



Scottish Information
Commissioner

Decision 012/2005
Ms Thorne and Perth and Kinross Council

*Request for details of names and addresses of supporters
and objectors to a planning application for a wind farm at
Drumderg, Bridge of Cally, Blairgowrie*

Applicant: Ms Sylvia Thorne
Authority: Perth and Kinross Council
Case No: 200500646
Decision Date: 18 July 2005

Kevin Dunion
Scottish Information Commissioner

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Facts

Ms Thorne requested details of the names and addresses of all supporters and objectors to a planning application for a wind farm at Drumderg, Bridge of Cally, Blairgowrie from Perth and Kinross Council (the Council). While the Council provided details of the letters of representation which were not received from individuals, it refused access to details of the remaining 692 supporters and objectors, citing Section 38 of the Freedom of Information (Scotland) Act 2002 (FOISA). The Council claimed in its refusal that the information requested constituted personal data and its disclosure would contravene the provisions of the Data Protection Act 1998 (DPA).

Outcome

The Commissioner found that the Council had applied the exemption under section 38(1)(b) of FOISA incorrectly and as a result had failed to comply with section 1(1) of FOISA. While the information requested by Ms Thorne does constitute personal information under the terms of the Data Protection Act 1998 (DPA), the Commissioner found that the circumstances under which that information was provided to the Council would permit the information to be released in response to Ms Thorne's request.

Appeal

Should either the Council or Ms Thorne wish to appeal against my 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.



Background

1. The Council was contacted by Ms Thorne on 5 January 2005 for information relating to a planning application made by SSE Generation Ltd for a wind farm at Drumderg, Bridge of Cally, Blairgowrie. The information sought by Ms Thorne was as follows:
 - a printout of the names and addresses of all supporters and objectors to the application and
 - a list of the names and addresses of all the Statutory and Stakeholder Consultees approached in connection with the application.
2. In its response dated 17 January 2005, the Council wrote to Ms Thorne informing her that, while it could respond in full with details of the Statutory and Stakeholder Consultees requested by her, it could only provide names and addresses of 5 of the 697 representations received to the planning application. These 5 representations constituted those which were not received from individuals. The details of the remaining 692 representations were withheld on the grounds that the information requested was personal data, and its disclosure would contravene the provisions of the Data Protection Act 1998. The Council therefore applied the exemption under section 38 of the Freedom of Information (Scotland) Act 2002 (FOISA) to the information.
3. On 25 January 2005 the Council received a request from Ms Thorne asking it to review its decision to withhold details of the names and addresses of those individuals submitting representations.
4. The Council wrote to Ms Thorne on 15 February to confirm that it believed its original decision to withhold the information to be correct. In addition, the Council indicated that it intended to write to those individuals who had submitted letters of representation in relation to the Drumderg planning application to seek their consent for the release of their names and addresses in response to Ms Thorne's request.



The Investigation

5. I received a valid application under the terms of section 47(1) of FOISA from Ms Thorne on 21 February 2005.
6. Following receipt of this application, my Office invited comments on the case from the Council on 8 March 2005. In this correspondence my Office also sought the following information:
 - a) details of the material withheld from Ms Thorne;
 - b) reasons for believing that the exemption under section 38 applied to the information requested;
 - c) confirmation of any legal obligations that the Council may have to disclose the information requested;
 - d) details of guidance or advice considered by the Council in its handling of this request;
 - e) details of the internal review process carried out by the Council;
 - f) details of any information provided by the Council to those submitting representations on how the information submitted would be used;
 - g) details of any other circumstances under which the information may be released into the public domain.
7. The Council responded, seeking clarification of my Office's entitlement to information which constitutes personal data under the DPA. Section 35(1) of the DPA exempts personal data from that Act's non-disclosure provisions if the disclosure is required under any enactment. As a result a formal Information Notice was issued by my Office under section 50 of FOISA on 17 March 2005, which placed a statutory obligation on the Council to supply the requested information.
8. The Council's response to this Information Notice was received by my Office on 30 March 2005.

