

**Decision 106/2007 – Mr Victor Muir and Orkney
Islands Council**

***Complaint about public access under section 1 of Land Reform
(Scotland) Act 2003***

**Applicant: Mr Victor Muir
Authority: Orkney Islands Council
Case No: 200601062
Decision Date: 9 July 2007**

**Kevin Dunion
Scottish Information Commissioner**

Kinburn Castle
Doubledykes Road
St Andrews
Fife KY16 9DS

Decision 106/2007 – Mr Victor Muir and Orkney Islands Council

Complaint about public access under section 1 of Land Reform (Scotland) Act 2003 - section 38(1)(a)(Personal Information)

Relevant Statutory Provisions and other Sources

Freedom of Information (Scotland) Act 2002 (FOISA): sections 1(1) (General entitlement) and 38(1)(a) and (5) (definition of “data subject” and “personal data”)(Personal information)

Data Protection Act 1998: section 1(1) (Basic interpretative provisions) (definition of “personal data”)

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

Other sources:

Scottish Ministers’ Code of Practice on the Discharge of Functions by Public Authorities under the Freedom of Information (Scotland) Act 2002: paragraph 54.

Facts

Mr Muir requested from Orkney Islands Council (the Council) all correspondence received by the Council with respect to a complaint about obstructions to public access at his farm. The Council responded by issuing a refusal notice stating that this information was exempt in terms of section 36(2) and 38 of FOISA. Mr Muir was not satisfied with this response and asked the Council to review its decision. The Council carried out a review and, as a result, notified Mr Muir that it upheld its initial decision. Mr Muir remained dissatisfied and applied to the Commissioner for a decision. In the course of the investigation, the Council confirmed that it also considered the information concerned to be Mr Muir’s own personal data and as such exempt under the terms of section 38(1)(a) of FOISA.

Following an investigation, the Commissioner found that the Council had acted accordance with Part 1 of FOISA in withholding this information. He did not require the Council to take any action in response to his decision.

Background

1. On 22 February 2006, Mr Muir made an information request to the Council under FOISA. Mr Muir requested all correspondence presented to the Council with respect to a complaint about obstructions to public access at his farm.
2. The Council replied to this request on 3 March 2006 stating that it held information relevant to the request, but that the information was exempt by virtue of section 38 (Personal information) of FOISA since the information was personal data and disclosure would contravene the data protection principles. The Council also stated that the information was provided in confidence and disclosure would result in an actionable breach of confidence, and therefore the exemption in section 36(2) (Confidentiality) also applied.
3. Mr Muir wrote to the Council on 8 March 2006 asking it to review its response to his information request.
4. The Council replied on 24 March 2006 upholding on review its initial decision to withhold the information on the grounds of sections 36(2) and 38 of FOISA.
5. On 15 June 2006, Mr Muir contacted my Office to express his dissatisfaction with the response from the Council and to make an application for a decision in terms of section 47(1) of FOISA. He stated that he wished access to correspondence to assess the validity of any accusation, which he believed to be possibly false and unjust.
6. Mr Muir's appeal was validated by establishing that he had made a valid information request to a Scottish public authority and had made an application to me only after asking the public authority to review its response to his request. The case was allocated to an investigating officer.

The Investigation

7. The investigating officer formally contacted the Council on 27 June 2006 in terms of section 49(3)(a) of FOISA asking for its comments on the application and a copy of the material withheld from Mr Muir.

8. The Council responded by letter of 17 July 2006 with detailed submissions and a copy of the information withheld from Mr Muir (a single letter). This letter made a complaint about public access in respect of Mr Muir's farm.
9. This letter contained personal data relating to the complainant, such as their name, address, and details of their involvement in the matter. The Council stated that disclosure of this letter would breach section 38(1)(b) of FOISA (read in conjunction with sections 38(2)) since it would breach the first, second and sixth data protection principles.
10. The Council also stated that the letter provided information in respect of a potential breach of section 1 of the Land Reform (Scotland) Act 2003 ("the 2003 Act") and was submitted in confidence and to assist the Council in performance of its statutory duties. The Council submitted that, as this duty of confidence was actionable, the letter was exempt under section 36(2) of FOISA.
11. In the course of the investigation, the investigating officer contacted both the applicant and public authority noting that it appeared to him that the information contained in the letter was personal data relating to Mr Muir. He pointed out that it was therefore likely that this information was exempt information under the terms of section 38(1)(a) of FOISA.
12. In a series of exchanges, the investigating officer provided detailed advice to Mr Muir about his rights under the DPA and how to pursue a request for his own personal data using these.
13. In further correspondence, the Council confirmed that it also wished to rely upon the exemption in section 38(1)(a) when withholding the information requested by Mr Muir.

