

Andrew Phillips  
Freedom of Information Officer  
Scottish Information Commissioner  
Kinburn Castle  
Doubledykes Road  
St Andrews KY16 9DS

Our Ref: FM/ROADS001/001  
Your Ref: 200901106

Date: 31st March, 2010

Dear Mr Phillips

**DR A D HAWKINS**

Thank you for your letter of 2<sup>nd</sup> September 2009. We would respond as follows.

1. Applicable law

We agree that in terms of section 39 (2) that the Freedom of Information (Scotland) Act 2002 does not apply to this request.

2. Information withheld

We would firstly reiterate the information that has been withheld by SNH. Dr Hawkins asked for a copy of any reports, papers or correspondence produced by SNH from 2005 onwards relating to the status of freshwater pearl mussels. We should point out that he was not just seeking information as to the location of freshwater pearl mussels, but also information on the state of the current population including any threats to the population. We are aware that there is at least one report produced by SNH, which was referred to in papers lodged by Jacob Babbie and we enclose a copy of part of their papers and have highlighted the relevant part. We note that your letter of 2<sup>nd</sup> September 2009 indicates that SNH released some information to our client, but this is not our client's understanding. Rather, in a request for information last year, our client had asked for information not just in relation to the pearl mussel but also information relating to whether an appropriate assessment had been carried out in terms of Directive 92/43/EEC (the 'Habitats Directive'). Information relating to the issue of an appropriate assessment was released in 2008, but not information in relation to the state of the pearl mussel population. Our client does not recall having received any information from SNH on pearl mussels following his second request made in 2009. We would be grateful if you can clarify this with SNH.

SNH therefore have not just kept the location of pearl mussels secret, but have also withheld all information on the status and condition of pearl mussels. SNH's position is

that such information cannot be released without a threat to the mussels. We would argue that much, if not all, of the information contained within the reports could have been disclosed to our client without any threat. Indeed, releasing the information to Dr Hawkins could potentially have increased protection of pearl mussel habitat within the Dee Special Area of Conservation (SAC). Dr Hawkins' main purpose in seeking the information was and is to argue for stronger protection for a species which currently appears to be in a catastrophic state of decline.

There is no dispute that the freshwater pearl mussel is a protected species. It is a protected species under the 'Habitats Directive' and our client agrees with SNH that such species should – and national authorities are obliged to – take certain steps in terms of its conservation. There is evidence that SNH's efforts are failing. Indeed, there could be questions as to whether the steps taken by SNH are sufficient. The pearl mussels are continuing to decline on the Dee. The withholding of the information could give the impression that public bodies, such as SNH, are not prepared to disclose what steps have taken to protect the pearl mussel, and receive any criticism that might arise as to how adequate those steps are. It may well be that in some cases specific locations within a river should not be disclosed but each request must be taken on its own merits.

We would submit the following issues were not taken into account by SNH. Firstly, the individual circumstances of Dr Hawkins' request were not properly considered, particularly in terms of the subsequent consequences of participation in an environmental decision-making process. Secondly, the particular conservation status and threats against the pearl mussels in that location at that time were not considered, and thirdly SNH have failed to give due consideration to the offer by Dr Hawkins to hold the information on a confidential basis.

In relation to the first heading, it was known to SNH that Dr Hawkins was making the request in his capacity of a member of Road Sense. We attach a copy of the constitution of Road Sense, which is a voluntary organisation consisting of individuals seeking to question the Scottish Government's proposal to build an Aberdeen Western Peripheral Route ('AWPR'). Part of that proposed route will cross the River Dee SAC. This section of the route will involve the construction of a new bridge with a main span of 120 metres, and two side spans of 70 metres. The bridge is a substantial piece of construction work and both the construction of the bridge and its subsequent use pose threats to freshwater pearl mussels downstream, and to the passage upstream of salmon (which play an important part in the life cycle of freshwater pearl mussels).

