

Decision Notice

Decision 018/2019: Mr Nick Kempe and Loch Lomond and the Trossachs National Park Authority

Integrated Land Management Plans

Reference No: 201701771

Decision Date: 11 February 2019



Scottish Information
Commissioner

Summary

LLTNPA was asked for the integrated land management plans (ILMPs) that had been agreed, and information about the proportion of land which these plans covered, in the national park. LLTNPA withheld all information from the ILMPs.

The Commissioner found that LLTNPA had correctly withheld some information, but that other information should have been provided. He required LLTNPA to provide the information which was not excepted from disclosure.

Relevant statutory provisions

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

The Environmental Information (Scotland) Regulations 2004 (the EIRs) regulations 2(1) (Interpretation) (parts (a), (b), (c) and (e) of the definition of "environmental information"); 5(1) and (2)(b) (Duty to make environmental information available on request); 10(1), (2), (5)(e), (f) and (g), (6) (Exceptions from duty to make environmental information available on request); 11(2) (Personal data)

Data Protection Act 1998 (the DPA 1998) sections 1(1) (Basic interpretative provision) (definition of "personal data"); Schedules 1 (The data protection principles, Part 1: the principles) (the first data protection principle)

Data Protection Act 2018 (the DPA 2018) Schedule 20 (Transitional provision etc – paragraph 61)

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 16 May 2017, Mr Kempe made a request for information to Loch Lomond and the Trossachs National Park Authority (LLTNPA):

"I see from the last NPPP [National Park Partnership Plan 2012 – 2017] that your target was that 25% of the NP [National Park] should have had integrated management plans in place by 2017. Please could you provide me with (a) a copy of all integrated management plans that have been agreed to date (the Cairngorms National Park publishes estate plans but I can see none on your website) and (b) information about what proportion of land in the Park these plans cover."

2. LLTNPA responded on 14 June 2017. It understood the request was for environmental information and should be considered under the EIRs. LLTNPA withheld the integrated management plans under regulation 10(5)(e) of the EIRs, stating that they included "commercially sensitive details of all aspect of a private business, including accounts analysis, income projections and capital costs" and disclosure would, or would be likely to, substantially prejudice the commercial business interests of private landowners. LLTNPA considered that the balance of public interest lay in withholding the information, so it could

engage with private landowners within the National Park. It supplied information to Mr Kempe about the proportion of land in the National Park which was covered by the plans.

3. On 15 July 2017, Mr Kempe wrote to LLTNPA requesting a review of its decision. He believed that the integrated management plans were not commercially sensitive, or at least did not consist wholly of commercially sensitive information.
4. LLTNPA notified Mr Kempe of the outcome of its review on 14 August 2017. It upheld its view that there was commercially sensitive information throughout the plans. It stated that the plans had been put together on the understanding that the information would not be shared publicly. LLTNPA said that an implied duty of confidence existed to protect a legitimate economic interest from being harmed by the disclosure of the information. It believed the public interest favoured withholding the information.
5. On 11 October 2017, Mr Kempe applied to the Commissioner 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 Kempe did not believe that all the information withheld by LLTNPA (in relation to the first part of his request) had been correctly withheld, because he disagreed that all information within an integrated management plan was commercially sensitive. He believed it should be possible for LLTNPA to provide some information after redacting commercial information.

Investigation

6. The application was accepted as valid. The Commissioner confirmed that Mr Kempe made a request for information to a Scottish public authority and asked the authority to review its response to that request before applying to him for a decision.
7. On 8 November 2017, LLTNPA was notified in writing that Mr Kempe had made a valid application. LLTNPA was asked to send the Commissioner the information withheld from Mr Kempe. LLTNPA 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. LLTNPA was invited to comment on this application and answer specific questions including justifying its reliance on any provisions of FOISA and the EIRs it considered applicable to the information requested.
9. LLTNPA clarified that although ILMPs had been drafted for a number of farms and estates, only five had been agreed and were past the proposal stage. The Commissioner accepted that only the five plans which had been agreed constituted information covered by the terms of Mr Kempe's request.
10. LLTNPA withheld personal data it had identified in the integrated land management plans, under regulation 11(2) of the EIRs. Mr Kempe did not generally dispute this, but he believed it was in the public interest for the name of the landowner to be disclosed. The Commissioner has found that the integrated land management plans contain a wide range of personal data. For the most part, the Commissioner has not considered further whether personal data should have been provided in response to Mr Kempe's request, given that he has not expressed an interest in receiving this information.

