

Decision Notice

Decision 190/2015: Mr Marc Ellison and Cairngorms National Park Authority

Correspondence with HRH Prince Charles

Reference No: 201501510

Decision Date: 14 December 2015



Summary

On 24 June 2015, Mr Ellison asked Cairngorms National Park Authority (CNPA) for correspondence between HRH Prince Charles and CNPA since January 2007.

CNPA considered Mr Ellison's request under FOISA. It refused to provide the information requested, as it believed the Royal Family was entitled to correspond with public authorities in private. Following a review, where CNPA also considered disclosure of the information would constitute an actionable breach of confidence, Mr Ellison remained dissatisfied and applied to the Commissioner for a decision.

The Commissioner investigated and found that the information withheld from Mr Ellison was environmental information, and therefore required to be considered under the EIRs. As CNPA had failed to respond to Mr Ellison's request for information in accordance with the EIRs, the Commissioner required CNPA to consider the request under the EIRs and provide Mr Ellison with a compliant review outcome.

Relevant statutory provisions

The Environmental Information (Scotland) Regulations 2004 (the EIRs) regulations 2(1) (paragraphs (a), (c) and (f) of definition of "environmental information") (Interpretation); 5(1) (Duty to make available environmental information on request)

The full text of each of the statutory provisions cited above is reproduced in Appendix 1 to this decision. The Appendix forms part of this decision.

Background

1. On 24 June 2015, Mr Ellison made a request for information to CNPA, seeking complete digital copies of correspondence sent by HRH Prince Charles since January 2007, with any responses sent to Prince Charles.
2. CNPA responded on 22 July 2015, refusing to provide the information requested as it considered it exempt from disclosure under section 41(a) of FOISA (Communications with Her Majesty etc. and honours). CNPA considered the public interest lay in maintaining the Royal Family's ability to correspond with public bodies in a private capacity.
3. On 23 July 2015, Mr Ellison wrote to CNPA, requiring a review of its decision. He argued that a recent disclosure of correspondence with Prince Charles¹, had set a precedent for such disclosure being in the public interest.
4. CNPA notified Mr Ellison of the outcome of its review on 17 August 2015, upholding its original decision to rely on section 41(a) of FOISA. It informed Mr Ellison that it also considered the information exempt under section 36(2) (Confidentiality), as disclosure would constitute a breach of confidence actionable by the correspondent.

¹ <https://www.supremecourt.uk/cases/uksc-2014-0137.html>

5. On 18 August 2015, Mr Ellison wrote to the Commissioner, 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 specified modifications. Mr Ellison stated he was dissatisfied with the outcome of CNPA's review because he did not agree that the exemptions cited applied.

Investigation

6. The application was accepted as valid. The Commissioner confirmed that Mr Ellison made a request for information to a Scottish public authority and asked the authority to review its response to that request before applying to her for a decision.
7. On 19 August 2015, CNPA was notified in writing that Mr Ellison had made a valid application. CNPA was asked to send the Commissioner the information withheld from him. CNPA provided the information and the case was allocated to an investigating officer.
8. Section 49(3)(a) of FOISA requires the Commissioner to give public authorities an opportunity to provide comments on an application. CNPA was invited to comment on this application. In particular, CNPA was asked to comment on the application of the EIRs to any of the information, and to justify its reliance on any provisions of either FOISA or the EIRs it considered applicable to the information requested.
9. CNPA provided submissions to the investigating officer. Mr Ellison also provided submissions on why he believed it was in the public interest for the information to be disclosed.

Commissioner's analysis and findings

10. In coming to a decision on this matter, the Commissioner considered all of the withheld information and the relevant submissions, or parts of submissions, made to her by both Mr Ellison and CNPA. She is satisfied that no matter of relevance has been overlooked.

Environmental information?

11. There is one overriding issue to be addressed before the Commissioner can consider whether CNPA was entitled to withhold the information sought by Mr Ellison. That is whether the withheld information is properly considered to be environmental information and therefore subject to the EIRs.
12. The Commissioner's views on the relationship between FOISA and the EIRs are set out in detail in *Decision 218/2007 Professor A D Hawkins and Transport Scotland*². They need not be repeated in full here, although the Commissioner would reiterate some of the key points:
 - (i) The definition of what constitutes environmental information should not be viewed narrowly, but in line with the definition of environmental information in the EIRs.
 - (ii) There are two separate statutory frameworks for access to environmental information and an authority is required to consider any request for environmental information under both FOISA and the EIRs.

² <http://www.itspublicknowledge.info/ApplicationsandDecisions/Decisions/2007/200600654.aspx>

- (iii) Any request for environmental information therefore must be dealt with under the EIRs.
 - (iv) In responding to a request for environmental information under FOISA, an authority may claim the exemption in section 39(2).
13. In the present case, CNPA submitted that it had spent time considering whether or not the withheld information was environmental information. CNPA formed the conclusion that it was not: it was general and personal correspondence between a member of the Royal Household and the authority concerning the potential development of a business relationship between CNPA and a charitable trust, and therefore the request should be considered under FOISA. CNPA did not consider that the content of the correspondence satisfied the definition of information on “the state of the elements of the environment”: that content, in its view, was not scientific or otherwise “environmental” in a substantive sense.
 14. CNPA also submitted there was no merit in backtracking to reconsider the request under the EIRs, thereby relying on the exemption in section 39(2) of FOISA. CNPA confirmed it was upholding its decision to consider the request under FOISA.
 15. Having considered the nature and content of the withheld information, the Commissioner is satisfied that it comprises environmental information as defined within regulation 2(1) of the EIRs. The Commissioner is satisfied that it would fall within paragraph (a) of the definition of environmental information (as information on the state of the elements of the environment); paragraph (c) of that definition (as information on measures affecting or likely to affect those elements); or paragraph (f) (as information on the state of human health and safety that is or may be effected by those elements or measures).
 16. The definition of what constitutes environmental information should not be viewed narrowly. Here, without disclosing the content of the withheld information, the Commissioner can confirm that it relates in general terms to the conservation of species and related questions of sustainability: that is enough, without the information being of a more scientific or otherwise technically “environmental” character.
 17. In this case, therefore, the Commissioner must conclude that by failing to consider and respond to Mr Ellison's request in terms of the EIRs, CNPA failed to comply with regulation 5(1) of the EIRs. It must now respond to Mr Ellison's requirement for review in accordance with regulation 16 of the EIRs.

Decision

The Commissioner finds that Cairngorms National Park Authority (CNPA) failed to comply with the Environmental Information (Scotland) Regulations 2004 (the EIRs) in responding to the information request made by Mr Ellison.

By failing to identify the information requested as environmental information, as defined by regulation 2(1) of the EIRs, and respond accordingly, the Commissioner finds that CNPA failed to comply with regulation 5(1) of the EIRs in handling Mr Ellison's request.

The Commissioner therefore requires CNPA to reconsider Mr Ellison's request under the EIRs and provide him with a review outcome under regulation 16 of the EIRs, by 28 January 2016.

Appeal

Should either Mr Ellison or Cairngorms National Park Authority wish to appeal against this decision, they have the right to 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.

Enforcement

If Cairngorms National Park Authority (CNPA) fails to comply with this decision, the Commissioner has the right to certify to the Court of Session that CNPA has failed to comply. The Court has the right to inquire into the matter and may deal with CNPA as if it had committed a contempt of court.

Rosemary Agnew
Scottish Information Commissioner

14 December 2015

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;

...

(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;

...

(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.

...

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