



Scottish Information
Commissioner

Decision 170/2007 Ms Nadine Russell and the Scottish Ministers
Rural Stewardship Schemes in Orkney

Applicants: Ms Nadine Russell
Authority: Scottish Ministers
Case No: 200601014
Decision Date: 20 September 2007

Kevin Dunion
Scottish Information Commissioner

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Decision 170/2007 Ms Nadine Russell and the Scottish Ministers

Request for information on the distribution of Rural Stewardship Schemes in Orkney, maps of the farm boundaries under the schemes and information about the prescriptions being followed – regulation 11(2) of the Environmental Information (Scotland) Regulations 2004 applied – not upheld by the Commissioner

Relevant Statutory Provisions and Other Sources

Environmental Information (Scotland) Regulations 2004: regulation 5(1) (Duty to make available environmental information on request); regulation 11(2) and (3) (Personal data)

Data Protection Act 1998: Section 1 (Basic interpretative provision) (definition of “personal data”); Schedule 1 Part 1 (the data protection principles) (the first data protection principle) and Schedule 2, paragraph 6(1) (Conditions relevant for purposes of the first principle: processing of any personal data)

Nature Conservation (Scotland) Act 2004: Section 1(1) (Duty to further the conservation of biodiversity)

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

Facts

Ms Russell, a biodiversity officer with Orkney Islands Council (the Council), wrote to the Scottish Ministers (the Ministers) requesting information relating to Rural Stewardship Schemes (RSS) in Orkney. The Ministers released some details for each parish district in the Orkney Islands Council area, but withheld other information under regulation 11(2) of the Environmental Information (Scotland) Regulations 2004 (EIRs) on the grounds that it constituted personal data and that the release of the information requested by Ms Russell would breach the data protection principles contained in the Data Protection Act 1998 (the DPA).

Following an investigation, the Commissioner found that the release of the information would not breach the data protection principles. He therefore ordered the Ministers to disclose the information.



Background

1. On 17 February 2005, Ms Russell, a biodiversity officer with the Council, wrote to the Ministers in order to obtain RSS information for the monitoring of the Orkney Local Biodiversity Action Plan. Ms Russell requested “information on the distribution of Rural Stewardship Schemes in Orkney, maps of the farm boundaries under the schemes and information about the prescriptions being followed.”
2. A telephone discussion was held between both parties on 18 July 2005, and the scope of Ms Russell’s request was clarified in relation to the information she wanted concerning the prescriptions being followed. Ms Russell confirmed in the course of the telephone conversation that the information she sought was the area and location of each measure being undertaken.
3. The Ministers responded to the request on 1 August 2005. In their letter the Ministers informed Ms Russell that her request had been considered against the requirements of the EIRs rather than the Freedom of Information (Scotland) Act 2002 (FOISA) as it constituted a request for “agri-environment data”. (In any event, Ms Russell’s request was made under both the EIRs and FOISA.)
4. The Ministers advised Ms Russell that some of the information she had requested (e.g. boundary maps) had been withheld under regulation 11(2) of the EIRs on the basis that it came under the definition of personal data as set out in the DPA and that to disclose such information would breach the first data protection principle by being unfair to RSS applicants.
5. The Ministers informed Ms Russell that they had given some consideration to which data about RSS participation in Orkney they might be able to supply without infringing the privacy rights of individual farmers participating in the RSS. The Ministers had concluded that it was possible to provide the Council with data about RSS participation at parish level and a table of information was provided to Ms Russell. The table showed, for each parish in the Council area, the number of RSS agreements in force and the area of each RSS measure being undertaken and set out the total hectarages per prescription as of 30 June 2005. However, Ms Russell informed the Ministers that she was not able to use such data as functionally as the map based data she had requested.



