

**Decision 211/2006 - Mr Gordon Watson and the Scottish
Executive**

*Recommendations to Scottish Ministers in respect of East Renfrewshire Local
Plan and Ministers' response*

**Applicant: Mr Gordon Watson
Authority: The Scottish Executive
Case No: 200503244
Decision Date: 22 November 2006**

**Kevin Dunion
Scottish Information Commissioner**

Kinburn Castle
Doubledykes Road
St Andrews
Fife
KY16 9DS



Decision 211/2006 – Mr Gordon Watson and the Scottish Executive

Request for report provided to Scottish Ministers by the Scottish Executive Planning Division regarding the East Renfrewshire Local Plan, and Ministers' response.

Relevant Statutory Provisions and other Sources

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) (General entitlement); 30(b)(i) and (ii) (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 Watson asked the Scottish Executive (“the Executive”) to provide a copy of the report prepared for Scottish Ministers by the Executive’s Planning Division in respect of the East Renfrewshire Local Plan. He later submitted a request for the Ministers’ response to the Planning Division report.

The Executive disclosed factual information from two of the three annexes to the report, but withheld the remainder on the grounds that it was exempt under section 30(b)(i) and (ii) of the Freedom of Information (Scotland) Act 2002 (FOISA). The Ministers’ response was also withheld under these exemptions. The Executive argued that disclosure would, or would be likely to, substantially inhibit officials from the free and frank provision of advice or the free and frank exchange of views for the purposes of deliberation.



Background

1. On 11 October 2005, Mr Watson wrote to the Executive asking whether a report had been prepared for the Scottish Ministers by the Scottish Executive Planning Division (the Planning Division) on two planning applications which had been referred to Scottish Ministers by East Renfrewshire Council (the Council). He also asked whether the Planning Division had prepared a recommendation report for the Scottish Ministers, relating to the East Renfrewshire Local Plan (the Local Plan): the Scottish Ministers had been notified when the Council had voted to adopt the Local Plan. Mr Watson asked that if such reports had been prepared, he should be sent copies.
2. The Executive responded on 17 October 2005. It advised that no report had been prepared in relation to the two planning applications referred to in Mr Watson's request. In relation to the Local Plan the Executive confirmed that it did hold the information requested in the form of a submission to Ministers and their response. (It should be noted that Mr Watson had not asked for the Ministers' response.) The Executive provided Mr Watson with factual information from Annexes 2 and 3 of the submission to Ministers, but withheld some information on the grounds that it was exempt from disclosure under section 30(b)(i) and 30(b)(ii) of FOISA (effective conduct of public affairs).
3. On 22 October 2005 Mr Watson asked for a review of the Executive's decision to withhold some of the information he had asked for, setting out his reasons why the information should be released. In this letter he described the information he sought as "a report submitted by the Scottish Executive Development Department (or others) to the Scottish Ministers and their response...".
4. Mr Watson took the view that if all other information relating to the local plan process must be made available to the public, it was anomalous that the final stage in the process could be exempt from public inspection. He also pointed out that the Local Plan was the subject of great public interest and had attracted 495 objections, including a petition with 1087 signatures.
5. The Executive replied on 21 November 2005, upholding the decision to withhold some of the information from Mr Watson under section 30(b)(i) and (ii) of FOISA.
6. Mr Watson applied to me for a decision on 3 December 2005. In his application he raised five separate areas of dissatisfaction with the Executive's decision. These are described and considered later in this decision notice.



7. The case was allocated to an investigating officer and Mr Watson's application was validated by establishing that he had made a request for information to a Scottish public authority, and had appealed to me only after requesting the authority to review its response to his request.

