

Decision Notice



Decision 073/2010 Dr A D Hawkins and Scottish Natural Heritage

River Dee Special Area of Conservation

Reference No: 200901106
Decision Date: 25 May 2010

www.itspublicknowledge.info

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Summary

Dr A D Hawkins (Dr Hawkins) requested from Scottish Natural Heritage (SNH) environmental information relating to the River Dee Special Area of Conservation (SAC), and particularly the state of freshwater pearl mussels. SNH provided some information, but withheld a number of documents on the basis that disclosure would, in terms of regulation 10(5)(g) of the Environmental Information (Scotland) Regulations 2004 (the EIRs), be likely to prejudice substantially the protection of the pearl mussels to which it related. Following a review, Dr Hawkins remained dissatisfied and applied to the Commissioner for a decision.

During the investigation, SNH reconsidered its approach to this request, and no longer sought to apply the exception in regulation 10(5)(g) to most of the information that had previously been withheld. The Commissioner found that SNH had failed to deal with Dr Hawkins' request for information fully in accordance with the EIRs. He accepted that disclosure of information that revealed the location of freshwater pearl mussel populations would, or would be likely to, harm the protection of that species, and found that SNH complied with the EIRs by withholding this information.

However, he concluded that the remaining information had been wrongly withheld in terms of regulation 10(5)(g), and that SNH had failed to comply with its duty to provide advice and assistance to Dr Hawkins in this case. The Commissioner required SNH to provide the withheld information to Dr Hawkins, subject to the removal of the information to which regulation 10(5)(g) was found to apply.

Relevant statutory provisions and other sources

Freedom of Information (Scotland) Act 2002 sections 1(1) and (6) (General entitlement); 2(1) (Effect of exemptions) and 39(2) (Health, safety and the environment)

The Environmental Information (Scotland) Regulations 2004 (the EIRs) regulations 2(1) (Interpretation – definition of environmental information); 5(1) and (2)(b) (Duty to make available environmental information on request); 6(1)(b) (Form and format of information); 9(1) (Duty to provide advice and assistance) and 10(1), (2), and (5)(g) (Exceptions from duty to make environmental information available)

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 8 April 2009, Dr Hawkins wrote to SNH requesting a variety of information about the state of freshwater pearl mussels in the River Dee Special Area of Conservation (SAC), and matters relating to the impact of the development of the Aberdeen Western Peripheral Route (AWPR) on this area.
2. Dr Hawkins specified:

“... I am requesting any reports and information in the possession of SNH (since January 2005) in relation to the state of freshwater pearl mussels within the Aberdeenshire Dee SAC, including the minutes of any meetings, or any internal correspondence in relation to the state of freshwater pearl mussels within the Dee. I am also requesting copies of any correspondence, minutes of meetings, reports and other information which may have been exchanged since July 2008 between Transport Scotland and its agents for the AWPR (including Jacobs Babbie and the Managing Agents) in relation to the AWPR crossing of the Dee SAC, including any information with respect to an Appropriate Assessment for the crossing, or in relation to derogations or licenses under the Conservation (Natural Habitats etc) Amendment (Scotland) Regulations 2007 (2007 No. 80) to allow the AWPR to be constructed despite the damage it will cause to otters and their places of shelter and bats and their places of shelter.

“I also seek any information including letters, emails, minutes of meetings or reports exchanged between SNH and the Scottish Government (including any department dealing with licensing under the Conservation (Natural Habitats etc) Amendment (Scotland) Regulations 2007 (2007 No. 80)), exchanged since July 2008, with respect to the licensing of activities in relation to otters and bats along the line of the proposed AWPR, or in relation to the preparation of an Appropriate Assessment under the Habitats Directive for any work associated with the AWPR.”
3. SNH responded on 11 May 2009, advising that this request had been considered under the EIRs. It advised that the information held about freshwater pearl mussels contained locational data which could not be disclosed without risk of persecution of this species. SNH maintained that this locational information fell under the exception in regulation 10(5)(g) of the EIRs on the basis that release would be likely to prejudice substantially the protection of the freshwater pearl mussels to which this information related. SNH noted that if the information were released to Dr Hawkins, it would have to be released to any other member of the public who requested it.
4. SNH provided a number of documents falling under the scope of the other parts of Dr Hawkins’ request, but noted that there had been no correspondence between itself and the Scottish Government in relation to potential derogations under the Habitats Regulations in relation to otters and bats.



