



Scottish Information
Commissioner

**Decision 132/2007 Mr John Stewart and the
Scottish Executive**

*List of all registered agricultural holdings in Scotland, together with
the owners' details and farm code numbers*

**Applicant: Mr John Stewart
Authority: Scottish Executive
Case No: 200500841 (part 1)
Decision Date: 13 August 2007**

**Kevin Dunion
Scottish Information Commissioner**

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Decision 132/2007 Mr John Stewart and the Scottish Executive

Request for a list of all registered agricultural holdings in Scotland with the name and addresses of owners and the farm code numbers - information withheld under sections 26(a) and 38(1)(b) of the Freedom of Information (Scotland) Act 2002

Relevant Statutory Provisions and Other Sources

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) (General entitlement); 2(1) and 2(2)(b) (Effect of exemptions); 26(a) (Prohibitions on disclosure) and 38(1)(b) and 38(2)(a)(i) and (b) (Personal information).

Agriculture Act 1947 sections 78(1) (Power to obtain agricultural statistics), 79 (Information as to dealings in land used for agriculture) and 80 (Restriction on disclosure of information).

Data Protection Act 1998 (the DPA) sections 1(1) (Basic interpretative provisions) (definition of “personal data”); Schedule 1 (The data protection principles: the first principle).

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 Stewart requested a list of all registered agricultural holdings in Scotland, together with the owners' details and farm code numbers from the Executive. The Executive responded by refusing to release the information in terms of section 26(a) and 38(1)(b) of the Freedom of Information (Scotland) Act 2002 (FOISA). Mr Stewart was not satisfied with this response and asked the Executive to review its decision. Following the outcome of the review, in which the Executive upheld its original decision, Mr Stewart remained dissatisfied and applied to the Commissioner for a decision.

Following an investigation, the Commissioner found that the Executive was entitled to refuse to disclose the information to Mr Stewart.



Background

1. On 6 January 2005, Mr Stewart wrote to the Scottish Executive (the Executive) requesting the following information:

A list of all registered agricultural holdings in Scotland with the names and addresses of the owners and the farm code numbers.
2. On 3 February 2005, the Executive wrote to Mr Stewart in response to his request for information. The Executive informed Mr Stewart that it was withholding the requested information in terms of sections 26(a) and 38(1)(b) of FOISA.
3. On 5 February 2005, Mr Stewart wrote to the Executive requesting a review of its decision.
4. On 4 March 2005, the Executive wrote to notify Mr Stewart of the outcome of its review. The Executive confirmed that it upheld its original decision to withhold the information in terms of section 26(a) and 38(1)(b) of FOISA, and explained that farm census information is already released in an aggregate format.
5. On 7 March 2005, Mr Stewart wrote to my Office, stating that he was dissatisfied with the outcome of the Executive's review and applying to me for a decision in terms of section 47(1) of FOISA.
6. The case was then allocated to an investigating officer.

The Investigation

7. The application was validated by establishing that Mr Stewart had made a request for information to a Scottish public authority and had applied to me for a decision only after asking the authority to review its response to that request.
8. On 6 April 2005, the investigating officer wrote to the Executive, giving notice that an application had been received and that an investigation into the matter had begun. The Executive was notified of the application and was asked to provide its comments in terms of section 49(3)(a) of FOISA, along with supporting documentation for the purposes of the investigation.



Submissions from the Executive

9. The Executive argued that information on farm holdings in Scotland is collected, via the Agricultural & Horticultural Census and various related surveys, under the Agriculture Act 1947 (the 1947 Act) and that the 1947 Act specifies conditions precluding the release of farm-level information to third parties. Although census information can be released under the 1947 Act in certain limited circumstances, if it is in the public interest to do so, the Executive argued that putting names and addresses into the public domain would not be justified as to do so would undermine farmers' faith in statements from the Executive regarding how their data is treated.
10. The Executive also stated that it was of the opinion that the release of the information would lead to problems with various ongoing monitoring and survey exercises that are generally regarded as being necessary to serve a wider public interest. The Executive asserted that it is in the wider public interest that it maintains an ability to generate robust statistical estimates of various aspects of the industry in order to facilitate the efficient operation of markets and to inform policy formulation, implementation and evaluation. The Executive further argued that an up-to-date and comprehensive register of names and addresses is essential for Government identification of, and communication with, farmers – especially during emergency situations such as a disease outbreak. Anything that reduces the willingness of farmers to share their contact and farm details will undermine the value of the register.
11. The Executive also referred specifically to section 80 of the 1947 Act and maintained that this section vests the Scottish Ministers with a discretion to release the information requested by Mr Stewart where they consider that the disclosure of names and addresses is required in the public interest. However, it stated that this discretion is constrained to the extent that the information cannot be released if the release cannot be considered to be in the public interest (the public interest arguments from the Executive are set out in paragraphs 9 and 10 above).
12. In addition, the Executive submitted that the requested information was also exempt in terms of section 38(1)(b) of FOISA, as it constituted the personal data of individuals and that release would contravene any of the data protection principles contained in the Data Protection Act 1998 (DPA).
13. The Executive argued that the DPA applies to the names and addresses of individual farmers, and potentially farm partnerships, who return the agricultural census on the basis that it is information which relates to them as individuals, but that it does not extend to company information.