The Investigation

8. A letter was sent to the Executive on 8 December 2005, informing it that an appeal had been received and that an investigation into the matter had begun and seeking comments from the Executive in terms of section 49(3)(a) of FOISA.
9. The Executive was asked to supply copies of all the information requested by Mr Watson. It was invited to provide further explanation of its reasons for believing the information withheld to be exempt under section 30(b)(i) and (ii) of FOISA and to explain why it took the view that the public interest lay in upholding the exemption. The Executive was also invited to comment on the points raised by Mr Watson in his application to me.
10. The Executive replied on 23 January 2006, providing the information and comments requested above.
11. During the investigation it was noted that Mr Watson's original request of 11 October 2005 did not ask for the Ministers' response, but that following the inclusion of this phrase in the Executive's reply, his request for review (22 October 2005) included this information in its scope. It was agreed that this part of his letter of 22 October 2005 should be treated as a separate information request. Mr Watson then asked the Executive to review its decision to withhold the Ministers' response (28 July 2006), and on 30 August 2006 the Executive confirmed its decision to withhold the information under section 30(b)(i) and (ii) of FOISA.
12. Mr Watson then submitted a second application to me on 5 September 2006. The application was found to be valid and the case was conjoined with his first application.
13. The Executive was invited (8 September 2006) to comment on the matters raised by the applicant and on the new application as a whole, again in terms of section 49(3)(a) of FOISA. It was also asked to provide full details of all exemptions applied to the information and a full analysis of the application of the public interest test to any information withheld. This information was supplied on 12 October 2006.



Points raised by Mr Watson and the Executive's responses

14. In both his applications to me Mr Watson gave several reasons why he believed that the Executive was wrong to withhold some of the information he had requested. The Executive was invited to comment on each point and did so. As the discussion of some of these points is relevant to my decision on this matter, I have included a summary below. I should like to note that all points brought forward by Mr Watson were considered during the investigation of his application, along with the Executive's response: however, in this decision notice I have only included those points most relevant to my decision.
15. Mr Watson's first reason for dissatisfaction with the Executive's response is summarised as follows:

The Executive is currently promoting legislation to make it compulsory for planning authorities to publish full details of planning decisions. In her foreword to "Your Place, Your Plan: a White Paper on Public Involvement in Planning" (2003) the Minister expressed her determination to see clearer explanations and accountability, so that people can satisfy themselves that taking part in the planning process has been worthwhile. Mr Watson believed it seemed inconsistent for the Executive to expect local authorities to fully publicise their planning decisions while the Executive's planning decisions remain exempt from public scrutiny.
16. The Executive commented that in considering its response to Mr Watson's request it had taken into account the proposed legislation (the Planning etc. Scotland Bill). However, the internal advice provided to Ministers does not fall within the category of information which the proposed new legislation will require planning authorities to publish. The Executive reiterated that it believed the overriding public interest to lie in the non-disclosure of such internal advice. This argument is discussed later in this decision notice.
17. Mr Watson noted that documentation relating to all other stages of the adoption of a local plan are publicly available. When a local authority notifies the Scottish Ministers that it intends to adopt its local plan, this is the final step in the many stages of the local plan process, in each of which the public is encouraged to participate. Mr Watson drew a direct comparison between the reports submitted by the planning department to the local council, which are publicly available, and the Scottish Executive Development Department's report to Scottish Ministers, which has been withheld. He believes that if all other information relating to the local plan process must be made available to the public it is anomalous that the final stage in the process could be exempt from public inspection.



18. The Executive has responded that the responsibility for the contents of a prepared plan rests firmly with the relevant planning authority who are required to follow the prescribed provisions of the Town and Country Planning (Structure and Local Plans) (Scotland) Regulations 1983 in terms of consultation and publicity of draft and finalised plans. The Council's processing of the Local Plan is therefore open to public scrutiny, but in this instance the information in question is an internal submission to Ministers.
19. Mr Watson pointed out that the proposed planning legislation being promoted by the Executive has the stated aim of making the planning system "more open, transparent and accountable". He found this to be at odds with the view expressed in the Executive's letter to him of 21 November 2005, which anticipated that disclosure in this case would lead to the Executive in future deliberately abstaining from recording certain information in case it was later ordered to be disclosed:
20. In Mr Watson's view that this position seemed to be at variance with the principles of the Freedom of Information legislation which the Executive has endorsed.
21. In response, the Executive referred to its comments about the application of exemptions and the public interest test, which are considered below in paragraphs 38 – 47 of this decision notice.

