

Decision Notice



Decision 282/2013 Mr G and the Scottish Ministers

Rural payments: information about a farm code

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Summary

On 25 July 2013, Mr G asked the Scottish Ministers (the Ministers) for the correspondence they held regarding a specific farm code. The Ministers failed to respond and, following a review, withheld the information requested in terms of section 11 of the EIRs on the basis that it was personal data, disclosure of which would breach the data protection principles.

Following an investigation, the Commissioner found that the Ministers had been entitled to withhold the information.

Relevant statutory provisions

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

The Environmental Information (Scotland) Regulations 2004 (the EIRs) regulations 2(1) (paragraphs (a) and (c) of definition of "environmental information"); 5(1) and (2)(b) (Duty to make available environmental information on request); 6(1)(b) (Form and format of information); 10(3) (Exceptions from duty to make environmental information available); 11(1), (2), (3)(a)(i) and (3)(b) (Personal data)

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

1. On 25 July 2013, Mr G wrote to the Ministers and in relation to the allocation of a specific farm code (for the administration of Rural Payments), requested the following information:
... all written and electronic correspondence with regard to the original farm code now in possession of my relation.
2. On 28 August 2013, Mr G wrote to the Ministers again, requesting a review on the basis that they had failed to respond.



3. The Ministers notified Mr G of the outcome of their review on 20 September 2013. They apologised for their failure to respond and informed Mr G that the request fell to be dealt with in terms of the EIRs. The Ministers explained that they were withholding the information in terms of regulation 11(2) of the EIRs, on the basis that disclosure would contravene the data protection principles.
4. On 26 September 2013, Mr G wrote to the Commissioner's office, stating that he was dissatisfied with the outcome of the Ministers' review and applying to the Commissioner for a decision in terms of section 47(1) of FOISA. By virtue of regulation 17 of the EIRs, Part 4 of FOISA applies to the enforcement of the EIRs as it applies to the enforcement of FOISA, subject to certain specified modifications.
5. The application was validated by establishing that Mr G made a request for information to a Scottish public authority and applied to the Commissioner for a decision only after asking the authority to review its response to that request.

Investigation

6. On 9 October 2013, the Ministers were notified in writing that an application had been received from Mr G and were asked to provide the Commissioner with any information withheld from him. The Ministers responded with the information requested and the case was then allocated to an investigating officer.
7. The investigating officer subsequently contacted the Ministers, giving them an opportunity to provide comments on the application (as required by section 49(3)(a) of FOISA) and asking them to respond to specific questions. The Ministers were asked to justify their reliance on any provisions of FOISA and the EIRs they considered applicable to the information requested, with particular reference to the requirements of regulation 11 of the EIRs.
8. The Ministers responded, providing submissions to the effect that the request fell to be dealt with in terms of the EIRs and, as a result, applying the exemption in section 39(2) of FOISA (see below). They also provided submissions to support their position that the information was personal data and excepted from disclosure in terms of regulations 11(1) and (2) of the EIRs. In relation to some of the information withheld in terms of regulation 11(2), the Ministers also submitted that it was excepted in terms of regulation 10(5)(f) of the EIRs.
9. The Ministers also submitted that certain information was covered by regulation 6(1)(b) of the EIRs, on the basis that it was publicly available and easily accessible from the Registers of Scotland, on the payment of a fee.
10. During the investigation, the Ministers provided Mr G with some of the information previously withheld. Information considered to be Mr G's own personal data was provided in terms of the DPA and not under the EIRs. He was also informed that certain information was available from the Registers of Scotland and given the appropriate contact details.



Commissioner's analysis and findings

11. In coming to a decision on this matter, the Commissioner considered all of the withheld information and the relevant submissions, or parts of submissions, made to her by both Mr G and the Ministers. She is satisfied that no matter of relevance has been overlooked.

FOISA or EIRs?

12. It is clear from the Ministers' correspondence with both Mr G and the Commissioner that any information falling within the scope of the request would be environmental information, as defined in regulation 2(1) of the EIRs. The information in question concerns the allocation of a particular farm code for the purposes of Rural Payments administration.

Section 39(2) of FOISA – environmental information

13. The exemption in section 39(2) of FOISA provides, in effect, that environmental information (as defined by regulation 2(1) of the EIRs) is exempt from disclosure under FOISA, thereby allowing any such information to be considered solely in terms of the EIRs. In this case, the Commissioner accepts that the Ministers were entitled to apply the exemption to the withheld information, given her conclusion that it is properly classified as environmental information.
14. As there is a separate statutory right of access to environmental information available to the applicant in this case, the Commissioner also accepts that the public interest in maintaining this exemption and in dealing with the request in line with the requirements of the EIRs outweighs any public interest in dealing with the request under FOISA. The Commissioner will therefore consider the information in what follows solely in terms of the EIRs.

