



Scottish Information  
Commissioner

**Decision 136/2007 Mr John Stewart and the  
Scottish Executive**

*Request for the amount of agricultural subsidies and grant  
payments that were received by a named farm.*

**Applicant: Mr John Stewart  
Authority: Scottish Executive  
Case No: 200500841 (part 2)  
Decision Date: 13 August 2007**

**Kevin Dunion  
Scottish Information Commissioner**

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## Decision 136/2007 Mr John Stewart and the Scottish Executive

***Details of the amount of agricultural subsidies and grant payments that were received by a named farm under specific payment schemes - 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

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Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) (General entitlement); 17(1) (Notice that information is not held); 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

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Mr John Stewart requested details of the amount of money that a named farm received in subsidies and grants in the last complete subsidy year for which information was held from the Scottish Executive (the Executive).

The Executive refused to provide this information, claiming that it was exempt from disclosure under the terms of section 26(b) and 38(1)(b) of FOISA. This decision was upheld in full following an internal review. Mr Stewart 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 Stewart’s request for information in accordance with Part 1 of FOISA and required the release of the information requested by Mr Stewart.



## Background

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1. On 3 January 2005, Mr Stewart wrote to the Executive requesting the following information:
  - a) *How much money did a named farm receive in subsidy and grant payments for each of the subsidy or grants for which it successfully applied in respect of all registered holdings whether owned or rented. This information was requested for the last complete subsidy year for which information was available.*
  - b) *How much is the calculated amount of Single Farm Payment that the same named farm was expected to obtain in 2005.*
2. The Executive responded to this request for information on 2 February 2005, advising that it did hold the information he sought in relation to part a) of his request but that it considered it to be exempt from disclosure in terms of section 26 of FOISA, in that it was incompatible with a Community obligation. The Executive notified Mr Stewart that the payment details he sought form part of the Integrated Administration and Control System (IACS) subsidy database which was established in accordance with Council Regulation EEC No. 3508/92. It explained that Articles 9 and 9a of Council Regulation EEC No. 3508/92 provide that Member States must take the measures necessary to ensure protection of the data collected for this purpose. It explained that although Articles 9 and 9a have been repealed in relation to the Single Farm Payment Scheme (SFPS), the restrictions they offer still apply to payment schemes in place before 2005. The Executive reasoned that the open release of the information sought in part a) of his request would breach its duty under Regulation 3508/92.
3. The Executive advised Mr Stewart that it also considered this information to be exempt from disclosure in terms of section 38 of FOISA, as the payment details come under the definition of 'personal data' in the Data Protection Act 1998 (DPA).
4. With respect to part b) of his request, the Executive advised Mr Stewart it did not hold the information he sought as information on CAP reform payments was not expected to be available until December 2005, and that at the time of dealing with his request no-one had applied under the Single Farm Payment scheme.
5. On 5 February 2005, Mr Stewart wrote to the Executive requesting a review of its decision.
6. On 4 March 2005, the Executive wrote to notify Mr Stewart of the outcome of its review. The Executive upheld its original decision in full.



7. On 6 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.
8. The case was allocated to an investigating officer and Mr Stewart's 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

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9. 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.
10. In relation to Mr Stewart's application, a letter was sent to the Executive on 6 April 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 Stewart and on the application as a whole.
11. The Executive responded, providing detailed comments on this case, on 4 May 2005. 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 Stewart on the administration of grants and subsidies. The Executive also provided further information on the specific grant and subsidy schemes that were successfully applied for by the named farm.
12. The payment information sought by Mr Stewart consists of two types, agricultural subsidy payments, which were processed within the IACS administration system provided for under Regulation 3508/92 and grant payments which were processed outwith this system. During correspondence with the investigating officer, the Executive confirmed that it was withholding details of the grant payments in terms of 38(1)(b) of FOISA, and details of the agricultural subsidy payments in terms of section 38(1)(b) and section 26(b) of FOISA.



## The Commissioner's Analysis and Findings

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13. 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.
14. 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 Stewart's information request have been handled under FOISA or the Environmental Information (Scotland) Regulations 2004 (EIRs))?
  - c) Is this information exempt from disclosure?

