

<b>Decision 045/2007 – Blochairn Housing Co-operative Limited and Communities Scotland</b>
<i>Document considered by the Regulation Board of Communities Scotland</i>

**Applicant: Blochairn Housing Co-operative Limited**  
**Authority: Communities Scotland**  
**Case No: 200601824**  
**Decision Date: 08 March 2007**

**Kevin Dunion**  
**Scottish Information Commissioner**

Kinburn Castle  
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## **Decision 045/2007 – Blochairn Housing Co-operative Limited and Communities Scotland**

***Request for document considered by Communities Scotland Regulation Board – document withheld on the basis of sections 30(b)(i) (Prejudice to effective conduct of public affairs) and 35(1)(g) (Law enforcement) – Commissioner ordered release of the document subject to redaction of personal data.***

### **Relevant Statutory Provisions and other Sources**

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Freedom of Information (Scotland) Act 2002 sections 1(1) (General entitlement); 2(1) (Effect of Exemptions); 30(b)(i) (Prejudice to effective conduct of public affairs); 35(1)(g) and 35(2)(c) (Law enforcement) and 38(1)(a) (Personal information).

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

Regulatory Code of Practice for Communities Scotland

### **Facts**

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A request was made by Blochairn Housing Co-operative Limited (“Blochairn”) for a copy of the document about Blochairn considered by the Regulation Board of Communities Scotland on 2 December 2005 and referred to in the Regulation Board’s published minutes.

Communities Scotland withheld this information under a number of exemptions in the Freedom of Information (Scotland) Act 2002 (FOISA), arguing that the public interest was in favour of a preserving an environment in which the Regulation Board could receive full advice about regulatory action.

After an investigation, the Commissioner found none of the exemptions relied upon by Communities Scotland applied to the document in question and he ordered release of the document, subject to the redaction of personal data.



## Background

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1. Blochairn made an information request on 17 May 2006 to Communities Scotland for a copy of the document about Blochairn considered by the Regulation Board of Communities Scotland (the Board) at a meeting on 2 December 2005 and referred to in the Board's published minutes.
2. On 15 June 2006, Communities Scotland issued a refusal notice, confirming that it held the information, but that it was withholding the document under section 30(b)(i) and (ii) and 35(1)(g) (as read with 35(c)) of FOISA. However, at the same time, Communities Scotland provided the Director of Blochairn (who had made the information request on behalf of Blochairn) with the personal data about him which appeared in the document. Communities Scotland stated that this information was exempt in terms of section 38(1)(a) of FOISA, but that the information was being provided to him under the Data Protection Act 1998 (DPA). Communities Scotland also said it believed the public interest favoured non-disclosure of the remainder of the document to enable the preservation of an environment in which the Board could receive full advice about regulatory action.
3. On 30 August 2006, Blochairn asked Communities Scotland to review its decision to withhold parts of the document, commenting that it appeared that Communities Scotland had taken a "blanket approach" to the request for the document.
4. Communities Scotland carried out a review and, on 29 September 2006, wrote to Blochairn, upholding its original decision.
5. On 17 November 2006, Blochairn made an application to me for a decision as to whether Communities Scotland had dealt with its request in line with FOISA. Blochairn was dissatisfied with the reasons given by Communities Scotland for refusing to release the information and commented that the "blanket ban" on release of the information seemed contrary to the principles of FOISA.
6. The case was allocated to an investigating officer and the application validated by establishing that Blochairn 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 the request.



