



Scottish Information  
Commissioner

**Decision 232/2006 Tap o'Noth Community Council and  
Aberdeenshire Council**

*Copies of minutes and correspondence between Aberdeenshire  
Council and AMEC in relation to a wind farm development*

**Applicant: Tap o'Noth Community Council  
Authority: Aberdeenshire Council  
Case No: 200501790  
Decision Date: 13 December 2006**

**Kevin Dunion  
Scottish Information Commissioner**

Kinburn Castle  
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## Decision 232/2006 Tap o'Noth Community Council and Aberdeenshire Council

***Copies of minutes and correspondence between Aberdeenshire Council and AMEC in relation to a wind farm development – whether disclosure would, or would be likely to, prejudice substantially the effective conduct of public affairs under section 30(c) of the Freedom of Information (Scotland) Act 2002***

### Relevant Statutory Provisions and other Sources

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Freedom of Information (Scotland) Act 2002: section 30(c) (Prejudice to effective conduct of public affairs).

The text of this provision is reproduced in the Appendix to this decision. The Appendix forms part of this decision.

### Facts

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Tap o'Noth Community Council (Tap o'Noth) wrote to Aberdeenshire Council (the Council) requesting copies of the minutes of meetings and any correspondence between the Council and the developers, AMEC, regarding payment arrangements for a community fund in relation to a proposed wind farm development.

The Council provided Tap o'Noth with details of an exploratory meeting that its Planning Gain Co-ordinator had held with AMEC and stated that the Council's aim was to establish a formula for payment and to help put in place a community trust made up of the community councils concerned to administer the funds.

The Council informed Tap o'Noth that the information it had requested could not be disclosed, and relied upon section 30(c) of the Freedom of Information (Scotland) Act 2002, on the grounds that disclosure would, or would be likely to, prejudice substantially the effective conduct of public affairs.

The decision to withhold the information was upheld by the Council on review. Tap o'Noth was dissatisfied with this response and applied to the Commissioner for a decision.



## Background

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1. On 22 February 2005, Tap o'Noth wrote to the Council. In its letter Tap o'Noth stated that its members had recently met with representatives of the construction company and developer, AMEC, to discuss a number of issues of local interest regarding the proposed wind farm development at Clashindarroch. During that discussion AMEC revealed that it had been holding discussions with the Council regarding payment arrangements for any community fund that may be established as a result of the planning application being approved. Tap o'Noth was concerned that community funds would be channelled through the Council rather than being directed to the local community. Tap o'Noth asked the Council to provide "copies of the minutes of the meetings and any correspondence regarding the matter between AMEC and the Council."
2. The Council replied to Tap o'Noth on 15 March 2005. In its letter the Council stated that it had contacted Tap o'Noth's chairman and had discussed the Council's contact with AMEC and what it was trying to achieve. The Council provided Tap o'Noth with details of the exploratory meeting that its Planning Gain Co-ordinator had held with AMEC. It also stated that the Council's aim was to establish a formula for payment and to help put in place a community trust made up of the community councils concerned to administer the funds.
3. In relation to Tap o'Noth's request for copies of minutes and correspondence between the Council and AMEC, the Council refused to disclose the information on the grounds that it had been supplied to the Council in confidence by the developer in order for the Council to negotiate planning gain with it. The Council added that disclosure of the information would be likely to lead to that developer, and others, withholding information from the Council and therefore "affecting adversely" the ability of the Council to negotiate reasonable planning gain contributions.
4. The Council relied upon section 30(c) of FOISA to withhold the information on the grounds that disclosure would, or would be likely to, prejudice substantially the effective conduct of public affairs. This exemption is subject to the public interest test required by section 2(1)(b) of FOISA. In considering where the public interest lay, the Council stated that, in all the circumstances of the case, it was of the view that the public interest in maintaining the exemption outweighed the public interest in disclosing the information because of the effect disclosure would have on the Council's ability to negotiate with developers.