6. The Ministers informed Ms Russell that although they had been unable to provide all of the information requested under the EIRs, they were prepared to consider making some more detailed information available to the Council under the terms of a data sharing protocol, to be agreed between the Ministers and the Council. (Although the response from the Ministers did not set out the terms of this protocol, I presume that the effect of this would be to release the information to Ms Russell but outwith the terms of FOISA. In other words, the information would not be released into the public domain, but only to the Council and with conditions on its re-use.)
7. Ms Russell declined the Ministers' offer to enter into a data sharing agreement and, on 26 September 2005, requested a review of their decision to withhold the information she had requested. Ms Russell complained that the information that had been provided by the Ministers did not enable her to monitor the Orkney Local Biodiversity Action Plan targets and actions. In her letter, Ms Russell stated that her request was for the farm boundaries and the relevant RSS prescriptions - she emphasised that she did not require the name of the farmer or landowner nor their mailing address. She did not accept the Ministers' arguments that the information she had requested constituted personal data or that it was exempt from disclosure under the EIRs.
8. Ms Russell pointed out to the Ministers that the Nature Conservation (Scotland) Act 2004 confers on public bodies a duty to further the conservation of biodiversity. She added that the next stage in the biodiversity process was to begin to benchmark and monitor the system and plans. In order to do this, Ms Russell stated that she required access to a wide range of environmental information and data in many formats. She added that for the UK 2005 reporting round, all Local Biodiversity Action Programme officers and lead partners were being asked to use the new Biodiversity Action Reporting System.
9. On 11 January 2006, the Ministers contacted Ms Russell by letter to inform her that a review would be carried out and, on 23 January 2006, the outcome of the review was communicated to Ms Russell. In their review the Ministers upheld their original decision that the information was exempt from disclosure on the grounds that it constituted third party personal data and that to disclose such information would be unfair to the persons to whom the data related.
10. The Ministers added that the public interest was not so great as to require the data to be disclosed. This view had been arrived at on the basis that Orkney farmers should not be treated differently from farmers in other parts of Scotland who had not had their RSS information disclosed. (It should be noted that the part of the exception relied on by the Ministers to withhold the information is not subject to the public interest test required by regulation 10(1)(b) of the EIRs. However, public interest arguments may be appropriate when weighing the legitimate interests of the parties involved – I will come on to that later in the decision.)



11. As a result of the review, the Ministers provided Ms Russell with a detailed analysis of the issues they had considered. Ms Russell had asked for information on the area and location of each RSS measure and the Ministers were of the view that this would include the name and address/location of individual farms, and this would be personal data. They added that there could be an element of information that related to business/commercial interests, but this was not being claimed in the exchange of letters.
12. The Ministers contended that farmers in their dealings with them had for many years expected that their personal data would be treated as confidential and that it had been the practice of the Ministers not to disclose to third parties information on the individual farms in the RSS. It was argued that it would therefore be unfair to Orkney farmers to release information about their farms when information on farms elsewhere in Scotland had not been released.
13. As regards the Nature Conservation (Scotland) Act 2004, the Ministers recognised the requirement for all public bodies to promote biodiversity and nature conservation, which gave a presumption in favour of disclosure. However, it was argued that the legislation did not specify what information was needed and therefore did not introduce a duty for the Ministers to make the information available.
14. The Ministers argued that farmers who enter the RSS are now told that information about their participation may be published, but that this was not well defined and fell short of saying that all data may be released. The Ministers maintained that this could be read as meaning that some information was not necessarily going to be released, especially since by custom some data was not released to third parties.
15. The Ministers concluded in their review that farmers who had entered RSS agreements had an expectation that personal data would not be disclosed to third parties. It was acknowledged that this privacy right had been reduced, as compared with past practice, and was in any case not absolute and was subject to the public interest test (although see my comment on the public interest test in paragraph 10 above). However, the Ministers were of the view that it had remained their practice not to disclose personal data, and it would be unfair for it to disclose Orkney data without either the farmers' agreement or a change in national practice.
16. Ms Russell was dissatisfied with the outcome of the Ministers' review and applied to me for a decision on 25 May 2006. In her application, Ms Russell emphasised that her original request was for maps with Ordnance Survey Grid References and the RSS prescriptions in order to monitor the local biodiversity plan.



17. The case was then allocated to an investigating officer and Ms Russell's application was validated by establishing that she had made a valid request for information to a Scottish public authority and had applied to me only after asking the authority to review its response to her initial request.

