

# Decision Notice



Decision 005/2014 Mrs Isobel Balfour & Mrs Edna Myles and the Keeper of the Registers of Scotland

Title to land

Reference No: 201302022

Decision Date: 21 January 2014

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**Rosemary Agnew**

Scottish Information Commissioner

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## Summary

On 17 June 2013, Mrs Balfour and Mrs Myles (the applicants) asked the Keeper of the Registers of Scotland (the Keeper) for information relating to a title to land. The Keeper provided information to the applicants. Following a review, as a result of which the Keeper stated that further information held by her had previously been provided to the applicants, the applicants remained dissatisfied and applied to the Commissioner for a decision.

Following an investigation, the Commissioner found that generally the Keeper had dealt with the applicants' request in accordance with Part 1 of FOISA.

## Relevant statutory provisions

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Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) and (4) (General entitlement); 16(1)(c) (Refusal of request); 25(1) and (2) (Information otherwise accessible)

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

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1. Before making the information request which is the subject of this decision, representatives of the applicants had been in communication with the Keeper regarding the rectification of a particular title to land. On 4 April 2013, the representatives wrote to the Keeper seeking documentation relating to the initial application to register that title.
2. In response, the Keeper provided information, confirming that it was incomplete. This was because there had been an error in the archiving process: only 13 of the 36 relevant pages had been scanned into the electronic archive (where all of the Keeper's records were held). The remainder were no longer held.
3. On 17 June 2013, the applicants' representatives made a further request to the Keeper for the whole of the archive in relation to the title in question.
4. The Keeper responded on 24 June 2013, enclosing what was described as "all of the letters and email correspondence Registers of Scotland holds in its archive relating to the subject".



5. On 18 July 2013, the applicants wrote to the Keeper requesting a review of her decision. They did not accept that the Keeper had provided them with all the documents they required. They referred to the information described as “missing” in the Keeper’s response to the 4 April 2013 request, and also to the information provided with that response.
6. The Keeper notified the applicants of the outcome of her review on 13 August 2013 and upheld the initial response. The Keeper stated that the applicants had been provided with all of the information she held in relation to the title in question. She also stated that it was not the role of an FOI review to provide again the information already provided in response to the request of 4 April 2013.
7. On 26 August 2013, the applicants wrote to the Commissioner, stating that they were dissatisfied with the outcome of the review and applying to the Commissioner for a decision in terms of section 47(1) of FOISA.
8. The application was validated by establishing that the applicants 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. The case was then allocated to an investigating officer.

## Investigation

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9. On 11 September 2013, the Keeper was notified in writing that an application had been received from the applicants. She was asked to provide the Commissioner with a copy of the archive in question along with a full inventory.
10. The investigating officer also gave the Keeper an opportunity to provide comments on the application, as required by section 49(3)(a) of FOISA. The Keeper was asked to describe the steps taken to identify and locate the requested information.
11. The Keeper provided the copy documentation as requested, along with her submissions. Submissions were also received from the applicants, highlighting their concerns in relation to the information provided (and the information they believed should have been provided).

## Commissioner’s analysis and findings

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12. In coming to a decision on this matter, the Commissioner considered the relevant submissions, or parts of submissions, made to her by both the applicants and the Keeper. She is satisfied that no matter of relevance has been overlooked.



## Section 1(1) of FOISA

13. In order to comply with section 1(1) of FOISA in relation to any given request, a Scottish public authority must take reasonable steps to identify and locate all information it holds and which falls within the scope of that request. In the absence of an applicable exemption or other relevant provision of Part 1 of FOISA, it must provide that information to the applicant. The information to be provided is that held by the authority at the time the request is received, as defined in section 1(4); the authority is not required to create or obtain additional information in response to the request.
14. It must be noted that the accuracy of any information held is not a matter for the Commissioner, nor is the Commissioner able to make findings as to what information *should* be held by the authority (although reasons why information should be held may be of value in carrying out the investigation). The Commissioner's powers are limited to determining whether relevant information is held and, if so, whether it should be released. The authority cannot be required to collate information that it should hold, but does not hold (for example information lost or accidentally destroyed) from external sources.
15. The Keeper provided the Commissioner with full details of the searches that had been carried out to identify and locate any information falling within the scope of the request. The Keeper explained that all of the information was held in the electronic archive and correspondence file systems: paper copies of the relevant documents would be destroyed. A full search was carried out of the electronic archive, the electronic correspondence files and the caseworker email folders and inboxes. The Keeper submitted that she held no further information, in addition to that already provided to the applicants.
16. The investigating officer confirmed that there was no information in the copy archive provided by the Keeper which was not provided to the applicants. Some information provided in response to the 4 April 2013 request was duplicated in responding to the 17 June 2013 request. The applicants expressed concern at this perceived inconsistency of approach. The applicants also identified specific documents they expected to have been found within the archive. The Keeper confirmed that these documents
  - would not have been required as part of the registration process
  - were among the documents which were never archived (and therefore were missing)
  - was pro forma correspondence which would not be archived
  - had been provided to the applicants' representatives already (although it acknowledged some inconsistencies in this approach, by way of oversight), or
  - related to the information request made on behalf of the applicants (and therefore did not form part of the title archive).
17. The Commissioner has considered these submissions carefully. On the documents missing from the archive, the Keeper's submissions appear to be consistent with the inadvertent destruction of documents. It is entirely possible that copies of such documents might still be obtainable by the applicants from other sources (as some of them appear to be).