14. Reference was made to the wording on the “Agricultural Census form”. The Executive provided a copy of the form used for the Agricultural and Horticultural Census 1 June 2004. This form is the notice by which the Ministers required occupiers of agricultural land to provide them with information. The form states that:

“The information you provide is confidential and cannot be disclosed without your written consent, except as specified in Section 80 of the Agriculture Act 1947... and Section 12 of the European Communities Act 1972”
15. The Executive considers that the release of information other than for these purposes would breach the first data protection principle in that the disclosure would not be fair and lawful.
16. Further, the Executive also considers that the release of information would breach the second data protection principle as the notice given in the Agricultural census form does not say that the information could be released in response to a request such as that from Mr Stewart. The second data protection principle states that personal data shall be obtained only for one or more specified and lawful purposes, and shall not be further processed in any manner which is incompatible with that purpose or those purposes.

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

Application of the section 26(a) exemption

18. Section 26(a) of FOISA states that information is exempt information if its disclosure by a Scottish public authority is prohibited by or under any enactment. The Executive has argued that section 80 of the 1947 Act is such a prohibition.
19. The exemption in 26(a) is an absolute exemption. This means that if I am satisfied that section 80 does prohibit the release of information, I cannot go on to consider whether the public interest lies in the disclosure or the withholding of the information.



20. Section 78 of the 1947 Act gives the Scottish Ministers the power to serve notices on owners of agricultural land requiring them to provide information about the land; the names and addresses of the owners and occupiers of the land; livestock and the stocks of agricultural produce held in respect of the land and the number and description of persons employed on the land. In addition, the Ministers may require additional information in terms of section 79 of the 1947 Act. In both cases, failure to supply the information is a criminal offence.
21. Except in the limited circumstances set out in the section, section 80 of the 1947 Act prohibits the disclosure of information obtained under section 78 or 79 of the 1947 Act, unless prior written consent is obtained from both the person who supplied the information and every other person whose interests may, in the opinion of the Minister, be affected by the disclosure.
22. Section 80(c) of the 1947 Act allows limited information (such as the name and address of the owner and occupier) to be released to any person to whom the Scottish Ministers consider that the disclosure of information is required in the public interest. The Executive has provided me with a number of arguments (set out above in paragraphs 9 - 10) to show that, in the opinion of the Scottish Ministers, it would not be in the public interest for the information to be released to Mr Stewart. In these circumstances, this means that if I were to accept that a prohibition on disclosure applies, I am not entitled to question the views of the Scottish Ministers in deciding where the public interest would lie.
23. I have considered carefully the wording of section 80. Section 80 of the 1947 Act indicates that information shall not be published without the consent in writing of specific persons. However, this restriction is then subject to a number of qualifications. Subsection 80(c) essentially gives the Minister *discretion* to decide whether particular types of information can be disclosed to any person on the basis that he views such disclosure as being in the public interest. Whether information relating to 'situation, extent, number and kind of livestock, character of land, and name and address of owner and occupier' is to be disclosed or not is entirely dependent on whether the Minister adjudges disclosure of information to be in the public interest or not. In my view this constitutes a discretionary power to disclose rather than a prohibition on disclosure.
24. I am therefore of the opinion that section 80 of the 1947 Act does not constitute a prohibition for the purposes of section 26 of FOISA, and that the Executive cannot rely on section 26 to withhold the sought information from Mr Stewart.