The Investigation

18. The investigating officer wrote to the Ministers on 8 August 2006, giving notice that an application had been received and that an investigation into the matter had begun. The Ministers were asked to provide their comments in terms of section 49(3)(a) of FOISA (which also relates to applications made to me under the EIRs), along with supporting documentation for the purposes of the investigation.
19. The Ministers were also asked to provide details of all statutory exceptions which they considered applicable to the information that had been withheld, identifying (in respect of each exception) the information to which the exception was claimed to apply and the reasons for its application.
20. The Ministers responded on 30 August 2006, providing the investigating officer with a representative sample of maps and documents and details of its reasons for withholding the information in question.
21. Ms Russell was contacted by the investigating officer on 21 February 2007 in order to explore the possibility of arriving at an agreed settlement. Ms Russell was asked if she would reconsider the possibility of setting up a Data Sharing Protocol with the Ministers. However, Ms Russell did not wish to do so.
22. During the investigation the Ministers were also contacted by the investigating officer in order to try clarify some of the issues surrounding the case.

The Commissioner's Analysis and Findings

23. 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 Ms Russell and the Ministers and I am satisfied that no matter of relevance has been overlooked.



The Rural Stewardship Scheme

24. The RSS is part of the Scottish Rural Development Plan and is an agri-environment scheme which is designed to encourage farmers, crofters and Common Grazing Committees to adopt environmentally friendly practices and to maintain and enhance particular habitats and landscape features.
25. The RSS is discretionary and all applications for funding are subject to a selection process through a ranking system. Applicants undertake to participate in the RSS for a period of at least 5 years. In addition, they must agree to manage the relevant areas of land and carry out the relevant capital works in line with the rules and conditions of the RSS. Certain general environmental requirements (Standard of Good Farming Practice and General Environmental Conditions) also apply to the farm, croft or common grazing as a whole and not just to those areas or features that are being positively managed under the RSS.
26. Having considered the information requested by Ms Russell, I am satisfied that it constitutes environmental information and that the Ministers were correct to consider her request in line with the provisions of the EIRs.

Regulation 11(2) of the EIRs – third party personal information

27. When the Ministers responded to Ms Russell's request, they informed her that the information she had requested could not be provided as it was excepted under regulation 11(2) of the EIRs. Regulation 11(2) excepts third party personal data from release if either "the first condition" (set out in regulation 11(3)) or "the second condition" (set out in regulation 11(4)) applies to the information. All of the arguments made by the Ministers relate to "the first condition" and, in particular, the parts of the first condition which consider whether disclosure of the information would breach the data protection principles (regulation 11(2) read in conjunction with either regulation 11(3)(a)(i) or (b)). Consequently, this is what I will concentrate on in this decision.
28. The Ministers have made certain arguments in relation to the public interest as it applies to the exception. I can only assume that this was done in error as the parts of the exception in respect of which their arguments were made are not subject to the public interest test required by regulation 10(1)(b) of the EIRs. However, the public interest arguments are likely to be relevant when considering whether the disclosure of the information would breach the first data protection principle.
29. What I must therefore consider therefore is whether the information in question is personal data for the purposes of the DPA and if it is, whether release of the personal data would contravene any of the data protection principles set out in the DPA.



Personal information

30. The DPA defines personal data in section 1(1) as:

“data which relate to a living individual who can be identified -

(a) from those data, or

(b) from those data and other information which is in the possession of, or is likely to come into the possession of, the data controller,

and includes any expression of opinion about the individual and any indication of the intentions of the data controller or any other person in respect of the individual”.

31. In their submission to me, the Ministers stated that they were of the view that the details of a farm business which is owned or occupied by an individual, and which is information about that business, was personal data about that individual.

32. The Ministers also consider that the disclosure of the information would breach the first data protection principle on the basis that it would be unfair to RSS applicants. The Ministers stated that farmers did not expect that details of their farms, including the name and address/location, would be disclosed because it had not been their practice to disclose such information previously. (I would point out at this stage that Ms Russell did not request the names or addresses of farmers or their farms.)

33. Ms Russell rejected the argument that to disclose the information would be unfair to scheme participants. She maintained that this argument was in fact contrary to the terms in section 7 of the disclosure declaration in the RSS application form, where, in Ms Russell’s view, all participants in the scheme agreed, upon entering the scheme, to disclose all data they provided in order to participate in the scheme.

34. The wording in the section 7 declaration in the copy of the RSS application form provided by Ms Russell was as follows:

“I/We agree that details of my/our agreed proposals, in relation to this application may be made available to the public.”

Ms Russell argued that this statement was part of the declaration that allowed the Ministers to provide access to information provided to them by the farmer or landowner upon their entering the RSS.



35. In her request for review, Ms Russell also rejected the Ministers' argument that farmers did not expect such details about their farms to be made available as it had not been the Ministers' practice to disclose such information previously. Ms Russell argued that she did not consider this to be adequate justification for withholding information which related to farmers receiving public funds.