11. During the investigation, LLTNPA offered to disclose some information to Mr Kempe which it hoped would provide a clear picture of the nature and coverage of its land management plans, “while taking into account the commercial interests of the land managers concerned, thereby preserving the working relationships between the Park Authority and land managers”. Mr Kempe declined the offer as he believed it was important for the public to know what agreements LLTNPA was making with landowners about land management: as LLTNPA was still refusing to provide any information on this, he wished the Commissioner to proceed with the investigation.
12. On 18 June 2018, the Commissioner asked LLTNPA to reconsider the withheld information in each of the five plans, which varied considerably in content, detail and layout.
13. LLTNPA reviewed the plans and published more information on its website. This included an explanation of integrated land management plans and the template forms used to draft a plan; links to the website of two estates which have plans in place with LLTNPA; and one of the integrated land management plans which had been withheld from Mr Kempe.
14. LLTNPA continued to withhold all information in the other four ILMPs covered by Mr Kempe’s request. It stated that it was not possible to separate out information from these plans in a way which would respect the individual rights of the land managers but leave enough information to provide a good explanation of an agreed plan. LLTNPA accepted the land managers’ views that much of the information in these plans would normally only be made available to their accountants and lawyers and that they would never have given this information to LLTNPA if they thought there was any likelihood that it would be released into the public domain.
15. LLTNPA noted that it had been unable to progress its work on other ILMPs while this case was ongoing.

Commissioner’s analysis and findings

16. In coming to a decision on this matter, the Commissioner considered all the withheld information and the relevant submissions, or parts of submissions, made to him by both Mr Kempe and LLTNPA. He is satisfied that no matter of relevance has been overlooked.

Application of the EIRs

17. The purpose behind integrated land management plans is to put into place agreements between the LLTNPA and land managers, whereby the land manager is given detailed specialist advice in compliance with paragraph 2(1) to Schedule 2 to the National Parks (Scotland) Act 2000. This advice can cover a range of areas, including farm business, habitat management, renewable energy and tourism potential, as well as information about grants and funding opportunities that the land managers may be eligible for. By working with the LLTNPA in this way, land managers receive assistance in developing their commercial business interests and ultimately are better positioned to deliver public benefit gains such as the protection of endangered species, the preservation of areas of special scientific significance, the development of tourism opportunities, and ensuring access rights to visitors under the Land Reform (Scotland) Act 2002.
18. LLTNPA responded to Mr Kempe’s request in terms of the EIRs, rather than FOISA. Mr Kempe has not disputed that the EIRs are the correct legislation for responding to his request.

19. LLTNPA submitted that the information requested falls within paragraphs (a), (c) and (e) of the definition of environmental information in regulation 2(1) of the EIRs. LLTNPA explained that integrated land management plans contain information about land, landscape, water and soil and describe measures likely to affect the elements as well as cost benefits and other analyses of proposed measures in relation to use of the land.
20. The Commissioner is satisfied that the information requested by Mr Kempe is environmental information as defined in regulation 2(1) of the EIRs, for the reasons outlined by LLTNPA. The Commissioner takes the view that paragraph (b) of the definition is also relevant.
21. LLTNPA confirmed its reliance on the exemption in section 39(2) of FOISA. Section 39(2) provides, in effect, that environmental information is exempt from disclosure under FOISA, thereby allowing any such information to be considered solely in terms of the EIRs. LLTNPA submitted that the public interest in dealing with Mr Kempe's request solely under the EIRs outweighed the public interest in also dealing with his request under FOISA, on the basis that the public interest is not served by duplicating consideration of the request under both regimes.
22. The Commissioner accepts that the public interest in maintaining the exemption in section 39(2) of FOISA and dealing with the request in line with the EIRs outweighs the public interest in disclosure under FOISA. Therefore, the Commissioner will consider the information in what follows solely in terms of the EIRs.