The Council's Submissions

9. The Council confirmed in its response to my Office that 697 representations were received in connection with the proposed wind farm and provided this Office with full details of all names and addresses. This included the 692 names and addresses which were withheld from Ms Thorne.



10. The Council confirmed that information was withheld because it believed that the 692 names and addresses were personal data and the release of the information would breach two of the data protection principles. The exemption which was believed to be breached therefore was section 38(1)(b) of FOISA. The Council stated that both the first and second data protection principles would be breached by the release of the information.
11. The first data protection principle relates to fair and lawful processing. In its submissions to my Office, the Council stated that the release of the information would breach this principle since planning objectors have no expectation that their details would be released to the public. The Council also stated that those responding to neighbour notifications have an “explicitly stated expectation of confidentiality” (see paragraph 15).
12. The second data protection principle states that information should only be processed for a specified and lawful purpose. The Council stated that the release of this information would breach this principle as the purpose of collecting and recording the information was not to release it to the public, but to permit communications between the Council and objectors as and when required by the planning process.
13. The Council also provided an overview of legislation governing the planning system, as well as details of relevant guidance issued by the Scottish Executive. The Council noted however that neither the legislation nor guidance directly address how the names and addresses of those submitting letters of representation should be processed.
14. The Council stated that no external guidance was sought in relation to its consideration of this case, beyond its consideration of the DPA.
15. The Council confirmed that representations were received either through formal letters or emails of representation or through neighbour notification forms. The neighbour notification form is used by planning applicants to notify those likely to be directly affected by a particular application. This form also invites comments on the proposed application. In relation to the Drumderg application, the form also stated the following:

“Any letters received, either in support or representation, are confidential until an application goes before the Development Control Committee, or is subsequently appealed by the applicant.”



Those who submitted representation by other means were sent an acknowledgement letter by the Council, which contained the following statement:

“Your letter will be treated as confidential, unless the planning application is referred to the Committee, although the planning issues raised by your letter may be discussed with others (if, for instance, this will assist determination of the planning application).”

16. The Council stated in its submission to my Office that these statements were phrased to protect the anonymity of objectors, while also considering the practicalities of the planning system.
17. The Council also responded that, under normal circumstances, letters of representations which are not included in the report considered by the Development Control Committee are not generally made available to enquirers. The Council acknowledged, however, that the entire file relating to this case, including unedited copies of all letters of representation, were made available for inspection by members of the public in the period leading up to the Development Control Committee meeting in August 2004. The Council also acknowledged that Ms Thorne had inspected the files at this time and had noted the details of some of those submitting representations.
18. The Council informed my Office that it had approached all those submitting letters of representation in order to ascertain whether they would object to their information being released in response to Ms Thorne’s request. The Council informed my Office that Ms Thorne would receive the names and addresses of those who have no objection to disclosure, but would not receive details of the 135 individuals who withheld their consent.
19. Other submissions from the Council alongside the response received on 30 March of included:
 - Details of the Council’s review process in relation to this case
 - A copy of the Council’s ‘Right of Review’ leaflet
 - A copy of the public advertisement applicable to the Drumderg Wind farm.

Submissions from Ms Thorne

20. Alongside her formal application to my Office, Ms Thorne provided copies of relevant correspondence relating to her application (initial request, the response from the Council, request for review and second response from the Council).
21. In support of her application, Ms Thorne confirmed that on 30 July 2004 she was given access to the full case file and was able to read all of the letters of representation and note points. At that time she was also able to copy names and addresses. Ms Thorne also submitted press cuttings which confirm that the media also accessed copies of the full file at this time, and confirmed that she had been contacted to discuss the case by journalists who had accessed her details via the Council.



22. In a submission to my Office of 8 June 2005, Ms Thorne confirmed that she had received details of the names and addresses of those submitting letters of representation who had not objected to the release of their information, following the additional correspondence sent by the Council (discussed in paragraph 19 above). Ms Thorne stated in this correspondence that she was unhappy with the information provided, in that the information released did not differentiate between supporters and objectors.
23. Ms Thorne made additional submissions to this office, restating her belief that the information should be released, on 27 February, 28 March, 8 June and 12 June 2005.

