



Scottish Information
Commissioner

**Decision 215/2007 Mr David Fleming and
Aberdeenshire Council**

Developer's planning gain contribution

**Applicant: Mr David Fleming
Authority: Aberdeenshire Council
Case No: 200601757
Decision Date: 13 November 2007**

**Kevin Dunion
Scottish Information Commissioner**

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Decision 215/2007 Mr David Fleming and Aberdeenshire Council

Request for document discussing developer's planning gain contribution – information refused under sections 30 of the Freedom of Information (Scotland) Act 2002 – upheld by Commissioner

Relevant Statutory Provisions and Other Sources

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) (General entitlement); 2(1) (Effect of exemptions); 30(c) (Prejudice to effective conduct of public affairs).

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

Facts

Mr Fleming requested a copy of a document which related to the Developer's contribution from Aberdeenshire Council (the Council). The Council refused the information, citing sections 33 and 36 of FOISA. Mr Fleming was dissatisfied with this response and asked the Council to review its decision. The Council carried out a review and notified Mr Fleming that it had decided to maintain its refusal to release the information, citing exemptions in sections 30 and 33 but removing the exemption in section 36 of FOISA. Mr Fleming remained dissatisfied and applied to the Commissioner for a decision.

Following an investigation, the Commissioner found that the Council dealt with Mr Fleming's request for information in accordance with Part 1 of FOISA. He did not require Aberdeenshire Council to take any further action as a result of this Decision Notice.



Background

1. On 29 August 2006, Mr Fleming emailed the Council requesting the following information: a copy of a document which related to the developer's contribution with regard to a planning application for a supermarket at the Loop Road, Fetteresso Cemetery, Stonehaven (ref 2004/1231). He had seen this document when inspecting the planning file relating to the application.
2. On 4 September 2006, the Council emailed Mr Fleming in response to his request for information. The Council refused to provide the document, claiming that it was exempt under sections 33 and 36 of FOISA.
3. On 5 September 2006, Mr Fleming emailed the Council requesting a review of its decision. Mr Fleming considered the contribution to be a matter of public interest as it might have a bearing on the public enquiry to be held in relation to the application and enhance scrutiny of policy decisions made by the Council. He did not consider that any commercial interests would be impinged by the information, and in any event argued that any commercial information that did exist could be redacted prior to publication.
4. On 4 October 2006, the Council wrote to notify Mr Fleming of the outcome of its review. The review found that there was no basis for maintaining the exemption in section 36 of FOISA. However, the review concluded that section 30(c) of FOISA applied, in addition to upholding the Council's earlier reliance on section 33 (clarifying that section 33(1)(b) was the specific provision that applied).
5. On 8 November 2006, my Office received an application from Mr Fleming, 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.
6. The application was validated by establishing that Mr Fleming 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

7. On 29 November 2006 the Council was notified in writing, in terms of section 49(3) of FOISA, that an application had been received from Mr Fleming and was asked to provide my Office with its comments and specified items of information required for the purposes of the investigation. The Council responded with the information requested and the case was then allocated to an investigating officer.
8. The investigating officer subsequently contacted the Council, asking it to provide comments on the application and to respond to specific questions on it.
9. The investigation focussed on the Council's refusal to provide Mr Fleming with a copy of the document he requested and whether the Council's was correct in applying the exemptions in sections 30(c) and 33(1)(b) of FOISA in justifying that refusal.

Background to the information

10. By virtue of section 75(1) of the Town and Country Planning (Scotland) Act 1997, a planning authority (such as the Council) may enter into an agreement with any person interested in land in their district, for the purpose of restricting or regulating the development or use of the land, either permanently or during such period as may be prescribed by the agreement. Such agreements are generally known as "section 75 agreements".
11. Scottish Planning Policies (SPPs) are published by the Scottish Executive and provide statements of policy on nationally important land use and other planning matters. These are supplemented by Planning Advice Notes (PANs) which provide advice on good practice and other information on specific aspects of planning.
12. SPP 3: *Planning for Housing*, supported by and PAN 74: *Affordable Housing*, provides for developers making contributions to affordable housing provision where there is a demonstrable need for such housing in an area. Such a contribution will typically be made through a financial payment, or by the provision of land or discounted housing units, and secured by means of a section 75 agreement.