The report to Scottish Ministers in the context of the planning process

22. The East Renfrewshire Local Plan had already been the subject of much scrutiny and discussion by the time the Planning Division's report was prepared. The central consideration in this case is the benefit of increased accountability and transparency in the planning process when weighed against the possible harm that disclosure of the information might have on the efficacy of that process. I believe it will therefore be useful to make clear the context in which the report was prepared.
23. The Local Plan was prepared by East Renfrewshire Council, the planning authority. Following objections, the Council had arranged for a public local inquiry chaired by an independent Reporter. The role of the Reporter is to report evidence put forward at the inquiry and set out his conclusions on the issues raised. He may make recommendations to the local planning authority as to how it should deal with the issues, but the decision to accept or reject those recommendations rests with the authority. If it decides not to accept them, the authority is required to publish the reasons for its decision and interested parties are then given a further opportunity to make representations to the authority.



24. East Renfrewshire Council rejected some of the recommendations of the Reporter. Its reasons are available on its website, along with the Reporter's recommendations. The Local Plan was submitted to the Scottish Ministers on 2 October 2003. The Scottish Ministers had the option of directing the Council to consider modifying the plan or proposals, or directing the Council to refer the plan to them for approval ("calling in" the plan). The other option open to Ministers was to notify the Council that they did not propose to intervene and allow it to adopt the plan.
25. In this case the Scottish Ministers decided not to intervene in the adoption of the Local Plan. The decision made by East Renfrewshire Council to adopt the Local Plan and the Scottish Ministers' decision not to intervene was appealed to the courts, but the appeal was dismissed.

The Commissioner's Analysis and Findings

Information withheld under section 30(b)(i) and (ii)

26. Sections 30(b)(i) and (ii) allow information to be withheld if the disclosure of the information would, or would be likely to, inhibit substantially the free and frank provision of advice or the free and frank exchange of views for the purposes of deliberation. In applying these exemptions the main consideration is the effect of disclosure on future communications and in particular whether the release of the information would inhibit substantially the provision of advice or the exchange of views.
27. The Executive has submitted that the information withheld consisted of a mix of advice, opinion and factual information provided to the Minister by a senior planner. The factual content was not clearly separate, as in Annexes 2 and 3 of the report, but was an intrinsic part of the advice offered, which included the planner's views, opinions and advice.
28. I accept that the information withheld consists of a mixture of advice, views, opinions and factual content. I would generally expect that where a document contains both factual information and advice and opinions, and where the exemptions in section 30(b)(i) and (ii) are being relied on, the public authority should attempt to extract the factual information and supply this to the applicant. However, I have concluded that in this case it would be an extremely arduous and artificial exercise to separate out the different types of information contained within the report. For that reason, I accept the Executive's view that the exemptions in section 30(b)(i) and (ii) should be considered together in relation to all the information withheld from Mr Watson.



29. In justifying its decision to withhold the information under section 30(b)(i) and (ii), the Executive pointed out that the planner's advice included comments on the Council's planning processes and the recommendations of the Reporter who had chaired the public local enquiry. It took the view that such comments were "clearly sensitive". The Executive considered that the release of such advice would have a restricting effect on the quality and comprehensiveness of advice given to Ministers in the future, which would be damaging to the quality of the planning process itself.
30. The Executive has not put forward any other specific reasons why disclosure of the advice and views contained in the report might substantially inhibit officials from providing similar advice or views in future.
31. The exemptions under section 30(b) of FOISA acknowledge that the prospect that information which reveals internal thinking processes may be disclosed could, in itself, be detrimental to the ultimate quality of decision making within a public authority. The inhibition caused by this prospect may lead to discussions being less robust and candid, insufficient records being created, hard choices being avoided and, ultimately, the quality of government being undermined.
32. Given the harm test contained in these exemptions ("inhibit substantially"), the standard to be met in applying the test in sections 30(b)(i) and (ii) of FOISA is high. When considering the application of the exemptions in section 30(b) of FOISA, each request should be considered on a case by case basis, taking into account the effects anticipated from the release of the particular information involved. This is likely to involve consideration of:
 - the subject matter of the advice or exchange of views;
 - the content of the advice or exchange of views;
 - the manner in which the advice or exchange of views is expressed, and
 - whether the timing of release would have any bearing (releasing advice or views whilst a decision was being considered, and for which further views were still being sought, might be more substantially inhibiting than once a decision has been taken).



