



Scottish Information
Commissioner

Decision 072/2007 Mr Ian Gillies and Historic Scotland
<i>Information relating to correspondence between a named person and Historic Scotland</i>

Applicant: Mr Ian Gillies
Authority: Historic Scotland
Case No: 200600291
Decision Date: 16 May 2007

Kevin Dunion
Scottish Information Commissioner

Kinburn Castle
Doubledykes Road
St Andrews
Fife
KY16 9DS



Decision 072/2007 Mr Ian Gillies and Historic Scotland

Information relating to correspondence between a named person and Historic Scotland – section 38(1)(b) – Personal information – information withheld.

Relevant Statutory Provisions

Freedom of Information (Scotland) Act 2002 sections 1(1) (General entitlement); 38(1)(b), (2), (3) and (5) (Personal information).

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

The relevant parts of each of these provisions are reproduced in the Appendix to this decision. The Appendix forms part of this decision.

Facts

Mr Gillies requested copies of all correspondence between a named individual and Historic Scotland, relating to the individual’s interest in any buildings on the Isle of Tiree. Historic Scotland refused to release this information, claiming it to be exempt under section 38(1)(b) of the Freedom of Information (Scotland) Act 2002 (FOISA).

Following an investigation, the Commissioner found that Historic Scotland had failed to comply fully with the requirements of Part 1 of FOISA in its response to Mr Gillies’ requests.

He found that the exemption in section 38(1)(b) had been correctly applied in relation to some of the information withheld, but not all. The Commissioner required further information to be supplied to Mr Gillies in response to his requests.



Background

1. Mr Gillies contacted Historic Scotland on 18 November 2005 and requested copies of all correspondence, photographs and manuscripts exchanged between a named individual and Historic Scotland, relating to the individual's interest in any of the buildings on the Island of Tiree.
2. Historic Scotland responded to the request on 13 December 2005 and advised Mr Gillies that it was withholding the information in terms of section 38(1)(b) of FOISA.
3. Mr Gillies was dissatisfied with this response and, on 20 December 2005, he asked Historic Scotland to review its original decision to withhold the information.
4. Historic Scotland responded to Mr Gillies request for review on 23 January 2006. Historic Scotland upheld, without modification, its original decision to withhold the information under section 38(1)(b) of FOISA.
5. On 1 February 2006, Mr Gillies contacted my Office stating that he was dissatisfied with the outcome of Historic Scotland's review and applying to me for a decision in relation to the information withheld.
6. The case was then allocated to an Investigating officer and the application was validated by establishing that Mr Gillies 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 his request.

Investigation

7. My investigating officer contacted Mr Gillies on 8 February 2006 advising him that a full investigation would now be carried out into his case.
8. A letter was also sent to Historic Scotland on 9 February 2006, in terms of section 49(3)(a) of FOISA, giving notice that an application had been received and that an investigation into the matter had begun. Historic Scotland was invited to comment on the matters raised by Mr Gillies and on the application as a whole.
9. Historic Scotland responded in writing on 27 February 2006, and provided me with copies of the requested documents.



Submissions from Historic Scotland

10. In its letter of 27 February 2006, Historic Scotland stated that the information requested by Mr Gillies' was the personal information of the individual named in the information. Historic Scotland submitted that the correspondence in general related to the views and opinions of the individual and that this information was clearly personal data relating to that individual.
11. Historic Scotland argued that the release of the information would contravene the first principle of the Data Protection Act 1998 (DPA) which requires that all personal data is processed fairly and lawfully. Historic Scotland had considered the expectations of the individual with regard to the correspondence. It had noted that at no time had Historic Scotland indicated that the correspondence would be published. Likewise, there was no indication from the individual in the correspondence that they expected the correspondence to be published. It argued further that the broad tenor of the correspondence indicated that the individual had the expectation that it would not be published. Historic Scotland had also taken into account that release of this information under FOISA would not only be to the applicant but also into the wider public domain.
12. Taking these factors into account, Historic Scotland argued that if it disclosed the correspondence between itself and this individual it would be breaching the first principle of the DPA in that disclosure would be unfair. Therefore the information was exempt under section 38(1)(b) of FOISA.

Submissions from Mr Gillies

13. Mr Gillies argued that, as the individual in question had already circulated some of the material he was requesting to various public bodies, section 38(1)(b) of FOISA did not apply.
14. Mr Gillies was at the time of making the request an elected member of Argyll and Bute Council and he further argued that the requested information should be disclosed as he believed that Historic Scotland was making important decisions that affected his constituents in Tiree based on material which he believed to be flawed and factually incorrect.