The Commissioner's Analysis and Findings

24. The reason provided by the Council for the refusal of Ms Thorne's initial information request, and reiterated in its response to Ms Thorne's request for review, was that the information requested was exempt under section 38(1)(b) of FOISA. The principal issue to be addressed in relation to this case therefore is whether the information requested by Ms Thorne constitutes personal data, as defined by the DPA and, if so, whether its release under FOISA would contravene any of the data protection principles.

Is the information "personal data"?

25. The DPA defines personal data in section 1(1) as "data which relate to a living individual who can be identified from those data..." As Ms Thorne's information request was specifically for details of the names and addresses of the individuals who made representations to the Council in relation to the Drumderg wind farm, this can clearly be seen to constitute personal data under the terms of the DPA.

Would disclosure contravene the data protection principles?

26. In its submission to this Office, the Council indicated that it believed that the disclosure of this information would breach both the first and second data protection principles.

The first data protection principle

27. The first data protection principle relates to fair and lawful processing. The Council stated in its submissions to my Office that it believed this principle would be breached because those submitting letters of representation have no expectation that their details would be released to the public. The Council also stated that those submitting letters of representation have an "explicitly stated expectation of confidentiality" (discussed in paragraph 15 above). As a result, the Council argued that the processing of this personal data would not be 'fair', under the terms of the DPA.



28. The issue of whether the processing of personal data is 'fair' will largely depend on the circumstances under which that data is obtained, and the information provided to the individual submitting the data on how it will be processed.
29. In relation to the case under consideration, all the data supplied to the Council was provided within the context of submissions made in response to a planning application. It is my view that it is generally accepted that those submitting representations in relation to planning applications are aware that the information supplied is likely to become publicly available. Indeed, I note that the Council acknowledges that it makes full letters of representation available for public view if that letter is attached to a Development Control Committee (DCC) report. It is also noted that all the information held in relation to a planning application, including unedited copies of letters of representation, becomes publicly accessible at the point at which an appeal against a planning decision is made to the Scottish Executive. There is a substantial public interest in ensuring that the whole planning process is as open and transparent as possible, and access to the representations of those who either support or object to an application is a key part of the transparency and accountability of this process.
30. With regard to the information provided to individuals on how their data would be processed, this was detailed in the statements which were made available by the Council to all those commenting on the application (described in paragraph 15). These statements informed those commenting on the planning application that the letters they supplied would be treated as confidential until such time as the planning application was referred to the Development Control Committee (DCC).
31. It is clear from these statements that individuals were made aware that their submissions would remain confidential only until such time as the planning application was referred to the DCC. After this time, the information submitted should no longer be considered as confidential and would, therefore, be liable for release into the public domain. Indeed, it is noted that the Council allowed members of the press and public, including Ms Thorne herself, to access the full file in relation to this application in the week prior to the initial consideration by Committee in August 2004.
32. The Council has stated in correspondence to my Office that, notwithstanding this case (where public access was permitted to the entire case file), normal procedure is only to allow access to those letters of representation which have been attached to the DCC report. However, it should be noted that the statements provided to individuals refer to letters being confidential only until such time as the "application" is referred to committee, as opposed to the referral of the individual letters themselves. Therefore, this statement provides that confidentiality in relation to **all** letters submitted in response to a planning application expires at the point at which that application is referred to Committee, regardless of whether that letter forms part of the DCC report. In the case of the Drumderg wind farm, the planning application was initially referred to Committee in July 2004.