Regulation 5(1) of the EIRs - duty to make environmental information available

23. Regulation 5(1) of the EIRs requires a Scottish public authority that holds environmental information to make it available when requested to do so by any applicant. This obligation relates to information that is held by the authority when it receives a request. On receipt of a request for environmental information, therefore, the authority must ascertain what information it holds falling within the scope of the request. Having done so, regulation 5(1) requires the authority to provide that information to the requester, unless a qualification in regulations 6 to 12 applies (regulation 5(2)(b)).

Scope of the request – the withheld information

24. As noted above, LLTNPA has now published one of the five withheld integrated land management plans covered by Mr Kempe's request. The land owner is a registered charity, and LLTNPA obtained its permission to publish the plan. In relation to this information, the Commissioner concludes that LLTNPA was wrong to withhold it when responding to Mr Kempe's request, and, in this respect, LLTNPA failed to comply with regulation 5(1) of the EIRs.
25. The Commissioner will not consider further the information in the published plan.

Regulation 10(6) of the EIRs – information about emissions

26. LLTNPA applied the exceptions in regulation 10(5)(e), (f) and (g) to the information in the withheld plans. During the investigation, it became apparent that some of the withheld information related to emissions. It was therefore necessary to consider regulation 10(6) of the EIRs, which provides that where environmental information relates to information on emissions, it cannot be withheld under the exceptions cited by LLTNPA.
27. LLTNPA accepted that regulation 10(6) applied to the information highlighted by the Commissioner and that the exceptions in regulation 10(5)(e), (f) and (g) could not be used to withhold the information.

28. The Commissioner has considered later in this decision whether the information covered by regulation 10(6) is personal data and excepted from disclosure under regulation 11(2) of the EIRs.

Regulation 10(5)(e)

29. LLTNPA withheld all information in the four remaining plans under regulation 10(5)(e) of the EIRs. This provides 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 confidentiality of commercial or industrial information, where such confidentiality is provided for by law to protect a legitimate economic interest.
30. A Scottish public authority applying an exception must interpret it in a restrictive way and apply a presumption in favour of disclosure (regulation 10(2)). Even where the exception applies, the information must be disclosed unless, in all the circumstances, the public interest in making the information available is outweighed by that in maintaining the exception (regulation 10(1)(b)).
31. *The Aarhus Convention: an Implementation Guide*¹, which offers guidance on the interpretation of the convention from which the EIRs are derived, notes (at page 88) that the first test for considering the exception in regulation 10(5)(e) is whether national law expressly protects the confidentiality of the withheld information. The law must explicitly protect the type of information in question as commercial or industrial secrets. Secondly, the confidentiality must protect a "legitimate economic interest": this term is not defined in the Convention, but its meaning is considered further below.

Submissions from LLTNPA

32. LLTNPA submitted that confidentiality in this case is provided by the common law of confidentiality; the duty of confidentiality arises because the information has the necessary quality of confidence was received in circumstances which imposed an obligation on LLTNPA to maintain confidence.
33. LLTNPA submitted that the information has the necessary quality of confidence because it was not common knowledge: a member of the public would have to apply skill and labour to produce the information and it cannot be easily ascertained from information in the public domain. Furthermore, the information provided by land managers includes a range of commercially sensitive information such as livestock holdings, energy consumption and usage of land. The integrated land management plans also include financial cost benefit analysis, the disclosure of which would, or would be likely to substantially prejudice the confidentiality of current and planned business interests.
34. The obligation to maintain confidence under the common law duty of confidentiality can be either explicit or implied. LLTNPA submitted that an implied duty of confidence applied to some of the information in the plans, because of its commercial sensitivity and the land managers' reasonable expectation of privacy when providing this information, "developed through a confidential process based on custom and practice". LLTNPA had asked the land managers for their views on disclosure (for all integrated management plans, not just the four agreed plans under consideration here). Many land owners and managers (including those

