the conditions in Schedule 2 of the DPA, it is my view that condition 6 is the only such condition which might be considered to apply. Condition 6 covers processing (for example, by disclosure) which is necessary for the purposes of legitimate interests pursued by the third party to whom 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.
32. I must apply a number of tests to establish whether condition 6 supports disclosure of personal data in this case. The first test is whether it can be established that the third party / 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.

33. In considering the first test, I accept that Mr Fox, who has complained to the Council about a disturbance at the named address, has a legitimate interest in knowing what communication there has been between the Council and the occupant of the named address in relation to the complaints he has raised. In addition, I also consider that a wider legitimate interest is shared by the general public in being entitled to know what action is undertaken by public authorities in relation to complaints they make about noisy or antisocial neighbours. I find, therefore, that the first test can be fulfilled.
34. In considering the second test, with regard to whether disclosure is necessary for the purposes of the legitimate interests identified in paragraph 33 above, I have considered whether these interests might reasonably be met equally effectively by any alternative means. In all the circumstances, I have concluded that the legitimate interests in question cannot be met without disclosure of the withheld documents and therefore that disclosure of this data is necessary for the purposes of the legitimate interests.
35. In considering the third test, I am required to balance Mr Fox's legitimate interests against those of the individual.
36. As I have outlined in paragraph 30, individuals will normally have a reasonable expectation that documentation which is held by a public authority, in relation to any complaints made against them by a third party, will not be disclosed to anyone outside the complaints procedure of that public authority. In this case, the occupant of the named address clearly holds a legitimate interest in ensuring that the personal data in question is not processed by the Council in this manner, and is not released to Mr Fox.
37. However, it is also clear that the general public have a legitimate interest in discerning whether public authorities are pursuing complaints made to them and that their complaints procedures are robust and thorough.
38. I accept that, in the interests of accountability and transparency, the complaints procedures of the Council should be open to public scrutiny. I also accept that Mr Fox is entitled to know what steps the Council took in relation to the complaints he lodged against the occupant of the named address. However, I do not believe that the disclosure of the documentation held by the Council in relation to these complaints is necessary to fulfil the requirements of accountability or transparency.



39. Having read all of the withheld documents it is clear to me that although none of the information can be considered 'sensitive' as defined in the DPA, the content is highly personal to the occupant of the named address, as it relates to complaints made against the occupant. As such, it is reasonable to presume that the occupant of the named address has an expectation that the contents of these documents will be kept outwith the public domain. Additionally, it is my opinion that it would be impossible to release redacted versions of the documents as even if they were heavily edited, it would still be clear who the documents referred to, as the occupant is the focal point of all the correspondence.
40. In balancing the legitimate interests of Mr Fox (outlined in paragraph 33) against the rights of the occupant of the named address (outlined in paragraph 36) I have found that disclosure of the requested documentation would be unwarranted by reason of prejudice to the occupant's rights, freedoms or legitimate interests. Therefore I find that Condition 6 of Schedule 2 of the DPA does not support the disclosure of personal data in this case.
41. As Condition 6 of Schedule 2 of the DPA does not permit disclosure in this case, I do not have to consider whether the release of the information would be unfair or unlawful.
42. It is therefore my view, having considered fully the information in question, that the Council was correct to apply the exemption in section 38(1)(b) to the 20 withheld documents and that this information should not be disclosed.

## **Decision**

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I find that Moray Council complied with Part I of the Freedom of Information (Scotland) Act 2002 (FOISA) by withholding information requested by Mr Fox under the exemption in section 38(1)(b) of FOISA.

## **Appeal**

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Should either Mr Fox or Moray 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**  
**16 July 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  
(...)  
(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 relates to manual data held) 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.