



Scottish Information
Commissioner

**Decision 126/2007 Mr Rob Edwards of the Sunday
Herald and the Scottish Executive**

*Details of the 100 farmers or farm businesses receiving the greatest
agricultural grants and subsidies in Scotland between 2000 and
2004, and the amounts they received under each scheme.*

**Applicant: Mr Rob Edwards of the Sunday Herald
Authority: Scottish Executive
Case No: 200501683
Decision Date: 31 July 2007**

**Kevin Dunion
Scottish Information Commissioner**

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Decision 126/2007 Mr Rob Edwards of the Sunday Herald and the Scottish Executive

Details of the 100 farmers or farm businesses receiving the greatest agricultural grants and subsidies in Scotland between 2000 and 2004, and the amounts they received under each scheme - information withheld as exempt under sections 26(b) and 38(1)(b) of the Freedom of Information (Scotland) Act 2002 – Commissioner required disclosure

Relevant Statutory Provisions and Other Sources

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) (General entitlement); 26(b) (Prohibition on disclosure); 38(1)(b) (Personal information).

Data Protection Act 1998 (DPA) sections 1(1) (definition of “personal data”) (Basic interpretative provisions), Schedule 1, Part 1, paragraph 1 (the first data protection principle) and Schedule 2, condition 6(1) (Conditions relevant for purposes of the first principle: processing of any personal data).

Environmental Information (Scotland) Regulations 2004 (EIRs) regulations 2(1)(a) and 2(1)(c)

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

Facts

Mr Edwards, Environment Editor of the Sunday Herald, asked the Scottish Executive (the Executive) to supply him with the names and locations of the 100 individual farms and farm businesses in Scotland who received the highest level of agricultural grants and subsidies between 2000 and 2004, along with the amounts they each received under each scheme.

The Executive refused to provide this information, claiming that it was exempt from disclosure under the terms of sections 26(b) and 38(1)(b) of FOISA. This decision was upheld in full following an internal review. Mr Edwards was dissatisfied with the Executive’s responses and lodged an application for a decision by the Commissioner.



Following an investigation, the Commissioner found that the Executive had not dealt with Mr Edwards' request for information in accordance with Part 1 of FOISA and required the release of the information requested by Mr Edwards.

Background

1. On 9 March 2005, Mr Edwards, asked the Executive to supply him with the names and location of the 100 individual farms and farm businesses in Scotland who received the highest level of agricultural grants and subsidies between 2000 and 2004, along with the amounts they each received under each scheme.
2. The Executive responded to this request for information on 7 April 2005. It notified Mr Edwards that it held information on the individual claimants for the various agricultural grant and subsidy schemes administered by it (around 30 in all) and provided some general information about these schemes.
3. The Executive explained that it held a number of different databases that were designed for individual claims for groups of schemes rather than the production of analytical data such as the aggregation of individual payments across all schemes. However, the Executive confirmed that it did hold information on total payments under the EU Common Agricultural Policy (CAP) Schemes. The Executive also advised Mr Edwards that the EU subsidies administered under the Integrated Administration and Control System (IACS) account for the bulk of the money paid to farmers and crofters, and so the top 100 recipients are likely to be identified primarily from IACS payments.
4. The Executive went on to state that it was withholding this information in terms of section 38 and 26 of FOISA. Insofar as some of the information relevant to Mr Edwards' request contained personal data about third parties, the Executive claimed that it was exempt in terms of section 38(1)(b) of FOISA as disclosure would breach the data protection principles contained in the Data Protection Act 1998 (DPA).
5. Section 26(b) of FOISA states that information is exempt information if its disclosure by a public authority (otherwise than under FOISA) would be incompatible with a Community obligation. The Executive explained that the information forms part of the IACS subsidy database which has been established in accordance with Council Regulation EEC No 3508/92 and that Articles 9 and 9a of this Regulation provide that Member States must take the measures necessary to ensure protection of the data collected.