5. Tap o'Noth wrote to the Council on 5 April 2005, requesting a review of the Council's decision to withhold the information that was sought. In its letter, Tap o'Noth extended the scope of its request, stating that it required copies of minutes of meetings, correspondence, e-mails and memos referring to the arrangements being discussed to set up a community fund.
6. Tap o'Noth stated that it had requested the information because it was aware that discussions had taken place between the Council and AMEC which could materially affect a number of areas, such as the amount of money going into the community fund, the areas within which the fund could be applied, the kind of projects the fund could be used for, and the administrative arrangements for the fund. Tap o'Noth added that neither the Council nor AMEC had informed it of the content of their discussions, nor had they consulted Tap o'Noth on its views as one of the two community councils involved. The information was therefore sought to ensure that Tap o'Noth could make its views known before a framework was agreed between AMEC and the Council.
7. Tap o'Noth also questioned the Council's claim that the documents that had been requested contained commercially sensitive information. Tap o' Noth argued that it would be unlikely for information of a commercially sensitive nature (such as the expected capital investment, income and operating costs of the operators which could be calculated from information already in the public domain) to be included within the information that had been requested. It added that if any sensitive information did exist within the information requested it could be blacked out in any documents provided.
8. The Council acknowledged receipt of the request for review on 7 April 2005, and provided details of its review panel procedures. The Council also wrote to Tap o'Noth on 21 April 2005. In its letter, the Council attempted to answer some of Tap o'Noth's concerns surrounding the apportioning of the community fund. It also stated that the Council's Planning Gain Co-ordinator, in his negotiation with any developer, including AMEC, had to respect each developer's commercially sensitive information and negotiations needed to take account of a range of issues, not least of which were the costs of development and business projections.
9. In its letter to Tap o'Noth, the Council described in general terms how any anticipated community fund would be calculated. It also provided details of how such a fund would be apportioned between the respective community councils that would be affected by the development.
10. The Council added that although it would have liked to have had an open discussion with Tap o'Noth concerning what Tap o'Noth would like and what should be discussed with AMEC during negotiations, this was not a feasible position for the Council. It was also suggested that Tap o'Noth could contact AMEC directly.



11. In its letter of 5 May 2005, the Council informed Tap o'Noth that the Council's review panel had found in favour of the Council and therefore upheld the original decision to withhold information. The Council provided Tap o'Noth with a statement of reasons in which it set out its findings.
12. Tap o'Noth was dissatisfied with the outcome of the Council's review and, on 12 May 2005, applied to me for a decision.
13. The case was then allocated to an investigating officer. Tap o'Noth's appeal was validated by establishing that it had made a valid request to a Scottish public authority and had appealed to me only after asking the Council to review its response to Tap o'Noth's initial request.

## **The Investigation**

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14. The investigating officer wrote to the Council on 29 June 2005, giving notice that an appeal had been received and that an investigation into the matter had begun. The Council was asked to comment on the issues raised by the case and to provide supporting documentation for the purposes of the investigation. In particular, the Council was asked to provide a detailed analysis of its reliance on section 30(c) of FOISA and to provide details of its consideration of the harm test and public interest test in relation to the application of the exemption. The Council was also asked to supply information about how the review was carried out and to provide me with a copy of the information which it had withheld from Tap o'Noth.
15. At this point I would like to clarify the scope of the investigation, given that the initial request was worded differently from the request for review (see paragraphs 1. and 5. above). I consider that the information which falls within the scope of the request is limited to the initial request, i.e. copies of the minutes of the meetings between AMEC and the Council and any correspondence between AMEC and the Council regarding the matter in question.

## **Submissions from the Council**

16. On 12 July 2005, the Council provided comments and documentation for the purposes of the investigation. In its accompanying letter, the Council stated that there had been a series of e-mails, memos and letters in connection with this matter since the initial approach to the Council from Tap o'Noth in December 2004. Most of the information which the Council held relating to this matter consisted of internal Council correspondence.



