



Scottish Information
Commissioner

**Decision 047/2006 – Mr E Sutherland-Loveday and
Scottish Borders Council**

*Request for disclosure of a report of a property inspection carried
out on behalf of Berwickshire Housing Association.*

Applicant: Mr E Sutherland- Loveday
Authority: Scottish Borders Council
Case No: 200502853
Decision Date: 22 March 2006

Kevin Dunion
Scottish Information Commissioner

Kinburn Castle
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Decision 047/2006 – Mr Sutherland-Loveday and Scottish Borders Council

Request for a report that had been produced by Scottish Borders Council on behalf of Berwickshire Housing Association following the inspection of a property owned by the applicant – section 34 investigations by Scottish public authorities and proceedings arising out of such investigations – section 35 law enforcement.

Facts

Mr Sutherland-Loveday submitted an information request to Scottish Borders Council (the Council) for a copy of the report supplied by the Council to Berwickshire Housing Association concerning a property owned by him. Mr Sutherland-Loveday also requested a copy of each of any/all attendant files, paperwork relative to that report. The Council did not provide Mr Sutherland-Loveday with any information on the basis that this report was owned by Berwickshire Housing Association. Despite Mr Sutherland-Loveday asking the Council to carry out a review of its decision the Council did not do this. Mr Sutherland-Loveday applied to the Commissioner for a decision.

Outcome

The Commissioner found that the Council had incorrectly relied on the exemptions under section 34 and section 35 of the Freedom of Information (Scotland) Act 2002 (FOISA) and therefore had not complied with Part 1 of FOISA in withholding the information requested by Mr Sutherland-Loveday.

The Commissioner found that the Council had not applied the exemption under section 38(1)(b) of FOISA in relation to the information withheld in circumstances where it should have done.

The Commissioner found that the Council did not carry out a review of its response as required under section 21 of FOISA.



Appeal

Should either Mr Sutherland-Loveday or Scottish Borders 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 notice.

Background

1. On 30 June 2005, Mr Sutherland-Loveday submitted a request for information to the Council asking for a report which had been prepared by the Council on behalf of Berwickshire Housing Association following an inspection of a property owned by Mr Sutherland-Loveday. Mr Sutherland-Loveday also requested any/all attendant files, paperwork relative to that report.
2. The Council replied to Mr Sutherland-Loveday on 30 June 2005. The information was withheld from Mr Sutherland-Loveday on the basis that the report was owned by Berwickshire Housing Association and the Council indicated that Mr Sutherland-Loveday should write to the Association to request the information. In this letter the Council did not advise whether it held the information or not, or as to which exemption(s) it was relying on in withholding the information from Mr Sutherland-Loveday.
3. Mr Sutherland-Loveday sent several further faxes seeking clarification of the Council's response.
4. Mr Sutherland-Loveday submitted a request for review to the Council on 10 September 2005.
5. The Council did not respond to this request for review.
6. On 13 October 2005, Mr Sutherland-Loveday applied to me for a decision as to whether the Council had breached Part 1 of FOISA in withholding the report. The case was subsequently allocated to an investigating officer.



The Investigation

7. Mr Sutherland-Loveday's appeal was validated by establishing that he had made a valid information request to a Scottish public authority under FOISA and had appealed to me only after asking the Council to review its response to his request.
8. A letter was sent by the investigating officer to the Council on 25 October 2005, asking for its comments on Mr Sutherland-Loveday's application in terms of section 49(3)(a) of FOISA. The Council was asked to provide:
 - An analysis of the exemption(s) under FOISA it was relying on in not releasing the information and of the public interest test if applicable;
 - Information to allow the investigating officer to carry out the investigation, in particular the information withheld.
9. An information notice was sent to the Council on 1 December 2005 as no response had been received to the letter of 25 October 2005.
10. A full response to this letter was received from the Council on 12 December 2005.

Submissions from Scottish Borders Council

11. The Council submitted that in responding to Mr Sutherland-Loveday's request it had directed him to Berwickshire Housing Association as the owner of the report. While it had advised him in that response that Berwickshire Housing Association was not a public authority for the purposes of FOISA, the Council also stated that it had relied initially on the exemption under section 25 of FOISA, as the information was otherwise accessible through the Association.
12. The Council indicated that it was now relying on the following exemptions under FOISA to justify withholding the information:
 - Section 34(3)(a) (investigations by Scottish public authorities and proceedings arising out of such investigations);
 - Section 35(1)(g) (law enforcement).
13. I will consider the Council's reasoning for relying on each exemption further in my Analysis and Findings.