6. The Executive did provide Mr Edwards with details of payments of one grant scheme; the Agricultural Processing and Marketing Grant Scheme (APMGS), and advised him that summary information of IACS payment schemes is available and published annually. The information provided detailed the names of farms and farm businesses and the total sums received by these under the APMGS over the period 2000 and 2004.
7. Mr Edwards sought a review of the Executive's decision on 8 April 2005.
8. On 6 May 2005, the Executive wrote to Mr Edwards to notify him of the outcome of its review. The Executive upheld in full its decision to withhold the information in terms of section 38 and 26 of FOISA.
9. On 10 May 2005, Mr Edwards applied to the Scottish Information Commissioner for a decision as he was dissatisfied with the response he had received from the Executive. His application questioned why the Executive decided not to provide him with the information he had requested when similar information had been released by the Department for Environment Food and Rural Affairs (Defra) in relation to subsidies paid to English farmers, and such information was also made publicly available in Sweden and Ireland. Mr Edwards argued that it is in the public interest that recipients of agricultural subsidies should be named.
10. The case was allocated to an investigating officer and Mr Edwards' application was validated by establishing that he had made a request to a Scottish public authority (i.e. the Executive), and had sought a decision from the Commissioner only after requesting the authority to review its decision to withhold information

The Investigation

11. I have received a number of applications for decision in relation to the disclosure of details of individual agricultural subsidy payments. Although my decisions will consider the specific terms of each case in its own right, the general questions raised by these cases have been investigated together by my office.



12. In relation to Mr Edwards' application, a letter was sent to the Executive on 11 May 2005, in terms of section 49(3)(a) of FOISA, giving notice that this application had been received and that an investigation into the matter had begun. The Executive was invited to comment on the matters raised by Mr Edwards and on the application as a whole. This letter also noted the similarity between Mr Edwards' case and another already under consideration, and advised the Executive that these cases would be investigated together.
13. The Executive responded on 2 June 2005. It referred the investigating officer to submissions dated 4 May 2005, which were sent to my office in respect of the other ongoing investigation concerning details of agricultural subsidy payments. The Executive also provided further background information in response to questions raised in relation to the particulars of Mr Edwards' case.
14. In subsequent correspondence with the investigating officer, the Executive provided further background information on its views on the application of exemptions to the information requested by Mr Edwards on the administration of grants and subsidies, and on the extent of the application of EC Regulation No. 3508/92.
15. In the course of the investigation, Mr Edwards confirmed with my office that he was content for his information request to be interpreted as relating only to CAP payment information. In my findings below, I will therefore not consider whether any information should be disclosed relating to payments falling outside the CAP umbrella.
16. Mr Edwards also provided further clarification in relation to his request for the "location" of the recipients of subsidies and grants. He confirmed that he did not wish to receive the individual addresses of the recipients of payments. Instead, he indicated that he would wish to receive details of locations in terms of the 8 broad regions within Scotland (Argyll & Western Isles, Central, Grampian, Highland, Northern & Northern Isles, South Eastern, South Western, and Southern) that are used by the Executive when publishing subsidy information relating to calendar year 2005 onwards.

The Commissioner's Analysis and Findings

17. 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 Edwards and the Executive and I am satisfied that no matter of relevance has been overlooked.



18. In what follows below, I will address a number of questions in turn.
 - a) What information must I consider in this case?
 - b) Is this information environmental information? (and so should Mr Edwards' information request have been handled under FOISA or the Environmental Information (Scotland) Regulations 2004 (EIRs)?)
 - c) Is this information exempt from disclosure?