5. On 16 May 2009, Dr Hawkins wrote to SNH requesting a review of its decision in relation to the part of his request concerning freshwater pearl mussels. In particular, Dr Hawkins asked it to justify its statement that disclosure to him would oblige SNH to disclose the same information to any other person. Dr Hawkins maintained that he was an appropriately qualified person, and asked what justification could be given for SNH sharing this information with certain other parties but not him.
6. Dr Hawkins further argued that SNH was in breach of its obligations under FOISA and the EIRs, and the Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters at Aarhus, 1998 (Aarhus Convention) by withholding the requested information.
7. Dr Hawkins argued that without access to reports commissioned by SNH on the state of freshwater pearl mussels within the River Dee SAC, he would be unable to draw the attention of the European Commission effectively to his concerns regarding in his view the “lack of enforcement of the Habitats Directive” by the Scottish and UK Governments.
8. SNH notified Dr Hawkins of the outcome of its review on 9 June 2009. It upheld its previous decision that the information was excepted from disclosure under regulation 10(5)(g) of the EIRs. It reiterated that disclosure to any person under FOISA or the EIRs (rather than under licence) would have the effect of the information being released into the public domain.
9. On 12 June 2009, Dr Hawkins wrote to the Commissioner, stating that he was dissatisfied with the outcome of SNH’s review and applying for a decision in terms of section 47(1) of FOISA. By virtue of regulation 17 of the EIRs, Part 4 of FOISA applies to the enforcement of the EIRs as it applies to the enforcement of FOISA, subject to certain specified modifications.
10. The application was validated by establishing that Dr Hawkins 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

11. On 18 June 2009, SNH was notified in writing that an application had been received from Dr Hawkins and was asked to provide the Commissioner with any information withheld from him. SNH responded with the information requested and the case was then allocated to an investigating officer.
12. The investigating officer subsequently contacted SNH on 31 July 2009, giving it an opportunity to provide comments on the application (as required by section 49(3)(a) of FOISA) and asking it to respond to specific questions. In particular, SNH was asked to justify its reliance on any provisions of the EIRs it considered applicable to the information requested. SNH responded and provided detailed submissions on 24 August 2009.



13. The investigating officer asked Dr Hawkins to provide submissions on 2 September 2009. Detailed submissions were provided on 22 September 2009.
14. SNH submitted that, although it had withheld a number of documents, its arguments for so doing applied only to the content in the documents which directly identifies the location of freshwater pearl mussel colonies or from which that location can be deduced. SNH indicated that it had considered releasing redacted versions of the documents, but apart from the information about the location of the mussel beds, much of the information therein was in the public domain.
15. Following consideration of the information and these comments, SNH was asked to provide further submissions confirming:
 - a. exactly which parts of the withheld information it considered would lead to harm if released, and whether it considered the exception in regulation 10(5)(g) to apply to all of the withheld information
 - b. whether SNH would consider any other provision within the EIRs to apply to the information under consideration
 - c. whether any parts of the information withheld were publicly accessible, and if so, where and how.
16. SNH subsequently agreed that the exception in regulation 10(5)(g) did not apply to all of the withheld information, and that some of this was already publicly available, for example on the website for the AWPR public inquiry¹. SNH provided details of where some of the withheld information could be found on the internet, and now claimed that it was not obliged to provide this information to Dr Hawkins because (in terms of regulation 6(1)(b) of the EIRs), it was already publicly available and reasonably accessible to him.
17. SNH confirmed which specific information it considered revealed sensitive locational data, disclosure of which, it maintained, would be harmful to the conservation of the fresh water pearl mussel. In relation to this information, SNH continued to claim the exception in regulation 10(5)(g).
18. SNH no longer sought to apply any exception to the information to which it no longer sought to apply regulation 10(5)(g), and which was not already publicly accessible.
19. These and other submissions received from both Dr Hawkins and SNH are considered where relevant below.