The Commissioner's Analysis and Findings

14. 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 Mr Muir and the Council and I am satisfied that no matter of relevance has been overlooked.

Application of section 38(1)(a) – Personal information (of which applicant is data subject)

15. Section 38(1)(a) of FOISA contains an absolute exemption in relation to personal data of which the applicant is the data subject. This is an absolute exemption and therefore is not subject to the public interest test. Consequently, if I find that section 38(1)(a) applies, I cannot order the Council to disclose under FOISA the information contained within the relevant letter to Mr Muir.
16. "Personal data" is defined in section 1(1) of the DPA, which is reproduced in the Appendix below.
17. In looking at the information withheld in this case, it is clear that it is a letter which has Mr Muir at its focus. The letter relates directly to Mr Muir's personal life, his property and his activities. Although the letter also contains information that is personal data relating to the complainant, the document in its entirety clearly relates in a significant sense to Mr Muir.
18. Having considered the submissions from the Council together with the letter which has been withheld from Mr Muir, I am satisfied that the information withheld does constitute personal data of which Mr Muir is the subject, and it is therefore exempt in its entirety from release under section 38(1)(a) of FOISA. As such, I am unable to order the release of this information.
19. Should Mr Muir wish to request his own personal data, he is entitled to do so under the terms of section 7 of DPA. These provisions provide for access to personal data (subject to certain exemptions) by the data subject alone. This is therefore quite a different right of access to that under section 1(1) of FOISA, which provides for the disclosure of information into the public domain unless an exemption contained in Part 2 applies.
20. The effect of section 38(1)(a) of FOISA is to ensure that use of the data subjects' rights under DPA remains the appropriate route for access to their own personal data.
21. Mr Muir questioned why the Council, on receiving his initial request or review, had not informed him of his right to make a subject access request under the DPA. I consider that on receipt of Mr Muir's request for information the Council should have recognised that it contained a request for his own personal data and, while refusing access under the terms of FOISA, advising him of how to make a subject access request under the DPA.
22. Paragraph 54 of the Scottish Ministers' Code of Practice on the Discharge of Functions by Public Authorities under the Freedom of Information (Scotland) Act 2002 (commonly known as "the section 60 code") provides guidance on how a Scottish public authority should deal with a request that relates to personal data. It is clear that the Council failed to follow this guidance in this instance.

23. During the investigation Mr Muir was informed of the investigator's view that the withheld information contained his personal data and as such that should he wish access to it he should make a subject access request under the DPA to the Council. I understand that Mr Muir has made such a request.
24. I would advise Mr Muir that, if he wishes to pursue access to withheld information in relation to this case, he does so within the scope of the DPA.
25. Mr Muir has been advised that it is the UK Information Commissioner's Office (ICO) which is responsible for the DPA and, should it be necessary, that he make contact with the ICO in order to seek advice in relation to this data.

Application of other exemptions

26. Having concluded that the information requested by Mr Muir is entirely exempt under the terms of section 38(1)(a) of FOISA, it is not necessary for me to consider whether the other exemptions raised in this case were correctly applied.

Decision

I find I find that the Orkney Islands Council (the Council) complied with Part I of the Freedom of Information (Scotland) Act 2002 (FOISA) by withholding information requested by Mr Muir. I have found that this information is exempt from disclosure under the terms section 38(1)(a) of FOISA.

I do not require any action to be taken by the Council in response to this decision.

Appeal

Should either the Council or Mr Muir wish to appeal against this decision, there is an appeal to the Court of Session on a point of law only. Any such appeal must be made within 42 days of receipt of this notice.

Kevin Dunion
Scottish Information Commissioner
9 July 2007

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.

38 Personal information

- (1) Information is exempt information if it constitutes-
- (a) personal data of which the applicant is the data subject;
- [...]
- (5) In this section-
- [...]
- "data subject" and "personal data" have the meanings respectively assigned to those terms by section 1(1) of that Act;

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

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