Mr Edwards' information request

19. Mr Edwards asked the Executive to list the names and locations of the 100 individual farmers or farm businesses in Scotland who received the highest level of agricultural grants and subsidies between 2000 and 2004, along with the amounts they received under each scheme. In the course of my investigation, Mr Edwards has confirmed that he wishes to access only information relating to payments under the CAP umbrella.
20. The Executive's response to Mr Edwards and its correspondence with my office has confirmed that it administers around 30 farm subsidy and grant schemes. Information about these is held in a number of separate administrative systems.
21. All CAP subsidies (but not grants) are administered through the IACS system. The period requested by Mr Edwards is 2000-2004, the final 5 years prior to the reform of CAP which led to the replacement of a number of individual subsidy schemes with the Single Farm Payment Scheme (SFPS). I understand therefore, that the IACS system would allow the identification of the total subsidies received under CAP schemes by individual farmer or farm business, and the amount received by each business under each individual scheme. I understand that such analysis would be possible for each individual year or, as requested by Mr Edwards, across a 5 year period.
22. On the basis of the Executive's submissions on this case, I accept that it would not be possible to build the type of "top 100" list requested by Mr Edwards across all grant and subsidy schemes, or even across only those that form part of the CAP system.
23. However, the Executive has indicated that the subsidies administered through the IACS system will form the largest payments made to farm businesses, and so the 100 individual farmers or farm businesses receiving the greatest total payments could be identified [with a relatively high degree of accuracy] using only this database.
24. For the purposes of this case, I will therefore consider Mr Edwards' case only to relate to the top 100 recipients of subsidies, when those administered through the IACS database are aggregated, and to the breakdown for each recipient for the amount received under the separate subsidy schemes.



25. Mr Edwards has also asked for the names and locations of the top 100 farmers or farm businesses in receipt of subsidy. His request was unspecific as to the intended meaning of “location” and clarification was never sought by the Executive when responding to Mr Edwards’ request. In the course of my investigation, Mr Edwards has indicated that he does not wish to have access to the individual addresses of the farm businesses and farmers, but he would like to know which region within Scotland they are located in.
26. As such, disclosure in response to Mr Edwards’ request would follow the pattern established in February 2006 when the Executive began to proactively disclose information relating to payments under the SFPS. The Executive’s website makes available the names of all farmers and farm businesses in Scotland that are in receipt of this subsidy and the value of this subsidy in each calendar year, starting from the introduction of the Single Farm Payment in 2005.
27. The Executive’s website details individual payments across the whole of Scotland, but also across 8 regions. Mr Edwards has indicated that he would like his request for location of the 100 listed farmers and farm businesses to be interpreted as seeking confirmation of which of these regions they are based in. I shall interpret Mr Edwards’ request in these terms and consider whether this should be supplied.
28. To summarise, the information I will consider in what follows is a list of the top 100 subsidy recipients (as identified only from the IACS database for administering CAP subsidies, and so excluding grant payments) over the 5 year period 2000-2004. Each entry on this list would include:
 - a) Position in the list (where number 1 is the recipient of the greatest amount).
 - b) Name of the individual farmer or farm business.
 - c) Location of the farmer or farm business (in terms of the 8 regions used by the Executive when publishing details of payments under the Single Farm Payment scheme).
 - d) Total subsidy received across the period 2000-2004.
 - e) Subsidy received under each individual IACS scheme across the period 2000-2004.

FOISA or EIRS?

29. I now turn to consider whether the information identified above should be considered environmental information, and so whether the request should have been dealt with under FOISA or the EIRs.