1. http://www.unece.org/env/pp/implementation_guide.html

from the four farms whose plans are under consideration here) had objected, having understood that the information given to LLTNPA staff during development of their land management plan was provided on a confidential basis. When providing it, they had no expectation or understanding that this information would be released into the public domain.

35. In relation to confidentiality protecting a “legitimate economic interest”, LLTNPA submitted that all farm and estate owners within the National Park were operating in a challenging business environment and the disclosure of the information could adversely affect the operation of their business and their ability to run a successful business in the competitive agricultural industry. It argued that where land managers have provided detailed costs and margins of all aspects of their working farm, this information - if released into the public domain - could enable other similar businesses to undercut them, therefore having a negative impact on the market value of the land manager’s business.

Submissions from Mr Kempe

36. Mr Kempe made the following points about the decision to withhold information under regulation 10(5)(e).
- He challenged the LLTNPA’s view regarding the common law duty of confidentiality. He submitted that it implied that Freedom of Information laws would always be overridden by this alleged duty of confidence.
 - He submitted that land managers are not competitors in the normal sense, and what they do on their land is visible to their neighbours was owed to the land managers.
 - He noted that on its website, LLTNPA stated “We work with clusters of land management businesses where this increases the potential to deliver results at a landscape scale.” Mr Kempe submitted that LLTNPA cannot produce results at a landscape scale unless the landowners involved understand what each is doing, which implied that some information is being shared among landowners, but is being withheld from the public.
37. Mr Kempe acknowledged that some of the information supplied by land managers may be commercially sensitive, but submitted that large amounts of information are already made public. He commented that it could be difficult to track down information on a particular landholding because of the lack of information about who owns the land, with some landowners operating through various company structures.
38. Mr Kempe said he had: “...no wish or interest in finding out specific matters such as what farmers might be paying for a new tractor or what prices they can obtain for sale of ewes. My contention is it would be reasonable for the Park to redact such information from the Plans they have agreed and supply the rest.”

The Commissioner’s view

39. The Commissioner’s view is that before regulation 10(5)(e) can be engaged, authorities must consider the following matters:
- (i) Is the information commercial or industrial in nature?
 - (ii) Does a legally binding duty of confidence exist in relation to the information?
 - (iii) Is the information publicly available?
 - (iv) Would disclosure of the information cause, or be likely to cause, substantial harm to a legitimate economic interest?

Is the information commercial or industrial in nature?

40. The Commissioner accepts that the majority of information in the integrated land management plans is commercial in nature. LLTNPA describes the plans as “our way of working closely with land managers within the context of their individual business to develop strategic business plans which will identify and progress actions that will deliver both business and National Park priorities”. It is clear that the plans are intended both to promote the business interests of the land managers and to help LLNTPA achieve the aims set out in the National Parks (Scotland) Act 2000. It is clear to the Commissioner (and has been acknowledged by Mr Kempe) that the plans contain some commercial information.
41. However, the integrated land management plans also contain information which is less obviously commercial or industrial in nature. Some plans include information about the wildlife habitats or species found on the estate or farm. Information about land use or condition, or information about the presence of certain species may have commercial value (for example, when applying for certain types of funding), but in some instances it is not obvious that information of this nature was included in the plans for commercial purposes. The plans are not exclusively concerned with commercial development and profit, but with good management of the land in a much wider sense.
42. Some of the information in the plans relates to areas of land designated as SSSIs (sites of special scientific interest), where the focus is on protecting the features designated to be of interest and, generally, improving biodiversity. The Commissioner has found that much of this information is already available in the published site management statements from Scottish Natural Heritage.
43. The Commissioner therefore does not accept that all information in the withheld integrated land management plans is commercial or industrial in nature, or that regulation 10(5)(e) should be accepted in relation to all information in the plans. He will consider later whether other exceptions apply to this information.