The Ministers' submission

36. In their submission to my Office, the Ministers provided further arguments for withholding the information that had been requested. In their original response to Ms Russell it had been indicated that the farm boundary information which had been requested by Ms Russell was held by them. In fact, the maps which were held by the Ministers showed details of the boundaries of individual fields, not the boundaries of farms. It was also noted that certain features of the farms, such as buildings, roads and ponds were not shown because that land was not in agricultural use.
37. The Ministers also restated their view that the information about the location of individual management measures on individual farms participating in the RSS constituted personal data under the DPA, on the grounds that it represented personal data from which a living individual could be identified. In reaching this view, the Ministers had regard to guidance from the Information Commissioner (who is responsible for regulating the DPA), specifically the definition of personal data in relation to individuals and their business activities where it states:
- “Information may relate to an individual in a business capacity and not just to their private life. Information about the business of a sole trader will amount to personal data as information about the business will be about the sole trader.”
- http://www.ico.gov.uk/upload/documents/library/data_protection/detailed_specialist_guides/data_protection_act_legal_guidance.pdf.
38. The Ministers were of the view that the details of a farm business which is owned or occupied by an individual, and which is information about that business, constituted personal data about that individual. The Ministers stated that the list of recipients of payments under the RSS comprised a mix of individuals, sole traders, partnerships and businesses. It was also pointed out that the list did not include any distinction between the different types of recipient and that this was not relevant to the purposes or the situation in which the data was recorded.



39. Taking into account the fact that the Ministers did not hold information which could have enabled them to accurately identify the precise legal status of each recipient, the Ministers were of the view that there would be considerable work involved in trying to establish the exact nature of each of the recipients under the 124 RSS agreements in Orkney that were live at the time Ms Russell submitted her request. It had therefore viewed the information, in its entirety, as personal data.
40. I have addressed the issue concerning the legal status of the recipients of funds in other decisions. For example, in decision 041/2007 (Mr Jock Meikle and the Scottish Executive), I accepted in that instance that the information relating to individual sole traders constituted their personal data. However, I did not view information as constituting personal information if it related to recipients of funds which were companies or partnerships (unless the funds are allocated to one particular individual within a partnership). I also concluded in that case that such information should be disclosed where it is clear from the business name specified in an application form for funding that the applicant was a business (e.g. where the word “plc”, “ltd”, or “limited” is included in their descriptions) rather than a sole trader.
41. With regard to the question of whether individual farmers could be identified from the data requested by Ms Russell, I am of the opinion that the likelihood of this would be largely dependent on the content of the information released.
42. Taking into account the fact that:
- a) Ms Russell did not ask for any details of the farmers (such as their names or addresses) or the amounts paid through the scheme;
 - b) the information could have been disclosed in a format which simply identified the field boundaries and any associated management schemes that had been proposed (i.e. the area and location of each measure being undertaken); and
 - c) the location could have been provided as a national grid reference without including the names and addresses of individual farms or farmers,
- it could be argued that this information would not in itself constitute personal data since it would not in itself identify specific farms or farmers.
43. However, section 1(1) of the DPA requires me to consider only the information which would be released to Ms Russell but (on the basis that Ms Russell is considered to be the data controller once the information is released to her), other information which is in her possession, or is likely to come into her possession.



44. Taking into account the fact that the release of the information to Ms Russell (together with other information available to her) is likely to allow her to identify the names of the farms in question, I am of the view that the information falls within the definition of personal data where the data relate to a living individual (e.g. a sole trader) who could be identified from those and other data.
45. However, I do not consider that the information, as it relates to partnerships or companies, constitutes personal data. The reasons for this are set out in decision 041/2007 as referred to in paragraph 40 above.
46. I will now go on to consider whether disclosure of the information which is personal data would breach any of the data protection principles.

Regulation 11(3) of the EIRs - would release of the information breach any of the data protection principles?

47. As noted above, the Ministers have argued that release of the information would breach the first data protection principle on the grounds that disclosure would be unfair to the farmers taking part in the RSS.
48. The first data protection principle states that personal data must be processed fairly and lawfully and, in particular, shall not be processed unless at least one of the conditions in Schedule 2 of the DPA is met and, in the case of sensitive personal data, at least one of the conditions in Schedule 3 is met. (Having considered the information which has been withheld by the Ministers, I am satisfied that none of the information falls within the definition of sensitive personal data set out in section 2 of the DPA.)
49. I will firstly consider whether there are any conditions in Schedule 2 of the DPA which would permit the release of the information. I will then go on to consider whether the disclosure of the information is otherwise fair and lawful.