30. The Executive responded to Mr Edwards' request in terms of FOISA and has subsequently made detailed submissions to me about why it did not consider it appropriate to consider this request in terms of the EIRs.
31. In considering this matter, I have taken into account the comments made by the Scottish Executive, and also taken into account my previous decision *224/2006, Mr Alex Gordon-Duff and the Scottish Executive*. This decision concerned information about payments under the Farm Woodland Premium Scheme. I concluded that, although this scheme involved payments that were associated with environmental aims and measures, information about a payment under this scheme was not environmental information.
32. I have also noted guidance issued by Defra in July 2006 (revised December 2006) on the boundaries between the EIRs and FOI. This guidance suggests that information about the number of agricultural subsidies awarded under a particular scheme would be considered under the terms of freedom of information. It notes that such a request would be about numbers rather than the environmental effect of any subsidy, and as such was sufficiently removed from the environment to bring this information outside the scope of the definition of environmental information. I consider that the same argument might be made in relation to the value of individual subsidies.
33. Having considered decision 224/2006, the Executive's comments in relation to this specific case, and the Defra guidance, I am satisfied in this case that the Executive was correct to respond to Mr Edwards' request for information in terms of FOISA and not the EIRs.
34. I will therefore now turn to consider whether the Executive has appropriately cited the exemptions in section 26(b) and 38(1)(b) of FOSIA in response to this request.

Application of the exemption in section 26(b)

35. Section 26(b) of FOISA exempts information if its disclosure, otherwise than under FOISA, is incompatible with a Community obligation. This is an absolute exemption: if it is held to apply to the information then the public authority is not required to consider the public interest in disclosure of the information.



36. In applying this exemption, the Executive has cited Articles 9 and 9a of Council Regulation EEC No. 3508/92. This Regulation established the integrated administration and control system for certain Community aid schemes. Article 9 states:

" The Member States shall take the measures necessary to ensure protection of the data collected. "

Article 9a requires Member States to ensure that administration and control systems relating to the aid schemes are compatible with the integrated system in certain specified respects.

37. Council Regulation EEC No.3508/92 was repealed in 2003 by Council Regulation EEC No.1782/2003, which brought about reform of the CAP system, and the introduction of the Single Farm Payment in place of the multiple schemes that were previously administered under IACS. However, article 153 of 1782/2003 makes it clear that 3508/92 shall continue to apply to applications for direct payment made before 2005. Articles 9 and 9a therefore remain in force for information about the earlier payments.
38. The key question is whether Articles 9 and 9a impose a Community obligation which would be breached by the disclosure of the information sought by Mr Edwards. I considered this point also in my Decision 224/2006 and reached the view that no such obligation is created or implied, and so would not be breached by disclosure of the information requested relating to the Farm Woodland Premium Scheme. I therefore concluded that the exemption in section 26(b) of FOISA did not apply in that case.
39. The reasoning set out in paragraphs 23 – 28 of decision 224/2006 applies in this case also, and so I will not repeat these arguments in full here. Briefly, however, I took the view that Article 9 refers to information about payments in terms of protecting the data rather than prohibiting its disclosure and I concluded that the UK provides this protection through the Data Protection Act (1998). So, if disclosure of the information would not contravene the data protection principles laid down by the DPA, disclosure would not be incompatible with the obligation imposed by Articles 9 and 9a. For the same reasons fully set out in that decision, I have concluded that the exemption in section 26(b) of FOISA has been wrongly applied by the Executive in this case.

Application of the exemption in section 38(1)(b)

40. Section 38(1)(b), read in conjunction with section 38(2)(a)(i) or (b) states that information is exempt from disclosure if it is personal data and its disclosure to a member of the public otherwise than under FOISA would contravene any of the data protection principles set out in Schedule 1 of the DPA.



41. The Executive has informed me that the recipients of CAP subsidy payments comprise a mix of individuals, sole traders (estimated as around 45% of recipients), partnerships (estimated 45%) and businesses (estimated around 10%). The Executive indicated that whilst it was aware that the information relating to businesses would not normally qualify as "personal information" the information held relating to recipients did not distinguish between the different types. It has indicated that the majority of the information held concerning subsidy payments would constitute personal data.
42. The Executive has submitted that where the information requested by Mr Edwards constitutes personal data, its disclosure would be in breach of the first data protection principle, because this would be unfair to those claimants. Because the information held by the Executive does not allow it to distinguish between sole traders, companies and partnerships, the exemption in section 38(1)(b) has been applied to details of all subsidy recipients as requested by Mr Edwards.