Documents withheld by Historic Scotland

15. The correspondence withheld by Historic Scotland consists of emails, letters, photographs and several excerpts from published manuscripts.



The Commissioner's Analysis and Findings

16. I have considered whether the information requested is exempt under section 38(1)(b) of FOISA. 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 Gillies and Historic Scotland and I am satisfied that no matter of relevance has been overlooked.

The application of section 38(1)(b) – personal information

17. Section 38(1)(b) exempts personal data if the release of the information to a member of the public would contravene any of the data protection principles set out in Schedule 1 of the DPA. In its original response to Mr Gillies, Historic Scotland withheld the information relating to the individual's correspondence in terms of section 38(1)(b) of FOISA.
18. Historic Scotland argued that the section 38(1)(b) exemption applied because the requested information related to the views and opinions of an identifiable individual and was, therefore, personal data as defined in section 1 of the DPA. As noted above, Historic Scotland went on to assert that at no time was the individual informed that the correspondence would be made public, and that the broad tenor of the correspondence indicated that the individual had the expectation that it would not be published. Historic Scotland therefore argued that release of the information would breach the first data protection principle, which requires personal data to be processed fairly and lawfully.
19. I must now consider whether the information requested by Mr Gillies was correctly withheld.
20. In considering this exemption, I am required to consider two separate matters: firstly, whether the information under consideration is personal data and, if so, whether the release of the information to Mr Gillies would indeed breach any of the data protection principles.
21. It must be borne in mind that this particular exemption is an absolute exemption. This means that it is not subject to the public interest test contained in section 2(1) of FOISA.



Is the information personal data?

22. “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, 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.”
23. Mr Gillies requested copies of all emails and letters exchanged between Historic Scotland and the individual that relate to the individual’s interest in any building on Tiree. Having considered the nature of the emails and letters in this case, I am satisfied that the material in question constitutes the ‘personal data’ of the individual, in that it is biographical in a significant sense relating as it does to the individual’s hobbies and interests.
24. Mr Gillies also requested copies of all photographs and manuscript excerpts exchanged between the individual and Historic Scotland. The photographs consist of 2 main types, those belonging to the individual and those sourced by the individual from the Royal Commission on Ancient and Historical Monuments (RCAHMS). Having considered the nature of the photographs belonging to the individual I am of the opinion that they form part of the individual’s personal opinion and as such constitute the individual’s personal data. However, I am satisfied that the RCAHMS photographs along with the manuscript excerpts requested by Mr Gillies are not personal data and therefore cannot be withheld under section 38(1)(b) of FOISA. As section 38(1)(b) does not apply to these materials, I find that the RCAHMS photographs and manuscript excerpts exchanged between the individual and Historic Scotland should be disclosed to Mr Gillies.
25. Having established that the correspondence and personal photographs exchanged between Historic Scotland and the individual constitute personal data, I must now consider whether the release of this information to Mr Gillies would breach any of the data protection principles.

Would release of the information breach the first data protection principle?

26. Historic Scotland has submitted that disclosure of the correspondence exchanged between itself and the individual would breach the first data protection principle, which states that personal data shall 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.
27. I have considered the definition of “sensitive personal data” in section 2 of the DPA and do not consider that any of the information sought by Mr Gillies falls into this category.



28. 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.
29. In my view, correspondence (including photographs) sent on a personal basis to a named person within a specific organisation is normally supplied in the expectation that it will be used for a limited purpose. Individuals who contact organisations in a private capacity would not expect the contents of their correspondence to appear in the public domain as a matter of course. Additionally, in this case there are several documents in which the individual expressly requests that the information contained within them is not made public.
30. With regard to the conditions in Schedule 2 of the DPA, it is my view that condition 6 is the only such condition which might be considered to apply. Condition 6 covers processing (for example, by disclosure) which 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.
31. I must apply a number of tests to establish whether condition 6 supports disclosure of personal data in this case. The first test is whether it can be established that the third party/parties to whom the data would be disclosed has/have a legitimate interest in the processing of the personal data (in this case by disclosure to a member of the public) to which the request relates. The second is whether the processing is necessary for the purposes of those legitimate interests. The third is whether that processing can be seen to be unwarranted in this particular case by reason of prejudice to the rights and freedoms or legitimate interests of the data subject. Both competing interests must then be balanced.
32. In considering the first test, I accept that Mr Gillies, whose constituency in Tiree, has a legitimate interest in gaining access to correspondence and photographs exchanged between the individual and Historic Scotland in order to determine whether the individual in question has unduly influenced the decision-making processes of Historic Scotland with regard to his constituency. I also consider that the general public holds a wider legitimate interest in ensuring that no single individual wields excessive influence over the policy-making practices of a public agency, e.g. Historic Scotland. I find, therefore, that the first test can be fulfilled.