¹ www.awpr-pli.org/index.asp



Commissioner's analysis and findings

20. In coming to a decision on this matter, the Commissioner has considered all of the withheld information and the submissions made to him by both Dr Hawkins and SNH and is satisfied that no matter of relevance has been overlooked.

Environmental information

21. Environmental information is defined in regulation 2(1) of the EIRs, and this definition is reproduced in full in the Appendix to this decision. Where information falls within the scope of this definition, a person has a right to access it under the EIRs, subject to the exceptions contained within regulation 10 and the provisions of regulation 11, and certain other restrictions set out in the EIRs.
22. In this case, the Commissioner is satisfied that the information under consideration is environmental information. Documents 1 – 6 all contain information on the state of the elements of the environment, and in particular, the state of water, natural sites, and “biological diversity and its components”. They also include information on factors that can affect the state of the elements of the environment, and measures likely to affect those elements or factors, or designed to protect those elements.
23. As such, this information is entirely environmental information in terms of parts (a), (b) and (c) of the definition of environmental information set out in regulation 2(1) of the EIRs.
24. The exemption in section 39(2) of FOISA provides that environmental information as defined by regulation 2(1) of the EIRs is exempt from disclosure under FOISA (thereby allowing any such information to be considered solely in terms of the EIRs).
25. Given that the Commissioner's view is that the information requested by Dr Hawkins is environmental information, he has also concluded that the information is exempt information in terms of section 39(2) of FOISA.
26. The exemption in section 39(2) is subject to the public interest test in section 2(1)(b) of FOISA. Since there is a separate legislative right of access to environmental information (via the EIRs), the Commissioner also accepts that in this case the public interest in maintaining this exemption and dealing with Dr Hawkins' information request under the EIRs outweighs any public interest there may be in considering the disclosure of any information under FOISA. In what follows, the Commissioner has therefore made his decision solely in terms of the EIRs.

Licensed release of information

27. The Commissioner has first considered whether SNH could or should have provided the withheld information to Dr Hawkins notwithstanding its view that it should not be available to the general public, since he was willing to give an undertaking that he would not disclose this further.



28. In his request to SNH, Dr Hawkins noted that this information had been shared with consultants advising Transport Scotland on the AWPR, which would cross the River Dee. He highlighted that he was a qualified aquatic biologist who needed the information for legitimate purposes and that he was willing to sign an undertaking not to reveal the information to others.
29. He also indicated that the lack of access to the information relating to fresh water pearl mussels impeded the case being prepared by a campaigning organisation with which he worked about the planned road crossing of the River Dee at the public local inquiry about the AWPR. He noted that he was preparing a complaint to the Aarhus Convention Compliance Committee in relation to this issue.
30. In responding to Dr Hawkins' request, SNH emphasised that its stance in no way reflected upon Dr Hawkins' own suitability as an individual to obtain access to the requested information. However, it pointed out that disclosure to any person under FOISA or the EIRs (rather than under licence) would have the effect of the information being released into the public domain.
31. The Commissioner has considered Dr Hawkins' representations on this point, but he notes that his request must be considered in terms of the EIRs. The EIRs (like FOISA) provide a general right of access to environmental information, which applies equally to all people. They contain no provision for the supply of information only to qualified people, or to those who give an undertaking not to distribute that information further.
32. Therefore, the Commissioner has no power to require or enforce any licensed or conditional release of information under the terms of the EIRs.
33. This does not prevent a public authority choosing to provide information that it would not be obliged to make publicly available under the EIRs to certain individuals or organisations on a confidential or licensed basis. However, any such arrangements would be a matter for those parties alone, and it would fall outside the scope of FOISA or the EIRs and the Commissioner's jurisdiction.
34. For this reason, the Commissioner has proceeded to consider the information on the understanding that disclosure of the information requested by Dr Hawkins would have the effect of making that information generally accessible.