Description of the information requested

13. It is perhaps worth describing at this stage the information Mr Fleming has requested.
14. The document in question is a memo and report exchanged between two Council officials in relation to a planning application for a proposed food retail unit at the Loop Road, Stonehaven. The detail within the attached report forms the basis of part of a proposed section 75 agreement.
15. Within the report there are guidance and figures relating to affordable housing contributions sought from the developer (often described as a developer contribution). The Council has adopted a formula which it uses to calculate the developer contribution for affordable housing from non-residential developments.

Submissions from the Council

16. The Council submitted that the document in question had been mistakenly put into the planning application file and should not have been seen by him at all.
17. The Council added that operating procedures used by the Council's Planning Gain Co-ordinator are that all negotiations with developers are in confidence and remain so until there is a positive planning decision in favour of the application. Thereafter any section 75 agreement can be viewed in the Land Register: If there is no agreement, the finalised information can be made available thereafter.
18. The Council stated that its affairs would be prejudiced substantially if the information were to be released prior to the application being determined and that the information was commercially sensitive. The Council added that even where an application had been refused, the results of negotiations would not be released as this might compromise future negotiations on the same site.
19. The Council further submitted that any decision which undermines the procedures for negotiating developer contributions would have very serious implications for the continued success of the Planning Gain Co-ordinator and would make it more difficult for the Council to derive planning gain.

Submissions from the applicant

20. Mr Fleming considered that the lack of transparency and democratic accountability in relation to planning gain and developer contributions was unacceptable.
21. Mr Fleming questioned whether the Council should be in a commercial relationship with the party concerned and suggested that truly commercially sensitive information could be redacted prior to the document's release.



22. Mr Fleming also raised the point that the planning application was subject to a public enquiry and the information may be part of the evidence heard by that enquiry.

The Commissioner's Analysis and Findings

23. 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 Fleming and the Council and I am satisfied that no matter of relevance has been overlooked.
24. I will address the refusal of the Council to provide the information Mr Fleming requested in relation to the two exemptions in FOISA claimed by the Council.

Section 30(c): Prejudice to effective conduct of public affairs

25. The exemption in section 30(c) of FOISA allows public authorities to withhold information which would "otherwise prejudice substantially, or be likely to prejudice substantially, the effective conduct of public affairs".
26. In this instance the effective conduct of public affairs has been identified by the Council as trying to negotiate fair planning gain contributions with developers. It argued that release of that information prior to a finalised position being established between both parties could jeopardise that process.
27. Authorities seeking to rely on the exemption in section 30(c) need to show that disclosure will substantially prejudice the interests contained in the exemption. For example they should be able to demonstrate that the risk of damage being caused by disclosing information is real or very likely, not simply a remote possibility. The harm caused or likely to be caused must be of some real and demonstrable significance, not simply marginal, and it would need to occur in the near (certainly the foreseeable) future rather than in some unspecified distant time. Authorities should therefore consider disclosing the information asked for unless it would (or would be likely to) cause real, actual and significant harm. This exemption is subject to the public interest test required by section 2(1)(b) of FOISA



28. In its submissions the Council indicated that the planning gain contribution calculation was formulaic in nature. In my view, to release the formula would be to provide the underlying framework upon which calculations are made and from which actual developer contributions are derived. Having arrived at those figures it is by no means certain that the developer will accept these, and it is here that the negotiations would presumably begin. Indeed, the Council stated that “as in all negotiations the Council lays down a marker as a starting point and matters proceed from there.” In my view this document serves as the Council’s “marker.”
29. In my view the Council’s position in negotiations would be substantially prejudiced if it were to enter negotiations with its “marker” already known.
30. Given that the variables in each planning application and the actual value of the land will differ in each case, and that the formula was devised by the Council to ensure a fair and equitable basis for calculating developer contributions, I am persuaded that the process in general in relation to this or other section 75 agreements will be substantially prejudiced by disclosure of the information withheld.
31. Having examined the withheld document, I am persuaded that release of both the formula and the specific figures that are utilised in this particular calculation would cause real or actual significant harm to the *process* of negotiating developer contributions. I accept the Council’s point that there may be public pressure put upon the Council to achieve the sum produced by the formula without reference to the detailed negotiations between the Council and the developer. The Formula produces a figure but it is the experience, expertise and bargaining positions of both the Council and the developer that determine the outcome of the whole planning gain process.
32. I am therefore persuaded by the arguments put forward by the Council that substantial prejudice would, or would be likely to, be caused to the effective conduct of public affairs by the release of the information requested. Being satisfied that the exemption in section 30(c) applies, I am required to go on to consider the public interest test.