### ***Mr Stewart's information request***

15. In his application to my office, Mr Stewart asked me to establish whether agricultural support payments should be disclosed to the wider public. In particular, Mr Stewart requested details of how much money a named farm received in both subsidy and grant payments in the last complete year for which information is available. Mr Stewart clarified that the relevant schemes he is interested in are those listed in pages 4, 5, 6 and 7 of the '*Serving Scotland's Farmers*' booklet.
16. The Executive advised that the named farm received payments under a variety of agricultural subsidy schemes and two grant schemes. Therefore, the information under consideration in this case, is the sum received by the named farm under each of these schemes for the final year for which this information was held at the time of Mr Stewart's information request.

### ***FOISA or EIRs?***

17. 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.
18. The Executive responded to Mr Stewart's 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.



19. In considering this matter, I have taken into account the comments made by the Executive, and also my previous decisions 224/2006, *Mr Alex Gordon-Duff and the Scottish Executive* and 126/2007, *Mr Rob Edwards and the Scottish Executive*. I have also noted guidance issued by Defra in July 2006 (revised December 2006) on the boundaries between the EIRs and FOI. Having reviewed all of the above, I am satisfied that in this case the Executive was correct to respond to Mr Stewart's request for information in terms of FOISA and not the EIRs. I will therefore now examine whether the Executive has appropriately cited the exemptions in section 26(b) and 38(1)(b) of FOISA in response to this request.

### ***Application of the exemption in section 26(b)***

20. 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 go on to consider whether the public interest lies in disclosure of the information or in maintaining the exemption.
21. In this case, the Executive has confirmed that it considers all of the IACS scheme payment details (but not the grant payments) requested by Mr Stewart to be exempt in terms of section 26(b).
22. In applying this exemption, the Executive has cited Articles 9 and 9a of the Council Regulation EEC No. 3508/92. This Regulation established the IACS 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
23. 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.



24. 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 Stewart. I considered this point 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.
25. 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 (DPA). 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)***

26. Section 38(1)(b), read in conjunction with section 38(2)(a)(i) or (b) states that information is exempt from disclosure if its 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.
27. Mr Stewart has requested details of all the monies received by a named farm under the specific payment schemes that are listed on pages 4-7 of the '*Serving Scotland's Farmers*' booklet. The Executive has applied the exemption in 38(1)(b) of FOISA to both the subsidy payments and the grant payments sought by Mr Stewart, as it considers all of the payments to be personal data as defined in the DPA. It has argued that to disclose this information would breach the first data protection principle.

#### ***Does information relating to subsidy payments constitute personal data?***

28. When considering the exemption in section 38(1)(b), I must first consider whether the information concerned is personal data. In my decisions *224/2006 Mr Alex Gordon-Duff and the Scottish Executive*, *041/2007 Mr Jock Meikle and the Scottish Executive* and *126/2007 Mr Rob Edwards and the Scottish Executive*, I considered whether information about agricultural subsidy payments should be considered personal data, and my thinking in this case has been informed by similar considerations to those set out in detail in these decisions.



29. 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 the possession of, or is likely to come into the possession of the Executive?
  - Does the data relate to a living individual?
30. In all the circumstances of this particular case, I am satisfied that the amount of payments received by the named farm in respect of agricultural subsidies and grants constitute the personal data of the owners of the named farm.

*Would disclosure breach the first data protection principle?*

31. 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.
32. 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.)
33. With regard to the lawfulness of the processing, it should be noted that the Executive has 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 26(b). I have not accepted the Executive's claim that a prohibition on disclosure exists within Council Regulation EEC No. 3508/92, and 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.
34. 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.