33. In general, I do not accept that disclosure of the Planning Division report would, or would be likely to, substantially inhibit officials from producing reports of similar character and substance in the future. The report puts forward the objective opinions of an experienced official, based on factual evidence and her own professional knowledge. As such it is not dissimilar from the report produced by the public inquiry Reporter, which is publicly available for any interested party to scrutinise. I do not accept that the possibility of future scrutiny would be sufficient to substantially inhibit officials of the Planning Division from making recommendations to Ministers.
34. I have also taken into account the fact that the Scottish Ministers have issued their decision on the Local Plan. It seems to me less likely that officials would be inhibited in future from providing advice or views if they were aware that disclosure of the information in this case took place after all active consideration of the advice and views in the report has ceased.
35. I have found two sentences in the report in which the author freely imparts her own opinions regarding the Council's planning processes and the Reporter's recommendations, and I accept that disclosure of these opinions might inhibit authors of future reports from expressing their views with a similar degree of frankness. The rest of the report and Annex 1 appears to me to be no more sensitive than the advice and views of the public inquiry Reporter, published in his report.
36. The response from the Minister simply confirms his acceptance of the report's recommendation without further explanation. I do not accept that this communication comprises advice or should be regarded as part of an exchange of views for the purposes of deliberation. Although the application of the exemption does not rely on the information being either advice or part of an exchange of views, it is more difficult to see how the disclosure of information which falls into neither category could have an inhibiting effect on these processes. I do not accept that disclosure of the Minister's response would have the inhibiting effect necessary in order for the exemptions in section 30(b)(i) or (ii) to be engaged.
37. To summarise, I do not accept that the exemptions in section 30(b)(i) and (ii) should be upheld in respect of the Minister's response. Nor do I accept that these exemptions should be upheld in respect of the information in the report and Annex 1, with the exception of the fifth and eighth sentences in section 5 of the report. I believe these sentences contain comments which are more sensitive in nature than the other contents of the report and which, if disclosed, would, or would be likely to, substantially inhibit officials from expressing their views so freely in future.



The public interest test

38. The exemptions in section 30(b)(i) and (ii) of FOISA are subject to the public interest test required by section 2(1)(b) of FOISA. Given that I have found that some of the information contained within the report is exempt in terms of both section 30(b)(i) and (ii) of FOISA, I must now go on to consider whether, in all the circumstances of the case, the public interest in disclosure of this information is outweighed by the public interest in maintaining the exemption.
39. Although I am only required to consider the public interest in relation to the information which I have found to be exempt in terms of section 30(b)(i) and (ii), I will consider the public interest arguments as they relate to all the information withheld from Mr Watson and as if, contrary to my findings, this information was also deemed to be exempt from disclosure under section 30(b)(i) and (ii).
40. The Executive has advanced public interest arguments supporting non-disclosure which encompass both the exemptions in section 30(b).
41. The Executive considered that the potential damage done to the quality of the planning process would override the public interest in the release of planning advice, pointing out that where officials are considering the merits of a particular proposal there is an opportunity for ideas and opinion to be put forward which may be followed by discussions on the strengths and weaknesses in policy and different options of the delivery of such proposals. If this position were to be damaged then decisions would not be taken on the basis of free and frank advice and views.
42. The Executive also argued that there is a public interest in protecting internal communications in cases where the likely effect of releasing information would be the suppression of effective communication in the future, such as advice or discussion being oral rather than written down. The Executive commented that it would not suggest that the public interest lay in withholding internal communications where officials had used strong or trenchant language, which would focus the exemption on rigorous, outlandish or unusual statements. Rather, the public interest test should focus on the real impact of releasing the information.
43. I accept much of the Executive's argument in principle: I agree that there is considerable public interest in ensuring that Ministers are fully informed about the various factors involved when decisions are taken, and that if officials were substantially inhibited from providing advice or views in a free and frank manner, this could ultimately impinge upon the quality of the decision. There is clearly a strong public interest in avoiding such an outcome.



