

Decision Notice



Decision 049/2009 Eriskay Pony Mother Studbook Society – Comann Each nan Eilean Ltd and the Scottish Ministers

Correspondence relating to legal advice

Reference No: 200801325
Decision Date: 17 April 2009

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Kevin Dunion

Scottish Information Commissioner

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Summary

Eriskay Pony Mother Studbook Society – Comann Each nan Eilean Ltd (EPMSS) requested from the Scottish Ministers (the Ministers) copies of correspondence relating to Eriskay Ponies and the organisations concerned with them. The Ministers responded by providing some of the information requested, but also citing section 14(2) of FOISA on the basis that EPMSS had previously been provided with certain of the information. Following a review, which resulted in the Ministers withholding information on the basis of section 36(1) of FOISA, EPMSS remained dissatisfied and applied to the Commissioner for a decision.

Following an investigation, the Commissioner found that the Ministers had dealt with EPMSS's request for information in accordance with Part 1 of FOISA, by providing all the information it held which fell within the scope of the request.

Relevant statutory provisions and other sources

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

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.

Background

1. On 12 December 2007, EPMSS wrote to the Ministers requesting the following information:
 - (a) Copies of all Ministerial correspondence relating to Eriskay Ponies or the organisations concerned with them, i.e. EPMSS and Eriskay Pony Society Ltd from the year 2000 to date;
 - (b) Copies of any faxes, internal notes, memos, handwritten or typed, within the Environment and Rural Affairs Department for the period 13 September 2006 to 5 April 2007 relating to any aspect of Eriskay Ponies, EPMSS or Eriskay Pony Society Ltd.

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2. The Ministers responded on 29 January 2008. They confirmed that all information held by the Rural Directorate of the Scottish Government in relation to the two societies up to and including 18 October 2007 (including any ministerial correspondence covered by part (a) of the request) had been previously provided to EPMSS. However, the Ministers provided copies of all information held in this context from 19 October 2007 to the date of the request. In response to part (b) of the request, the Ministers confirmed that they would not be providing this information on the basis that they had already done so in response to previous information requests made by EPMSS. Consequently the Ministers concluded that this part of the request was “repeated” in terms of section 14(2) of FOISA and refused it on that basis.
3. On 21 February 2008, EPMSS wrote to the Ministers requesting a review of their decision. It submitted, with reference to six particular cases from the information it had already received, that there appeared to be examples of non supply / incomplete supply of material.
4. The Ministers notified EPMSS of the outcome of their review on 23 April 2008. In their response, the Ministers provided some additional information relating to points 1 and 3 of EPMSS’s request for review. With respect to points 2 and 6, the Ministers confirmed that all information held had been provided to EPMSS, while in relation to parts 4 and 5 they submitted that the information was exempt in terms of section 36(1) of FOISA, because it related to advice received from the Ministers’ legal advisers.
5. On 2 September 2008, EPMSS wrote to the Commissioner, stating that it was dissatisfied with the outcome of the Ministers’ review in relation to points 4 and 5 and applying to the Commissioner for a decision in terms of section 47(1) of FOISA.
6. EPMSS’s application to the Commissioner was based on the response it had received from the Ministers in their letter of 23 April 2008, i.e. that certain information was being withheld on the basis of section 36(1) of FOISA.
7. The application was validated by establishing that EPMSS 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

8. On 13 October 2008, the Ministers were notified in writing that an application had been received from EPMSS and were asked to provide the Commissioner with any information withheld from EPMSS. The Ministers responded by advising that, on further consideration of the information request, they did not consider any information to have been withheld from EPMSS, any relevant information having been provided already. The case was then allocated to an investigating officer.



9. The investigating officer subsequently contacted the Ministers, giving them an opportunity to provide comments on the application (as required by section 49(3)(a) of FOISA) and asking them to respond to specific questions. In particular, the Ministers were asked to provide details of the searches and search methodology used to identify the information falling within the scope of EPMSS's request for information. The Ministers' submissions are discussed in the Commissioner's analysis and findings section below.