Information under consideration

35. SNH identified the following documents as the information withheld from Dr Hawkins:
 1. SNH Commissioned Report (2006) on the Management and Conservation of the freshwater pearl mussel in Scottish catchments designated as SACs or SSSIs.
 2. Aberdeen West Peripheral Route: Information to Inform an Appropriate Assessment (2008): Jacobs (Consultancy).
 3. SNH Site Condition Form (undated): table for River Dee, Grampian.



4. Fresh Water Pearl Mussel Survey of the River Dee (July 2006) at a specified location.
5. Fresh Water Pearl Mussel Survey of the River Dee (June 2006) at a specified location.
6. Fresh Water Pearl Mussel Survey of the River Dee (September 2005) at a specified location.

These documents are referred to by the numbers above in this decision.

36. When responding to Dr Hawkins' request and request for review, SNH withheld each of these documents in their entirety on the basis that they were exempt in terms of regulation 10(5)(g) of the EIRs. SNH's response did not indicate what information had been withheld, but it advised that it had been withheld on the basis that it was locational information with respect to fresh water pearl mussels, disclosure of which would increase the risk of persecution of that species.
37. Having reviewed this information, the Commissioner notes that documents 1, 3, 4, 5 and 6 all comprise information relating to the state of freshwater pearl mussels in the River Dee, but that only limited parts of the documents specifically relate to their location.
38. Document 2 is a more wide-ranging report on the likely nature and scale of the impacts on the River Dee SAC resulting from the proposed AWPR, and the mitigation proposed to avoid or minimise these impacts. While document 2 contains locational and other information about freshwater pearl mussels in the River Dee, it contains a range of other information, relating for example to Atlantic salmon, otters and the water environment.
39. The Commissioner is satisfied that the whole of document 2 falls within the scope of Dr Hawkins' request, which was broad and referred in particular "any information with respect to an Appropriate Assessment for the [AWPR] crossing [of the River Dee]" that was exchanged between Transport Scotland and its agents for the AWPR.
40. He has also noted that SNH, by indicating only that it had withheld information relating to freshwater pearl mussels and their location, gave a misleading impression to Dr Hawkins about the extent of the information that had been withheld in this case. He has commented on this point further when considering SNH's compliance with its duty to provide advice and assistance below.
41. As noted above, SNH reconsidered its approach to Dr Hawkins' request during the investigation. It identified the particular locational information within the six documents to which it still considered the exception in regulation 10(5)(g) applied, and it no longer sought to apply this exception to the remaining information.
42. However, it maintained that it was not obliged to provide some of information to Dr Hawkins because, in terms of regulation 6(1)(b) of the EIRs, it was already publicly available and so easily accessible to Dr Hawkins.



Regulation 6(1)(b)

