



Scottish Information  
Commissioner

**Decision 224/2006 - Mr Alex Gordon-Duff and the Scottish Executive**

*Payments made under the Farm Woodland Premium Scheme*

**Applicant: Mr Alex Gordon-Duff  
Authority: The Scottish Executive  
Case No: 200502648  
Decision Date: 06 December 2006**

**Kevin Dunion  
Scottish Information Commissioner**

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## Decision 224/2006 – Mr Alex Gordon-Duff and the Scottish Executive

***Request for information about payments made under the Farm Woodland Premium Scheme from 2000 to 2004. Information withheld under Regulation 11(2) of the Environmental Information (Scotland) Regulations 2004 – personal information. Information considered in relation to section 26(b) of the Freedom of Information (Scotland) Act 2002 (FOISA) – prohibition on disclosure – and section 38(1)(b) of FOISA – personal information.***

### Facts

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Mr Gordon-Duff asked the Scottish Executive Environment and Rural Affairs Department (“the Executive”) to provide details of certain grant payments made under the Farm Woodland Premium Scheme in the period 2000 to 2004.

The Executive withheld the information on the grounds that it was personal information which was exempt from disclosure under regulation 11(2) of the Environmental Information (Scotland) Regulations 2004 (the EIRs).

### Outcome

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The Commissioner found that the Executive was wrong to deal with Mr Gordon-Duff’s request under the EIRs. He did not uphold the Executive’s view that the information withheld was personal information, which, if disclosed, would breach the data protection principles laid down in the Data Protection Act 1998. The Commissioner required the Executive to provide Mr Gordon-Duff with the information he had requested.

### Appeal

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Should either Mr Gordon-Duff or the Executive wish to appeal against my 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 notice.



## Background

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1. On 31 May 2005, Mr Gordon-Duff from Drummuir Estate wrote to the Executive to ask for details of payments made under the Farm Woodland Premium Scheme (FWPS) into the bank account of one of the Estate's tenant farms. Mr Gordon-Duff had been in correspondence with the Executive for several years in relation to this matter: the woodland had been planted by Drummuir Estate, but during a five year period the FWPS payments had been made to the bank account of the tenant. The Estate sought reimbursement by the tenant, and asked how much FWPS grant had been paid into the tenant's bank account in the five years 2000 to 2004.
2. The Executive responded on 23 June 2005, and asked for some clarification of the relationship between the applicant and the tenant. In particular it asked if they were in partnership.
3. Mr Gordon-Duff responded on 28 June 2005, providing the Executive with background information about his request and explaining that Drummuir Estate's lease of the farm in question was to a limited partnership, in which he and his wife were the limited partners and the tenant farmer was the general partner. He also explained that for the first two years, the grant payment had been made into the bank account of the Estate, which had paid all the woodland costs. In 2000 the method of payment changed, and payments were instead made into the bank account of the Estate's tenant. The administrative problem regarding the bank account had since been resolved, but the Estate wished be recompensed for any payments made to the tenant's bank account for the years 2000 to 2004. The tenant farmer had not co-operated fully in providing this information.
4. On 4 July 2005, the Executive wrote to Mr Gordon-Duff to advise him that it had decided to withhold the information he had asked for on the grounds that payments to individuals were "personal data" as defined by the Data Protection Act 1998 (the DPA) and therefore exempt from disclosure under section 38 of FOISA.
5. The Executive also stated that "Articles 9 and 9a of this Regulation provide that Member States shall take the measures necessary to ensure protection of the data collected." It did not explain which Regulation was referred to, but stated that the information was exempt under section 26 of FOISA, which prevents disclosure of information if release is not compatible with a Community obligation. (The Executive later confirmed that the reference was to EEC No. 3508/92. However, at the review stage, the Executive took the decision to treat the information request under the EIRs and did not continue to rely on this exemption.)