Given the River Dee's status as a SAC, for any plan or programme to be agreed or undertaken, an appropriate assessment must be carried out beforehand. That appropriate assessment has yet to be completed. However, a 'Report to Inform the Appropriate Assessment' was presented at the Public Inquiry. Evidence was heard at the public enquiry which questioned whether this report was fit for purpose, and whether it properly took account of the threats to the Dee SAC and all three of its designated species, including the freshwater pearl mussel. Evidence and submissions were made at the

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Public Inquiry that questioned Transport Scotland's compliance with the Habitats Directive.

The Scottish Information Commissioner would be aware that the overall purpose of the Convention on Public Participation and Access to Justice ('the Aarhus Convention') is to increase public participation and involvement in environmental decision-making leading to improved environmental protection. All three pillars of the Aarhus Convention are designed to complement each other. In particular, the Aarhus Convention recognises that "improved access to information and public participation in decision-making enhance the quality and the implementation of decisions, contribute to public awareness of environmental issues, give the public the opportunity to express its concerns and enable public authorities to take due account of such concerns." Further, the Aarhus Convention sets out that public bodies hold environmental information in the public interest. This fundamentally affects the way that Dr Hawkins' request should have been dealt with.

Although we appreciate that SNH cannot ask the applicant for the reason why the information is sought, in our submission SNH can take the purpose into account where the applicant volunteers that information. This is not dissimilar to the duty on public bodies to assist applicants, where often there will be a constructive discussion about what information is sought and the applicant will assist the public body by volunteering the purpose of the request in order that the public body can better respond. SNH were aware that the information was sought for the purposes of participating in the public inquiry process (and any subsequent legal proceedings that may arise out of that process) and that Dr Hawkins was seeking to oppose the Roads Orders for the AWPR and safeguard both pearl mussel habitat and the survival of the mussels themselves. It is important to note that the provision of the requested information would not necessarily have meant the information would have leaked out into the public domain, but rather that Dr Hawkins, who was the main ecological witness for Road Sense, would have been in the same position as witnesses for Transport Scotland in being able to properly give his views on the threat to pearl mussels and their habitat from the construction and operation of the AWPR.

In view of that knowledge, SNH should have considered the particular circumstance of this case. We consider this to be especially important as the Aarhus Convention requires effective public participation. We cannot see how our client can effectively participate in the inquiry process and any subsequent proceeding arising from it, without that information, particularly given that Transport Scotland, and their consultants, had seen the reports on the status of freshwater pearl mussels and their location. We would also point out that it was Transport Scotland's consultants, the private sector firm Jacobs Babbie, which prepared the documentation for the inquiry. We presume SNH released the information to Transport Scotland in the knowledge that they in turn would release it

to private sector consultants. This is crucial for two reasons; firstly that there could not be effective participation within the inquiry process as our client could not properly test the proposed mitigation measures in terms of the bridge across the River Dee without details on the location and current conservation status of the mussels, and secondly that the information was already in some sense in the public domain given it had been released to private sector consultants. We would query what steps or measures were put in place by Transport Scotland to avoid the information being further disclosed.

The fact that SNH had been able to participate in the inquiry process without disclosing the detail of the location is irrelevant to the question of public participation. There is a fundamental difference in being able to participate when the body or person has that knowledge, and the situation where a witness has been kept in the dark on a particularly crucial part of a case as information, which is known to others, has been withheld. In any event, SNH's position in relation to the inquiry was quite different to our client's position.

The withholding of the information relating to pearl mussels put Dr Hawkins in a position where he was unable to effectively participate in the inquiry process. We attach a copy of paragraph 32.6.22 of the Closing Submissions to the Inquiry made by Transport Scotland. You will see criticism is made of Dr Hawkins with regard to the extent of his evidence on pearl mussels. It is evident that a lack of information undermined his right and ability to participate in the process.