43. Regulation 6(1)(b) of the EIRs states that where an applicant requests that environmental information be made available in a particular form or format, a Scottish public authority shall comply with that request unless the information is already publicly available and easily accessible to the applicant in another form or format. The Commissioner must therefore consider whether the information requested by Dr Hawkins was publicly available and easily accessible to him.
44. The Commissioner has noted that SNH provided no information to Dr Hawkins to assist him in identifying publicly available information that might fall within the terms of his information request. He has also considered this point in relation to SNH's duty to provide advice and assistance below.
45. SNH applied regulation 6(1)(b) to documents 1 and 2 insofar as the information contained within these items was publicly available. It directed the Commissioner to the web pages where it claimed that these documents could be accessed².
46. However, in further correspondence, SNH accepted with respect to document 1 that the published report to which it had directed the Commissioner was in fact materially different from the version supplied to the Commissioner, and it bore a different year of publication. While there is some similarity in the content of these reports, the Commissioner is therefore unable to accept that document 1 was publicly available at the time of Dr Hawkins' request.
47. With respect to document 2, the Commissioner is satisfied that the vast majority of the content of the report (and associated appendices) is publicly accessible on the website for the AWPR public local inquiry. However, the published version has been modified to remove certain content that is present within the version that was withheld by SNH. The Commissioner has noted that where text has been removed, there is no indication of this within the published version, and page, section and table numbers have been modified, with the effect that the removal of content would not be apparent to a person reviewing the published version without access to the non-published version.
48. Furthermore, having compared parts of the published report with the version withheld from Dr Hawkins, the Commissioner has identified that content has been removed from the published version that extends beyond the information regarding freshwater pearl mussels that was identified by SNH during the investigation.
49. He considers that the effect of the modifications to the published version of the report, particularly when the fact of the modification is not apparent to the reader, has been to produce a document that is materially different from the non-published version (i.e. document 2). In the circumstances, the Commissioner has concluded that document 2 was not publicly available at the time of the request.

² www.snh.org.uk/pdfs/publications/commissioned_reports/Report%20No249.pdf and www.awpr-pli.org/document_library.asp?command=OpenFolder&folder=D
documents%5CTransport+Scotland+Documents%5CTS081%5C&file=Written+Report



50. In relation to both documents 1 and 2, the Commissioner has noted that much of the content of the documents is contained in or is substantially similar to that contained in publicly available documents.
51. However, the Commissioner has had regard to the terms of Directive 2003/4/EC (which is implemented in Scots law via the EIRs), and the Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters ('the Aarhus Convention'), from which Directive 2003/4/EC is derived. In particular, it is relevant to note that recital 5 of Directive 2003/4/EC refers to the need for provisions of Community law to be consistent with the Aarhus Convention. Article 4(3) of that Convention obliges public authorities to make environmental information available when requested including 'copies of the actual documentation containing or comprising such information'.
52. The Commissioner further notes that the UNECE Implementation Guide to the Aarhus Convention³ explains at page 54 that:
- "...under the Convention, public authorities must upon request provide copies of the actual documents containing the information, rather than summaries or excerpts prepared by the public authorities. This requirement goes together with subparagraph (b), requiring that information should be given in the form requested, subject to certain exceptions. **The requirement that copies of actual documents should be provided ensures that members of the public are able to see the specific information requested in full, in the original language and in context.**" [emphasis added]
53. Since the published documents to which the Commissioner was directed do not contain the actual documents within which the information requested by Dr Hawkins was requested, the Commissioner is unable to conclude that any of the withheld information is (or was at the time of the request) publicly available and easily accessible to Dr Hawkins.
54. The Commissioner has therefore concluded that regulation 6(1)(b) is not (and was not at the time of SNH's consideration of Dr Hawkins' information request) applicable to either of documents 1 or 2.

Regulation 10(5)(g) of the EIRs

55. During the investigation, SNH confirmed that it wished to apply the exception in regulation 10(5)(g) to a limited amount of the information in each of documents 1 to 6, from which the location of fresh water pearl mussels could be known or determined. SNH provided marked up copies of each of these documents showing the parts to which it considered regulation 10(5)(g) to apply.
56. SNH agreed that the remaining information within these documents could be disclosed without harm to the conservation of freshwater pearl mussels.

³ <http://www.unece.org/env/pp/acig.pdf>



57. Regulation 10(5)(g) of the EIRs states that a Scottish public authority may refuse to make environmental information available to the extent that its disclosure would, or would be likely to, prejudice substantially the protection of the environment to which the information relates.
58. For the exception in regulation 10(5)(g) to apply to the information, SNH must first be able to demonstrate that disclosure would, or would be likely to, prejudice substantially the protection of the environment to which the information relates.
59. As with all the exceptions under regulation 10, a Scottish public authority applying this exception must interpret the exception in a restrictive way (regulation 10(2)(a)) and apply a presumption in favour of disclosure (regulation 10(2)(b)). Even where the exception applies, the information must be released unless, in all the circumstances of the case, the public interest in making the information available is outweighed by that in maintaining the exception (regulation 10(1)(b)).