17. The Council stated that it had tried to be of assistance to Tap o'Noth by providing information, in its letter of 21 April 2005, which reflected the Council's position in relation to its discussions with AMEC. The Council stated that the approach taken by the Marr Area Manager in his correspondence with Tap o'Noth had always been to provide as much information as possible about negotiations with AMEC but not to provide documentation where such existed. It added that there was no documentation of any significance at the time of the request.
18. The Council stated that since its letter of 21 April 2005, AMEC had met with the community councils involved and was considering how it might set up a trust to handle any community fund available. The Council maintained that AMEC would have disclosed what it felt able to disclose at the meeting and the situation had moved on.
19. As regards the wind farm development, the Council stated that no permission for the project to proceed had yet been received from the Scottish Executive under the Electricity Acts. It was also intimated that there was a possibility of a Local Public Inquiry being held. The Council added that no planning gain for affordable housing had been agreed nor had the amount per megawatt of electricity produced been agreed for the community fund.
20. The Council also stated that most of the initial negotiations with the developer by the Planning Gain Co-ordinator had been conducted verbally and notes of meetings had not been taken. It also stated that, at some given point, the Planning Gain Co-ordinator would provide the developer with a written view of what planning gain required to be provided.
21. The Council argued that it was essential that, for this process to continue, there must be trust between the developers and the Council that what was discussed would not be disclosed prematurely, although it would eventually become public knowledge if a development actually occurred.
22. The Council commented that it did not wish to add much to what had already been set out in its statement of reasons, as provided to Tap o'Noth on 5 May 2005. In the statement of reasons, the Council had stated that the Review Panel was satisfied that disclosure of the information requested would substantially prejudice the effective conduct of public affairs in that it would affect the ability of the Council to negotiate planning gain contribution with developers. It added that the Council required to be seen as being fair to all developers and discussion with a wider audience before a finalised position had been established could jeopardise individual applicants' financial affairs.



23. In relation to the public interest, the review panel held that non-disclosure would ensure that trust was maintained between the developer and the Council and that what was discussed would not be disclosed except when a development actually occurred and the planning gain negotiated then becomes public knowledge. It added that it considered that the public interest in maintaining that trust outweighed any interest in making that information available as it was considered that the developer would be less forthcoming with information, leading to difficulty in negotiating meaningful planning gain contributions, if they believed that their commercial information could be disclosed to anyone.

### **Submissions from Tap o'Noth**

24. In its letter of application to me, dated 12 May 2005, Tap o'Noth provided background information relating to its request. It also listed its reasons for dissatisfaction with the outcome of the Council's review.
25. Tap o'Noth stated that, as part of the public consultation exercise carried out by AMEC and as part of AMEC's application involving the wind farm development in Clashindarroch Forest, AMEC had undertaken to set up a community fund from which payments could be made to local communities for approved projects. In January 2005, at the request of Tap o'Noth, a meeting was held between Tap o'Noth and representatives from AMEC to discuss a number of items which were of concern to the local community. Amongst the items raised were requests for details about the way in which the community fund would be set up, how it could be used and how any funds would be apportioned between the local communities involved. AMEC intimated to Tap o'Noth that it could not provide any specific information since discussions were underway with the Council regarding a framework for the whole of the county.
26. Tap o'Noth asked the Marr Area Manager in the Council for some details of these discussions, as there had been no consultation at that stage with Tap o'Noth. Tap o'Noth was concerned that any framework decided by the Council and the developers "should reflect in a fair and transparent manner the disruption, additional traffic impact, effect on properties and visual impact of the development on those most affected by it." Tap o'Noth was also concerned that it might be presented with an unacceptable "fait accompli" by the Council and the developers that would restrict its ability to negotiate the best possible deal for the community.
27. Tap o'Noth argued that most of the matters the Council had claimed were commercially sensitive were in fact already available in the public arena from published sources. Nevertheless, Tap o'Noth suggested to the Council that it would be willing to accept the information it had requested with any information that was deemed to be commercially sensitive blacked out.



28. Tap o'Noth also stated, in its application to me, that there was no planning gain associated with wind farm developments and yet one of the reasons given for the Council's refusal to release information was that if provided it would affect the ability of the Council to negotiate planning gain. Tap o'Noth argued that the release of the information it sought would not prejudice planning gain negotiations and it would not set a valid precedent since this was not a planning gain issue.

## The Commissioner's Analysis and Findings

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29. In coming to a decision on this matter, I have considered all of the information and the submissions that have been presented to me by both Tap o'Noth and the Council and I am satisfied that no matter of relevance has been overlooked.
30. As mentioned above, in Tap o'Noth's application to me for a decision it asserted that the Council had stated that planning gain was not associated with a wind farm development yet the reason given for the Council's refusal to release information was that disclosure would affect the ability of the Council to negotiate planning gain. Tap o' Noth argued that since the wind farm development was not a planning gain issue, release of the information it sought would not prejudice any planning gain negotiations.
31. The Council was asked to comment on this since, in the Council's refusal notice of 15 March 2005, it had stated that the Planning Gain Co-ordinator had held an exploratory meeting with AMEC in which he had discussed the need for the developer to make a contribution towards the cost of affordable housing in the area. The letter stated: "The operators are under no obligation to provide a community fund, as it is not Planning Gain so I would suggest that the Council's involvement [...] is beneficial."
32. However, in the accompanying refusal notice, it was stated that "We are of the opinion that this exemption [section 30(c) of FOISA] applies because the information you seek is information provided in confidence by the developer in order for the Council to negotiate planning gain with it. Disclosure of the information is likely to lead to this developer, and others, withholding information from the Council and therefore affecting adversely the Council's ability to negotiate reasonable planning gain contributions."