Condition 6 of schedule 2 of the DPA

50. With regard to the conditions in Schedule 2 of the DPA, it is my view that condition 6 is the only such condition which might be considered to apply in this instance. Condition 6 covers processing (for example, by disclosure) which is necessary for the purposes of legitimate interests pursued by the third party to whom information is disclosed, except where the processing is unwarranted in any particular case by reason of prejudice to the rights and freedoms or legitimate interests of the data subject.
51. I must apply a number of tests to establish whether condition 6 supports disclosure of personal data in this case. The first test is whether it can be established that the third party/parties to whom the data would be disclosed has/have a legitimate interest in the processing of the personal data (in this case by disclosure to a member of the public) to which the request relates.



52. The second test is whether the processing is necessary for the purposes of those legitimate interests. The third test is whether that processing can be seen to be unwarranted in this particular case by reason of prejudice to the rights and freedoms or legitimate interests of the data subject. Both competing interests must then be balanced.
53. In considering the first test, I accept that Ms Russell has a legitimate interest in gaining access to the RSS information (details of the RSS measures being undertaken in Orkney and their area and location) in order to enable her to monitor the Orkney Local Biodiversity Action Plan targets and actions. I also consider that the general public holds a wider legitimate interest in being informed of the measures that are being carried out in return for public funds. Disclosure of the information in question would also indicate what public benefit is expected to flow from the distribution of RSS funds (e.g. protecting or improving biodiversity). I find, therefore, that the first test can be fulfilled.
54. In considering the second test, with regard to whether disclosure is necessary for the purposes of the legitimate interests identified in paragraph 53 above, I have considered whether these interests might be met equally effectively by any alternative means. It was noted above that Ms Russell was not able to use the information that had been provided by the Ministers on a statistical basis by parish rather than the map based data she required.
55. If a Data Sharing Protocol had been agreed between Ms Russell and the Ministers, the information which could have been shared might have been of benefit to Ms Russell, but it would have been of no benefit to the general public since it would not have been released into the public domain. In all the circumstances, I have therefore concluded that the legitimate interests in question could not be met without disclosure to the public of the relevant information contained within RSS applicants' agreed proposals and, therefore, that disclosure of this data is necessary for the purposes of the legitimate interests that have been identified in this instance.
56. In considering the third test, I am required to balance those legitimate interests against those of the individual RSS applicants who supplied the data in their applications for funding to the Ministers. It was also mentioned by the Ministers that as biodiversity planning develops the value of the disclosure of more and more detailed information may be expected to increase. This could be a significant factor in achieving the overall aim of protecting and promoting biodiversity. It is interesting to note that the Ministers, in the outcome of its review, stated that it had little information on the risks of disclosure to the Orkney data subjects.



57. The Ministers argued that farmers who participated in the scheme could reasonably expect that certain information about them would be protected as personal data and I accept that individuals may generally have a reasonable expectation that certain personal data they submit in an application for funding to a public authority will not be placed in the public domain – unless they consent to such disclosure, for example, in the form of an explicit declaration that such information may be made available to the general public (as was the case in this instance).
58. I will go on to analyse these arguments in more detail when I consider below whether the release of the information in question would be fair, but I am of the view that in accepting the declaration in section 7 of the pre-2006 RSS forms, RSS applicants were made fully aware of the possibility that any information relating to their agreed RSS proposals may be disclosed to the general public at any time. The only legitimate interests of the data subjects that I can identify in this instance would be their expectation that their personal data would not be disclosed if the disclosure of such information would contravene any of the data protection principles, thereby causing them some form of harm. If I was of the view that such harm would result from disclosure of the information in question, I would not require the release of that information.
59. Having considered the legitimate interests of those to whom the information would be disclosed and the legitimate interests of the data subjects (i.e. the applicants for RSS), I consider that the processing would not be unwarranted. I therefore consider that condition 6 of schedule 2 would allow the personal data to be disclosed.
60. I will now go on to consider whether the processing of the information would be otherwise fair and lawful.