Regulation 6(1)(b) of the EIRs

15. Regulation 6(1)(b) of the EIRs states that where an applicant requests that information is made available in a particular form or format, a Scottish public authority shall comply with that request unless the information is already publicly available and easily accessible to the applicant in another form or format. As noted above, and as explained to Mr G during the investigation, the Ministers argued that certain information (from title deeds) was publicly available from the Registers of Scotland on the payment of a fee. They explained that they had confirmed its availability with the Registers of Scotland: the Ministers informed Mr G of this during the investigation, providing him with relevant contact details.



16. Mr G did not refer to a specific form or format in his information request or his requirement, but it is apparent from his correspondence that he expected the Ministers to provide him with copies of any relevant information they held. Having considered regulation 6(1)(b) in the context of *The Aarhus Convention: an Implementation Guide*¹ (see pages 74 and 75), the Commissioner accepts that this provision can apply to information available from a public register, such as the Registers of Scotland, at a reasonable cost.
17. In this case, the Commissioner has considered all relevant submissions and noted the relatively small amount of information to which the Ministers applied this provision. In the circumstances, she accepts that the information was (and remains) publicly available and easily accessible to Mr G, by requesting copies from the Registers of Scotland.
18. The Commissioner therefore accepts that the Ministers were entitled to apply regulation 6(1)(b) of the EIRs to the information, and therefore were not required to make it available to Mr G.

Regulation 11(1) of the EIRs - personal information of the applicant

19. The Ministers stated that they could not provide some of the information requested by Mr G as it was excepted under regulation 11(1) of the EIRs. In other words, it comprised Mr G's own personal data. Regulation 11(1) contains an absolute exception (i.e. not subject to the public interest test) in relation to personal data of which the applicant is the data subject.
20. This exception exists under the EIRs because individuals have a separate right to make a request for their own personal data (commonly known as a subject access request) under section 7 of the DPA. The DPA will therefore usually determine whether a person has a right to information about themselves. Therefore, the effect of the exception in regulation 11(1) of the EIRs is not to deny individuals a right of access to information about themselves, but to ensure that the right is exercised under the appropriate legislation.

Is the information under consideration personal data?

21. "Personal data" are defined in section 1(1) of the DPA as "data which relate to a living individual who can be identified from those data, or 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."
22. Having reviewed the information withheld in terms of regulation 11(1) of FOISA, the Commissioner is satisfied the information comprises the personal data of Mr G. Mr G can be identified from the information, which focuses on, and is biographical in relation to, him: consequently, it relates to him. Therefore, it is the Commissioner's view that this information is absolutely excepted from disclosure under regulation 11(1) of the EIRs: as such, this information was correctly withheld by the Ministers.

¹ http://www.unece.org/fileadmin/DAM/env/pp/ppdm/Aarhus_Implementation_Guide_second_edition_text_only.pdf



23. The Commissioner notes that, during the investigation, this information was provided to Mr G under his subject access rights in terms of section 7 of the DPA.
24. The Ministers applied the exception in regulation 11(2) of the EIRs to the remainder of the information.

Regulation 11(2) of the EIRs - personal data of another person

25. Regulation 11(2) excepts personal data from disclosure where the applicant is not the data subject in certain specified circumstances. These include where disclosure would contravene any of the data protection principles in Schedule 1 of the DPA. The Ministers argued that disclosure in this case would breach the first data protection principle.

Is the information under consideration personal data?

26. The definition of “personal data” is considered in paragraph 21 and 22 above. Having considered the information withheld under this exception and the submissions received from the Ministers on this point along with the withheld information, the Commissioner accepts that the information meets the requirements set out in those paragraphs in relation to the individual concerned and therefore comprises that individual’s personal data as defined by section 1(1) of the DPA.

The first data protection principle

27. The first data protection principle states that personal data shall be processed fairly and lawfully. The processing in this case would be disclosure of the information into the public domain in response to Mr G’s request. The first principle also states that personal data shall not be processed unless at least one of the conditions in Schedule 2 to the DPA is met (the full text of the principle is set out in the Appendix). A condition in Schedule 3 to the DPA would also require to be met if the information were sensitive personal data as defined in section 2 of the DPA, but the Commissioner is satisfied that none of the withheld personal data fall into that category.
28. The Commissioner will now consider whether there are any conditions in Schedule 2 to the DPA which would permit the withheld personal data to be disclosed. If any of these conditions can be met, she must then consider whether disclosure would be fair and lawful.
29. There are three separate aspects to the first data protection principle: (i) fairness, (ii) lawfulness and (iii) the conditions in the schedules. These three aspects are interlinked. For example, if there is a specific condition in Schedule 2 which permits the personal data to be disclosed, it is likely that the disclosure will also be fair and lawful.