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

25. The Executive has also applied the exemption in section 38(1)(b) of FOISA to the withheld information. The exemption under section 38 relates to personal information. Section 38(1)(b) of FOISA, read in conjunction with section 38(2)(a)(i) or (b), exempts information if it constitutes personal data, the disclosure of which to a member of the public otherwise than under FOISA would contravene any of the data protection principles in Schedule 1 of the DPA. Section 38(1)(b), read with section 38(2)(a)(i) or (b) confers an absolute exemption. Therefore, where a public authority considers that information falls within the scope of this exemption it is not required to consider whether the public interest lies in disclosure of the information or in the maintenance of the exemption.
26. Mr Stewart has requested:

“A list of all registered agricultural holdings in Scotland with the names and addresses of the owners and the farm code numbers.”
27. The Executive has submitted that where the information requested by Mr Stewart constitutes personal data, its disclosure would be in breach of the first data protection principle, because this would be unfair to the individuals from whom the information had been obtained. The Executive has informed me that Agricultural Census forms, from which it is possible to compile a list of all registered agricultural holdings in Scotland, are returned by a mix of individual farmers, farm partnerships and businesses.
28. The Executive has argued that where the information requested by Mr Stewart constitutes personal data, its disclosure would be in breach of the first data protection principle. In addition, the Executive has submitted that because the information it holds does not allow it to distinguish between sole traders, companies and partnerships, the exemption in 38(1)(b) has been applied to details of all registered agricultural holdings as requested by Mr Stewart.

Does information relating to agricultural census data constitute personal data?

29. 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 claimed that some of the information requested by Mr Stewart (that portion that relates to companies) is not personal data. However, it has indicated that a significant proportion of it is personal data, and has submitted that it is not able to determine the status of any registered agricultural holding from the information it holds.



30. 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 pointed out that this would exceed what they are required to do under FOISA.
31. Having considered the submissions provided by the Executive I am satisfied that the Executive does not hold information about the individual business status of registered agricultural holdings in a reliable and accurate format.
32. Before information can be considered personal data for the purposes of the DPA, two questions must be answered:
 - a) 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?
 - b) 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.
33. In all the circumstances of this particular case, I am satisfied that the names, addresses and farm codes of all registered agricultural holdings in Scotland constitute personal data where this relates to a sole trader.
34. 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 relating to a farm partnership constitutes personal data.

Would disclosure breach the first data protection principle?

35. I must now go on to consider whether disclosure of the personal data falling under the scope of Mr Stewart's request would breach the first data protection principle.
36. 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 Stewart falls into this category.)



37. 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, beyond those arguments made in relation to section 38(1)(b).
38. According to guidance from the Information Commissioner, who is responsible for overseeing and regulating the DPA, ("Freedom of Information Awareness Guidance 1", which can be viewed at http://www.ico.gov.uk/upload/documents/library/freedom_of_information/detail_ed_specialist_guides/awareness_guidance%201%20personal_information_v2.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.
39. The wording on the Agricultural Census form states that "*The information you provide is confidential and cannot be disclosed without your written consent, except as specified in Section 80 of the [Agriculture Act 1947, section 78 (As Amended)] and Section 12 of the European Communities Act 1972*". In addition, the June 2004 census wording also states that "*...in general census data are only released in exceptional circumstances*".
40. The Executive has submitted that while the reference to relevant sections of the 1947 Act in the Agricultural Census form may in some circumstances serve as notice of processing for the purposes covered by the various exceptions under that 1947 Act, this would not allow general release to be fair and adequate notice of the purposes under the first and second data protection principles in other cases not caught by those exceptions. The Executive's submissions went on to assert that disclosure would breach the first (and second) data protection principle as it would be unfair to living individuals from whom the information had been obtained, and would also be in breach of the requirements of the DPA to give notice of the purposes for which the information will be put.
41. I have considered the wording of the Agricultural Census forms (outlined above in paragraph 41) and I accept that, for the reasons identified in paragraph 42, it is reasonable to conclude that sole traders who completed the census forms would have an expectation that information relating to their name and address and farm code would not be publicly disclosed.
42. I have also considered the arguments raised by the Executive in relation to whether disclosure would be unfair (set out in paragraph 42), and I am satisfied that in all the circumstances of the case, disclosure of the information in relation to a sole trader would be unfair and therefore in breach of the first data protection principle.



43. As I have found that disclosure of the personal data requested by Mr Stewart would be unfair I am not required to go on to consider whether any of the conditions in Schedule 2 can be met.

Conclusion

44. It will be recalled that I have only accepted that information relating to individual sole traders is personal data. Census information relating to registered agricultural holdings that are companies is not personal data and as set out in paragraph 47 of decision 041/2007, I do not consider that information relating to farm partnerships is personal data. Therefore the application of section 38(1)(b) applies only to sole traders and not to information relating to partnerships or companies.
45. I have accepted the Executive's submission that it does not hold information which accurately identifies the precise legal status of each registered agricultural holding in Scotland. However, it is clear that a number of the agricultural holdings will be companies and partnerships. In these circumstances, I see no reason for this information not to be provided to Mr Stewart, given that it is clearly not exempt in terms of 38(1)(b). However, I am unable to order the release of information relating to the partnerships and companies where their status is not clear to the Executive.
46. As in decision 041/2007, I recognise this to be an unsatisfactory conclusion, but in the circumstances I am unable to conclude differently. I would suggest, however, that in future it would be good practice for the Executive to amend its Agricultural Census forms to clearly show whether an agricultural holding is registered as a sole trader, partnership or limited company.