18. Having considered the Keeper's explanations, the Commissioner accepts that the Keeper took reasonable steps in the circumstances to identify and locate the information she held and which fell within the scope of the applicants' request. On balance, she is also satisfied with the Keeper's responses to the applicants' more specific comments, supporting the conclusion that no further relevant information is held by the Keeper. In this respect, the Commissioner is satisfied that the Keeper dealt with the applicants' request in accordance with Part 1 of FOISA.
19. As indicated above, the Keeper was not obliged, in response to the applicants' request, to take steps to retrieve the documents missing from the archive.
20. The Commissioner would comment, however, that it would have been good practice (although not a legal requirement) for the Keeper to have provided the applicants with clear schedules of the documents sent to them, at the time of the sending. Although the applicants now have copies of the schedules, these were only made available to the applicants during the Commissioner's investigation.

#### **Section 25(1) of FOISA**

21. Under section 25(1) of FOISA, information which an applicant can reasonably obtain other than by requesting it under section 1(1) of FOISA is exempt information. The exemption in section 25 is absolute, in that it is not subject to the public interest test set out in section 2(1)(b) of FOISA.
22. The Commissioner notes that some of the information falling within the scope of the request of 17 June 2013 had previously been provided by the Keeper in response to the request of 4 April 2013. From correspondence with the applicants, the Commissioner is satisfied that they have (and had, at the time of their 17 June request) access to this information.
23. In the circumstances, the Commissioner accepts that some of the information falling within the scope of the applicants' request of 17 June 2013 and not provided by the Keeper in response to that request was otherwise reasonably obtainable by the applicants. Therefore, she concludes that the Keeper was entitled to withhold this information under section 25(1) of FOISA.
24. Nonetheless, the Commissioner understands the confusion caused to the applicants by the fact that the Keeper did (albeit unintentionally) provide the applicants with some documents in duplicate while telling them that she was under no obligation to do so. This confusion may have been compounded by the fact that the Keeper failed to refer to section 25(1) in her review outcome letter of 13 August 2013. However, none of this confusion affects the fact that section 25(1) applied to the information.
25. While she is satisfied that the Keeper was not obliged to comply with the request to the extent that section 25(1) applied, the Commissioner must also find that the Keeper failed to give the applicants notice that she was applying this exemption, as required by section 16(1)(c) of FOISA. She accepts that the underlying reasoning (that the information was in the applicants' possession already) was stated in the review outcome of 13 August 2013.



## **DECISION**

The Commissioner finds that the Keeper of the Registers of Scotland (the Keeper) generally complied with Part 1 of the Freedom of Information (Scotland) Act 2002 (FOISA) in responding to the applicants' information request.

The Commissioner finds that the Keeper failed to comply with Part 1 in giving the applicants notice that she was not obliged to provide information already in the applicants' possession. While she accepts that the Keeper intended (and was entitled) to withhold this information under section 25 of FOISA, the exemption was not cited by the Keeper in responding to the applicants. In this respect, the Keeper failed to comply with section 16(1)(c) of FOISA. In the circumstances, the Commissioner acknowledges that the applicants were not prejudiced in the exercise of their rights under FOISA by this failure and does not require the Keeper to take any action in response.

## **Appeal**

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Should either the applicants or the Keeper of the Registers of Scotland 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.

**Margret Keyse**  
**Head of Enforcement**  
**21 January 2014**



## Appendix

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### 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.
- ...
- (4) The information to be given by the authority is that held by it at the time the request is received, except that, subject to subsection (5), any amendment or deletion which would have been made, regardless of the receipt of the request, between that time and the time it gives the information may be made before the information is given.
- ...

##### 16 Refusal of request

- (1) Subject to section 18, a Scottish public authority which, in relation to a request for information which it holds, to any extent claims that, by virtue of any provision of Part 2, the information is exempt information must, within the time allowed by or by virtue of section 10 for complying with the request, give the applicant a notice in writing (in this Act referred to as a "refusal notice") which-
- ...

- (c) specifies the exemption in question; and
- ...

##### 25 Information otherwise accessible

- (1) Information which the applicant can reasonably obtain other than by requesting it under section 1(1) is exempt information.
- (2) For the purposes of subsection (1), information-
- (a) may be reasonably obtainable even if payment is required for access to it;
- (b) is to be taken to be reasonably obtainable if-

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- (i) the Scottish public authority which holds it, or any other person, is obliged by or under any enactment to communicate it (otherwise than by making it available for inspection) to; or
- (ii) the Keeper of the Records of Scotland holds it and makes it available for inspection and (in so far as practicable) copying by,

members of the public on request, whether free of charge or on payment.

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