Commissioner's analysis and findings

10. In coming to a decision on this matter, the Commissioner has considered all submissions made to him by both EPMSS and the Ministers and is satisfied that no matter of relevance has been overlooked.
11. The Commissioner notes that, although initially this investigation was instigated by EPMSS to consider the Ministers' application of section 36(1) of FOISA, on further consideration of the terms of EPMSS's request for review, the Ministers confirmed that the information referred to in the relevant points of the review request was either not held or had been provided in full already to EPMSS. Therefore, the Commissioner's primary role in this investigation was to consider whether the information in question was indeed held by the Ministers when requested, or whether the Ministers had in fact provided EPMSS with the relevant information already. The Commissioner cannot comment on whether a public authority should have recorded any or more information about a particular event or process. Consequently, in this instance, he cannot comment on whether the Ministers ought to hold further recorded information on action it took or omitted to take at any particular time.

Section 17 of FOISA (Notice that information is not held)

12. In its submissions to the Commissioner, EPMSS referred to information obtained from the Ministers which suggested that legal advice had been sought by the Ministers on a certain matter. It was EPMSS's view that a response to this apparent request for legal advice should exist and it advised that it had not received a copy of any such response (which in its view would fall within the scope of its request, and in particular that of point 4 in its request for review) in the information provided by the Ministers to date. In relation to various questions identified in point 5 of its request for review, it believed that legal advice should have been provided in response.
13. In their response to EPMSS's request for review, the Ministers indicated that they held information relating to points 4 and 5 and responded by stating that they would be unable to provide this information on the basis that it was exempt in terms of section 36(1) of FOISA, because it represented advice received by the Ministers from their legal advisers. In the course of the investigation, as indicated above, the Ministers submitted that they did not in fact hold the information in question.

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14. The Ministers provided an overview of the searches conducted to establish whether any relevant information was held in this context. They assured the investigating officer that both paper-based and electronic sources were considered on several occasions, in response to multiple, overlapping requests. They referred to the particular files searched, submitting that every document in the relevant paper file had been examined more than once and the relevant electronic records examined line by line. The Ministers confirmed that they also checked the relevant file held by the Scottish Government Legal Directorate, but again this did not produce any relevant information. It was on completion of these searches that the Ministers concluded that no further relevant information was held by them.
15. The Ministers further pointed out that in a letter dated 27 March 2007, they had responded to EPMSS in relation to the matter raised in point 4. This response had resulted from a previous information request made by EPMSS on 22 February 2007. In this response (that of 27 March 2007), the Ministers had explained to EPMSS that it did not hold a response from the legal adviser on the matter referred to in point 4. They also referred to (and provided copies of) documents provided to EPMSS in response to another information request, which they submitted comprised all information they held concerning the matters raised in point 5.
16. Having considered the Ministers' submissions detailing the searches they have undertaken, and having taken account of the information provided to EPMSS previously, the Commissioner is satisfied that the information referred to in points 4 and 5 of EPMSS's request for review is not held by the Ministers and was not held by them at the time they received EPMSS's request. The Commissioner has concluded that the Ministers took all reasonable steps (on this and previous occasions) to identify whether this information was held or not, and in the circumstances is satisfied that EPMSS has been provided with all information falling within the scope of its information request.

DECISION

The Commissioner finds that the Scottish Ministers (the Ministers), in supplying all of the information they held in relation to this information request to Eriskay Pony Mother Society – Comann Each nan Eilean Ltd (EPMSS), acted in accordance with Part 1 of the Freedom of Information (Scotland) Act 2002.

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Appeal

Should either EPMSS or the Ministers 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.

Margaret Keyse
Head of Enforcement
17 April 2009



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.

...

17 Notice that information is not held

- (1) Where-
- (a) a Scottish public authority receives a request which would require it either-
 - (i) to comply with section 1(1); or
 - (ii) to determine any question arising by virtue of paragraph (a) or (b) of section 2(1),

if it held the information to which the request relates; but

- (b) the authority does not hold that information,

it must, within the time allowed by or by virtue of section 10 for complying with the request, give the applicant notice in writing that it does not hold it.

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