33. In considering the second test, with regard to whether disclosure is necessary for the purposes of the legitimate interests identified in paragraph 33 above, I have considered whether these interests might be met equally effectively by any alternative means. In all the circumstances, I have concluded that the legitimate interests in question cannot be met without disclosure of the individual's correspondence and photographs and therefore that disclosure of this data is necessary for the purposes of the legitimate interests.
34. In considering the third test, I am required to balance Mr Gillies legitimate interests against those of the individual.
35. As I have outlined in paragraph 30, individuals will normally have a reasonable expectation that information which is submitted to a public authority, via private correspondence, will not be placed in the public domain. In this case, the individual has also made it clear in several letters/emails to Historic Scotland that they oppose the disclosure of the contents of their correspondence to the wider public. The individual, therefore, clearly holds a legitimate interest in ensuring that the personal data in question is not processed in this manner.
36. However, it is also clear that the general public has a legitimate interest in discerning whether certain individuals are influencing the policies and decision-making processes of a public authority. In this case, Mr Gillies contended that the properties of a number of his constituents are being affected by the policies of Historic Scotland; policies which he feels have been unduly influenced by the individual.
37. I accept that, in the interests of accountability and transparency, the policies and policy-making processes of Historic Scotland should be transparent. Mr Gillies and his constituents are entitled to know why Historic Scotland pursued specific policies with regard to their properties. However, I do not believe that the disclosure of correspondence and photographs between Historic Scotland and the individual in question will aid this transparency.
38. The individual in question has lobbied Historic Scotland on issues which are of personal interest to them. The individual does not represent an organisation or a special interest group and the correspondence with Historic Scotland was clearly undertaken in a personal capacity. As such, it is reasonable to presume that the individual fully expected the content of this correspondence to be kept outwith the public domain. Even in cases where the individual contacted several public bodies requesting feedback on specific issues, it is clear that the correspondence was made available only to those named bodies and was not intended for a wider audience.



39. In balancing the legitimate interests of Mr Gillies (outlined in paragraph 33) against the rights of the individual (outlined in paragraph 36) I have found that disclosure of the requested correspondence and photographs would be unwarranted by reason of prejudice to the individual's rights, freedoms or legitimate interests. Therefore I find that Condition 6 of Schedule 2 of the DPA does not support the disclosure of personal data in this case.
40. As Condition 6 of Schedule 2 of the DPA does not permit disclosure in this case, I do not have to consider whether the release of the information would be unfair or unlawful.
41. It is therefore my view, having considered fully the information in question, that Historic Scotland was correct to apply the exemption in section 38(1)(b) to the correspondence and personal photographs exchanged between itself and the individual, and that this information should be withheld. However, I also find that the exemption in section 38(1)(b) has been wrongly applied by the Council, in that the RCAHMS photographs and manuscript excerpts exchanged between Historic Scotland and the individual are not 'personal data' as defined out in Part 1 of the DPA, and should be disclosed to Mr Gillies.

Decision

I find that Historic Scotland dealt with Mr Ian Gillies request for information partially in accordance with Part 1 of the Freedom of Information (Scotland) Act 2002 (FOISA), in correctly applying the exemption under section 38(1)(b) of FOISA to the correspondence and personal photographs.

However, I find that Historic Scotland misapplied section 38(1)(b) to the manuscript excerpts and RCAHMS photographs.

In order to comply with section 1(1) of FOISA, I now require Historic Scotland to provide copies of the RCHAMS photographs and manuscript excerpts to Mr Gillies within 45 days of the receipt of this decision.



Appeal

Should either Historic Scotland or Mr Gillies wish to appeal against this decision, there is a right to 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.

Kevin Dunion
Scottish Information Commissioner
16 May 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.

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
- (3) The second condition is that, by virtue of any provision of Part IV of that Act, the information is exempt from section 7(1)(c) of that Act (data subject's right of access to personal data)
...
- (5) In this section-
"the data protection principles" means the principles set out in Part I of Schedule 1 to that Act, as read subject to Part II of that Schedule and to section 27(1) of that Act;
"data subject" and "personal data" have the meanings respectively assigned to those terms by section 1(1) of that Act;
...



Data Protection Act 1998

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.

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.