14. The Council has also provided a copy of the report that Mr Sutherland-Loveday requested in his original request for information, along with copies of correspondence relating to it.
15. During previous correspondence between Mr Sutherland-Loveday and the Council in 2002 regarding access to this same report, the Council had provided Mr Sutherland-Loveday with a summary of the defects that had been noted in relation to the property during the Council's inspection.
16. In its submissions to my office the Council has indicated that the inspection of the premises owned by Mr Sutherland-Loveday was not carried out in terms of the Housing Scotland Act 1987, but as a chargeable advisory service in response to a request received from the Berwickshire Housing Association.

The Commissioner's Analysis and Findings

17. In his submissions Mr Sutherland-Loveday asked the Council to consider his request under FOISA and if applicable under the Environmental Information (Scotland) Regulations 2004 (the EIRs). In its submissions the Council has considered whether the information requested would come under the EIRs but has concluded that it would come under FOISA. I am satisfied having considered the full definition of environmental information under regulation 2 of the EIRs that this request for information was correctly considered under FOISA.
18. In its response to my office the Council provided copies of the documents that it had withheld from Mr Sutherland-Loveday together with a schedule detailing the documents and an explanation of the exemptions that it was relying upon in not disclosing this information to him.
19. The documents submitted by the Council include:
 - a copy of the report that was requested by Mr Sutherland-Loveday, and correspondence between the Council and Berwickshire Housing Association, the Council and Mr Sutherland-Loveday, and internal Council correspondence.
20. It is these documents that have been considered by the Investigating Officer in relation to this decision notice.



The application of Section 34(3)(a) – investigations by Scottish public authorities and proceedings arising out of such investigations

21. In order for a public authority to be able to rely on the exemption under section 34(3), there are two requirements to be satisfied. Neither part of the exemption is capable of standing alone. Firstly (section 34(3)(a)), the authority would have to be able to show that the information was obtained or recorded for the purposes of an investigation that it had carried out for one of the purposes for one of the purposes specified in section 35(2), by virtue of either Her Majesty's prerogative or powers conferred by or under any enactment.
22. The Council has indicated that the investigation was carried out to ascertain whether circumstances which would justify regulatory action in pursuance of any enactment existed or might arise, being the purpose identified at section 35(2)(c). The Council has not, however, been able to identify the statutory powers under which it was acting (clearly, the exercise of prerogative powers is not relevant to a local authority). In its original submissions to my Office the Council indicated that it was acting under the terms of the Housing (Scotland) Act 1987, but it has since submitted that it was not in fact acting under these powers but in response to a request received from Berwickshire Housing Association and the tenant of the property concerned.
23. The Council has advised that it was providing an advisory opinion on the condition of the property. Entry to the property was invited by the tenant and no statutory powers were exercised. The Council explained that these advisory visits are not covered by the Housing (Scotland) Act 1987, although if a house were deemed to fail the tolerable standard then this would be detailed in any report and the Council could take such further action as was required in terms of the powers afforded to it under that Act. No such action was required on this occasion.
24. The Council is also required to show (section 34(3)(b)) that the information withheld relates to the obtaining of information from confidential sources. The Council has been asked to provide information as to the basis on which it is relying on this part of the exemption but has failed to do so. There is nothing in the information which has been provided to me which would indicate any use of confidential sources in connection with this matter.
25. From the Council's submissions and the information it has provided to me, I am not satisfied that the information withheld falls within the scope of the exemption in section 34(3) of FOISA. Therefore, I am not required to consider the application of the public interest test.



The application of Section 35(1)(g) – law enforcement

26. In refusing to disclose the information requested by Mr Sutherland-Loveday, the Council also cited section 35(1)(g) of FOISA.

27. Section 35 states that –

(1) Information is exempt information if its disclosure under this Act would, or would be likely to, prejudice substantially –

(g) the exercise by any public authority (within the meaning of the Freedom of Information Act 200) or Scottish public authority of its functions for any of the purposes mentioned in subsection (2).

The Council has cited the following purpose under section 35(2) of FOISA as being relevant in this instance –

(c) to ascertain whether circumstances which would justify regulatory action in pursuance of any enactment exist or may arise.