6. Mr Gordon-Duff requested a review of the Executive's decision on 7 July 2005. He asked the Executive to note that public money had been wrongly allocated and pointed out that he did not wish details of all payments made to the tenant farm, but only those made under the FWPS scheme. He confirmed that the information would only be used to ensure reimbursement of Drummuir Estate and would not be publicised or used in any other way, and offered to sign any document required to guarantee protection and confidentiality of the information. He pointed out that he was not requesting details of payments to an individual, but to a firm of which he was a partner.
7. The Executive replied on 1 August 2005. The reply advised Mr Gordon-Duff that the Executive now believed his request should have been dealt with under the Environmental Information (Scotland) Regulations 2004 (the EIRS) rather than FOISA. It state that regulation 11(2) of the EIRS applied to the information requested. Under this regulation a Scottish public authority shall not make personal data of which the applicant is not the data subject available in cases where (read in conjunction with regulation 11(3)(a)(i)) making the information available otherwise than under the EIRs would contravene any of the data protection principles contained in the DPA. In this case the Executive believed that disclosure would breach the first data protection principle by being unfair to the tenant farmer.
8. The Executive went on to explain that it considered details about individual payments in relation to members of partnerships participating in forestry schemes such as FWPS to come under the definition of "personal data" in terms of the DPA. Scheme applicants did not expect details of the applications to be disclosed because they had not been given notice that this could happen. It had not previously been the Executive's practice to disclose such information and applicants had not been made aware of any change relating to past data collection. It would therefore be unfair to applicants to disclose details of payments to them, and would breach the first data protection principle, which requires the processing (e.g. disclosure) of personal data of be fair and lawful.
9. Mr Gordon-Duff was not satisfied with this response and applied to me for a decision on the matter on 19 September 2005. In his application he reiterated that he was not seeking personal data, as the payments in question were made into the bank account of a partnership and not to one particular member of it. He pointed out that he was already entitled to copies of the partnership accounts, but that these did not include the details of the FWPS payments. He argued that the tenant farmer was not the applicant to the FWPS scheme, as the application had been made in the name of Drummuir Estate. In a later letter (29 September 2005) he also advised my Office that in 2001 the Executive (SEERAD) had disclosed details of a FWPS payment made on 25 October 2000.
10. The case was allocated to an investigating officer.



## The Investigation

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11. Mr Gordon-Duff's application was validated by establishing that he had made a request for information to a Scottish public authority, and had appealed to me only after requesting the authority to review its response to his request.
12. A letter was sent to the Executive on 14 October 2005, informing it that an appeal had been received and that an investigation into the matter had begun. The Executive was invited to comment on Mr Gordon-Duff's application, in terms of section 49(3) of FOISA.
13. The Executive was asked to note that Mr Gordon-Duff had already received details of one of the payments he had requested. It was asked why it had decided that the information requested was covered by the EIRs rather than FOISA, and invited to comment further on its reasons for believing that disclosure of the information would breach the first data protection principle.
14. The Executive replied on 1 November 2005. It provided background information about the FWPS and explained that it had taken the view that as the scheme contributes to the maintenance and development of the economic, ecological and social functions of forests in rural areas, payment made under the scheme fall under the wide definition of environmental information under the EIRs.
15. The Executive confirmed that as the information requested related to individual payments made to a member of a partnership, it had concluded that it was personal data, the disclosure of which would be unfair for reasons previously stated in correspondence with Mr Gordon-Duff. The Executive stated that the disclosure of information about payments in 2001 had been an error caused by confusion over that status of the tenant farm in relation to the FWPS scheme at a time when changes were made to the method of making payments. The Executive did not consider that this error relieved it from its obligations under the DPA in relation to Mr Gordon-Duff's subsequent FOI request.



## The Commissioner's Analysis and Findings

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16. This decision notice will consider two questions:
- a) whether the Executive's decision to deal with the request under the EIRs rather than FOISA should be upheld
  - b) whether the information withheld from Mr Gordon-Duff was exempt from disclosure as stated by the Executive.

### EIRs or FOISA?

17. As noted previously, the Executive revised its decision to deal with Mr Gordon-Duff's request under FOISA and instead considered it under the EIRs. The reason given was that the FWPS contributes to the maintenance and development of the economic, ecological and social functions of forests in rural areas and that consequently payments made under the scheme fall under the wide definition of environmental information under the EIRs.
18. The definition of environmental information in regulation 2 of the EIRs includes information 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;
  - (b) factors, such as substances, energy, noise, radiation or waste, including radioactive waste, emissions, discharges and other releases into the environment, affecting or likely to affect the elements of the environment referred to in paragraph (a);
  - (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.
19. In considering whether this request should have been dealt with under FOISA or the EIRs, I have taken into account guidance issued on 17 July 2006 by the Environmental Information Unit of DEFRA (Department for Environment Food and Rural Affairs) Department, entitled "The Boundaries between EIR and FOI".