## The Investigation

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7. In line with agreed procedures, a letter was sent to the Freedom of Information Unit of the Scottish Executive (the Executive) on 24 November 2006, giving notice that an appeal had been received and that an investigation into the matter had begun and inviting comments from the Executive on behalf of Communities Scotland. The Executive replied on 21 December 2006 and provided a copy of the document in question together with a redacted version of the document which had already been supplied to Blochairn's Director.
8. Communities Scotland is an Executive Agency of the Scottish Ministers and acts on behalf of Scottish Ministers. As a matter of general policy, Communities Scotland deals with all aspects of the regulation and inspection of Registered Social Landlords (RSLs) and the inspection of the housing and related services of local authorities. In carrying out these regulatory duties Communities Scotland operates in accordance with a Code of Practice.
9. The Executive explained that in September 2004 Communities Scotland had introduced changes to its inspection process. One result of these changes was that small RSLs – i.e. those with fewer than 250 houses - were not subject to graded inspections. In September 2005, Blochairn had formally requested a review of Communities Scotland's decision to apply the small RSL approach to the inspection of Blochairn. The review was refused and Blochairn appealed. Communities Scotland decided that the decision was not open to appeal since the inspection process was in accordance with the published policy and guide to inspection which had gone through the appropriate approval process.
10. Blochairn again asked that the approach to the graded inspections be reviewed and as a consequence the Board carried out a review at a meeting on 2 December 2005. The decision that the inspection approach was not open to appeal in this instance was recorded and in the minutes. The minutes referred to a document considered by the Board in reaching its decision that the inspection approach to Blochairn was not open to appeal. It is this document which has been requested.

### Submissions from the Executive

11. The Executive explained that the information withheld relates to the free and frank provision of advice on the role of the Board in appeal cases and on the most appropriate way to deal with issues in respect of a particular inspection. The Executive said that it regarded the exemption in section 30(b)(i) of FOISA to apply, but that it no longer wished to rely on section 30(b)(ii) of FOISA.



12. The Executive argued that it is important that the Board is able to take decisions based on the best advice available to them and that the Board can be confident that this advice is given freely, frankly and without reserve. The Executive also argued that release of the information would be likely to inhibit substantially the free and frank provision of advice from officials to the Board. Officials could feel restrained from offering full and frank advice or opinion on future occasions if they were concerned that their comments would be made public in such circumstances. This would have a negative affect on the ability of the Board to execute its functions effectively.
13. The Executive also commented that the function which the Board performs requires that its decisions are made independently and are legally sound. Putting information such as that contained in the document into the public domain would mean that the Board's consideration of circumstances which may justify regulatory action would be subject to external pressures which may affect their deliberation. Consequently, section 35(1)(g), as read with section 35(2)(c), of FOISA was relevant to the document.
14. The Executive relied on the same public interest arguments for both exemptions. It argued that, as a regulator operating within statutory powers, there is a strong public interest in maintaining the integrity of the Board's decision making process, thus allowing the Board to perform its functions for the public good. It was in the public interest that the deliberative process was efficient and of good quality: the fact that the minutes of the Board were published satisfied the public interest requirements for transparency and scrutiny of decision making processes.

### **Submissions from the applicant**

15. As noted above, Blochairn disagreed with the basis on which the information was withheld from it and commented that the "blanket ban" on release of information was contrary to the principles of FOISA.

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

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16. In coming to this decision, I have taken account of all of the arguments made by Blochairn and Communities Scotland and am satisfied that I have addressed all relevant matters.



17. The work of Communities Scotland Regulation and Inspection Division is overseen by the Board. The Minutes of the December 2005 meeting of the Board state in respect of Blochairn (item 9(a) of Agenda):

**“Blochairn Housing Co-operative**

The Board considered a paper concerning about [sic] an inspection of Blochairn Housing Cooperative which because of its size, and in line with normal published inspection procedures, will not be graded.

After consideration, the Board confirmed that this inspection approach was not open to appeal and that the Chair would advise Blochairn Housing Co-operative of the position.“

**Application of section 30(b)(i) – Prejudice to effective conduct of public affairs**

18. Section 30(b)(i) of FOISA allows information to be withheld if its disclosure under FOISA would, or would be likely to, inhibit substantially the free and frank provision of advice. In applying this exemption the chief consideration should not be whether the information constitutes advice, but whether the release of the information would or would be likely to have the effect set out in FOISA – i.e. to inhibit substantially the free and frank provision of advice.
19. As noted above, the Executive considers that the disclosure of the document would, or would be likely to, have a substantially inhibiting effect on advice provided by officers, who would no longer feel able to express their advice freely or frankly.
20. Before discussing this question, I would like it to be noted that the disclosure of information in one case should not be taken to mean that information in a similar case would require to be disclosed. As I have made clear in other decision notices, each case must be considered separately.
21. For example, in decision 151/2006, Mr Reiner Luyken and the Scottish Executive (at paragraph 33), I said:

“In assessing the inhibiting effect disclosure might have the authority should consider:

- a) the subject matter of the advice or opinion,
- b) the content of the advice and opinion itself,
- c) the manner in which the advice or opinion is expressed, and
- d) whether the timing of release would have any bearing (releasing advice or opinion 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). “



22. The Executive submitted that officials would be constrained because of concern that their comments would be made public, but did not explain in any detail why that should be of concern here. I do not regard the subject matter of the advice, the content of the advice or the way in which the advice is expressed to be such that disclosure would or would be likely to be substantially inhibiting in the future. The advice does not appear to be forthright, candid, frank, critical, or sensitive (and if it is, the Executive has not provided me with any detailed submissions in this respect). While advice does not require to be any of these things in order for this exemption to apply, these are matters which I may take into account. In this case, the advice is measured. Much of the information is of a factual nature and it is difficult to see how release of this information could have the relevant inhibiting effect.
23. I therefore do not accept the arguments put forward by the Executive for withholding the document under the exemption in section 30(b)(i) of FOISA. If the information were disclosed, officials would be aware in future that advice they give might be required to be disclosed, and it is likely that they would bear this in mind when giving advice. (In any event, officials should be aware that, since FOISA came into force more than two years ago, there is always the possibility that information may be released). However, I am not convinced that any inhibition that would or would be likely to occur would be of a substantial nature. As I have said previously, other factors would come into play: for instance, the officials' commitment to a high quality public service by providing high quality advice; the increasing recognition that public officials are required to be accountable for their actions and the importance of ensuring that concerns are subject to fair and rigorous consideration.
24. The exemption in section 30(b)(i) is subject to the public interest test required by section 2(1)(b) of FOISA. However, given that I have not upheld the use of either of the exemption, I am not required to go on to consider the public interest test or the submissions made by the Executive in relation to the public interest in relation to this particular exemption.

#### **Application of section 35(1)(g) – law enforcement**

25. In refusing to disclose the document, the Executive submitted that the exemption under section 35(1)(g) of FOISA applied to the information. In order for a public authority to be able to rely on this exemption, it must show that disclosure of the information requested would, or would be likely to, prejudice substantially the exercise by any public authority of its functions for any of the purposes mentioned in section 35(2) of FOISA.
26. The Executive cited the purpose under section 35(2)(c) of FOISA as being relevant in this case, i.e. to ascertain whether circumstances which would justify regulatory action in pursuance of any enactment exist or may arise.



27. In its submissions, the Executive indicated that Communities Scotland exercises, on behalf of Scottish Ministers, their statutory functions as set out in the Housing Act 2001 (the 2001 Act) in relation to the regulation and inspection of RSLs and local authority housing, homelessness and factoring functions.
28. Section 80 of the 2001 Act requires that Scottish Ministers publish a statement that sets out how they propose to exercise their functions as referred to in Part 3 of that Act.
29. In the Regulatory Code of Practice for Communities Scotland, it is stated that the work of the Regulation and Inspection Division will be overseen by the Board. The duties of that Board will include (stated in paragraph 4.4):
  - a) ensuring that Communities Scotland's delivery of its regulatory functions is consistent with the Ministerial policy framework;
  - b) ensuring that Communities Scotland's regulatory work is free from any inappropriate influence;
  - c) ensuring that Communities Scotland acts in the best interests of tenants, future tenants and other users of housing and related services;
  - d) ensuring that Communities Scotland provides assurance to public investors, service users and tax payers;
  - e) making recommendations to Scottish Ministers on any major changes to regulatory policy, and ensuring that Communities Scotland has effective operational frameworks to implement regulatory policy;
  - f) considering applications for entry to the register of social landlords; and
  - g) considering the use of statutory powers.
30. The detailed functions of the Board are set out in Communities Scotland's Framework Document and include ensuring that regulatory activities undertaken by the agency are consistent with the policies of Scottish Ministers – including the Regulatory Code of Practice (2001 and revised in November 2006) – and that the agency operates within the limits of its statutory authority. Also relevant in the context of this application is the function:

“To act as an Appeals Board to determine appeals arising from the regulation and inspection process which are referred to them.”