Parties' submissions on regulation 10(5)(g)

60. SNH drew the Commissioner's attention to the freshwater pearl mussel's status as a protected species and the status of the River Dee as a SAC.
61. SNH submitted that the disclosure of information pertaining to the location of freshwater pearl mussel colonies significantly increases the risk of exploitation of these populations for pearl fishing. It provided a list of incidents of which it was aware where damage had occurred to freshwater pearl mussels since 2000, and pointed out that freshwater pearl mussels are not a mobile species and so cannot escape from exploitation. It went on to note that it considered non-disclosure of the locations of colonies is a particularly effective conservation measure.
62. For these reasons, SNH maintained that disclosure of the locational information would be likely to prejudice substantially the protection of the environment to which that information relates.
63. Dr Hawkins accepted that, while some locational data might need to be withheld, each case would need to be considered on its merits. He noted that SNH's approach to this case had failed to recognise that much of the withheld information could be disclosed without risk.

Conclusions on regulation 10(5)(g)

64. The Commissioner has fully considered the submissions made by both parties to this case, noting that many of the comments made by Dr Hawkins were made in support of disclosure to him, without any consequent general public access. As noted above, disclosure under the EIRs would not simply be to Dr Hawkins, but would have the effect of making the information generally accessible.



65. The Commissioner has noted that this case raises matters similar to those addressed in *Decision 044/2007 Mr G Crole and Transport Scotland*, in which he accepted that information concerning badger surveys could be withheld in terms of regulation 10(5)(g) of the EIRs. In that case, Transport Scotland was concerned that the information might fall into the hands of people who would abuse the animals, and the Commissioner accepted that the information could, if misused, endanger the badgers' habitat and increase the likelihood that the badgers' habitat would be endangered.
66. The Commissioner recognises that if the information withheld under this exception were disclosed to Dr Hawkins, this information would also become available to any other member of the public, enabling them to identify the location of fresh water pearl mussels within the River Dee. The Commissioner accepts that the availability of this information would substantially increase the risk of harm to that species as a result. This is particularly so in the light of the high degree of vulnerability and protected status of that species, which has been accepted by both parties in this case.
67. In all the circumstances, the Commissioner accepts that disclosure under the EIRs of the locational identified by SNH within documents 1 to 6 would, or would be likely to, prejudice substantially the protection of the environment to which the information relates. The Commissioner has therefore concluded that the exception in regulation 10(5)(g) applies to the withheld information.
68. The Commissioner must now go on to consider the public interest test in respect of the withheld information, described above, to which he has accepted that the exception in regulation 10(5)(g) was correctly applied.

Public interest test

69. Both SNH and Dr Hawkins put forward a number of arguments as to why the public interest test favoured the disclosure of the information withheld in this case. The Commissioner has taken all these points into account where relevant, although they are not set out in full in this decision.
70. Dr Hawkins noted that his main purpose in seeking this information was to argue for stronger protection for a species which "currently appears to be in a catastrophic state of decline". He maintained that there was evidence that SNH's efforts in this respect were failing.
71. In particular, Dr Hawkins noted that withholding the information might give the impression that public bodies such as SNH are not prepared to disclose what steps have been taken to protect the pearl mussel, or to receive any criticism that might arise as to how adequate those steps are.
72. Without the information in question, Dr Hawkins also argued that he had been impaired from presenting an adequately-informed challenge to the AWPR project, particularly in comparison with representatives of bodies such as Transport Scotland who had access to greater information.