The Public Interest

33. The public interest test is set out in section 2(1)(b) of FOISA. This states that, as regards information which is exempt information by virtue of any provision of Part 2 of FOISA, a person's general entitlement to receive information under FOISA applies only to the extent that the provision does not confer absolute exemption and, in all the circumstances of the case, the public interest in disclosing the information is not outweighed by that in maintaining the exemption.



34. Generally I am of the view that in instances where negotiations have ended, the public interest in openness and accountability would generally tend towards release of the information. However, where disclosure of past negotiations could prejudice current or future negotiations or cause some other harm, as in this particular case (containing as it does the formula itself and how it is used in specific negotiations), then this also weighs heavily in the balance in applying the public interest test.
35. The Scottish Ministers' Code of Practice on the Discharge of Functions by Public Authorities under the Freedom of Information (Scotland) Act 2002 (commonly known as the section 60 code) suggests a number of factors which may inform a decision about the public interest. Such factors include the general public interest in information being accessible (such as whether disclosure would enhance scrutiny of decision-making processes and thereby improve accountability and participation) and whether disclosure would contribute to a debate on a matter of public interest.
36. There is an undoubted public interest in openness, accountability and scrutiny of the actions taken by public authorities in major decisions such as planning applications. There is a public interest in contributing to the debate and participating in the planning process, particularly where planning gain is concerned. However, in this case I am not persuaded that the release of the information in this case would necessarily be the mechanism whereby that accountability is increased. As the Council have indicated, once a planning application is approved the planning gain figures are a matter of public record anyway. The Council do not appear to be attempting to thwart or obfuscate that in refusing the formula or figures prior to the completion of a planning application or appeal. In my view the Council will be properly held to account for any irregularities or discrepancies in the planning gain process on the basis of the completed planning process where all the facts and evidence are considered in the round and in the context of completed bargaining positions of both parties.
37. While public oversight is a valuable mechanism in ensuring that public authorities achieve best value or get the best price in planning gain contributions, the ability of the Council to actually achieve this where their negotiating position is already known to the other party may actually be detrimental to achieving those ends. In my view the public interest in this case lies in the Council being able to achieve best value by entering negotiations secure in the knowledge that their "marker" is unknown to the other party. To do otherwise may be to seriously restrict the Council's options, choices or bargaining position. If, after the negotiations are complete and the information goes into the public domain, questions about achieving that value for money or best price remain, then these may be addressed at that stage but not prior to or in the middle of negotiations.



38. In my view, having weighed up the public interest arguments for openness, accountability, value for money and participation in the democratic process and planning considerations, I consider that the public interest in this case lies in maintaining the exemption and permitting the Council a secure bargaining position, the room to manoeuvre within that bargaining position and the ability to achieve best value by the means the Council and its officials deem appropriate in a given set of circumstances. However, I must stress that in cases where there are allegations of wrongdoing or accountability, openness and transparency on a public authority's part are not of the level expected my view of the public interest in disclosure may well be different.
39. I therefore find that the public interest lies in maintaining the exemption in section 30(c) of FOISA. Given that I accept that exemption in section 30(c) of FOISA applies I am not required to consider the other exemption claimed by the Council and therefore do not intend to.

Decision

I find that Aberdeenshire Council complied with Part 1 of the Freedom of Information (Scotland) Act 2002 (FOISA) in responding to the information request from Mr Fleming. In correctly applying the exemption in sections 30(c) of FOISA, Aberdeenshire Council dealt with the request in accordance with section 1(1) of FOISA.

I therefore do not require Aberdeenshire Council to take any further action as a result of this decision notice.



Appeal

Should either Mr Fleming or Aberdeenshire 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 42 days after the date of intimation of this notice.

Kevin Dunion
Scottish Information Commissioner
13 November 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.

2 Effect of exemptions

- (1) To information which is exempt information by virtue of any provision of Part 2, section 1 applies only to the extent that –
 - (a) the provision does not confer absolute exemption; and
 - (b) in all the circumstances of the case, the public interest in disclosing the information is not outweighed by that in maintaining the exemption.

30 Prejudice to effective conduct of public affairs

Information is exempt information if its disclosure under this Act-

...

- (c) would otherwise prejudice substantially, or be likely to prejudice substantially, the effective conduct of public affairs.