

Decision Notice



Decision 041/2009 Prestoungrange Arts Festival (2006) and Historic Scotland

Details of the qualifications of an ex-employee

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www.itspublicknowledge.info

Kevin Dunion
Scottish Information Commissioner

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



Summary

Prestoungrange Arts Festival (2006) (PAF) requested from Historic Scotland the qualifications of specific members of staff. Historic Scotland responded by providing full details of the qualifications of all but one of the staff members, advising that the remaining individual (who was now an ex-employee) was both degree and post-graduate degree educated, although no field of study was specified. Following a review, in which Historic Scotland continued to withhold the specific subject areas of the qualifications obtained by the ex-employee, PAF remained dissatisfied and applied to the Commissioner for a decision.

Following an investigation, the Commissioner found that Historic Scotland had dealt with PAF's request for information in accordance with Part 1 of FOISA, by correctly applying the exemption in section 38(1)(b) to the personal data it was withholding from PAF. He did not require Historic Scotland to take any action.

Relevant statutory provisions and other sources

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) and (6) (General entitlement); 2(1) and (2)(e)(ii) (Effect of exemptions) and 38(1)(b) and (2)(a)(i) and (b) (Personal information)

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

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 29 July 2008, Prestoungrange Arts Festival (2006) (PAF) wrote to Historic Scotland requesting the following information:

Qualifications of Historic Scotland staff who were involved in considering the matter of whether Auld Fowler's HQ in Prestonpans should be a listed building on the three occasions the files were addressed.



2. Historic Scotland responded to part of this request on 29 August 2008 and provided PAF with information concerning certain staff members who had previously been involved in considering the listing of the Auld Fowler's HQ in Prestonpans. In this letter, Historic Scotland also advised that the remaining staff member whose qualifications were sought was no longer employed by Historic Scotland and that it may take it some time to provide a response to PAF in relation to this individual's qualifications.
3. On 16 September 2008, Historic Scotland wrote to PAF and confirmed that the remaining individual was educated to both degree and post-graduate level and had been recruited in line with the Civil Service Recruitment Code. It went on to note that this individual had worked for Historic Scotland for 10 years and undertook continual professional development through his work.
4. On 21 September 2008, PAF wrote to Historic Scotland requesting a review of its decision. In particular, PAF drew Historic Scotland's attention to the fact that it had not indicated the areas in which the ex-employee gained their graduate and post-graduate qualifications, and it required this information to be disclosed.
5. Historic Scotland notified PAF of the outcome of its review on 20 October 2008. Its letter acknowledged that it had disclosed the qualifications of certain members of current staff to PAF, but explained that the information in these cases had either been released with the specific consent of the individuals concerned, or because it was already in the public domain. Historic Scotland stated that neither of those scenarios applied to the ex-employee, and no reply had been received to communications seeking to secure the person's consent to disclosure. In the circumstances, Historic Scotland considered that disclosure would be unfair and the information was personal data exempt from disclosure in terms of section 38(1)(b) of FOISA.
6. On 4 November 2008, PAF wrote to the Commissioner, stating that it was dissatisfied with the outcome of Historic Scotland's review and applying to the Commissioner for a decision in terms of section 47(1) of FOISA.
7. The application was validated by establishing that PAF 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.



Investigation

8. Historic Scotland is an Executive Agency of the Scottish Ministers and a letter was sent to the Ministers' Freedom of Information Unit on 5 December 2008, in line with agreed procedures, giving notice that an application had been received from PAF and that an investigation into the matter had commenced. The Ministers were asked to provide the Commissioner with any information withheld from the applicant. (Subsequent references to submissions etc. being received from Historic Scotland are therefore references to submissions etc. made by the Ministers' Freedom of Information Unit on behalf of Historic Scotland.) The case was then allocated to an investigating officer.
9. The investigating officer subsequently contacted Historic Scotland, giving it an opportunity to provide comments on the application (as required by section 49(3)(a) of FOISA) and asking it to respond to specific questions. In particular, Historic Scotland was asked to justify its reliance on any provisions of FOISA it considered applicable to the information requested.
10. In its response, Historic Scotland provided submissions supporting its application of the exemption in section 38(1)(b). Further background information to assist the Commissioner's consideration of this case was provided in subsequent correspondence.
11. The investigating officer also contacted PAF and asked it for its views and comments regarding its legitimate interests in accessing the information under consideration, and why it believed these legitimate interests outweighed any prejudice to the rights and freedoms of the data subject. PAF responded with arguments supporting its views.

