

# Decision Notice



Decision 088/2008 Mr WH Mullin and the Fisheries Research Service

Names of complainants

Reference No: 200800038  
Decision Date: 22 July 2008

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**Kevin Dunion**  
Scottish Information Commissioner

Kinburn Castle  
Doubledykes Road  
St Andrews KY16 9DS  
Tel: 01334 464610



## Summary

Mr Mullin asked for the details of the persons who had submitted complaints about activities taking place on Loch Reiff from the Fisheries Research Service. The Fisheries Research Service refused to give him this information on the basis that it was exempt under section 38(1)(b) of FOISA.

Following an investigation, the Commissioner found that the Fisheries Research Service had been entitled to withhold the information from Mr Mullin.

## Relevant statutory provisions and other sources

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Freedom of Information (Scotland) Act 2002 (FOISA): section 1(1) (General entitlement) and 38(1)(b), (2)(a)(i) and (b) (Personal information)

Data Protection Act 1998 (DPA): section 1 (Basic interpretative provisions) (definition of personal data); schedules 1 (The data protection principles) (the first data protection principle) and 2 (Conditions relevant for purposes of the first principle: processing of any personal data) (condition 6(1))

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

## Background

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1. Before describing the information request under consideration in this case, it will be helpful to explain the context in which this was made.
2. The Fisheries Research Service, on behalf of the Scottish Ministers (the Ministers), licences certain activities carried out below the tidal level of mean high water springs. In 2007, it received a number of complaints relating to possibly unlicensed activities being carried out in Loch Reiff in the Scottish Highlands. As a result of the complaints made, it sent a letter to Mr Mullin on 8 November 2007, asking him to confirm whether he was responsible for, or involved in, the activities carried out in Loch Reiff.

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3. Mr Mullin strongly refuted any allegations of his involvement in the activities about which the Fisheries Research Service had received complaints, and, on 10 November 2007, requested details of those making complaints or implicating him in relation to the activities in order to enable him “to take appropriate action”. It is to these requests this application relates.
4. The Fisheries Research Service replied to Mr Mullin on 5 December 2007 and withheld the information on the basis that it was exempt from disclosure under section 38 of FOISA. The Fisheries Research Service went on to explain that, to the extent that the information includes personal data as defined in section 1 of the Data Protection Act 1998 (the DPA), this information is exempt where disclosure would contravene any of the data protection principles. The Fisheries Research Service stated that, in its view, to release the information requested by Mr Mullin would breach the first data protection principle. Although the Fisheries Research Service did not explicitly state it, the Commissioner has taken from its response that it wished to claim that the exemption in section 38(1)(b) (read in conjunction with 38(2)(a)(i) or (b)) of FOISA applied to the information requested.
5. On 6 December 2007, Mr Mullin wrote to the Fisheries Research Service requesting a review of its decision. In particular, Mr Mullin stated that it was a matter of fairness for him to know the identities of those individuals who had made complaints.
6. On 7 January 2008, the Fisheries Research Service notified Mr Mullin of the outcome of its review. The Fisheries Research Service explained to Mr Mullin that three complaints about work being carried out in Loch Reiff had been received, one of which had been received via another agency of the Scottish Ministers.
7. The letter went on to address the second part of Mr Mullin’s request for information, which sought the details of the person or persons who had implicated his name in work carried out upon Loch Reiff. It stated that the Fisheries Research Service could find no record of any person mentioning Mr Mullin’s name in connection with work carried out upon Loch Reiff. By way of explanation, the Fisheries Research Service stated that it had received further information that linked another individual with work carried out upon Loch Reiff, who should have received a letter similar to that received by Mr Mullin on 8 November 2007, but contrary to the Fisheries Research Service’s own procedures this had not happened.
8. On 8 January 2008, Mr Mullin wrote to the Commissioner, stating that he was dissatisfied with the outcome of the Fisheries Research Service’s review and applying to him for a decision in terms of section 47(1) of FOISA.
9. The application was validated by establishing that Mr Mullin had made a request for information to a Scottish public authority and had applied to the Commissioner for a decision only after asking the authority to review its response to that request.