33. This raises a question over the significance of the planning gain issue in relation to the information that had been requested by Tap o'Noth (i.e., information relating to the Council's negotiations with AMEC over the setting up of a community fund). In a letter from the Council to Tap o'Noth on behalf of the Area Manager on 21 April 2005, it was stated: "I can confirm that it is the Council's policy to seek developer contributions towards affordable housing from all developers of commercial/industrial sites as well as housing sites. This is subject to negotiation and would be separate from any contributions to Community Fund." At the end of the letter it was stated that Tap o'Noth was free to negotiate its own deal, but that AMEC may decide not to respond "as it still has to negotiate Planning Gain with the Council."
34. In the Council's review of its decision to withhold the information requested by Tap o'Noth, dated 5 May 2005, it was stated that the Review Panel was satisfied that disclosure of the information requested would prejudice substantially the effective conduct of public affairs in that it would affect the ability of the Council to negotiate planning gain contributions with developers. In considering the public interest, the Review Panel was of the view that non-disclosure "would ensure that the trust is maintained between the developer and the Council that what is discussed will not be disclosed except when a development actually occurs and the planning gain negotiated then becomes public knowledge." The Council added that it was considered that the public interest in maintaining that trust outweighed any interest in making that information available as it was considered that the developer would be less forthcoming with information, leading to difficulty in negotiating meaningful planning gain contributions.
35. The investigating officer asked the Council to comment on Tap o'Noth's contention that there was no planning gain associated with the wind farm development, yet the reason given for the Council's refusal to release the requested information was that if it were to be disclosed this would affect the ability of the Council to negotiate planning gain. The difficulty here would appear to be that if the wind farm development did not itself concern planning gain, it is hard to see how disclosure of the community fund negotiations between the Council and AMEC would prejudice substantially the Council's ability to negotiate planning gain contributions with developers in other instances.



36. In the Council's response it was argued that it had not stated that wind farm developments would not be associated with planning gain, although it was the case that payment of a community fund by a developer is entirely voluntary. In this particular development the Planning Gain Co-ordinator had been negotiating for a contribution to affordable housing, which is a particular form of planning gain and which may be a legitimate requirement of commercial and industrial developers as well as housing developers. The Council stated that the discussions about affordable housing and a community fund would have taken place at the same time because the Council wanted to see communities receiving a community fund.
37. The Council stated that wind farm developments are relatively unique industrial developments and may not generate other types of planning gain because of where they are located, the use of planning conditions to deal with mitigation of potential effects, and because they do not generally create additional pressures on public services. However, the Council added that this may not be the case in every development and there may be a need in individual cases to require planning gain to mitigate specific effects of the provision of a particular wind farm in a particular location.
38. The Council asserted that the negotiation of planning gain for such provision as affordable housing is in the overall public interest as it helps to provide for identified need and helps reduce costs to the local and national taxpayer. It added that the Council's general approach to negotiating and securing planning gain has also been viewed as best practice and was used to inform the Scottish Executive's Planning Advice Note 74 on affordable housing.
39. The Council stated that it relies upon developers to be honest and forthcoming with information which allows both parties to negotiate the appropriate planning gain for particular developments. The Council contended that it would not be in the public interest if developers refused to divulge information because of a fear that it would be in the public domain and open to competitors since the Council would not be able to negotiate appropriate planning gain. The Council added that developers meet the cost of planning gain by taking account of it in negotiations for purchase of the land on which the development sits. The Council concluded that early discussion on planning gain was therefore advantageous to developers and the Council (and local communities) alike.
40. Tap o'Noth contended that the information relating to community fund negotiations could be provided to it with any commercially sensitive information edited out. It stated that the size of community funding was generally set by a wind farm industry standard (around £1,000 per megawatt installed per annum) which could be subject to further negotiation. Tap o'Noth stated that since that figure was well known, it was not the size of the fund *per se* which was of most concern to it but the arrangements for managing the fund and the determination of which areas were to be included in it.