Fair and lawful processing

61. The Information Commissioner has issued guidance on the consideration of the data protection principles within the context of freedom of information legislation. In this guidance, the Information Commissioner provided examples of the types of questions which should be considered by authorities when assessing whether the release of personal data would amount to 'fair' processing. These include:
- a. Would disclosure cause unnecessary or unjustified distress or damage to the data subject?
 - b. Would the data subject expect that his or her information might be disclosed to others?
 - c. Has the person been led to believe that his or her information would be kept secret?



62. In relation to point a. above, the Ministers stated in their review that they had little information on the risks of disclosure to the Orkney data subjects. As regards points b. and c. above, the Ministers argued in their review that farmers, in their dealings with them, had for many years expected that their personal data would be treated as confidential. However, I am of the opinion that this view does not accord with the explicit declaration in the RSS forms that details of the agreed proposals may be made available to the public.
63. The Ministers asserted that as information about individual RSS agreements was customarily not disclosed, farmers participating in the scheme could reasonably expect that certain information about them would be protected as personal data. It was argued that those farmers would therefore have no expectation of anything other than confidentiality. The Ministers were of the view that an absolute exception from release under the EIRs therefore applied by virtue of regulation 11(2).
64. In their submission to me the Ministers stated that their assessment of the fairness, or otherwise, of disclosure involved the consideration of a number of factors, such as: how the information was obtained, the likely expectations of the data subjects concerned, the effect disclosure was likely to have on the data subjects, the content of the information concerned, and the public interest in disclosure. The Ministers also stated that an additional consideration was that release of the information may be detrimental to future data gathering exercises as farmers would be likely to lose confidence in the Ministers' handling of their information and would therefore be unwilling to provide it.
65. My investigating officer contacted the Ministers in order to determine their reasons for asserting that the declaration in section 7 of the RSS application forms did not allow the Ministers to disclose the information that had been requested.
66. The Ministers explained that the data it received from RSS applicants included an application form, an audit which detailed the individual fields in which measures were to be carried out (the audit contained the 14-digit FID (field identifier) for each field and the area of the measure within the field, but not its location within the field), and a map showing all of the fields on the holding, the boundaries of the fields, the FID and the location of measures within each field. The Ministers stated that they had taken the view that field boundary information was personal data and they did not see how they could redact this and other personal information without making the remainder of the data meaningless.



67. It was pointed out to the Ministers that, on 12 January 2005 (shortly before Ms Russell made her information request), the then Rural Development Minister, Ross Finnie, had said that the Ministers' policy would be to disclose information about receipts and amounts of subsidy under the new single farm payment and new schemes under the rural development regulations (<http://www.scotland.gov.uk/News/Releases/2005/01/12132833>).
68. Mr Finnie stated: "The Freedom of Information (Scotland) Act increases the openness and accountability of public administration in Scotland. People have a right to find out how their taxes were spent. The new system of CAP support provides public funds in return for farmers meeting environmental and agricultural standards, I believe it is right that people should know more about how this money is spent. This will also help farmers demonstrate the public benefits they are delivering. For the new single farm payment and new schemes under the rural development regulation we will make it clear to farmers when they apply that our policy will be to disclose information about payments. For historic information, the situation is more complex as some of the information that has been provided by farmers may be exempt from disclosure. The Scottish Executive will individually assess each request for information we receive for pre SFP schemes."
69. The Ministers were also referred to a statement on their website which concerned subsidy and recipient information ("Addition to the Rural Stewardship Scheme Explanatory Booklet 2006" – <http://www.scotland.gov.uk/Topics/Agriculture/Environment/Agrienvironment/RuralSteward/Addition>):

"SECTION 9

9.1 Release Of Subsidy And Recipient Information

The Scottish Executive is bound by the terms of the Data Protection Act 1998, the Freedom of Information (Scotland) Act 2002 and the Environmental Information (Scotland) Regulations 2004.

It is the policy of the Scottish Executive to release information about the amounts of subsidy and the new recipients for the Single Farm Payments Scheme and the agreements under the Rural Development Regulation. We will process personal data we receive in line with the Data Protection Act 1998, but applicants should be aware the particular information mentioned above will generally be disclosed.