33. The Information Commissioner, who is responsible for enforcing the DPA, has provided guidance on the consideration of the data protection principles within the context of freedom of information legislation. In this, the Commissioner provides examples of the types of questions which should be considered by authorities when assessing whether the release of personal data to a third party would amount to 'fair' processing. These include:
- Would disclosure cause unnecessary or unjustified distress or damage to the data subject?
 - Would the data subject expect that his or her information might be disclosed to others?
 - Has the person been led to believe that his or her information would be kept secret?
 - Has the person expressly refused consent to disclosure of the information?
34. In relation to this case, the statements provided to those submitting representations contained a clear communication that the information submitted will only remain confidential until such time as the application is considered by the DCC and, therefore, may be subject to public scrutiny after this time. In addition, the Council has confirmed to my Office that, at the time of Ms Thorne's submission of her initial information request in January 2005, approximately 14 months after comments were first invited in relation to the Drumderg application, no communications had been received from individuals who, on receipt of this statement, contacted the authority to request that their details be kept confidential or that their letter of representation be withdrawn. It should also be noted that no evidence has been presented which would suggest that disclosure of the information in question would cause distress or damage to any of the individuals submitting that information.

The second data protection principle

35. The second data protection principle relates to processing for a specified and lawful purpose, and states that data should not be processed in any manner incompatible with that purpose. The Council states in its submission to this Office that the release of the information supplied by supporters and objectors would breach this principle as the purpose of collecting and recording the information was not to release it into the public domain, but was to permit communications between the Council and objectors as and when required by the planning process.
36. I cannot accept the Council's argument in relation to the second principle as a valid reason for withholding information under FOISA. By stating that it cannot respond to Ms Thorne's request because the data had not been collected for that purpose, the Council is effectively presenting an argument that third party personal data should never be released in response to freedom of information requests, given that the specified purpose for collecting personal data will never be solely for responding to information requests. This was clearly not the intention of the Scottish Parliament when setting out section 38 of FOISA; indeed it is clear that FOISA was drafted to provide that third party personal data should be made available in certain limited circumstances.



37. In addition, the circumstances under which the information was provided, which are discussed in more detail in paragraph 29 above, will also have a bearing on whether the information is being processed for a specified purpose. As discussed above, it is my view that those submitting representations are aware that the information supplied is may become publicly available, as part of the transparency and accountability of the planning process. Therefore the release of this information in response to a freedom of information request will not generally constitute a breach of the 'specified purpose' for which the information was provided.

Conclusion

38. I conclude therefore that, based on the context within which the information was initially supplied to the Council, and the wording of the statements provided by the Council to those submitting letters of representation, the release of the information requested by Ms Thorne at the time of the submission of her initial request would not have contravened the data protection principles, and therefore would not have been in breach of section 38(1)(b) of FOISA.

Correspondence from the Council seeking consent for release

39. The situation in relation to this case is, however, complicated by the actions of the Council following Ms Thorne's request that it review its initial decision to withhold the information.
40. As noted in paragraphs 4 and 18 above, following Ms Thorne's request for review, the Council contacted all those who submitted letters of representation in order to ask them whether they consented to the release of their personal data to Ms Thorne. In a letter dated 16 February 2005, the Council's Head of Development Control said:
- "I have received a request from a local resident under the Freedom of Information (Scotland) Act 2002 for the name and address of each person who submitted representation regarding this planning application. In the circumstances, where your name and address is otherwise treated as confidential, I request your authority to release your name and address in response to that enquiry. Accordingly if I do not hear from you within fourteen days of the date of this letter, I shall presume that you have no objection to your name and address being released."*
41. The Council subsequently released details of an additional 557 correspondents to Ms Thorne, but withheld details of the 135 individuals who contacted the Council to withhold their consent.



