

Decision Notice



Decision 124/2012 Mr Marc Horne and the Keeper of the Records of Scotland

National Front march in Glasgow

Reference No: 201200103
Decision Date: 20 July 2012

www.itspublicknowledge.info

Rosemary Agnew
Scottish Information Commissioner

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



Summary

Mr Horne asked the Keeper of the Records of Scotland (the Keeper) for information held in certain specified files. The Keeper advised Mr Horne that some of the information in the files was open to public access and could be viewed at General Register House. Some of the information was considered to be exempt from disclosure under the Freedom of Information (Scotland) Act 2002 (FOISA), and some was not held by the Keeper for the purposes of FOISA.

After investigation and discussion with the Keeper and other parties, the Commissioner concluded that only one of the files contained information which could be considered to be held by the Keeper for the purposes of FOISA. The Commissioner agreed with the Keeper that some of the information in that file was exempt from disclosure under section 38(1)(b) of FOISA (personal information). The Keeper has agreed to provide the remaining information in that file to Mr Horne.

Relevant statutory provisions and other sources

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) and (6) (General entitlement); 2(1)(a) and (2)(e)(ii) (Effect of exemptions); 3(4) and (5) (Scottish public authorities); 22(1), (2), (5) and (6) (Special provisions relating to records transferred to the Keeper); 25(2)(b)(ii) (Information otherwise accessible); 38(1)(b), (2)(a)(i) and (b) and (5) (definitions of “the data protection principles”, “data subject” and “personal data”) (Personal information)

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

The full text of each of the statutory provisions cited above is reproduced in the Appendix to this decision. The Appendix forms part of this decision.

Transfer of Property etc. (Scottish Ministers) Order 1999 (S.I. 1999/1104)



Background

1. On 22 March 2011, Mr Horne asked the Keeper to provide him with the opportunity to view the information contained in certain specified files.
2. On 28 October 2011, the Keeper responded to Mr Horne's request. The Keeper apologised for the delay in providing a final response, explaining that the delay had resulted from the Scottish Office's request that the files be checked to determine whether information in the files was subject to the Freedom of Information Act 2002 (FOIA) rather than to FOISA (the relevance of this is explained below). The Keeper advised that some of the information which was subject to FOISA was considered to be exempt from disclosure either for reasons of national security or because it was personal data.
3. On 16 November 2011, Mr Horne asked for a review of the decision to withhold information from three files: HH55/1948/2 (Consideration by the Cabinet Office of possible terrorist attacks on UK economic key points (1976-1978)), HH55/1950/2 (The National Front (1977-1980)) and HH55/1954/2 (Scottish Republican Army (1971)).
4. On 4 January 2012, the Keeper notified Mr Horne of the outcome of the review, which had, in line with section 22(5) of FOISA, been carried out by the Scottish Ministers, on the basis that the Scottish Ministers had transferred the records to the Keeper. The review response confirmed that the information was considered to be exempt from disclosure under FOISA, either for reasons of national security or because it was personal data.
5. On 10 January 2012, Mr Horne wrote to the Commissioner, expressing his dissatisfaction with the outcome of the review and applying to the Commissioner for a decision in terms of section 47(1) of FOISA. Mr Horne believed that there was a public interest in the information being brought into the public domain, and asserted that similar files had been opened in recent years on both sides of the border.
6. The application was validated by establishing that Mr Horne had made a request for information to a Scottish public authority and had applied to the Commissioner for a decision only after asking the authority to review its response to that request.

Investigation

7. On 8 February 2012, the Keeper was notified in writing that an application had been received from Mr Horne and was asked to provide the information which had been withheld from Mr Horne. Once this had been received, the case was allocated to an investigating officer.