## The investigation

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10. On 11 January 2008, and in line with agreed practice, the Ministers were notified in writing that an application had been received from Mr Mullin in relation to the Fisheries Research Service and were asked to provide the Commissioner with specified items of information required for the purposes of the investigation. The Ministers responded on behalf of the Fisheries Research Service with the information requested and the case was then allocated to an investigating officer.
11. The investigating officer subsequently contacted the Ministers, asking them to provide comments on the application in terms of section 49(3)(a) of FOISA and to respond to specific questions on the application.
12. The Ministers responded to the investigating officer's letter, providing comments on the application as a whole. The Ministers provided comments on their application of the exemption in section 38(1)(b) to the information held. Finally, the Ministers provided details of the search methods used to ascertain that no further information was held by the Fisheries Research Service relating to Mr Mullin's request.
13. Mr Mullin provided detailed comments on the merits of the case in his application to the Commissioner, and contacted the Commissioner during the course of the investigation clarifying specific points. These are referred to, where appropriate, below.

## The Commissioner's Analysis and Findings

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14. In coming to a decision on this matter, the Commissioner has considered all of the information and the submissions that have been presented to him by Mr Mullin and the Ministers and is satisfied that no matter of relevance has been overlooked.

### Mr Mullin's requests for information

15. Mr Mullin sought the names and addresses of the "several complainants" mentioned in the Fisheries Research Service's letter to Mr Mullin dated 8 November 2007, and details of the person or persons who had implicated Mr Mullin's name in relation to work carried out upon Loch Reiff. In what follows, the Commissioner considers the two parts of this request in turn.

### Mr Mullin's first request

16. In his first request, Mr Mullin asked for the names and addresses of the complainants mentioned in the Fisheries Research Service's letter to him of 10 November 2007.



17. In the Fisheries Research Service's responses to Mr Mullin, and the Minister's subsequent submissions to the Commissioner, it was noted that, in total, three complaints were made relating to activities carried out in Loch Reiff. Of those three complaints, the name and address of only one of the complainants was held in their records. The Commissioner's first task is to determine whether details of the remaining two complainants are held by the Fisheries Research Service.

#### **Whether further information is held**

18. In a letter to the Ministers dated 11 February 2008, the Commissioner asked that the Ministers provide him with a summary of the search methods used by the Fisheries Research Service to determine whether further details of the remaining two complainants were held.
19. In their response, the Ministers stated that the Fisheries Research Service records on file information is provided by a complainant. However, in cases where anonymity is requested, the complaints are usually reported by telephone and/or by word of mouth, and the Fisheries Research Service would not record the complainant's personal details. A record of any action(s) the Fisheries Research Service instigates following receipt of a complaint is always recorded on file, regardless of how the complaint is received. Historically, most complaints were reported by telephone or by word of mouth, but recently the Fisheries Research Service has more often received letters or e-mails. The remaining two complainants contacted the Fisheries Research by telephone, and so no record was taken of the complainants' personal details.
20. The Commissioner is satisfied with the Ministers' explanation of events and accepts that the Fisheries Research Service holds no further information relating to the remaining two complainants.
21. The Commissioner will now go on to consider whether the Fisheries Research Service were correct in withholding the name and address of the final complainant from Mr Mullin on the basis of the exemption contained in section 38(1)(b).

#### **Section 38: Personal Information**

22. Having considered the information that has been withheld by the Fisheries Research Service, the Commissioner is satisfied that the name and the address of the complainant constitutes that individual's personal data. The individual can be identified from their name and address. The record is biographical in a significant sense and it focuses on the individual. The Commissioner therefore accepts that it relates to the individual in question. He must now consider whether the release of this information would (as the Fisheries Research Service has argued) breach the first data protection principle.
23. There are a number of circumstances in which personal data will be exempt under section 38(1)(b), including (in terms of section 38(2)(a)(i) or (b)) where the disclosure of the information to a member of the public otherwise than under FOISA would contravene any of the data protection principles (which are set out in Schedule 1 to the DPA).