41. Tap o'Noth also argued that it was difficult to see how such matters were required to be kept confidential by the Council in order to "maintain trust between the developer and the Council" until such times as they were determined. However, it should be noted that attempts were made by the Council to answer Tap o'Noth's concerns in its letter, dated 21 April 2005, in which it explained how any anticipated community fund would be calculated and provided details of how such a fund would be apportioned between the community councils involved.
42. In its correspondence to me, the Council stated that, at the date of the request for information, nothing of any significance was committed to paper. The Council stressed that an initial negotiating position statement was only put to paper on 24 May 2005, in an e-mail to AMEC. Since then, according to the Council, AMEC had been negotiating directly with the community councils involved and others on the community fund through its consultants. The Council was of the view that things had therefore moved on and what had been discussed between AMEC and the Council had been adjusted following consultation.
43. It was also pointed out by the Council that a website had been set up ([www.glassclash.info](http://www.glassclash.info)) which gave an account of the current position on the community fund. This had been developed as a result of the consultation, in which Tap O'Noth was represented. The Council argued that since this information was in the public domain, Tap O'Noth effectively had the information it sought, albeit changed because of the result of the consultation. It was also mentioned that the Council's negotiations to obtain an affordable housing contribution appeared to have been unsuccessful in this instance because it was successfully argued that the development did not affect housing need.
44. The Council was of the opinion that, given its letter of 21 April 2005 and its e-mail to the secretary of Tap o'Noth dated 24th May 2005, Tap o'Noth did in fact have all the relevant information it sought, although it was not provided with actual documentation of the discussions that took place between the Council and AMEC. The Council added that the Planning Gain Officer creates and keeps as little documentation as possible in order to avoid the possibility of having to release confidential information and the Council had sought to give Tap o'Noth the information it required by other means.



45. Tap o'Noth responded by stating that the Council was wrong to suggest that negotiations regarding the community fund had taken place between Tap o'Noth and AMEC. Instead, Tap o'Noth contended that AMEC had hired an organisation called SAOS to run a series of public consultations in order to canvas views on what sort of projects the fund could be used for and to get views on the alternative forms of organisations which would manage the fund. Tap o'Noth stated that these consultations did not constitute negotiations and they did not address the issues of the basis of the calculation of the fund nor its likely size, nor how the funds were to be distributed between communities. Tap o'Noth added that whilst members of the community council were able to attend these meetings, it was as private individuals not as a representative body.
46. According to Tap o'Noth, the basis of the calculation of the community fund and which geographical areas would benefit from it were decided upon without any consultation with Tap o'Noth. Tap o'Noth argued that it still knew nothing of any arrangements that had been agreed in relation to the community fund between the Council and AMEC. Tap o'Noth added that, contrary to the Council's assertion, it had not received information "by other means". However, following representations made by Tap o'Noth, AMEC had intimated that they may be prepared to discuss the basis of the calculation of the community fund with Tap o'Noth at a future date. Tap o'Noth stated that it required the information it had requested on the basis that knowledge of the arrangements that had already been concluded with the Council would be important to those discussions.
47. Tap o'Noth also questioned the Council's assertion that very little information existed at the time of its request which fell within the scope of the request. Tap o'Noth voiced doubts that AMEC and the Council could "conclude a deal to channel wind farm related funds directly to the Council without there being a single memo, e-mail or minute referring to it." In response to Tap o'Noth's misgivings about the existence of further information held by the Council relating to its negotiations with AMEC, my investigating officer contacted the Council to obtain confirmation that no other relevant documentation existed at the time the initial request was made (e.g. memoranda, e-mails, minutes of meetings). The Council responded that it had carried out extensive searches on its computer system as well as various notebooks held by the Planning Gain Co-ordinator and could find no further documents relating to the project dated prior to 22 February 2005. The Planning Gain Co-ordinator reiterated that notes of any meetings prior to that date were not taken since the meetings were at a preparatory stage and discussions were held in confidence.
48. Having considered the submissions from both Tap o'Noth and the Council, I will now go on to examine the Council's application of the section 30(c) exemption under FOISA to the information requested by Tap o'Noth.