42. I acknowledge that this action was taken by the Council in an attempt to seek a resolution to Ms Thorne's request and that the Council's action was clearly an attempt to seek permission retrospectively for the processing of personal data held. This appears to be a result of uncertainty on the part of the Council in relation to the statements which was provided to those submitting representations. Indeed, it is noted that the Council has, since the receipt of Ms Thorne's request for information, amended these statements to inform correspondents that all representations submitted will be made available for viewing or copy, at any point in the planning process.
43. Nevertheless, it is my opinion that the action was misguided and served only to compound and confuse the issue rather than resolve it. Whilst it did mean that the significant majority of those making representations allowed their names to go forward, a minority were led to believe they were in a position where their names were being treated as confidential and that by responding to the Council they could ensure that their names would remain confidential.
44. In my view neither of these circumstances existed.
45. Section 1(4) of FOISA clearly states that the information provided to persons in response to requests under FOISA should be that held at the time the request is received. It is therefore the responsibility of every public authority to deal with the requests for information they receive purely within the context of the information they hold – and the circumstances under which they hold it – at the time the request is made. Authorities should not therefore contact third parties to allow them to change these circumstances retrospectively or to impose a confidentiality condition retrospectively, particularly where it is clear that the information is not or is no longer actually held in confidence.
46. Furthermore the letter gives the impression that at the time of writing in February 2005 the Council was still treating the names and addresses in representations as confidential. Yet as has been previously noted the provision of confidentiality is withdrawn when an application goes before the Development Control Committee, which had already happened more than 6 months previously, at which time names had been made available to the press and indeed to Ms Thorne.
47. While it may, in certain limited situations, be appropriate for an authority to contact third parties to seek comment on whether, in their opinion, the circumstances under which the information was supplied would permit release, this process should only be used to inform an authority's decision making, rather than to create a new set of obligations or to imply outcomes which cannot be assured.
48. To provide a parallel example, under the terms of FOISA, it would clearly be unacceptable for an authority, on receipt of a request for information held relating to a private company, to subsequently contact that company and invite it to introduce a retrospective confidentiality agreement preventing the release of the information.



49. Whilst clearly that has not happened here, nevertheless the outcome is such that some people may believe that by responding they were creating or at least bolstering a claim to confidentiality.
50. As discussed previously, however, it is my opinion that the statement provided to all correspondents contains clear information relating to how information submitted to the Council would be processed, and the extent to which names and addresses would be held in confidence. That cannot be set aside or altered after the date on which Ms Thorne has made her request. In fact, a careful reading of the letter from the Council shows that this has not been done. The letter asks for consent to release names and addresses where names and addresses are “otherwise treated as confidential.” It is clear, from the statement provided to all correspondents that the information would only remain confidential until such time as the application went before the Development Control Committee.
51. In this particular case, the Council had already refused Ms Thorne’s initial request, had maintained its position after review and informed her of her right to appeal to me if she was not satisfied, before writing out to the individuals. Ms Thorne made her appeal to me before any names and addresses were released, and confirmation of the numbers being withheld as a result of that exercise was made known to her.

Conclusion

50. I consider that at the time of Ms Thorne’s request and at the time of her appeal, the Council were incorrect in refusing to supply information requested and its has not justified its claim for exemption under section 38(1)(b) of FOISA. This position is not altered by the subsequent actions of the Council by which it secured the views of the individuals who had made representation. I accept that the Council’s intentions were well-meaning, but it is regrettable that those individuals who responded to object to the release of the information may have been given the impression that this would ensure that their names would not be released. The Council was not in a position, however, to give or create the impression of such an assurance, and the consequences of the Council’s actions cannot bind my hands in this matter. One of the key principles underpinning the freedom of information legislation is that the information provided by an authority in response to a request should be that information which is available at the time at which the request is received.



Decision

I find that Perth and Kinross Council did not deal with Ms Thorne's request for information in accordance with Part 1 of the Freedom of Information (Scotland) Act 2002 (FOISA) in that it failed to comply with section 1(1) of FOISA, as set out above. The Council should therefore take steps to respond in full to Ms Thorne's information request by providing Ms Thorne with the full name and address details of all 692 supporters and objectors to the Drumderg wind farm application. Details of those who support and those who oppose the application should be clearly differentiated in the Council's response, in line with Ms Thorne's initial information request, received by the Council on 5 January 2004.

I am obliged to give the Council at least 42 days in which to supply Ms Thorne with the information as set out above. In this case, I require the Council to take these steps within two months of the date of receipt of this notice.

Kevin Dunion
Scottish Information Commissioner
18 July 2005