

# Decision Notice



Decision 086/2011 Mr B and Scottish Borders Council

Floor plans for named buildings

Reference No: 201100306  
Decision Date: 12 May 2011

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**Kevin Dunion**  
Scottish Information Commissioner

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## Summary

Mr B requested from Scottish Borders Council (the Council) information pertaining to buildings it owned and operated. The Council disclosed a schedule of buildings but withheld the floor plans that Mr B had requested under section 39(1) of the Freedom of Information (Scotland) Act 2002 (FOISA), which applies to information where its disclosure would or would be likely to endanger the health or safety of any person. Following a review, Mr B remained dissatisfied with the withholding of the floor plans and applied to the Commissioner for a decision.

Following an investigation, the Commissioner found that the Council had failed to deal with Mr B's request for information in accordance with Part 1 of FOISA, by incorrectly withholding the requested floor plans on the basis that they were exempt from disclosure under section 39(1) of FOISA. He required the Council to provide Mr B with the floor plans.

## Relevant statutory provisions and other sources

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Freedom of Information (Scotland) Act 2002 (FOISA) section 1(1) and (6) (General entitlement); 2(1) (Effect of exemptions) and 39(1) (Health, safety and the environment).

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

## Background

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1. On 28 October 2010, Mr B emailed Scottish Borders Council (the Council) requesting the following:
  - a. the floor plans for buildings located on the following sites owned / operated by Scottish Borders Council:
    - Galashiels Academy on Elm Road, Galashiels
    - Hawick High School on Buccleuch Road, Hawick
    - Selkirk High School on Hillside Terrace, Selkirk
    - Council Headquarters in Newton St. Boswells
  - b. A list of buildings / sites owned / operated by Scottish Borders Council.



2. The Council responded on 24 November 2010. It withheld the floor plans which had been requested in part a of Mr B's request on the basis that their disclosure would be likely to endanger the physical or mental health or safety of individuals, and so they were exempt from disclosure under section 39(1) of FOISA. The Council provided a schedule of operational land and building assets in response to part b of Mr B's request.
3. On 1 December 2010, Mr B emailed the Council requesting a review of its decision to withhold the requested floor plans. In particular, Mr B drew the Council's attention to the fact that similar (but not identical) information was available through the Council's public access system for planning applications.
4. The Council notified Mr B of the outcome of its review on 13 December 2010. The Council noted Mr B's comments that similar information was available through the public access system but indicated that complete and detailed floor plans being withheld were not the type submitted with planning applications. The Council maintained that disclosure of the withheld floor plans could pose a security risk to staff and pupils in the relevant buildings and it upheld its previous decision to withhold the plans on the basis that they were exempt from disclosure under section 39(1) of FOISA.
5. On 14 February 2011, Mr B emailed the Commissioner, stating that he was dissatisfied with the outcome of the Council's review and applying to the Commissioner for a decision in terms of section 47(1) of FOISA.
6. The application was validated by establishing that Mr B had made a request for information to a Scottish public authority and had applied to the Commissioner for a decision only after asking the authority to review its response to that request.

## Investigation

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7. On 22 February 2011, the Council was notified in writing that an application had been received from Mr B and was asked to provide the Commissioner with the information withheld from him. The Council responded with the information requested and the case was then allocated to an investigating officer.
8. The investigating officer subsequently contacted the Council, giving it an opportunity to provide comments on the application (as required by section 49(3)(a) of FOISA) and asking it to respond to specific questions. In particular, the Council was asked to provide background information on its arrangements for keeping buildings secure and its justification for relying upon any provisions of FOISA it considered relevant to the withheld information (with particular reference to section 39(1)). The Council responded with its comments and responses to the questions asked.



9. Mr B's comments were sought and received on the matters raised by this case, and in particular as to why he considered the public interest test favoured disclosure of the information being withheld. When providing his submissions, Mr B also provided a copy of a publicly accessible floor plan of another school building in the Council area.
10. The submissions received from both Mr B and the Council are (where relevant) summarised and considered in the Commissioner's analysis and findings section below.

## **Commissioner's analysis and findings**

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11. In coming to a decision on this matter, the Commissioner has considered all of the withheld information and the submissions made to him by both Mr B and the Council and is satisfied that no matter of relevance has been overlooked.
12. Mr B's dissatisfaction with the Council's response to his information request relates only to part a, which sought floor plans of specified buildings. Consequently, the Commissioner's decision has considered only this part of his request.

