

Our Ref 200901106

Your Ref FMcC/

Ms Frances McCartney
Solicitor
Messrs McCartney & Co
Solicitors
Environmental Law Centre Scotland Ltd
65 George Street
Paisley PA1 2JY

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Dear Ms McCartney/Frances

I understand that you act for Dr A D Hawkins in relation to his Application to the Scottish Information Commissioner under the Environmental Information (Scotland) Regulations 2004 (EIRs). I write to request submissions on behalf of your client, please.

First, however, it may be helpful to you if I outline the main heads of argument advanced by SNH. They are relying upon the exception in regulation 10(5)(g) of the EIRs, and have also claimed the exemption in section 39(2) of the Freedom of Information (Scotland) Act 2002 (FOISA).

In relation to the latter point, the Commissioner's preliminary view is that the information in question is environmental. SNH also takes the view that the information in question is environmental, and you are invited to submit your views. If the information is ultimately environmental, since there is a separate right to obtain environmental information enshrined in the EIRs (ie following on from the Aarhus Convention and Directive 2003/4/EC) compared with FOISA, the Commissioner would in such circumstances be likely to be minded to find that the public interest in upholding the exemption in section 39(2) FOISA would outweigh that in disapplying it. The practical effect of this, if the Commissioner so holds, would be that the EIRs would apply to this case (rather than the established alternative of applying FOISA in full plus the EIRs). However, if you have any comments on this, or if you disagree, your submissions are most welcome.

Turning to the substantive arguments advanced by SNH in support of their reliance upon regulation 10(5)(g) of the EIRs, they have pointed out that the freshwater pearl mussel is protected under Directive 92/43/EEC of 21 May 1992 listed in Annexes II and V and is also listed in the International Union for Conservation of Nature 1996 Red Data List as "endangered".

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There are, they state, several pearl mussel locations which are classified as Special Areas of Conservation (SAC) and Sites of Special Scientific Interest (SSSI).

A consequence of these factors is that SNH considers that such species should be targeted for conservation. As a result of the high risk of incidents and/or actual damage, SNH argues that the locations of the pearl mussel beds should be kept confidential to aid their conservation. This, if I understand correctly, is seen as a key part of their management strategy for this species.

SNH also cited a number of legislative sources which bear upon the legal protection accorded to these mussels (noted in Appendix 1). Notwithstanding regulation 5(3) of the EIRs, SNH considers that the existence of legislation protecting pearl mussels supports their stance in terms of non-disclosure of the requested information under regulation 10(5)(g) and the public interest test under regulation 10(1)(b) both of the EIRs.

They argue that SNH may also, if disclosing the information requested, be in breach of duty under the Habitats Directive in terms of regulation 3(2) of the Conservation (Natural Habitats...) Regulations 2004 and Article 6 of the Habitats Directive. SNH has also referred to its "balancing duty" under section 3 of the Natural Heritage (Scotland) Act 1991 when disseminating information. SNH also considers that the precautionary principle further supports their stance in relation to disclosing the requested information about this endangered species.

SNH also referred to the Aarhus Implementation Guide which, they submit, states that the exception relating to the protection of the environment "allows the government to protect certain sites, such as the breeding sites of rare species, from exploitation – even to the extent of keeping their location a secret".

If it is helpful, this Guide is available at: <http://www.unece.org/env/pp/acig.pdf>

SNH has argued that there is considerable public interest in the non-disclosure of the information in question, and that this outweighs the public interest in disclosing the information. Scotland is, if I understand correctly, an important locus for this species which is under threat, and SNH has submitted that the public importance of preservation of this species represents a higher public interest than that in disclosure of environmental information. SNH has also advised that some of the requested information has been released already, wherever they thought this possible, and that their actions with regard to this species have always been to support its conservation. Overall, SNH's view is that the public interest in withholding the information exceeds that in its disclosure.

SNH has also pointed out that it has previously made submissions to the Reporter in relation to the Aberdeen West Peripheral Route (AWPR) but that they did not, in doing so, disclose any detail (including locational data), which they generally wish to avoid being released into the public domain.

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The issue of a licensed release of the information is really outwith the Commissioner's remit, but I mention that SNH have said that their unwillingness to do so in this particular case is in no way any adverse reflection upon your client individually nor upon his professional expertise, but as I understand it is in effect part of their conservation management policy for this species. I hope that this may perhaps be of some encouragement to your client.

May I invite you please to provide me with your submissions on behalf of your client by Wednesday 16 September.

Thank you for your assistance.

With kind regards

Yours sincerely

Andrew Phillips
Freedom of Information Officer

Appendix 1

Wildlife and Countryside Act 1981 section 9(1) and Schedule 5

The Wildlife and Countryside Act 1981 (Variation of Schedules 5 and 8) Order 1998

Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora (Habitats Directive) (including Annexes II and V)

The Conservation (Natural Habitats, &c.) Regulations 1994 regulation 7

The Conservation (Natural Habitats, &c.) Regulations 1994 (As amended by the Conservation (Natural Habitats, &c.) Amendment (Scotland) Regulations 2007) regulation 37A

The Water Environment (Controlled Activities) (Scotland) Amendment Regulations 2007 re Schedule 3, section 9(g) mentioning pearl mussels

Water Environment and Water Services (Scotland) Act 2003 section 1(2)(a)