Decision

I find that the Scottish Executive acted in accordance with Part 1 of the Freedom of Information (Scotland) Act 2002 (FOISA) by withholding the names, addresses and farm codes of all registered agricultural holdings in Scotland who operate as a sole trader, from Mr Stewart.

However, I also find that the Executive did not comply with Part 1 of FOISA in withholding the names, addresses and farm codes of partnerships and companies whose status is unclear from their names. In refusing to release this information in terms of 38(1)(b), I find that the Executive failed to comply with section 1(1) of FOISA. However, given the lack of clarity as to their status, I do not require the Executive to release any information in relation to this breach.



Appeal

Should either Mr Stewart or the Scottish 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
13 August 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.

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 –
 - ...
 - (b) section 26

26 Prohibitions on disclosure

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

- (a) is prohibited by or under an enactment

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 the 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.

Agriculture Act 1947

78 Power to obtain agricultural statistics

- (1) Where it appears to the Minister expedient so to do for the purpose of obtaining statistical information relating to agriculture, he may serve on any owners or occupiers of land used for agriculture, or of land which the Minister has reason to believe may be so used, notices requiring them to furnish in writing, in such form and manner and to such person as may be specified in the notice, and within such time and with respect to such date or dates or such period or periods as may be specified in the notice, the information referred to in the notice (including, as respects paragraphs (c) to (e) of this subsection, the information referred to in the notice as to quantities, values, expenditure and receipts) relating to—
- (a) The situation, area and description of relevant land owned or occupied by them, the date of acquisition of the land, and the date at which so much thereof as is comprised in any agricultural unit became comprised therein, and the rates payable in respect of the land,
 - (b) the names and addresses of the owners and occupiers of the land, whether the land or any, and if so what, part thereof is let and at what rent,
 - (c) the character and use of different parts of the land, the time at which any use thereof was begun or will become fully effective, and their product at any time during the period beginning one year before, and ending one year after, the time at which the information is required to be furnished,



- (d) fixed and other equipment, livestock, and the stocks of agricultural produce and requisites held in respect of the land, and the provision and maintenance of such equipment, livestock and requisites and the provision of agricultural services for the benefit of the land,
- (e) the methods and operations used on the land, the marketing or other disposal of the produce thereof, any payments received under any enactment in respect of such produce, and the provision of agricultural services otherwise than for the benefit of the land,
- (f) the number and description of persons employed on, or employed by the occupier in disposing of the produce of, the land, and the remuneration paid to, and hours worked by, persons so employed or such persons of different descriptions.

79 Information as to dealings in land used for agriculture

The Minister may by regulation require the parties to any sale of land which immediately before the completion of the transaction was being used for agriculture, or to any grant, assignment or surrender of a tenancy of such land for an interest not less than that of a tenant for a year, shall within the prescribed period from the completion of the transaction furnish to the Minister, in such manner as may be prescribed, information as to the names and addresses of the parties to the transaction and the situation and extent of the land thereby affected.

80 Restriction on disclosure of information

No information relating to any particular land or business, being information which has been obtained under section seventy-eight or seventy-nine of this Act, shall be published or otherwise disclosed without the previous consent in writing of the person by whom the information was furnished and every other person whose interests may in the opinion of the Minister be affected by the disclosure, being an owner or the occupier of the land:

Provided that nothing in this section shall restrict the disclosure of information—

- (a) to the Minister in charge of any Government department, to any authority acting under an enactment for regulating the marketing of any agricultural produce, or to any person exercising functions on behalf of any such Minister or authority for the purpose of the exercise of those functions;



- (b) to an authority having power under any enactment to give permission for the development of land, for the purpose of assisting that authority in the preparation of proposals relating to such development or in considering whether or not to give such permission;
- (c) if the disclosure is confined to situation, extent, number and kind of livestock, character of land, and name and address of owner and occupier, to any person to whom the Minister considers that the disclosure thereof is required in the public interest;
- (d) to any person for the purposes of any criminal proceedings under the next following section or for the purposes of any report of such proceedings, or the use of information in any manner which the Minister thinks necessary or expedient in connection with the maintenance of the supply of food in the United Kingdom.
- (e) to the Food Standards Agency for purposes connected with the carrying out of any of its functions,

or the use of information in any manner which the Minister thinks necessary or expedient in connection with the maintenance of the supply of food in the United Kingdom.

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 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.