Decision 124/2012
Mr Marc Horne and
the Keeper of the Records of Scotland



8. On 5 March 2012, the Keeper advised the Commissioner that the information in file HH55/1954/2 was now considered to fall under FOIA, not FOISA. The Keeper wrote to Mr Horne to let him know of this decision. Mr Horne then told the Commissioner that he wished to challenge the decision that FOIA rather than FOISA applied in relation to the information in file HH55/1954/2.
9. On 13 March 2012, the investigating officer contacted the Keeper, giving him an opportunity to provide comments on the application (as required by section 49(3)(a) of FOISA) and asking him to respond to specific questions.
10. In particular, the Keeper was asked to clarify which exemptions had been applied to the information in each of the three files. He was also asked to provide copies of any correspondence between the Keeper or his staff and the Scottish Ministers or their staff which related to Mr Horne's request (in terms of section 22(3) of FOISA, where information is contained in a record which has been transferred to the Keeper, and where that information has not been designated as "open", it is for the transferring authority, rather than the Keeper, to determine whether the information is exempt information).
11. The Keeper was asked to explain how a decision is reached on whether recorded information falls under FOIA or FOISA, and the role and responsibilities of both the Keeper and the Scottish Government in making this decision. Questions about the status of the information in HH55/1954/2 were also asked.
12. The Commissioner's staff met with representatives of the Keeper and of the Scottish and United Kingdom Governments to discuss whether the information covered by Mr Horne's request fell under FOIA or FOISA. Following this meeting, the Keeper was asked to confirm whether he held the information in the files HH55/1948/2, HH/1950/2 and HH55/1954/2 for the purposes of FOISA.
13. If the Keeper concluded that the information was not held for the purposes of FOISA, he was asked to explain whether the records were devolved functions records or reserved functions records (in terms of the Transfer of Property etc. (Scottish Ministers) Order 1999 (the Transfer of Property Order)).
14. The Keeper was also asked to provide full details of any exemptions applied to information held for the purposes of FOISA.
15. On 7 June 2012, the Keeper confirmed which information was considered to be held for the purposes of FOISA and explained why some of the information was subject to FOIA, not FOISA. The Keeper provided comments from the Scottish Government and the Scotland Office on this matter, and a copy of the 2004 agreement between the Scottish Executive and the Scotland Office on the treatment of pre-devolution records of the Scottish Office.
16. Submissions from all parties involved in this case (where relevant) are summarised and considered in the Commissioner's analysis and findings section below.



Commissioner's analysis and findings

17. In coming to a decision on this matter, the Commissioner has considered all of the withheld information and the submissions made to her by both Mr Horne and the Keeper and is satisfied that no matter of relevance has been overlooked.

FOIA or FOISA?

18. After the Keeper had issued his review response, the status of some of the information covered by Mr Horne's request was reviewed and revised, following communications with the United Kingdom Government. This decision was discussed at the meeting of 1 May 2012, referred to in paragraph 12 above. The status of each file, in its entirety, was also discussed and the United Kingdom Government confirmed that files HH55/1948 and HH55/1954 related to reserved functions (national security).

Files HH55/1948 and HH55/1954

19. The Keeper subsequently confirmed to the Commissioner that files HH55/1948 and HH55/1954 (which include the sub-files HH55/1948/2 and HH55/1954/2 requested by Mr Horne) are "reserved function records" held on behalf of the United Kingdom Government, and accordingly are not held for the purposes of FOISA but are subject to FOIA.
20. The Keeper referred the Commissioner to the Agreement between the Scottish Government and the Scotland Office on pre-devolution records of the Scottish Office. The Agreement summarises the legal position regarding ownership and possession of such records, as set out in the Transfer of Property Order.
21. The key points identified by the Keeper, in relation to files HH55/1948/2 and HH55/1954/2, were as follows:
- The files in question were created by the Scottish Home and Health Department and, as such, are pre-devolution records of the former Scottish Office.
 - The files are "reserved function records" because immediately before devolution they were held or used in connection with the exercise of a reserved function (national security).
 - The files were held by the Scottish Office until 1 July 1999 when, in terms of the Transfer of Property Order, they came into the possession (but not the ownership) of the Scottish Government.
 - The files were transferred to the Keeper on 27 August 2008. They were not open files, and the information they contain has never been in the public domain. (The Keeper explained that, although Mr Horne was invited to view parts of the information in October 2011, he did not do so, nor have any other members of the public. The information is therefore not considered to have entered the public domain.)



- Paragraph 11 of the Agreements states: “Reserved functions records which were transferred to the Keeper on or after 1 July 1999 and have not been designated as open for the purposes of section 3(4) of the FOISA are subject to the FOIA and the Keeper will refer any requests for access to the Scotland Office as soon as possible.”
22. The Keeper confirmed that, as soon as the information was found to be “not held” for the purposes of FOISA, it was made available to the Scotland Office to be included as part of Mr Horne’s current FOIA request with the United Kingdom Government.
23. The Commissioner accepts that the information in files HH55/1948/2 and HH55/1954/2 is not held for the purposes of FOISA. Section 3(4) of FOISA sets out the circumstances in which records transferred to the Keeper are held for the purposes of FOISA. The Commissioner is satisfied that neither section 3(4)(a) or (b) applies in this case, for the reasons outlined in paragraph 21 above.