35. The Executive's submissions assert that disclosure would be unfair because (prior to the introduction of the SFPS in 2005) there was an expectation among agricultural subsidy applicants that information relating to payments would not be disclosed to the public at large. Additionally, the Executive asserts that grant applicants also had an expectation that information relating to payments would not be generally disclosed.
36. I considered the Executive's submissions on the question of fairness in relation to the disclosure of agricultural subsidy payments in decision 126/2007. The Executive's submissions and my comments thereon as set out in paragraphs 56-63 of that decision apply equally in this case. I will not repeat these arguments in full here. Briefly, however, I took the view that subsidy recipients prior to 2005 may have had some expectation that information relating to individual subsidy payments would not be published, and may also have had the expectation that it would not be publicly disclosed.
37. This expectation would be reasonable given the existence of Regulation 3508/92 [notwithstanding my conclusion that this did not create a prohibition on disclosure]; the fact that access to such information had been controlled; and the existence of certain statements relating to the use of this information within IACS guidance booklets and application forms. However, I also noted that, given the nature of the statements in the 2003 and 2004 IACS guidance booklets it could equally be held that claimants were aware that there was at the least the possibility that information may have to be released.
38. In my decision 126/2007, I rejected the Executive's argument that FOISA only requires compliance [through disclosure] where fair notice that such disclosure would be made has been given under the DPA. I would also reject this point in relation to Mr Stewart's information request.
39. In this case, I have also considered the expectations of recipients of grants that are administered outwith the IACS system. With respect to the two relevant schemes, the Executive submitted many of the same arguments that it has put forward in relation to subsidy payments. It has provided detailed background information about the two relevant schemes and the information provided to applicants about the use of their information contained in documents relating to these schemes. Although Regulation 3508/92 would not apply in relation to information about grant schemes, the Executive noted that no individual grant payment details had been disclosed in the past, and so it considered that applicants would have an expectation that information about payments would not be disclosed. Given these expectations, it concluded that it would be unfair to disclose in this case.



40. I have noted all the Executive's comments on applicants' expectations with respect to the handling of information about payments under these two grant schemes. I again accept that applicants in general, and the specific farmer concerned in this case, may have some expectation that these would not be disclosed publicly or published. However, I also note that explicit assurances were not given to claim that information would not be disclosed.
41. The Executive has argued that given an expectation against disclosure, it would be unfair to disclose the information requested by Mr Stewart, and that none of the conditions in schedule 2 of the DPA can be met in this case. However, I take the view that condition 6 within Schedule 2 of the DPA 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.
42. 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 named farm).
43. In this case I accept that Mr Stewart, as an individual citizen, has a legitimate interest in knowing the amount paid in publicly-funded subsidies and grants to an individual farm or all farms in Scotland. In addition, I also consider that a wider legitimate interest in this information is shared by the general public.
44. Disclosure of this information would contribute to the transparency and oversight of the use of potentially significant amounts of public funding. It would allow understanding of the scale of payments made to an individual farm before the introduction of the Single Farm Payment, and across different types of agricultural support payment scheme.
45. 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 and grant payment details and therefore that disclosure of this data is necessary for the purposes of the legitimate interests.



46. 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 of the competing legitimate interests of the data subject. I must therefore balance the legitimate interests of Mr Stewart and the wider public in having access to the payment information, and the legitimate interests of the data subject in having it remain private.
47. In my decision 126/2007 I found that the legitimate interests of the general public outweighed the legitimate interests of agricultural subsidy recipients and subsequently, I concluded that disclosure of the information sought in that case (i.e. names and location of the 100 individual farm and farm businesses receiving the greatest agricultural grants and subsidies in Scotland, along with the amounts they received between 2000 and 2004) would be fair for the purposes of the first data protection principle.
48. In all the circumstances of this case, I have also concluded that the legitimate interests of the data subjects do not outweigh the countervailing legitimate interests of the applicant.
49. In reaching this decision, I have recognised that subsidy and grant applicants might reasonably have an expectation that this information (for the period prior to 2005) would not be disclosed. However, I have noted that the subsidy and grant information, while a factor in determining the named farm owner's 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 Stewart to be unwarranted.
50. 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 that they have been made correctly. A distinction can be drawn between matters which relate to a person's business capacity may be justified given these counter balancing concerns.”
51. In all the circumstances of the case, I am satisfied that in this case disclosure of the information requested by Mr Stewart 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 Stewart. I now require the disclosure of this information.



## **Decision**

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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 Stewart's 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 Stewart.

I now require the Executive to disclose the information requested by Mr Stewart within 45 days of the receipt of this decision.

## **Appeal**

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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

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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.

##### 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
    - (ii) section 10 of that Act (right to prevent processing likely to cause damage or distress); and
  - (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;