Does information relating to subsidy payments constitute personal data?

43. When considering the exemption in section 38(1)(b), I must first consider whether the information concerned is personal data. In this case, the Executive has stated that some of the information requested by Mr Edwards (that portion that relates to companies) is not personal data. However, it has indicated that a significant proportion of it is personal data, but it is not able to determine the status of any particular recipient from the information it holds.
44. The Executive advised that it would take the additional collation of information, possibly through contacting each organisation concerned, to verify their status, in order for it to determine which of the claimants constitute sole traders, partnerships or limited companies. The Executive considered that this would exceed what it is required to do under FOISA.
45. Having considered the submissions provided by the Executive I am satisfied that the Executive does not hold information about the individual business status of the recipients in a reliable and accurate format.
46. I considered whether information about agricultural subsidy payments should be considered personal data in some detail in my decisions 041/2007 *Mr Jock Meikle and the Scottish Executive* and 224/2006, and my thinking in this case has been informed by similar considerations to those set out in these decisions.



47. Before information can be considered personal data for the purposes of the DPA, two questions must be answered:
- Can a living individual be identified from the data held by the Executive or from that data and other information which is in possession of, or is likely to come into the possession of the Executive?
 - Does the data relate to a living individual?

In the decision of *Durant v the Financial Services Authority* [2003] EWCA Civ 1746 (*Durant*) the English Court of Appeal took the view that for information to relate to an individual it had to be about that individual. The information has to be biographical in a significant sense, i.e. go beyond the recording of the individual's involvement in a matter or event that has no personal connotations.

48. In all the circumstances of this particular case, I am satisfied that the names and locations of the recipients of agricultural subsidy payments together with the amounts received constitute personal data where this information relates to a sole trader.
49. However, in line with my findings in decision 041/2007 (and for the reasons set out in paragraph 47 of that decision), I do not accept that information about subsidy payments made to a partnership (or, indeed, to a company) constitutes personal data.

Would disclosure breach the first data protection principle?

50. I must now go on to consider whether disclosure of the personal data falling under the scope of Mr Edwards' request would breach the first data protection principle.
51. 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 also met. (I have considered the definition of "sensitive personal data" in section 2 of the DPA and do not consider that the information sought by Mr Edwards falls into this category.)
52. With regard to the lawfulness of the processing, it should be noted that the Executive have advanced no argument which would suggest that processing would be unlawful for the purposes of the first data protection principle, beyond the arguments made in relation to the application of section 26(b). As I have not accepted the Executive's claim that a prohibition on disclosure exists within Council Regulation EEC No.3508/92, I am satisfied that the existence of this provision does not entail that disclosure would be unlawful for the purposes of the first data protection principle.



53. According to guidance from the Information Commissioner (“Freedom of Information Awareness Guidance 1”, which can be viewed at <http://www.ico.gov.uk/documentUploads/AG%201%20personal%20info.pdf>), the assessment of fairness includes looking at whether the third party would expect that his/her information might be disclosed to others and/or whether the third party would expect that his/her information would be kept private.
54. The Executive’s submissions assert that disclosure would be unfair because (prior to the introduction of the Single Farm Payment) there was an expectation among subsidy applicants that information relating to payments would not be disclosed to the public at large.
55. The Executive informed me that the reason for its disclosure of information relating to one grant scheme (the Agricultural Processing and Marketing scheme) was that an explicit condition of this scheme is that the Executive reserves the right to publicise the assistance provided under it. As such, the Executive was satisfied that applicants to this scheme would have an expectation that information relating to their grant would be made publicly available.
56. With respect to IACS schemes, however, the Executive has asserted that farmers would have a general expectation that information relating to payments would not be made publicly available. A number of reasons for this such an expectation were identified by the Executive:
 - a) The requirement to protect such information contained in EC Regulation 3508/92.
 - b) The fact that this information had been tightly controlled in the past.
 - c) The wording of data protection statements and other commitments in application forms for the IACS schemes.
57. I would note that IACS application forms for the years 2000, 2001 and 2002 included declarations to be signed by the applicants agreeing that the information they provided may be used in confidence by the Executive for a limited number of purposes. Apart from that, there was no mention of data protection or the Data Protection Act 1998. Nor is there any reference to the Environmental Information Regulations 1992 or any of the Codes of Practice on Access to Government Information under which, conceivably, requests for information regarding the payments could have been made at that time
58. The data protection statements in the 2003 and 2004 IACS guidance booklet, stated that personal data “may also be used when necessary to comply with” FOISA or the EIRs. This wording appears to be inconclusive - depending on the interpretation adopted in relation to DPA and FOISA, this might be interpreted as suggesting that payment details would not be disclosed, or that they may be released.