Commissioner's analysis and findings

12. In coming to a decision on this matter, the Commissioner has considered all of the withheld information and the submissions made to him by both PAF and Historic Scotland and is satisfied that no matter of relevance has been overlooked.
13. In this case, PAF is seeking the qualifications of an ex-employee of Historic Scotland.

Consideration of section 38(1)(b)

14. Historic Scotland has applied the exemption in section 38(1)(b) of FOISA to the qualifications of its ex-employee requested by PAF.



15. The exemption under section 38(1)(b) of FOISA, read in conjunction with section 38(2)(a)(i) or (as appropriate) section 38(2)(b), provides that information is exempt information if it constitutes personal data (as defined in section 1(1) of the DPA) and its disclosure to a member of the public otherwise than under FOISA would contravene any of the data protection principles contained in the DPA. This is an absolute exemption and therefore is not subject to the public interest test laid down by section 2(1)(b) of FOISA.
16. In order for a public authority to rely on this exemption, it must show firstly that the information which has been requested is personal data for the purposes of the DPA, and secondly that disclosure of the information would contravene at least one of the data protection principles laid down in the DPA.
17. Historic Scotland submitted that the qualifications requested by PAF were personal data, the release of which would contravene the first data protection principle on fair processing of personal data because the individual concerned would have no expectation that their personal data would be made public. It considered that of the processing conditions provided in Schedule 2 of the DPA, only the sixth might be of relevance but in practice it was not met. In its view, processing of the data in this case was not necessary for the purposes of any legitimate interest, and even if it were, the processing would be prejudicial to the rights and freedoms or legitimate interests of the ex-employee.

Is the information personal data?

18. When considering the exemption in section 38(1)(b) of FOISA, the Commissioner must first establish whether the information withheld is personal data. Personal data is 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 (the definition is set out in full in the Appendix).
19. In this case, the qualifications are information relating to a named and identifiable living individual, who is the focus of that information. By providing details of that person's education, it provides information of a biographical nature. The Commissioner has therefore concluded that the information is clearly personal data for the purposes of section 1(1) of the DPA.

Would disclosure breach the first data protection principle?

20. As noted above, Historic Scotland has argued that release of the information in question in this case would breach the first data protection principle.



21. The first data protection principle requires that the processing of personal data (here, the disclosure of data in response to a request made under FOISA) must be fair and lawful and, in particular, that personal data shall not be processed unless at least one of the conditions in Schedule 2 (to the DPA) is met. For sensitive personal data, one of the conditions in Schedule 3 to the DPA must also be met. The Commissioner has considered the definition of sensitive personal data set out in section 2 of the DPA, and he is satisfied that the personal data in this case does not fall into this category. It is therefore not necessary to consider the conditions in Schedule 3 of the DPA in this case.
22. There are three separate aspects to the first data protection principle: (i) fairness, (ii) lawfulness and (iii) the conditions in the schedules. However, these three aspects are interlinked. If there is a specific condition which permits the personal data to be disclosed, it is likely that the disclosure will also be fair and lawful.
23. The Commissioner will now go on to consider whether there are any conditions in Schedule 2 to the DPA which would permit the personal data to be disclosed and whether the disclosure of this personal data would be fair and lawful.

Can any of the conditions in Schedule 2 of the DPA be met?

24. Historic Scotland has argued that of all the conditions in Schedule 2 of the DPA, only the sixth might permit disclosure of the personal data in this case.
25. The Commissioner has considered all of the conditions in Schedule 2 of the DPA, and shares the view that condition 6(1) of Schedule 2 of the DPA is the only condition which might be considered to apply in this case. Condition 6(1) allows personal data to be processed (in this case, disclosed in response to an information request made under section 1(1) of FOISA) if the processing is necessary for the purposes of legitimate interests pursued 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.
26. There are, therefore, a number of different tests which must be satisfied before condition 6 can be met. These are:
 - a. Does the applicant (PAF) have a legitimate interest in obtaining this personal data?
 - b. If yes, is the disclosure necessary to achieve these legitimate interests? In other words, is the disclosure proportionate as a means and fairly balanced as to ends, or could these legitimate interests be achieved by means which interfere less with the privacy of the data subject?
 - c. Even if the processing is necessary for the legitimate purposes of the applicant, would the disclosure nevertheless cause unwarranted prejudice to the rights and freedoms or legitimate interests of the data subject? This will involve a balancing exercise between the legitimate interests of the applicant and those of the data subject. Only if (or to the extent that) the legitimate interests of the applicant outweigh those of the data subject can the personal data be disclosed.