24. The Ministers argued that in this case disclosure of the information would breach the first data protection principle.
25. The first data protection principle states that personal data shall be processed fairly and lawfully and, in particular, shall not be processed unless at least one of the conditions in Schedule 2 to the DPA (see appendix for full text) is met and, in the case of sensitive personal data, at least one of the conditions in Schedule 3 is also met. The Commissioner has considered whether the information under consideration in this case is the complainant's sensitive personal data and is satisfied that it is not.
26. In considering whether disclosure of personal information is fair, the Commissioner will now discuss whether, by disclosing the personal data requested by Mr Mullin, any of the conditions in schedule 2 of the DPA can be met. In particular, the Commissioner will consider condition 6 of schedule 2 of the DPA as he is satisfied that this is the only condition that bears relevance to the information requested.
27. Condition 6 of schedule 2 of the DPA requires a balance to be carried out between the legitimate interests of the individual requiring the data to be processed (in this case Mr Mullin) and the rights and freedoms or legitimate interests of the third party.
28. In their submissions relating to the application of this exemption, the Ministers referred to condition 6 of schedule 2 of the DPA, only so far as to state that processing the personal data of the individual named would be prejudicial to the legitimate interests of the individual concerned. The Ministers provided no further submissions on why they believed the legitimate interests of the complainant would be prejudiced by disclosure.
29. The Commissioner notes that neither the responses of the Fisheries Research Service to Mr Mullin's request, nor the subsequent submissions of the Ministers, provide any detailed arguments on why they contended that disclosure of the information requested would be unfair or unlawful.
30. Mr Mullin, on the other hand, argues that condition 6 would permit the information to be disclosed to him. He holds that, in this case, it is only fair that he learn the identities of those individuals who have (in his view) falsely accused him of carrying out activities on Loch Reiff. The Commissioner accepts that, were there any information to suggest that the named individual implicated Mr Mullin personally in the activities carried out on Loch Reiff, Mr Mullin may feel that he would have a right (i.e. a legitimate interest) to learn the identity of the individual who had accused him.
31. However, in this case, as Mr Mullin has already been advised, there is no evidence to suggest that the individual named by the Fisheries Research Service implicated Mr Mullin in the activities carried out on Loch Reiff.



32. In relation to the legitimate interests of the individual named in the requested information, the Commissioner has considered whether the individual would have any expectation of their personal details being put into the public domain as a result of contacting the Fisheries Research Service about possible activity carried out on Loch Reiff. He has also taken into account the Ministers' account of the way in which such complaints are made to the Fisheries Research Service. Finally, he has noted that, as the individual concerned made no mention of Mr Mullin in their communications with the Fisheries Research Service, it is most unlikely that he or she would have expected Mr Mullin (or any other person) to gain access to their personal information as a result of their complaint.
33. Given that to order disclosure of the name and address of the individual who provided information to the Fisheries Research Service on possibly unlicensed activities on Loch Reiff would in effect be putting their contact details into the public domain, and that retaliation from the parties who were complained against could take place against those who made the complaint, the Commissioner is of the view that to disclose the information in this case would prejudice the rights and freedoms of the individual in question. The Commissioner has weighed up the legitimate interests of both parties, and in this case, has decided that disclosure of details of the complainant would be unwarranted in terms of condition 6 of Schedule 2 to the DPA.
34. The Commissioner has also considered the expectations of the person who made the complaint and is satisfied that disclosure of the information would be unfair. Given that the Commissioner is satisfied that none of the conditions in Schedule 2 can be met, and that the processing would be unfair, he is satisfied that the disclosure of the information to Mr Mullin would breach the first data protection principle. Consequently, he is satisfied that the information is exempt in terms of section 38(1)(b) of FOISA.

#### **Mr Mullin's second request**

35. Mr Mullin also requested details of the individual or individuals who had implicated him in the activities taking place on Loch Reiff. In its response to his request for review, the Fisheries Research Service explained to Mr Mullin that no individual had implicated him in the activities taking place on Loch Reiff that had led to complaints being made. In their submissions to the Commissioner, the Ministers reiterated that this was the case. Having examined the information provided to me during my investigation, the Commissioner is satisfied that no evidence exists to suggest that the Fisheries Research Service holds any records of individuals implicating Mr Mullin in the activities on Loch Reiff.



## **DECISION**

The Commissioner finds that the Fisheries Research Service acted in accordance with Part 1 of the Freedom of Information (Scotland) Act 2002 (FOISA) in responding to the information request made by Mr Mullin.

## **Appeal**

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Should either Mr Mullin or the Fisheries Research Service 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 after the date of intimation of this decision notice.

**Margaret Keyse**  
**Head of Investigations**  
**22 July 2008**





## Appendix

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### 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-

(...)

- (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.