73. Dr Hawkins argued that the withholding of the information by SNH in effect contravened duties relating to public participation in environmental decision-making under the Aarhus Convention.
74. SNH acknowledged that there were some public interest factors weighing in favour of disclosure of the withheld information. Amongst these were, for example, facilitating a challenge to the AWPR; facilitating public participation in the planning process, and compliance with related duties in terms of achieving justice in the environmental decision-making process under the Aarhus Convention.
75. However, it maintained that the overall balance of public interest lay in favour of maintaining the exception in regulation 10(5)(g). SNH submitted that the legally protected nature of the pearl mussel species in question indicated the strong public interest in its conservation. It also noted that its role was as a statutory conservation body with duties to protect, as it saw fit under the relevant legislation, species including the freshwater pearl mussel.
76. In considering the public interest, SNH took into consideration the risk to the species of illegal fishing, and the fact that access to locational data would facilitate such persecution
77. SNH argued in the light of these submissions that the conservation of endangered species in question took higher priority, in terms of the public interest, than facilitating a challenge to the proposed AWPR.
78. The Commissioner has weighed up the public interest arguments both for and against disclosure in this case, as required to do by regulation 10(1)(b). He considers that the arguments presented by Dr Hawkins do identify a strong public interest in disclosure of the information. He agrees that disclosure would enable assessment of the adequacy of conservation measures, would facilitate environmental justice, and inform debate and decision-making on a major infrastructure project. There is considerable weight to the public interest in each of these things.
79. However, the Commissioner finds that the public interest arguments put forward by SNH are also compelling. He is satisfied that disclosure of the locational information under consideration would be likely to endanger the conservation of a protected species. The threats from disclosure are real not theoretical given the degree to which sites across Scotland have been damaged by illegal fishing.
80. The Commissioner is therefore satisfied in all the circumstances of the case that the public interest in making this information available is outweighed by that in maintaining the exception.
81. The Commissioner therefore accepts that SNH was correct to withhold the information within documents 1 to 6 which was identified during the investigation as being excepted from disclosure in terms of regulation 10(5)(g) of the EIRs.



Breach of regulation 5(1)

82. As noted above, after reconsidering its position during the investigation, SNH no longer sought to apply the exception in regulation 10(5)(g) to all information contained within documents 1 to 6. It accepted that much of the content of these documents could be disclosed without harm to the conservation of the freshwater pearl mussel.
83. The Commissioner has therefore found that SNH incorrectly applied the exception in regulation 10(5)(g) to the remaining information under consideration in this case.
84. Regulation 5(1) of the EIRs requires that a Scottish public authority that holds environmental information make it available when requested to do so by any applicant (subject to the application of exceptions and other restrictions set out in regulations 6 to 12).
85. The Commissioner has therefore concluded that SNH breached regulation 5(1) by failing to supply to Dr Hawkins the information in documents 1, 2, 3, 4, 5 and 6, that has not been accepted in this decision to be excepted from disclosure under regulation 10(5)(g).
86. The Commissioner now requires SNH to disclose to Dr Hawkins all of the information in these documents, subject to the redaction of the information excepted under regulation 10(5)(g) (as marked in versions of the documents supplied to the Commissioner).

Regulation 9 - the duty to provide advice and assistance

87. Regulation 9(1) of the EIRs provides that a Scottish public authority shall provide advice and assistance, so far as it would be reasonable to expect the authority to do so, to applicants and prospective applicants.
88. The Commissioner has noted above that SNH withheld the entire content of the documents that have been considered in this case, when its concerns about disclosure of the content related only to a very limited part of the content therein. While it considered disclosing redacted version of documents, it decided against this approach since much of the content was already publicly available.
89. The Commissioner notes that SNH's response to Dr Hawkins indicated only that the information withheld was excepted from disclosure in terms of regulation 10(5)(g) of the EIRs, and in so doing provided a misleading impression of the nature and extent of the information that had been withheld.
90. Furthermore, where a public authority declines to provide information having identified that it is easily available to a requestor by other means, the Commissioner would expect that authority to explain this to the requestor and provide advice on how to locate that information.
91. SNH made no reference to the public availability of information that may be of interest to him, and provided no advice on how this might be accessed.