31. Having taken into consideration the submissions made by the Executive, I accept that in considering the document, the Board was carrying out a function for the purpose of section 35(2)(c).
32. I must now go on to consider whether the release of the document would, or would be likely to, prejudice substantially the exercise of that function. The Executive argued that the function of the Board required that its decisions are made independently and are legally sound. To release the information, the Executive contended, would mean that the Board's consideration of circumstances (which might justify regulatory action) would be subject to external pressures and this would adversely affect the Board's deliberation of the issues.
33. I do not accept the Executive's submissions on this point. As have said, I shall decide each application on a case by case basis, looking at the content and context of the information which has been withheld. For this document, I do not accept that release of the material would, or would be likely to, substantially prejudice the Board's ability properly to carry out this function. The Board is composed of senior personnel from Communities Scotland and of independent persons. I do not consider it likely that the Board would be influenced by "external pressures". Membership of the Board is set out in the Regulatory Code of Practice and the Framework Document as:
  - (a) the Non-Executive Directors, previously appointed to the Management Board of Communities Scotland, one of whom will chair the Regulation Board; and
  - (b) the Chief Executive.
34. Additionally, the document in question is basically a briefing for the Board: it does not record the views of Board members or the way in which they viewed or considered the information. The views of the Board would, I assume, be recorded in the Minutes where necessary.
35. I also note that the document consists largely of factual information which outlines the issue before the Board. I do not see how release of such a document could be said in this instance to result in external pressures being brought on the Board, which is essentially making a decision based on its regulatory code and enactment. I do not see how a document which essentially outlines the issue to be considered by the Board can meet the test required in section 35(1)(g), as read with section 35(c).
36. Whilst there may be instances when a document before the Board does meet the requirements of section 35(1)(g), I am not persuaded by the arguments given by the Executive in this case to the effect that disclosure would, or would be likely to, be substantially prejudicial as it could lead to the authority being unable to provide independent legally sound decisions.



37. As I am not satisfied that the document in question is exempt under section 35(1)(g), I am not required to go on to consider the application of the public interest test.

### **The personal data of the Director of Blochairn**

38. As noted above, in responding to the information request (which was made by the Director of Blochairn), Communities Scotland released to the Director his personal data under the DPA, while commenting that the personal data was exempt in terms of section 38(1)(a) of FOISA. (Section 38(1)(a) exempts from release personal information of which the applicant is the data subject).
39. This means that, although the information has been released to the Director, it has not been released into the public domain.
40. No specific reference has been made to this personal information in the application to me and I have therefore presumed, in carrying out this investigation, that Blochairn are satisfied, for the reasons given by Communities Scotland, that the personal data should not be released under FOISA.

### **Decision**

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I find that Communities Scotland did not deal with the request for information by Blochairn Housing Co-operative Ltd (Blochairn) in accordance with Part 1 of the Freedom of Information (Scotland) Act 2002 in that it misapplied the exemptions in sections 30(b)(i) and 35(1)(g) of FOISA.

I therefore require Communities Scotland to release to Blochairn the document in question with the personal data of the Director (as referred to above) redacted.

I cannot require Communities Scotland to take any action until the time allowed for an appeal to be made to the Court of Session has elapsed. I therefore require Communities Scotland to release the information to Blochairn within 45 days of the date of receipt of this decision notice.



## **Appeal**

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Should either Communities Scotland or Blochairn 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.

**Kevin Dunion**  
**Scottish Information Commissioner**  
**08 March 2007**



## 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.

#### 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-

- ...
- (b) would, or would be likely to, inhibit substantially-
- (i) the free and frank provision of advice; or
- ...

#### 35 Law enforcement

- (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 2000 (c.36)) or Scottish public authority of its functions for any of the purposes mentioned in subsection (2);
- ...
- (2) The purposes are-
- ...
- (c) to ascertain whether circumstances which would justify regulatory action in pursuance of any enactment exist or may arise;
- ...



**38 Personal information**

- (1) Information is exempt information if it constitutes-
  - (a) personal data of which the applicant is the data subject;
  - ...