Does the applicant have a legitimate interest?

27. PAF was invited to comment on its legitimate interests, and in its response informed the Commissioner that although the individual (whose qualifications are sought) is now an ex-employee of Historic Scotland, the individual did work for Historic Scotland when they had responsibility for assessing whether the Auld Fowlers HQ building should be listed. As the ex-employee recommended against listing the building, PAF argued that the professional qualifications of the individual should be open to public scrutiny, in order for the public to determine whether they were appropriately qualified to make that decision at the time. PAF argued that it has a right to expect officers at Historic Scotland, who address proposals for listing buildings on the grounds of historical significance, to have professional expertise in that area.
28. PAF noted that Historic Scotland has rejected the proposal to have the Auld Fowler's HQ building listed three times, and went on to argue that, if Historic Scotland is to be provided with the power to decide which buildings should be listed, then it is vital that the public is assured of the relevant competencies of those making such decisions in the name of Scottish Ministers.
29. PAF also argued that it had a legitimate right to know the professional competencies of those making decisions in the names of Scottish Ministers. It maintained that public awareness of the qualifications of those involved is not, in any way, an affront to or breach of their personal rights or freedoms or legitimate interests. PAF asserted that its request applies solely to the qualifications and experience of the ex-employee at the time they were exercising their duty in the name of the Scottish Ministers in respect of Listing.
30. The Commissioner has considered the arguments put forward by PAF and he accepts that members of the public are entitled to know that an employee, with a key role in deciding whether a building should be listed and safeguarded for future generations, has appropriate relevant qualifications and experience to enable them to carry out their duty. The Commissioner therefore concludes that PAF has a legitimate interest in obtaining the personal data that has been withheld by Historic Scotland.

Is disclosure of the information necessary to achieve those legitimate interests?

31. The Commissioner must now consider whether disclosure is necessary for those legitimate interests. In this case the Commissioner, in taking account of the specific information requested by PAF, is satisfied that disclosure is proportionate and that the aims of PAF cannot be achieved by any other mean which would interfere less with the privacy of the ex-employee in question.
32. The Commissioner notes that, although the Ministers have disclosed to PAF that the person in question is qualified to graduate and post-graduate level, it is only by knowing the subject matter of those qualifications that a person could satisfy themselves fully that these qualifications were indeed appropriate and relevant to the role.



Would disclosure cause unwarranted prejudice to the legitimate interests of the data subject?

33. The Commissioner must now consider whether disclosure would nevertheless cause unwarranted prejudice to the rights, freedoms and legitimate interests of the former employee whose qualifications have been requested. As noted above, this will involve a balancing exercise between the legitimate interests of PAF and those of the former employee. Only if the legitimate interests of PAF outweigh those of the employees can the information be disclosed without breaching the first data protection principle.
34. In a briefing recently published by the Commissioner¹, the Commissioner notes a number of factors which should be taken into account in carrying out this balancing exercise. These include:
- a. whether the information relates to the individual's public life (i.e. their work as a public official or employee) or their private life (i.e. their home, family, social life or finances).
 - b. the potential harm or distress that may be caused by the disclosure.
 - c. whether the individual has objected to the disclosure
 - d. the reasonable expectations of the individuals as to whether the information would be disclosed.
35. Turning to consider any prejudice to the rights, freedoms and legitimate interests of the data subject (the ex-employee) the Commissioner notes that this information was held by the Historic Scotland having received it in the course of its recruitment process. The Commissioner recognises that employees will normally have a reasonable expectation that information which is supplied to a prospective employer during the recruitment process will not be disclosed to anyone outside the recruitment process. The Commissioner has expressed this view in previous cases involving requests for employees' qualifications.
36. In paragraph 44 of *Decision 055/2007 Ronald MacDonald and Highland Council* the Commissioner recognised that information included on an application form submitted in response to a job application, such as qualifications obtained, is normally supplied in the expectation that it will be seen only by those involved in the recruitment process. However, in paragraph 55 of that Decision, the Commissioner stated that the "cut-off point" between public and private information is highly dependant on the relevance of the qualification to the individual's position within a public authority. Additionally, the Commissioner also noted that the specialist nature of an employee's role within an organisation must be considered and that while the level of an employee's post may not be of sufficient seniority to ensure that disclosure of qualifications, etc. would normally be expected, the specific nature and responsibilities of the post in question may well give rise to expectations of transparency and accountability.