28. In order for the Council to be able to rely on the terms of this exemption it would have to show that to disclose the information would have a substantially prejudicial effect on the exercise of a particular statutory regulatory function of the Council or another public authority.

29. Having considered all of the Council's submissions and the other information provided to me, I am not satisfied that the Council has provided justification for its reliance on the exemption under section 35 of FOISA. There is no indication that the Council carried out this inspection for the purposes of determining whether any regulatory action needed to be taken under any enactment. The inspection was carried out to provide an advisory opinion on the condition of the property following a request from Berwickshire Housing Association and the tenant and does not appear to have been done in pursuance of any statutory power afforded to the Council. It might have revealed the need for statutory regulatory action by the Council, but that was not the purpose of the inspection and it is clear in any event that no such requirement was identified in this case. In the circumstances, I am unable to conclude that disclosure of the information requested would be capable of causing prejudice, substantial or otherwise, to the exercise of any function falling within section 35(1)(g) and therefore am unable to accept that the exemption applies.



30. As I am satisfied that the information that the Council has withheld from Mr Sutherland-Loveday does not come within the exemption under section 35, I am not required to consider the application the public interest test.

Application of section 38(1)(b) – personal information

31. The exemptions that have been relied upon by the Council have been outlined above. The Council has not cited the exemption in section 38 of FOISA, which relates to personal information, but I am concerned that I should not require the Council to disclose information in contravention of the principles in the Data Protection Act 1998 (DPA).
32. Section 38(1)(b) of FOISA applies to the personal data of persons other than the applicant and exempts such data absolutely from the application of FOISA. In other words, if the exemption applies there is no need to consider the public interest. The relevant definition of “personal data” is that in section 1(1) of the DPA, in other words basically data relating to a living individual and from which that individual can be identified. The definition is subject to the interpretation contained in *Durant v Financial Services Authority* [2003] EWCA Civ 1746, in which the Court of Appeal held that if information is to be viewed as personal data it has to be biographical in a significant sense and must have the individual as its focus. The Court of Appeal summarised these two aspects as information affecting a person’s privacy whether in his or her personal or family life, business or professional capacity.
33. In the circumstances of the report carried out by the Council, I am satisfied that the names of the tenants of the property would be personal data. For the exemption in section 38(1)(b) to apply, however, one of two further conditions must be satisfied. The first of these is that disclosure other than under FOISA would contravene, *inter alia*, one of the data protection principles set out in schedule 1 to the DPA. The first principle is 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 [to the DPA] is met.
34. Given the reasonable expectations of the tenants at the time the information was recorded, I am not satisfied that disclosure of their names would be fair and therefore in compliance with the first principle. Neither am I satisfied that any of the conditions in schedule 2 to the DPA would permit their disclosure in the circumstances. I therefore require that the information be released subject to the redaction of the names of the tenants.



Decision

I find that Scottish Borders Council has not dealt with the applicant's request for information in accordance with Part 1 of the Freedom of Information (Scotland) Act 2002 (FOISA) in withholding information relating to the report of an inspection carried out by the Council on behalf of Berwickshire Housing Association on a property owned by the applicant. The exemptions in sections 34 and 35 were not relied upon correctly and as a result section 1(1) was not applied correctly.

I require Scottish Borders Council to provide Mr Sutherland-Loveday with a copy of the report, subject to the redaction of the names of the tenants in compliance with section 38(1)(a), within 42 days of the date of this notice.

I require Scottish Borders Council to provide Mr Sutherland-Loveday with a copy of all the correspondence between the applicant and the Council and the internal email communications between Council staff in 2002, subject to the redaction of the names of the tenants in compliance with section 38(1)(a), within 42 days of the date of this notice. I require the Council to provide Mr Sutherland-Loveday with a copy of the letter from Berwickshire Housing Association subject to the redaction of the names of the tenants in compliance with section 38(1)(a), within 42 days of the date of this notice.

I find that Scottish Borders Council has not dealt with the applicant's request for information in accordance with Part 1 of the Freedom of Information (Scotland) Act 2002 as it has not complied with section 21, in that no review was carried out by the Council. However, I do not require any remedial action to be taken in relation to this breach.

Kevin Dunion
Scottish Information Commissioner
22 March 2006