File HH55/1950

24. The Keeper considers that the information in file HH55/1950 is held for the purposes of FOISA. The information was created by the Scottish Home and Health Department and is a pre-devolution record of the former Scottish Office; it is a “devolved function record” because it was held or used in connection with the exercise of a devolved function (namely, policing). Paragraph 8 of the Agreement between the Scottish Government and the Scotland Office states that devolved functions records of the pre-devolution Scottish Office are subject to FOISA.
25. The Commissioner accepts that the information in file HH55/1950 is held by the Keeper for the purposes of FOISA.
26. The Keeper confirmed that file HH55/1950 has been subdivided into two subfiles, HH55/1950/1 (open information) and HH55/1950/2 (information considered to be exempt from disclosure under FOISA).
27. The Keeper has agreed to provide the information in subfile HH55/1950/1 to Mr Horne. The Commissioner notes that, although the Keeper is willing to provide a copy of this information to Mr Horne (he has confirmed he will do so after this decision is issued), the Keeper would have been entitled not to provide a copy of the subfile to Mr Horne, given that the information in the subfile is exempt from disclosure under section 25(2)(b)(ii) of FOISA, on the basis that it is held by the Keeper and the Keeper makes it available for inspection by members of the public on request.
28. The Commissioner will go on to consider whether the exemption in section 38(1)(b) of FOISA was correctly applied to the information in subfile HH55/1950/2.



Section 38(1)(b) – personal information

29. Section 38(1)(b) of FOISA, read in conjunction with section 38(2)(a)(i) or (as appropriate) section 38(2)(b), exempts information if it is personal data and if its disclosure to a member of the public otherwise than under FOISA would breach any of the data protection principles set out in Schedule 1 to the DPA.
30. The exemption in section 38(1)(b) is an absolute exemption, not subject to the public interest test laid down by section 2(1)(b) of FOISA

Is the information personal data?

31. Personal data is defined in section 1(1) of the DPA as 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 (the full definition is set out in the Appendix).
32. The information which has been withheld under section 38(1)(b) of FOISA consists of the names, addresses, and other identifying details of members of the public who wrote to the Government with their views on the decision to temporarily ban public processions in Glasgow. The views expressed have not been withheld (these are contained in sub-file HH55/1950/1); only the information which would identify the letter writers. The Commissioner accepts that the withheld information is personal data as defined in section 1(1) of the DPA, as it relates to a living individual who can be identified from that information. The Commissioner will go on to consider whether this information is exempt from disclosure under section 38(1)(b) of FOISA.

Would disclosure breach the first data protection principle?

33. The Keeper considers that disclosure of the information requested by Mr Horne would breach the first data protection principle, which requires 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 to the DPA is met. In the case of sensitive personal data, at least one of the conditions in Schedule 3 to the DPA must also be met.
34. The Commissioner does not consider any of the personal data withheld in this case to be sensitive personal data. She will therefore consider only whether any of the conditions in Schedule 2 to the DPA would permit disclosure of the information.



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

35. When considering the conditions in Schedule 2, the Commissioner notes Lord Hope's comment in *Common Services Agency v Scottish Information Commissioner* [2008] UKHL 47¹ that the conditions require careful treatment in the context of a request for information under FOISA, given that they were not designed to facilitate the release of information, but rather to protect personal data from being processed in a way that might prejudice the rights and freedoms or legitimate interests of the data subject.
36. The Commissioner considers that condition 6 of Schedule 2 of the DPA would appear to be the only condition which might permit disclosure of the personal data requested by Mr Horne. Condition 6 allows personal data to be processed if 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.
37. There are a number of different tests which must therefore be satisfied before condition 6 can be met. These are:
- Does Mr Horne have a legitimate interest in obtaining the personal data?
 - If he does, is the disclosure necessary to achieve these legitimate aims? In other words, is the disclosure proportionate as a means and fairly balanced as to ends, or could these legitimate aims be achieved by means which interfere less with the privacy of the data subjects?
 - Even if the processing is necessary for Mr Horne's legitimate purposes, would the disclosure nevertheless cause unwarranted prejudice to the rights and freedoms or legitimate interests of the data subjects?
38. There is no presumption in favour of the release of personal data under the general obligation laid down by FOISA. Accordingly, the legitimate interests of Mr Horne must outweigh the rights and freedoms or legitimate interests of the data subject before condition 6 will permit the personal data to be disclosed. If the two are evenly balanced, the Commissioner must find that the Keeper was correct to refuse to disclose the personal data to Mr Horne.

Does Mr Horne have a legitimate interest?

39. In his application to the Commissioner, Mr Horne explained that he believed there was a public interest in the withheld information being brought into the public domain. Mr Horne went on to say: "If the naming of individuals in the document is causing difficulties I have no problem in them being redacted".