For the Rural Stewardship Scheme, this means that we will release information on the options for which you have applied for aid and the amount approved and received. The information will also include your name and geographic location. For public limited companies only, addresses will also be supplied." (my emphasis)



70. The explanatory booklet also mentioned that other personal data which were received would be protected in line with the DPA and that the Ministers would use the data provided in RSS applications primarily for the purpose of processing the applications. However, it was added in the booklet that personal data may also be used “when necessary to comply with the Freedom of Information Act or the Environmental Information Regulations”.
71. The Ministers explained that while it had included within the 2006 RSS forms a declaration on the release of subsidy and recipient information, this declaration was different to that contained in the pre-2006 RSS application forms which related to Ms Russell’s request (as detailed above). The 2006 forms included the following declaration:
- “The data I/We have provided in the application form is subject to the provisions of the Freedom of Information Act (Scotland) 2002 and the Data Protection Act 1998. Please refer to “Release of Subsidy and Recipient Information” paragraphs in the Explanatory Booklet (RSS1) for information on the purposes for which we will use the data.”
72. The Ministers were of the view that the declaration within the 2006 RSS application forms enabled the release of payments under the new Rural Development Programme which will run from 2007-2013 and that this was in line with the Minister’s commitment “to disclose information about receipts and amounts of subsidy under the new single farm payment and new schemes under the rural development regulations.” The Ministers added that in Ross Finnie’s statement he had pointed out that historic information may be exempt from disclosure and so each request for access would need to be assessed individually (see the last two sentences of the statement made by Mr Finnie in paragraph 68 above).
73. The Ministers argued that the information requested by Ms Russell was for earlier years which were not covered by that commitment to release information. As regards the declaration in the pre-2006 forms, the Ministers stated that they were of the view that the terms of the declaration would not be sufficient to protect it from action in the event of a complaint about the release of personal data.
74. The Ministers were also asked if they would be prepared to provide current RSS information if Ms Russell were to make a new application for the same type of information. In its response the Ministers stated that the agreement was to release agri-environment subsidy data under “new schemes under the rural development regulation”. This included the new Scottish Rural Development Plan which took effect from 2007. The Ministers advised that it did not at that time have any 2007 participants and the RSS was closed to new applicants in 2006 and would be replaced by Rural Development Contracts.



Conclusion

75. Having considered the arguments above, and having taken into account the content of the information requested (details of the RSS measures being undertaken in Orkney and their area and location), I am of the view that the disclosure of such information would not cause any unnecessary or unjustified distress or damage to the persons who had undertaken to participate in the RSS schemes in Orkney and who had signed the declaration in section 7 of the pre-2006 RSS application forms. I am satisfied that the disclosure of the information would not be unfair or unlawful and that it would not, therefore, breach the first data protection principle.
76. It is my view that in signing the RSS forms all applicants were in effect agreeing with the terms of the declaration. The explicit declaration contained in section 7 of the pre-2006 RSS application forms alerted applicants to the possibility that their agreed proposals relating to their application may be made available to the public.
77. It should be noted that, prior to the EIRs coming into force on 1 January 2005, the information sought by Ms Russell could have been requested under the provisions of the Environmental Information Regulations 1992 (the 1992 regulations). In determining whether, under the terms of the 1992 regulations, the personal information should have been disclosed, a similar test would have applied (i.e. whether the personal information is contained in a record in relation to an individual who has not given his consent to the disclosure).
78. The Ministers were of the view that it was important to note that “prior to the Minister's announcement in January 2005, applicants were aware that their information was not generally disclosed, despite the declaration on the form.” However, although the Ministers did not proactively disseminate any of the information contained within the RSS applications, as far as I am aware the Ministers did not actually receive any requests for such information prior to Ms Russell's request in February 2005. Therefore, I find it hard to agree that it could be argued that there was an expectation of confidentiality on the basis that requests for similar information had previously been denied by the Ministers on the grounds that it would be unfair to disclose the personal information of RSS applicants.
79. In my view if any expectation existed at all it was the expectation that details of applicants' agreed proposals in relation to their RSS applications *may* be made available to the public, i.e. either proactively disseminated by the Ministers or in response to a legitimate request for such information under the EIRs.