20. I accept that information about the FWPS would be likely to fall within the above definition of environmental information. However, the information requested by Mr Gordon-Duff comprises details of specific payments made to a particular bank account under the FWPS. I do not consider the fact that the payments were made under the FWPS to be sufficient to establish that this financial information, on its own, is environmental information as defined by the EIRs.
21. I therefore consider that the Executive was wrong to substitute the EIRs for FOISA in dealing with Mr Gordon-Duff's request. However, in practical terms, the exception for personal data in regulation 11(2) of the EIRs involves the same test and principles as the exemption in section 38(1)(b) of FOISA. I do not consider that the Executive's decision to apply the EIRs instead of FOISA was detrimental to Mr Gordon-Duff, but in this decision notice I will consider whether the information should have been withheld in terms of section 38(1)(b) of FOISA.
22. The Executive's decision to substitute the EIRs for FOISA meant that it was unable to rely on one of its initial arguments for withholding the information from Mr Gordon-Duff: originally it had cited the exemption in section 26(b) of FOISA which prohibits disclosure of information if it is incompatible with a Community obligation. However, as I consider that the request must be considered under FOISA rather than the EIRs, it is necessary to consider whether the Executive was justified in citing the exemption in section 26(b) in relation to the information requested.
23. As noted, 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 consider the public interest in disclosure of the information. The Executive has cited Articles 9 and 9a of Council Regulation EEC No.3508/92 in relation to this exemption. This Regulation established an integrated administration and control system 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.
24. Council Regulation EEC No.3508/92 was repealed in 2003 by Council Regulation EEC No.1782/2003. 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.





25. 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 Gordon-Duff. I take the view that no such obligation is created or implied. As noted in paragraph 23 above, Article 9 refers to information about payments in terms of protecting the data rather than prohibiting its disclosure. I believe it is evident that within the context of 3508/92 the data referred to are not details of the actual payments made under any agricultural scheme, but data collected from the aid applications. This would, of course, include personal data relating to the applicant or other individuals named within the application. Article 9 requires a Member State to take the measures necessary to protect the data. I take the view that the UK provides this protection through the provisions of the Data Protection Act 1998 (the DPA).
26. The European Commission is currently consulting on a green paper which forms part of the European Transparency Initiative launched in 2005, and which includes a proposal for the publication of the beneficiaries of EU funds. The paper notes:

“Information on beneficiaries of Community funds spent in partnership with Member States is currently in the hands of each Member State and any disclosures on the subject are left to their discretion.”
27. The recognition that the release of information is left to the discretion of member states shows that the EU does not interpret the articles to mean that information is not to be released. The green paper goes on to note that this discretion has led to wide variations in the degree of detail available from each Member State.
28. In conclusion, I have taken the view that if disclosure of the information would not contravene the data protection principles laid down in the DPA, disclosure would not be incompatible with the obligation imposed by Articles 9 and 9a of Council Regulation EEC No.3508/92. I will now consider whether disclosure of the information requested by Mr Gordon-Duff would contravene any of the data protection principles.





## Information withheld – third party personal data

29. Section 38(1)(b) of FOISA, read in conjunction with section 38(2)(a)(i), allows a Scottish public authority to withhold information if it is personal data and its disclosure to a member of the public would contravene any of the data protection principles laid down in the DPA. In this case the Executive believed that the information was personal data because it related to payments made to an individual member of a partnership. For the reasons detailed in paragraph 8 above, the Executive took the view that disclosure of this information would breach the first data protection principle, which stipulates that disclosure should be fair and lawful and, in particular, that processing should not take place unless a condition in schedule 2 to the DPA (and in the case of sensitive personal information a condition in schedule 3 to the DPA) can be met.
30. The (United Kingdom) Information Commissioner who is responsible for data protection (and to whom references to the Information Commissioner in this decision should be taken to refer) has commented on the question whether information about farming subsidy payments should be considered to be personal data. He has taken the view that data about sole traders is capable of being personal data, and details of agricultural subsidies to them can be interpreted as personal data under section 1(1) of the DPA because the data will relate to an identifiable living individual.
31. In this case it is clear that the FWPS payment recipient is not a sole trader. The farm in question is leased to a limited partnership, in which the tenant farmer was the general partner and in which Mr Gordon-Duff and his wife were the limited partners.
32. A Scottish limited partnership has limited separate legal personality: in other words, it is a separate legal entity from the actual people who are members of the partnership. A Scottish limited partnership offers limited liability to some of the partners, but must file returns at Companies House giving details of the partners behind the partnership, thus ensuring a level of transparency. This is more akin to companies than general partnerships.
33. It is settled that information about a company cannot constitute personal data within the meaning of the DPA because it is not information that relates to an individual; it is information that relates to the company and it has separate legal existence from the directors, members and employees who are behind the company. However, information about the directors, members and employees of a company can be their personal data, even if generated in the context of their activities for the company.