¹ <http://www.publications.parliament.uk/pa/ld200708/ldjudgmt/jd080709/comm-1.htm>



40. The Commissioner takes the view that there is no obvious public interest which would require disclosure of the personal data withheld from Mr Horne. The views of the writers have been disclosed; only their identities have been kept back. The redaction of this information should not affect public understanding of the correspondence to any great extent, and Mr Horne had already indicated that he would accept the redaction of such information. In these circumstances, the Commissioner finds that Mr Horne does not have a legitimate interest in the personal data withheld by the Keeper.
41. The Commissioner therefore finds that none of the conditions in schedule 1 of the DPA can be met, and accordingly the Keeper was correct to withhold the information in question under section 38(1)(b) of FOISA.

DECISION

The Commissioner finds that, in relation to the matters specified in Mr Horne's application, the Keeper of the Records of Scotland complied with Part 1 of the Freedom of Information (Scotland) Act 2002 in responding to the information request from Mr Horne.

Appeal

Should either Mr Horne or the Keeper wish to appeal against this decision, there is an appeal to the Court of Session on a point of law only. Any such appeal must be made within 42 days after the date of intimation of this decision notice.

Rosemary Agnew
Scottish Information Commissioner
20 July 2012



Appendix

Relevant statutory provisions

Freedom of Information (Scotland) Act 2002

1 General entitlement

- (1) A person who requests information from a Scottish public authority which holds it is entitled to be given it by the authority.

...

- (6) This section is subject to sections 2, 9, 12 and 14.

2 Effect of exemptions

- (1) To information which is exempt information by virtue of any provision of Part 2, section 1 applies only to the extent that –

- (a) the provision does not confer absolute exemption; and

...

- (2) For the purposes of paragraph (a) of subsection 1, the following provisions of Part 2 (and no others) are to be regarded as conferring absolute exemption –

...

- (e) in subsection (1) of section 38 –

...

- (ii) paragraph (b) where the first condition referred to in that paragraph is satisfied by virtue of subsection (2)(a)(i) or (b) of that section.

3 Scottish public authorities

...

- (4) Information is not held by the Keeper of the Records of Scotland if it is contained in a record transferred to the Keeper by a public authority within the meaning of the Freedom of Information Act 2000 (c.36) unless it is information-



- (a) to which subsections (2) to (5) of section 22 apply by virtue of subsection (6) of that section; or
 - (b) designated by that authority as open information for the purposes of this subsection.
- (5) Where the public authority mentioned in subsection (4) is the Secretary of State for Scotland and the information is contained in a record transferred as is mentioned in subsection (6) of section 22 the reference in subsection (4)(b) to "that authority" is to be construed as a reference to the Scottish Ministers.

22 Special provisions relating to records transferred to Keeper

- (1) Subsections (2) to (5) apply to information which-
- (a) is contained in a record transferred to the Keeper of the Records of Scotland by a Scottish public authority; and
 - (b) has not been designated by the authority as open information for the purposes of this section.
- (2) The Keeper must, as soon as practicable after receiving a request for information to which this subsection applies, send a copy of that request to the authority which transferred the information; and it is for the authority, instead of the Keeper, to come to a decision as to whether the information is exempt information by virtue of any provision of Part 2 and to determine any question then arising by virtue of paragraph (a) or (b) of section 2(1) as respects the information.
- ...
- (5) After receiving the requirement, the authority must, within such time as will make it practicable for the Keeper to comply with subsection (5) of section 21 as respects the requirement, inform the Keeper of what it has done under subsection (4) of that section and provide a statement of its reasons for so doing; and it is that information and statement which the Keeper shall, in the notice in writing, give in so complying.
- (6) Subsections (2) to (5) also apply to information which is contained in a record transferred to the Keeper, before 1st July 1999, by the Secretary of State for Scotland and is not designated by the Scottish Ministers as open information for the purposes of section 3(4); but for the purposes of that application references in subsections (2) to (5) to "the authority" are to be construed as references to the Scottish Ministers

25 Information otherwise accessible

- (1) Information which the applicant can reasonably obtain other than by requesting it under section 1(1) is exempt information.
- (2) For the purposes of subsection (1), information-



...

(b) is to be taken to be reasonably obtainable if-

...

(ii) the Keeper of the Records of Scotland holds it and makes it available for inspection and (in so far as practicable) copying by,

members of the public on request, whether free of charge or on payment.

38 Personal information

(1) Information is exempt information if it constitutes-

...

(b) personal data and either the condition mentioned in subsection (2) (the "first condition") or that mentioned in subsection (3) (the "second condition") is satisfied;

...

(2) The first condition is-

(a) in a case where the information falls within any of paragraphs (a) to (d) of the definition of "data" in section 1(1) of the Data Protection Act 1998 (c.29), that the disclosure of the information to a member of the public otherwise than under this Act would contravene-

(i) any of the data protection principles; or

...

(b) in any other case, that such disclosure would contravene any of the data protection principles if the exemptions in section 33A(1) of that Act (which relate to manual data held) were disregarded.

...

(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

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

...

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.

...