Can any of the conditions in Schedule 2 be met?

30. In the circumstances, it appears to the Commissioner (and the Ministers) that condition 6 in Schedule 2 is the only one which might permit disclosure to Mr G. Condition 6 allows personal data to be processed if 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 (the individual to whom the data relate).
31. There are, therefore, a number of different tests which must be satisfied before condition 6 can be met. These are:
 - a. Is Mr G pursuing a legitimate interest or interests?
 - b. If yes, is the processing involved necessary for the purposes of those interests? In other words, is the processing proportionate as a means and fairly balanced as to ends, or could these interests be achieved by means which interfere less with the privacy of the data subject(s)?
 - c. Even if the processing is necessary for Mr G's legitimate interests, is that processing nevertheless unwarranted in this case by reason of prejudice to the rights and freedoms or legitimate interests of the data subjects?
32. There is no presumption in favour of the disclosure of personal data under the general obligation laid down by section 1(1) of FOISA. Accordingly, the legitimate interests of Mr G must outweigh the rights and freedoms or legitimate interests of the data subject before condition 6 will permit the personal data to be disclosed. If the two are evenly balanced, the Commissioner must find that the Ministers were correct to refuse to disclose the personal data to Mr G.

Is the applicant pursuing a legitimate interest or interests?

33. The Ministers agreed that Mr G might have some interest in obtaining the information requested as it related to the ownership of family land. However, they were unable to comment further in the absence of further information Mr G had been asked to provide them with.
34. Mr G submitted that he wished to know how his relative had obtained the farm code in question. While he also suggested that there had been a breach of the DPA, he was informed that this was a matter for the (UK) Information Commissioner (the ICO) and was given the ICO's contact details.
35. Having considered all relevant submissions she has received on this point, along with the withheld personal data, the Commissioner accepts that Mr G may have a personal interest in knowing how a farm code had been allocated to his relative. However, she does not accept in the circumstances (and on the basis of the submissions provided by Mr G) that this would be of sufficient substance to amount to a legitimate interest for the purposes of condition 6.



36. Given this conclusion, the Commissioner finds that there is no condition in Schedule 2 which would permit disclosure of the personal data under consideration. In the absence of a condition permitting disclosure, that disclosure would be unlawful. Consequently, the Commissioner finds that disclosure would breach the first data protection principle and that the information is therefore exempt from disclosure (and properly withheld) under regulation 11(2) of the EIRs.
37. Given that the Commissioner has concluded that the information still withheld by the Ministers was correctly withheld in terms of regulations 6(1)(b) and 11(2) of the EIRs, she is not required (and does not intend) to consider the exception in regulation 10(5)(f) in relation to that information.

DECISION

The Commissioner finds that the Scottish Ministers complied with Part 1 of the Freedom of Information (Scotland) Act 2002 and with the Environmental Information (Scotland) Regulations 2004 in responding to the information request made by Mr G.

Appeal

Should either Mr G or the Scottish Ministers wish to appeal against this decision, they have the right to 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.

Margaret Keyse
Head of Enforcement
10 December 2013



Appendix

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.

...

- (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 –

...

- (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

...

- (2) Information is exempt information if a Scottish public authority-
- (a) is obliged by regulations under section 62 to make it available to the public in accordance with the regulations; or
- (b) would be so obliged but for any exemption contained in the regulations.

...



The Environmental Information (Scotland) Regulations 2004

2 Interpretation

(1) In these Regulations –

...

"environmental information" has the same meaning as in Article 2(1) of the Directive, namely any information in written, visual, aural, electronic or any other material form on –

(a) the state of the elements of the environment, such as air and atmosphere, water, soil, land, landscape and natural sites including wetlands, coastal and marine areas, biological diversity and its components, including genetically modified organisms, and the interaction among these elements;

...

(c) measures (including administrative measures), such as policies, legislation, plans, programmes, environmental agreements, and activities affecting or likely to affect the elements and factors referred to in paragraphs (a) and (b) as well as measures or activities designed to protect those elements;

...

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.

(2) The duty under paragraph (1)-

...

(b) is subject to regulations 6 to 12.

...

6 Form and format of information

(1) Where an applicant requests that environmental information be made available in a particular form or format, a Scottish public authority shall comply with that request unless-

...



- (b) the information is already publicly available and easily accessible to the applicant in another form or format.

...

10 Exceptions from duty to make environmental information available–

...

- (3) Where the environmental information requested includes personal data, the authority shall not make those personal data available otherwise than in accordance with regulation 11.

...

11 Personal data

- (1) To the extent that environmental information requested includes personal data of which the applicant is the data subject then the duty under regulation 5(1) to make it available shall not apply to those 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
 - ...
 - (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.

...