### **Section 30(c) – Prejudice to effective conduct of public affairs**

49. It should be noted that, in coming to a decision, I must consider whether a Scottish public authority, in responding to a request for information and carrying out a review of its initial decision, has complied with the terms of FOISA. In this instance, the Council refused to disclose the information which Tap o'Noth had requested.
50. Section 30(c) of FOISA states that information is exempt information if its disclosure under FOISA would prejudice substantially, or be likely to prejudice substantially, the effective conduct of public affairs.
51. As noted above, the Council stated that developers are under no obligation to provide a community fund in relation to their plans for wind farm developments and the provision of such funds is entirely voluntary. The Council also stated, in an e-mail to my Office dated 8 September 2006, that the Council could, in theory, decide not to get involved in discussions about community funding with developers and allow local communities to carry out their own negotiations with developers. However, that is not the approach favoured by the Council: the Council views its involvement in such matters as being an important and positive factor in the negotiating process, with its main aim being to obtain the best deal possible for the benefit of the local community.
52. Having considered the information that has been withheld in this case, as well as the submissions made to me by both parties, it appears that there were two main strands to the negotiations that were taking place between the Council and AMEC: discussions concerning arrangements for a community fund and discussions concerning planning gain. The discussions held in relation to planning gain involved the possibility of a contribution towards affordable housing and it seems clear to me, on the basis of the representations that have been made, that the Council's discussions with AMEC concerning both planning gain and the community fund were, in this instance, inextricably linked.
53. If the discussions in relation to each matter had been held entirely separately, there would have been a stronger argument for release of the information (with any commercially sensitive information removed), since it could have been argued that the release of the community fund information requested by Tap o'Noth would not have had a material effect on any planning gain discussions that were being held in parallel. However, in this case both processes were interlinked and the Council argued that premature disclosure of the Council's discussions concerning the community fund would have had a detrimental effect on any planning gain negotiations.



54. In the Council's refusal notice to Tap o'Noth it stated that the information that had been requested had been provided in confidence by the developer in order for the Council to negotiate planning gain. In its submission to me, the Council emphasised the importance of ensuring that negotiations concerning planning gain between developers and councils could be pursued in private in order to explore the viability of different options and to protect the integrity of the negotiating process. The Council pointed out that the process of negotiating planning gain with developers has grown in importance in recent years and has become a well-established practice, to the extent that the Council now employs a full-time Planning Gain Co-ordinator. The Council added that it would be essential, if such negotiations were to continue, for there to be trust between the developers and the Council that what is discussed would not be disclosed prematurely, although it would eventually be made public knowledge if a development actually occurred. The Council also pointed out that, in this instance, the negotiation process was itself likely to change as it progressed, particularly in relation to the issue concerning a contribution for affordable housing.
55. I am satisfied that, at the time of Tap o'Noth's request, very little had been committed to paper by the Council regarding any outline proposals that had been discussed or agreed between the Council and AMEC. In Tap o'Noth's application to my Office, it stated that it had requested sight of any minutes and meetings between the Council and AMEC at which the community fund had been discussed and, in addition, any copies of memos, e-mails and letters between the two parties referring to the fund.
56. On the date of Tap o'Noth's request for information the Council only held two documents which fell within the scope of that request. One document consisted of two e-mails which the Council's Planning Gain Co-ordinator had sent to AMEC in order to arrange a meeting to discuss progress on the wind farm application. The other document consisted of a copy of a draft memorandum (labelled "not for publication") from the Council to AMEC, dated 2 February 2005, in which the matter of the community fund was discussed.
57. It is clear from the documents that were submitted for the purposes of my investigation that the Council was attempting to obtain the best possible arrangement for the local community through its negotiations with AMEC, both in regard to planning gain and any proposed community fund. It was the Council's intention to work with the relevant community councils once a framework had been arranged from which to establish a trust fund and its stated aim was to try to maintain a consistent approach throughout Aberdeenshire in its dealings on such matters. The Council also pointed out that it preferred to channel such matters through the Council in order to co-ordinate ongoing negotiations and to prevent any disparities arising from situations where AMEC could be approached by a number of different bodies or individuals.