59. However, the Executive has argued that FOISA only requires compliance [through disclosure] where fair notice has been given under the DPA. Where no such notice has been given, it claims that there is no obligation to disclose under FOISA. Given this reasoning, the Executive concluded that the 2003 and 2004 statements would not enable disclosure in this case because strictly there would be no requirement to release under FOISA given the absence of a DPA notice stating that information would be disclosed.
60. I am unable to accept the argument set out in paragraph 59 above. I acknowledge that the presence or absence of a statement indicating that personal information may be disclosed might influence an individual's expectations about the handling of that information. An individual's expectations might in turn influence the consideration of whether disclosure would be fair. However, I reject the view that it would only be fair to disclose such information under FOISA if an explicit notification had been provided to create an expectation of disclosure.
61. The Executive has advised me, that with the introduction of the SFPS, a revised data protection statement had been included that made clear that information relating to payments would be disclosed. However, with respect to historic information, subsidy recipients' expectations would be based on a different context.
62. Notwithstanding my conclusion that article 9 of Regulation 3508/92 does not create a prohibition on disclosure the purposes of section 26(b) of FOISA, and the inconclusive nature of the data protection statement in the 2004 IACS guidance booklet, I accept that subsidy recipients prior to 2005 may have some expectation that information relating to payments would not be published, and may also have had the expectation that it would not be publicly disclosed. However given the nature of the statements on 2003 and 2004 it could equally be held that claimants were aware that there was at the least the possibility that information may have to be released.
63. The Executive has concluded that given an expectation against disclosure, it would be unfair to disclose this information, and that none of the conditions in schedule 2 Schedule 2 of the DPA can be met in this case.
64. It is my view that condition 6 within Schedule 2 of the DPA is the only condition which might be considered to apply in this case. Condition 6 enables processing (for example, by disclosure) to be considered fair for the purposes of the first data protection principle where it 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.



65. In order to determine whether condition 6 can be met in this case, I must first consider whether the third party or parties to whom the data would be disclosed have a legitimate interest in the processing of the personal data to which the request relates. If legitimate interests are identified, I must go on to consider whether or not these are outweighed by the legitimate interests of the data subject (in this case the subsidy recipients).
66. I accept that Mr Edwards, as both an individual and journalist, has a legitimate interest in knowing the amount paid in publicly-funded subsidies to individual farms and farm businesses. In addition, I also consider that a wider legitimate interest in this information is shared by the general public.
67. Disclosure of this information would contribute to the transparency and oversight of the use of significant amounts of public funding. It would allow understanding of the scale of payments made to individual farms both before and after the reforms that introduced the SFPS.
68. I have considered whether these interests might reasonably be met by any alternative means. In all the circumstances, I have concluded that these legitimate interests cannot be met without disclosure of the subsidy payment details and therefore that disclosure of this data is necessary for the purposes of the legitimate interests.
69. Disclosure would be unfair for the purposes of the first data protection principle, however, if it was unwarranted due to prejudice to the rights or freedoms the competing legitimate interests of the data subject. I must therefore balance the legitimate interests of Mr Edwards and the wider public in having access to the payment information, and the legitimate interests of the data subjects in having it remain private.
70. In all the circumstances of this case, I have concluded that the legitimate interests of the data subjects do not outweigh the countervailing legitimate interests of the applicant.
71. It is my view that a significant legitimate interest exists in terms of ensuring that the public are informed of how the government distributes public funds in order to determine that the monies are being spent correctly. This requirement for transparency and accountability is particularly relevant in the case of agricultural subsidies which account for significant amounts of public monies (more than £433 million were allocated in 2005) and which are consequently of great interest to the general public. I consider that this wider legitimate interest held by the public outweighs the competing interests of the claimants in this case.