34. Is the situation different with a partnership? The only real distinction is that there is a closer connection between partners and their partnership than between a company and its directors or members, and this is because a partnership is created from a contract between the partners rather than being a corporation created by statute. Details of payments made to a partnership is information about the partnership, not the individual partners, and therefore, not their personal data.
35. However, as the partnership in this particular case involves the minimum possible number of partners, it is necessary to consider the data protection implications of disclosing information relating to this particular partnership. The questions to consider are therefore:
- a) whether a living individual can be identified from the information withheld, or from that data and other information which is in the possession of, or is likely to come into the possession of, the Executive; and
  - b) whether the information relates to an identifiable living individual even though the payments were made under an application submitted by a partnership.
36. The conditions for applying for payments under the FWPS make it clear that in the case of an agricultural or farm business tenancy, it is the tenant and not the landlord who is eligible to apply. I accept that, on the basis of the FWPS terms and conditions, it could be assumed that the tenant farmer was the applicant and the FWPS payments would form part of his income, and I have found that it is possible, through information already in the public domain, to identify the farmer in question.
37. However, the fact is that the application for the FWPS was submitted (and accepted) not in the name of the individual tenant farmer but in the name of the partnership to whom the farm was leased. The protection afforded by the DPA can only apply to information which is established to be personal information relating to an identifiable individual, and I therefore do not accept that information about the payments would constitute personal data simply because they may be wrongly assumed to have been made to the tenant farmer.
38. Even if it was accepted that, in this case, information about the FWPS payments could be identified as the farmer's personal data, it would be necessary to show that disclosure of this information would breach the first data protection principle by being unlawful or unfair before upholding the Executive's decision that the information is exempt from disclosure.



39. The Information Commissioner has provided some guidance relating to information about agricultural scheme payments, and the associated data protection issues. He has said that in considering whether release would breach the data protection principles, and in particular the requirement for 'fair processing', the interests of the individual should be balanced against the public interest in disclosing payments made out of public funds. In circumstances where the information relates to a person operating in a business capacity, as opposed to information which is intrinsically personal, this balance may favour release.
40. The Executive has started providing details on its website of subsidy payments made under the Single Farm Payment which has consolidated previous subsidy schemes, and I note that payments to the farm in question are publicly available for the year 2005. I am aware that FWPS payments are not included in the Single Farm Payment, and I accept that such disclosure of Single Farm Payment information took place after recipients were informed that the information would be made public. However, I take the view that the recipients will now be more inclined to expect that information about agricultural scheme payments might now be disclosed, even though they were not informed that this might happen when making their application. This weakens the argument that disclosure would be unfair.
41. As mentioned above, the Information Commissioner has commented: "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 they have been made correctly. " In this case there is a question to be resolved about whether payments have been made correctly, or whether an administrative mix-up or misunderstanding has resulted in payments being received by the wrong party. I have taken the view that disclosure of the information in these circumstances would not breach the first data protection principle, and that the information should not be withheld under section 38(1)(b) of FOISA.



## Decision

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I find that the Scottish Executive (the Executive) was wrong to deal with Mr Gordon-Duff's information request under the EIRs. I find that the Executive failed to comply with Part 1 of the Freedom of Information (Scotland) Act 2002 in that, in withholding the information requested by Mr Gordon-Duff, it failed to comply with section 1(1) of FOISA .

I require the Executive to provide Mr Gordon-Duff with the information he requested.

I am obliged to give the Executive at least 42 days in which to supply Mr Gordon-Duff with the information as set out above. In this case, I require the Executive to take these steps within 45 days of the date of receipt of this notice.

**Kevin Dunion**  
**Scottish Information Commissioner**  
**6 December 2006**