44. However, as the Executive has stated, the public interest test should focus on the real impact of releasing the information. As stated previously, I have difficulty in accepting the Executive's views on the likely effects of disclosing the specific information in this case. For instance, while agreeing that it is in the public interest for planning officials to have the opportunity to put forward different options for consideration and discussion when compiling their reports to Ministers, I have not found that the report in this case was written along these lines.
45. As already discussed, I take the view that disclosure of most of the information in the report or Annex 1, or disclosure of the Minister's response, would not have the effect of inhibiting officials to any substantial degree. I therefore do not believe that disclosure of the information in this case would be likely to encourage officials to attempt to provide similar advice or views orally rather than commit them to record, or would otherwise deter officials from providing Ministers with free and frank advice or views.
46. However, I do accept that in relation to the two sentences identified in paragraph 37 above, the effect of disclosure would be more likely to inhibit officials from including similar views in future reports, and that such inhibition would be detrimental to the decision-making process.
47. Against this, I have considered the public interest in full disclosure of the information. Like Mr Watson I find it anomalous that although documentation relating to all other stages of the adoption of a local plan is publicly available, the final stage in the process is exempt from public inspection. I also take the view that it is generally in the public interest to disclose information which enhances scrutiny of decision-making processes and thereby improves accountability and participation. As Mr Watson has pointed out (paragraph 11 above), this is a stated aim in recent published proposals for change in the planning process. I have also found that the 2005 White Paper "Modernising the Planning System" states:
- " Decisions need to be taken openly and transparently and should be explained to the people they affect. They should be fair and be seen to be fair." (paragraph 5.3.3)
48. I also believe that there is significant public interest in the disclosure of information which would contribute to ensuring that any public authority with regulatory responsibilities is adequately discharging its functions. In this case the Scottish Ministers had a statutory duty to decide whether it was necessary to intervene in the adoption of the local plan. It is rare for Ministers to "call in" a local plan, but it is within their power to do so. There is considerable public interest in disclosure of information which would show why, in this case, it was not thought necessary for Ministers to use their powers to call in the East Renfrewshire Local Plan, despite the many objections it had attracted.



49. Overall, I have found that the public interest in disclosure of the report to Ministers and the Minister's response outweighs the public interest in preventing possible inhibition of officials engaged in preparing future reports of this nature; as indicated above, I believe that such inhibition would be less substantial than the Executive has outlined, while there would be real benefits in terms of improving the transparency of the decision-making process on a matter which affects the lives of many residents of East Renfrewshire.
50. On balance, however, I believe that if Annex 1 and the report were to be released minus the two sentences identified in paragraph 37, this would provide sufficient information to satisfy the public interest arguments detailed above without the disclosure of information which I accept to be more sensitive in nature. I therefore do not require the Executive to disclose the fifth and eighth sentences in section 5 of the report.

Decision

I find that the Scottish Executive failed to comply with Part 1 of FOISA in withholding, in their entirety, the Planning Division report on the East Renfrewshire Local Plan, Annex 1 of that report, and the Minister's response to the report under section 30(b)(i) and (ii) of FOISA. In doing so the Scottish Executive failed to comply with section 1(1) of FOISA.

I require the Scottish Executive to provide Mr Watson with a copy of this information, after redaction of two sentences specified above in paragraph 37, which I accept should be withheld under the exemptions in section 30(b)(i) and (ii).

I am obliged to give the Executive at least 42 days in which to supply Mr Watson with the information as set out above. In this case, I require the Executive to take these steps within 45 days of the date of receipt of this notice.



Appeal

Should either Mr Watson or the Executive 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.

Kevin Dunion
Scottish Information Commissioner
22 November 2006



Appendix

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.

30 Prejudice to effective conduct of public affairs

Information is exempt information if its disclosure under this Act-

(...)

- (b) would, or would be likely to, inhibit substantially-
 - (i) the free and frank provision of advice; or
 - (ii) the free and frank exchange of views for the purposes of deliberation