¹ "Personal information" - <http://www.itspublicknowledge.info/nmsruntime/saveasdialog.asp?IID=3085&sID=133>



37. In this case, the individual whose qualifications have been sought is no longer an employee of Historic Scotland but an ex-employee, who left the organisation a year prior to PAF submitting its information request. Additionally, the Commissioner notes that while the individual was one of three officers who conducted an assessment of the Auld Fowlers HQ building, they did not have sole responsibility for deciding whether or not it should be listed.
38. Historic Scotland has explained that the ex-employee conducted the initial assessment of the Fowlers Brewery HQ building as part of a wider area-based survey in 1996. Historic Scotland also provided an overview of the procedures involved in assessing a building for listed status at that time. It has indicated that firstly, the officer would have carried out a reconnaissance of the burgh with the relevant line manager at the start of the resurvey. This would be followed up with core research (maps, local histories, statistical accounts, etc.) having come back from fieldwork with photographs of the building. Any marginal cases, which would include the former Fowlers Brewery HQ, would then be the subject of discussion with senior colleagues before a decision to reject the case for listing was reached.
39. It is clear, therefore, that while the ex-employee had a key role in assessing the building for listed status, they did not have sole say over whether it should or should not be listed, and consensus with senior management was required before a decision could be made. Furthermore, the Commissioner notes that the individual was involved in only the first assessment of the building in 1996, and that since then two other surveys have taken place, one in 2006 another in 2007-8. The qualifications of the staff involved in both recent assessments (along with the assessment documents themselves) have already been disclosed to PAF.
40. Historic Scotland also explained that it has tried (on several occasions) to contact the ex-employee to seek their permission to disclose their personal data. However, it has been unable to do so. Although no specific objection was received, neither was any kind of response. In these circumstances, Historic Scotland has maintained that it has released as much information as it could regarding the qualifications of the individual, without infringing their rights.
41. Having considered the nature of the requested information and the circumstances in which it was obtained by Historic Scotland, the Commissioner is satisfied that the individual concerned (the ex-employee) would not have had an expectation that their personal information would be made public in the context of PAF's information request. The Commissioner notes that the individual whose qualifications are sought, left the employment of Historic Scotland in July 2007, a year before PAF submitted its information request. The Commissioner also notes that the ex-employee was not of sufficient seniority that they would (or should) expect their qualifications to be disclosed in response to a request under FOISA, a year after they had left the employment of Historic Scotland.
42. In the circumstances, the Commissioner has concluded that disclosure of full details of this individual's qualifications would entail an intrusion into the private life of the individual concerned and would be prejudicial to the legitimate interests of that person. Having balanced the legitimate interests of the data subject against the legitimate interests identified by PAF, he has concluded that disclosure would be unwarranted in this case.



43. In all the circumstances, the Commissioner is satisfied that Condition 6 of Schedule 2 is not met in this case. For the same reasons, the Commissioner has concluded that disclosure would be unfair and would breach the first data protection principle.
44. Consequently, the Commissioner finds that the information is exempt from disclosure under section 38(1)(b) of FOISA.

DECISION

The Commissioner finds that Historic Scotland acted in accordance with Part 1 of the Freedom of Information (Scotland) Act 2002 (FOISA) in responding to the information request made by the Prestoungrange Arts Festival (2006).

Appeal

Should either the Prestoungrange Arts Festival (2006) or Historic Scotland 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 Enforcement
7 April 2009



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 –
 - (a) the provision does not confer absolute exemption; and
 - (b) in all the circumstances of the case, the public interest in disclosing the information is not outweighed by that in maintaining the exemption.
- (2) For the purposes of paragraph (a) of subsection 1, the following provisions of Part 2 (and no others) are to be regarded as conferring absolute exemption –
 - ...
 - (e) in subsection (1) of section 38 –
 - ...
 - (ii) paragraph (b) where the first condition referred to in that paragraph is satisfied by virtue of subsection (2)(a)(i) or (b) of that section.

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

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 I – 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.

...