Our second argument relates to the threats against the pearl mussel. SNH in effect have adopted a policy which leads to a blanket ban against disclosing information relating to endangered species. Under the second test, we note that SNH rely on the Aarhus Implementation Guide. We note that the crucial test is risk of exploitation. It is our contention that the risk of to pearl mussels from exploitation (in effect from fishing for them) from this location is not the major concern with respect to their conservation. We attach a copy of a document obtained from Jacobs Babbie's papers to the inquiry. As you will see, the main risk to the pearl mussel population at this and other locations is a lack of juvenile mussels. Older, mature mussels (which are the ones exposed to exploitation) are present, but the main issue is a lack of juvenile mussels. It is known that juvenile mussels are much more susceptible to water contamination than older individuals. It is likely that it is pollution, not persecution, which is putting freshwater pearl mussel populations at risk on the Dee. There is a strong possibility that sediment and chemical contaminants from the siting of a construction yard on the banks of the Dee, associated with bridge construction, and run-off from the new road itself, will create further problems for pearl mussels. Some sites, due to greater access, populations and other factors regarding their location, may mean there is a higher risk of exploitation. However, SNH effectively have applied a blanket ban according to species rather than considering their policy according to particular circumstances.

Further, the Aarhus Implementation Guide makes it clear that the use of "would" in Article 4 is significant. The Guide states that "the use of the word "would" instead of "may" requires a greater degree of certainty that the request will have an adverse affect

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than applies in other provisions of the Convention (e.g. art. 6, para. 1 (b)).”

We have had sight of SNH Board papers relating to this policy. In paper SNH/05/3/6 considered by the SNH Board on 10<sup>th</sup> May 2005, that policy is stated as “SNH advocates greater use of environmental information to inform decision-making”. The use of this information was for exactly that purpose. In the absence of specific information of threats from persecution, we fail to see how the information can be withheld.

Our last submission on this point relates to the issue of holding the information on a confidential basis. We note with some disappointment that the Commissioner seems to have taken an approach that would exclude any further exploration of releasing the information under some degree of confidentiality. It appears to us that there is nothing in the Aarhus Convention, in any European Directive or in the Environmental Information (Scotland) Regulations 2004 that would prevent this approach. Further, it may well be that the information was released from SNH to Transport Scotland or from Transport Scotland to their consultants on this basis. Although our client was acting on behalf of Road Sense, he had the authority of the Road Sense committee to retain the information himself; in other words, he would not have been in any way obliged to pass the information to others. Our client is a well-qualified aquatic biologist. His role within the inquiry process and the evidence he provided related to the impacts on habitats and European protected species. We would have thought releasing the information in this way was similar to placing restrictions on its use, e.g. due to copyright restrictions or other intellectual property concerns.

### 3. Other points

SNH advised that in terms of the public interest test, the public interest of preservation outweighs the interest of disclosure. We queried how that conclusion could be reached given threats to the pearl mussel in that location, which appear to us not to be connected to persecution.

We note SNH’s claim that to release the information may breach Article 6 of the Habitats Directive and Regulation 3 (2) of the Conservation (Natural Habitats) Regulations 2004. We presume SNH are referring to Article 6 (2) which states “Member States shall take appropriate steps to avoid, in the special areas of conservation, the deterioration of natural habitats and the habitats of species as well as disturbance of the species for which the areas have been designated, in so far as such disturbance could be significant in relation to the objectives of this Directive.” We disagree that SNH are obliged to withhold the information to comply with the Directive and in fact, the converse is true in respect that given the importance placed on public participation in assisting to reach the

best environmental decisions as per the Aarhus Convention and others, the information should have been released to Dr Hawkins.

We have argued in a complaint to the Aarhus Compliance Committee that the Scottish Government and its agents, including SNH, have breached the Convention by not providing information which could enable the public to take measures to prevent or mitigate harm arising from a threat to those protected species. Without the report on pearl mussels Road Sense has been unable to query the adequacy of measures taken by the Scottish Government and its agents to avoid deterioration of habitats for the freshwater pearl mussel within the Dee SAC. In denying access to an independent report SNH is protecting its own position and preventing Road Sense from holding the Scottish Government to account for their failure to act. In this respect the Scottish Government is failing to comply with Article 5 (1) (c) of the Aarhus Convention, which requires in the event of any imminent threat to the environment (in this case to freshwater pearl mussels) there should be access to information which could enable the public to take measures to prevent or mitigate harm arising from the threat.

Yours sincerely

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