58. The Council argued in its review notice that the disclosure of the information would prejudice substantially the effective conduct of public affairs in that it would affect the ability of the Council to negotiate planning gain contributions with developers. The Council stated that it required to be seen as fair to all developers and discussion with a wider audience before a finalised position had been established could jeopardise individual applicants' financial affairs.
59. Having considered the submissions from both parties in some detail, I am of the view that the disclosure of the information before any agreed position had been reached between the Council and AMEC in relation to planning gain or the community fund, would have been likely to have prejudiced substantially the negotiations in which the Council and AMEC were at that time engaged. I am of the opinion that, in this instance, disclosure would have been likely to have had a detrimental effect on the Council's negotiations concerning both planning gain and the community fund and I am of the view that this would still have been the case irrespective of whether the information had been provided to Tap o'Noth with any commercially sensitive information removed.
60. In this case, I am satisfied that if the details of the Council's preparatory discussions and negotiations with AMEC were to be made public before any arrangements had been concluded, the disclosure of that information at such an early stage of proceedings would, or would be likely to, prejudice substantially the Council's ability to enter into similar discussions or negotiations with developers in the future.
61. I am therefore of the opinion that the Council was correct to withhold the information requested by Tap o'Noth under section 30(c) of FOISA on the grounds that to disclose the information would, or would be likely to, prejudice substantially the effective conduct of public affairs. Having established that the section 30(c) exemption under FOISA applies, I must now go on to consider the public interest arguments for and against release of the information requested.

### **Public interest**

62. Section 30(c) is subject to the public interest test required by section 2(1)(b) of FOISA and I must therefore consider whether, in all the circumstances of the case, the public interest in disclosing the requested information is outweighed by the public interest in maintaining the exemption.
63. Whilst it is recognised that there is a general public interest in making information available to the public and a general need for transparency and accountability in decision making, this must be balanced against any potential harm that could be caused by the release of such information as well as the public interest in protecting the integrity of decision-making processes. Information can only be withheld under FOISA where the public interest in withholding it is greater than that in disclosure.



64. Tap o'Noth argued that it required the information in order to inform any subsequent discussions it may have with AMEC in relation to the community fund. In this case it could be argued that there is a public interest in disclosing the information to enable interested parties, such as community councils, to participate fully in the decision-making process. However, where such processes exist, regard must also be had to the public interest in public authorities being able to hold preparatory discussions with contractors in private until such time as any arrangements are concluded. In other words, there is a strong public interest in protecting the negotiation process itself.
65. In considering the public interest, the Council in this instance argued that non-disclosure would ensure that the trust would be maintained between the developer and the Council that what is discussed would not be disclosed except when a development actually occurs and the planning gain negotiated then becomes public knowledge. The Council considered that the public interest in maintaining that trust outweighed any interest in making that information available as it was considered that the developer would be less forthcoming with information, leading to difficulty in negotiating meaningful planning gain contributions.
66. Although Tap o'Noth stated that it was mainly concerned with the arrangements for managing the community fund and the determination of which areas were to be included in it rather than the size of the fund, it was not satisfied with the Council's attempts to provide it with such information. However, in my view, the Council's letter of 21 April 2005 was a valid attempt, and a reasonable one in these particular circumstances, to provide Tap o'Noth with as much of the information that it could without impacting negatively upon its ongoing negotiations with AMEC. In this respect I am satisfied that the Council fulfilled its duty under section 15 of FOISA to provide reasonable advice and assistance to Tap o'Noth.
67. Taking into account the information that has already been supplied to Tap o'Noth by the Council, I do not think there is a strong enough public interest argument to allow disclosure of the requested information when to do so would, or would be likely to, prejudice substantially the Council's ability to hold preparatory discussions in the future with contractors in relation to planning gain and community fund arrangements.
68. In this instance, I am of the view that it is essential for the Council to be able to carry out any negotiations concerning planning gain and community funds without fear of endangering the very process itself by prematurely disclosing information prior to any decisions or arrangements being made. Consequently, I am of the opinion that, given the particular circumstances of this case, the public interest in disclosing the information is outweighed by the public interest in maintaining the exemption.





## **Decision**

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I find that Aberdeenshire Council dealt with Tap o'Noth Community Council's request for information in accordance with Part 1 of the Freedom of Information (Scotland) Act 2002 (FOISA), in that it correctly applied section 30(c) of FOISA to the information requested.

I find that Aberdeenshire Council complied fully with section 1(1) of FOISA and was correct to withhold the information requested.

## **Appeal**

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Should either Tap o'Noth Community Council or Aberdeenshire Council wish to appeal against this decision, there is a right to 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**  
**13 December 2006**



## APPENDIX

### Relevant Statutory Provisions

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

#### **30 Prejudice to effective conduct of public affairs**

Information is exempt information if its disclosure under this Act-

- (a) ...
- (b) ...
- (c) would otherwise prejudice substantially, or be likely to prejudice substantially, the effective conduct of public affairs.