### **Consideration of section 39(1) – Health, safety and the environment**

13. The Council withheld the requested floor plans under section 39(1) of FOISA.
14. Section 39(1) of FOISA states that information is exempt information if its disclosure under FOISA would, or would be likely to endanger the physical or mental health or the safety of an individual. This is a qualified exemption and is subject to the public interest test required by section 2(1)(b) of FOISA.
15. In the Commissioner's briefing on this exemption, it is noted that section 39(1) does not contain the usual harm test. Instead of the "substantial prejudice" test found in various other exemptions contained in Part 2 of FOISA, this exemption refers to the "endangerment" of health or safety. The harm test in section 39(1) has therefore been set at a lower level.
16. In order for a public authority to rely on this exemption, it must show that the disclosure of the information would, or would be likely to, endanger the physical or mental health or the safety of an individual. Danger to physical health could mean a danger to a person as a result of physical injury, illness or disease. Danger to mental health could mean any type of mental ill health resulting from information being disclosed.
17. The Commissioner's view is that the term "endanger" is broad enough to apply where there is a (direct or indirect) threat to the health or safety of a person which would foreseeably arise in the future as well as immediate harm, since the exemption does not specify that any threat should be imminent before it applies. The Commissioner considers that for endangerment to be considered likely there must, however, be some well-founded apprehension of danger, such that the prospect of harm could be regarded as a distinct possibility.



18. The Council submitted that disclosure of the information to which it applied section 39(1) would pose a significant security risk to pupils and staff at the named schools and Council employees at the Council Headquarters building. It noted that Mr B gave no indication of his purpose in requesting the withheld information (although it recognised he was not required to provide this information), and it had taken the view that a precautionary approach was necessary.
19. The Council provided copies of the publicly available plans for the relevant buildings, which were less detailed than those withheld from Mr B. It maintained that in the wrong hands, the more detailed floor plans would be ideal for a terrorist to plan an attack, or to assist paedophiles in planning the interception of children for grooming and other purposes. It highlighted as examples of the type of harm that might follow from disclosure the shootings at Dunblane primary school in 1996 and the Beslan School hostage crisis in Russia in 2004.
20. The Commissioner recognises that the events in Dunblane and Beslan both involved the loss of the lives of both children and adults in terrible circumstances. Whilst it is right to consider whether any lessons can be learned from such events to reduce the risk of similar events taking place in the future, the Council has not demonstrated that they have done so in relation to the information sought in this case. Its submissions have provided no explanation as to how access to the withheld information would bring about harm in a specific way, for example by increasing the risk of unauthorised access.
21. In the circumstances, the Commissioner is not persuaded that release of the information withheld in this case would assist perpetrators seeking to harm the occupants of the buildings concerned, or that non disclosure would prevent any person from doing so. In reaching this conclusion, the Commissioner notes Lord Cullen's report into the shootings at Dunblane primary school contains a specific chapter on school security, focussing on proportionate response to the threat of unauthorised access by someone intent on violence. Lord Cullen's recommendations identified measures for consideration, including the use of CCTV cameras, lockable doors and personal alarms for teachers, but made no mention of withholding plans of the school layout (or any reference to floor plans at all).
22. The Commissioner has also considered the withheld information alongside the floor plans for another school within the Council area which were provided to him by Mr B, and (he has confirmed) are available online. Having compared these two sets of plans, he notes that those publicly available are in almost all respects of the same type as those being withheld. Both are scale drawings showing the detailed layout of the building, specifying the function of each space e.g. maths classroom, office, store, toilets etc. entrances, internal doors and stairwells are identified.
23. The public availability (through a statutory public inspection regime, and apparently without adverse consequences) of floor plans for other school buildings which reveal a very similar level of detail to those withheld, suggests that such information can be made public without such disclosure endangering security of the building concerned.



24. In the light of all of the above, the Commissioner has therefore concluded that disclosure of the plans under consideration in this case would not be likely to increase or extend the probability of harmful events, or endanger the health or safety of the occupants of the buildings.
25. Having concluded that disclosure of the plans would not be likely to endanger the physical or mental health or the safety of any person, the Commissioner has found that the exemption in section 39(1) was incorrectly applied by the Council to the withheld information.
26. Having reached this conclusion, the Commissioner is not required to consider the public interest test in relation to this information. He requires the Council to disclose the withheld floor plans to Mr B.

## DECISION

The Commissioner finds that Scottish Borders Council (the Council) failed to comply with Part 1 of the Freedom of Information (Scotland) Act 2002 (FOISA) in responding to the part a of the information request made by Mr B. The Council incorrectly applied the exemption in section 39(1) of FOISA to the requested floor plans, and by withholding this information, the Council acted in breach of section 1(1) of FOISA.

The Commissioner therefore requires the Council to provide Mr B with a copy of the requested floor plans, by 27 June 2011.

## Appeal

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Should either Mr B or the 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 after the date of intimation of this decision notice.

**Kevin Dunion**  
**Scottish Information Commissioner**  
**12 May 2011**



## Appendix

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### Relevant statutory provisions

#### Freedom of Information (Scotland) Act 2002

##### 1 General entitlement

- (1) A person who requests information from a Scottish public authority which holds it is entitled to be given it by the authority.

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- (6) This section is subject to sections 2, 9, 12 and 14.

##### 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.

##### 39 Health, safety and the environment

- (1) Information is exempt information if its disclosure under this Act would, or would be likely to, endanger the physical or mental health or the safety of an individual.