92. In the circumstances, the Commissioner has concluded that SNH failed to provide the type of advice and assistance that it was reasonable to expect given its understanding of the information that was withheld from Dr Hawkins. He has consequently found that it failed to comply fully with its duty under regulation 9(1) of the EIRs in this case.

DECISION

The Commissioner finds that Scottish Natural Heritage (SNH) failed to comply fully with the Environmental Information (Scotland) Regulations 2004 (the EIRs) in responding to the information request made by Dr Hawkins.

The Commissioner found that SNH correctly applied the exception in regulation 10(5)(g) to the particular information that was identified within documents 1 – 6 during the investigation, and so it was entitled to withhold this information from Dr Hawkins.

However, the Commissioner found that SNH incorrectly applied the exception regulation 10(5)(g) to the remaining information contained within documents 1-6, and by failing to supply this information, SNH failed to comply with the requirements of regulation 5(1) of the EIRs.

The Commissioner also found that SNH had failed to comply fully with its duty to provide advice and assistance to Dr Hawkins in terms of regulation 9(1) of the EIRs.

The Commissioner requires SNH to disclose to Dr Hawkins the information within documents 1-6, subject to the redaction of the information excepted from disclosure under regulation 10(5)(g) (as marked in versions of the documents supplied to the Commissioner), by 9 July 2010.

Appeal

Should either Dr Hawkins or Scottish Natural Heritage 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.

Kevin Dunion
Scottish Information Commissioner
25 May 2010



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
- (b) in all the circumstances of the case, the public interest in disclosing the information is not outweighed by that in maintaining the exemption.

...

39 Health, safety and the environment

...

- (2) Information is exempt information if a Scottish public authority-
- (a) is obliged by regulations under section 62 to make it available to the public in accordance with the regulations; or
- (b) would be so obliged but for any exemption contained in the regulations.



The Environmental Information (Scotland) Regulations 2004

2 Interpretation

(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

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- (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;
- (d) reports on the implementation of environmental legislation;
- (e) costs benefit and other economic analyses and assumptions used within the framework of the measures and activities referred to in paragraph (c); and
- (f) the state of human health and safety, including the contamination of the food chain, where relevant, conditions of human life, cultural sites and built structures inasmuch as they are or may be affected by the state of the elements of the environment referred to in paragraph (a) or, through those elements, by any of the matters referred to in paragraphs (b) and (c);

...



5 Duty to make available environmental information on request

- (1) Subject to paragraph (2), a Scottish public authority that holds environmental information shall make it available when requested to do so by any applicant.
- (2) The duty under paragraph (1)-
 - ...
 - (b) is subject to regulations 6 to 12.
 - ...

6 Form and format of information

- (1) Where an applicant requests that environmental information be made available in a particular form or format, a Scottish public authority shall comply with that request unless-
 - ...
 - (b) the information is already publicly available and easily accessible to the applicant in another form or format.

...

9 Duty to provide advice and assistance

- (1) A Scottish public authority shall provide advice and assistance, so far as it would be reasonable to expect the authority to do so, to applicants and prospective applicants.

...



10 Exceptions from duty to make environmental information available–

- (1) A Scottish public authority may refuse a request to make environmental information available if-
 - (a) there is an exception to disclosure under paragraphs (4) or (5); and
 - (b) in all the circumstances, the public interest in making the information available is outweighed by that in maintaining the exception.
- (2) In considering the application of the exceptions referred to in paragraphs (4) and (5), a Scottish public authority shall-
 - (a) interpret those paragraphs in a restrictive way; and
 - (b) apply a presumption in favour of disclosure.

...
- (5) A Scottish public authority may refuse to make environmental information available to the extent that its disclosure would, or would be likely to, prejudice substantially-
 - ...
 - (g) the protection of the environment to which the information relates.