80. It is interesting to note that the Ministers were of the view that the declaration in the 2006 RSS forms was sufficiently robust to enable them to release data if requested, whereas the pre-2006 declaration was not. The explanatory booklet to the 2006 forms states, in section 9, that for the RSS, information will be released on the options for which people have applied for aid (including the amount approved and received) and the information would include applicants' names and geographic locations.
81. This would suggest to me that the Ministers do not view the actual disclosure of such information as breaching any of the data protection principles. Instead the Ministers appear to be of the view that they could only release such information if an explicit reference had been made in the declaration in the RSS forms to the effect that the information provided in the application form was subject to the provisions of FOISA, the EIRs and the DPA.
82. If that is the case I cannot see how disclosure of the information requested by Ms Russell (which did not include personal details such as applicants' names and amounts of funding received) could be deemed to breach any of the data protection principles. This is especially the case when taking into account the section 7 declaration in the pre-2006 forms, which was essentially an agreement between the applicants and the Ministers that details of their agreed RSS proposals may be made available to the public.
83. Having considered all the circumstances of the case, I am of the opinion that disclosure of the information requested by Ms Russell would be fair and lawful. I therefore conclude that the disclosure of the information would not breach any of the data protection principles and, accordingly, that the exception in regulation 11(2) does not apply to the information in question.
84. I noted above that the information held by the Ministers concerning the recipients of payments under the RSS did not enable the different types of farming businesses to be distinguished (and therefore to distinguish what did and did not constitute personal data). However, given that I have come to the conclusion that the information relating to individuals should be released, this distinction is no longer important. I therefore require the Ministers to disclose all of the information they hold which relates to Ms Russell's request regardless of the status of the applicants involved (i.e. whether the information relates to a sole trader, partnership, or company).



Decision

I find that the Scottish Ministers (the Ministers) failed to comply with regulation 5(1) of the Environmental Information (Scotland) Regulations 2004 (the EIRs) in refusing to provide the information requested by Ms Russell on the basis that the information was exempted in terms of regulation 11(2) of the EIRs.

I therefore require the Ministers to supply the information requested by Ms Russell within 45 days of the date of intimation of this decision notice.

I note that Ms Russell's request includes maps of the farm boundaries under the RSS. I am satisfied that the Ministers do not hold such maps but that, instead, they hold maps showing the boundaries of individual fields. It is these maps which I require the Ministers to supply to Ms Russell.

Appeal

Should Ms Russell or the Ministers 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 after intimation of this decision notice.

Kevin Dunion
Scottish Information Commissioner
20 September 2007



Appendix

Relevant statutory provisions

The Environmental Information (Scotland) Regulations 2004

5 Duty to make available environmental information on request

- (1) Subject to paragraph (2), a Scottish public authority that holds environmental information shall make it available when requested to do so by any applicant.

11 Personal data

(...)

- (2) To the extent that environmental information requested includes personal data of which the applicant is not the data subject and in relation to which either the first or second condition set out in paragraphs (3) and (4) is satisfied, a Scottish public authority shall not make the personal data available.
- (3) The first condition is –
 - (a) in a case where the information falls within paragraphs (a) to (d) of the definition of "data" in section 1(1) of the Data Protection Act 1998 that making the information available otherwise than under these Regulations would contravene –
 - (i) any of the data protection principles; or
 - (ii) section 10 of that Act (right to prevent processing likely to cause damage or distress) and; in all the circumstances of the case, the public interest in making the information available is outweighed by that in not doing so; and



- (b) in any other case, that making the information available otherwise than under these Regulations would contravene any of the data protection principles if the exemptions in section 33A(1) of the Data Protection Act 1998 (which relate to manual data held by public authorities) were disregarded.

(...)

Data Protection Act 1998

1 Basic interpretative provisions.

- (1) In this Act, unless the context otherwise requires—

(...)

“personal data” means data which relate to a living individual who can be identified—

- (a) from those data, or
- (b) from those data and other information which is in the possession of, or is likely to come into the possession of, the data controller,

and includes any expression of opinion about the individual and any indication of the intentions of the data controller or any other person in respect of the individual

(...)

Schedule 2 - Conditions relevant for purposes of the first principle: processing of any personal data

- 6(1) The processing is necessary for the purposes of legitimate interests pursued by the data controller or by the third party or parties to whom the data are disclosed, except where the processing is unwarranted in any particular case by reason of prejudice to the rights and freedoms or legitimate interests of the data subject.



Nature Conservation (Scotland) Act 2004

1 Duty to further the conservation of biodiversity

- (1) It is the duty of every public body and office-holder, in exercising any functions, to further the conservation of biodiversity so far as is consistent with the proper exercise of those functions.