72. In reaching this decision, I have recognised that subsidy applicants might reasonably have an expectation that this information (for the period 2000-2004) would not be disclosed. However, I have noted that the subsidy information, while a factor in determining sole traders' personal income, essentially relates to their business rather than personal activities. Given the significant legitimate interest in understanding how significant amounts of public funding are spent, I do not consider the disclosure of the information requested by Mr Edwards to be unwarranted.
73. When reaching this view, I have also taken into consideration comments made by the Information Commissioner's Office (ICO) to my office in the course of my investigation. The ICO noted that:
- “In considering whether the principle is breached the interests of individuals should be balanced against the public interest in disclosing payments made out of public funds, for example to ensure they have been made correctly. A distinction can be drawn between matters which relate to a person's business circumstances and those which are intrinsically personal. In this instance details of a subsidy from public funds paid to a person operating in a business capacity may be justified given these counter balancing concerns.”
74. In all the circumstances of the case, I am satisfied that in this case disclosure of the information requested by Mr Edwards would be fair for the purposes of the first data protection principle. Therefore, I have concluded that the exemption in section 38(1)(b) does not apply to any of the information requested by Mr Edwards. I now require the disclosure of this information.

Decision

I find that the Scottish Executive failed to comply with the requirements of Part 1 of the Freedom of Information (Scotland) Act 2002 (FOISA) in responding to Mr Edwards' information request.

I have found that the Executive wrongly applied the exemptions in section 26(b) and 38(1)(b) [read in conjunction with section 38(2)(a)(i) or (b)] to this information, and so it failed to comply with section 1(1) by withholding it from Mr Edwards.

I now require the Executive to disclose the information requested by Mr Edwards in the form described in paragraph 28 of this decision within 45 days of the receipt of this decision.



Appeal

Should either Mr Edwards or the Executive 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 decision notice.

Kevin Dunion
Scottish Information Commissioner
31 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.

26 Prohibitions on disclosure

Information is exempt information if its disclosure by a Scottish public authority (otherwise than under this Act)-

- (b) is incompatible with a Community obligation; or

38 Personal information

- (1) Information is exempt information if it constitutes-
 - (b) personal data and either the condition mentioned in subsection (2) (the "first condition") or that mentioned in subsection (3) (the "second condition") is satisfied;
- (2) The first condition is-
 - (a) in a case where the information falls within any of paragraphs (a) to (d) of the definition of "data" in section 1(1) of the Data Protection Act 1998 (c.29), that the disclosure of the information to a member of the public otherwise than under this Act would contravene-
 - (i) any of the data protection principles; or

[...]
 - (b) in any other case, that such disclosure would contravene any of the data protection principles if the exemptions in section 33A(1) of that Act (which relate to manual data held) 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 1: The data protection principles

Part 1: The principles

1. Personal data shall be processed fairly and lawfully and, in particular, shall not be processed unless –

(a) at least one of the conditions in Schedule 2 is met, and

(b) in the case of sensitive personal data, at least one of the conditions in Schedule 3 is also met.

...

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.



The Environmental Information (Scotland) Regulations 2004

Interpretation

2. - (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;