Is the information publicly available?

44. The Commissioner has found that the plans include some commercial information which is already in the public domain. Some estates or farms have websites with information about their livestock or tourist facilities which reflects the information in the integrated land management plan. (In some cases, the website appears to offer an updated version of information in the integrated land management plan.)
45. It is not possible for the Commissioner to state exactly what the information in the plans is already in the public domain. Where it is not obvious whether the commercial information in the plans is in the public domain, the Commissioner has accepted on the balance of probabilities that the information is not publicly available, noting that the plans themselves are not publicly available.

Does a legally binding duty of confidence exist in relation to the information?

46. In the Commissioner's view, confidentiality "provided for by law" will include confidentiality imposed on any person under the common law of confidence, under a contractual obligation or by statute. For a duty of confidence to be owed under the common law, it is necessary for certain criteria to be met. These are:
 - (i) the information must have the necessary quality of confidence about it. It must not be generally accessible to the public already.

(ii) the information must have been communicated in circumstances importing an obligation of confidentiality. The obligation may be express (for example, in a contract or other agreement), or implied from the circumstances or the nature of the relationship between the parties; and

(iii) unauthorised use or disclosure of the information would be to the detriment of the party communicating it. Detriment may be potential rather than actual and need not be financial.

Necessary quality of confidence

47. To have the necessary quality of confidence, the information should not be generally accessible. The Commissioner has already considered this above. In this case, the Commissioner notes that LLTNPA is withholding information which has not already been disclosed under the EIRs. Whilst some of the information within the integrated land management plans is likely to be in the public domain, the plans themselves are not.
48. The Commissioner accepts that the information (i.e. information which is commercial in nature) is confidential in that it has not previously been put into the public domain. The information will only have been viewed by a limited number of individuals and was clearly received under circumstances from which it would reasonably have been inferred that it was confidential. LLTNPA concurs with the land managers who stated that much of the information in these plans would normally only be made available to their accountants and lawyers and they would never have given this information to the LLTNPA if they had thought there was any likelihood that it would be released into the public domain.

Obligation to maintain confidentiality

49. LLTNPA must also have received the information in circumstances which imposed an obligation on it to maintain confidentiality.
50. There are no markings on any of the withheld integrated land management plans indicating that it should be treated confidentially, but the Commissioner is required to look beyond any expression of confidentiality and to focus on the nature of any withheld information to determine whether the duty of confidence should stand.
51. In this case, the Commissioner accepts that the integrated land management plans contain confidential information, provided by the land managers, who expected it to be treated accordingly. He therefore accepts that there is an implied obligation to maintain confidentiality. He accepts that there was no legal requirement for the land managers to provide the information to LLTNPA while noting that creation of an integrated land management plan ensures compliance with aspects of the National Parks (Scotland) Act 2000 and the Land Reform (Scotland) Act 2002.

Unauthorised disclosure would cause detriment

52. The third requirement is that that unauthorised disclosure of the information would cause detriment to the person (or persons) who communicated it. Detriment need only be potential for the test to be met.
53. In its submissions, LLTNPA outlined the harm which it considered would result from disclosure of the information. LLTNPA argued that disclosing details of the integrated land management plans would cause substantial harm to the interests of the land managers. (The arguments put forward by LLTNPA are outlined in paragraph 35 above.)

54. The Commissioner accepts that the land owners and managers have not authorised disclosure of the withheld information and have objected to any disclosure. He accepts that disclosure of some information would cause actual or potential detriment to the commercial interests of the land owners or managers, on the lines indicated by LLTNPA. The information in the plans is detailed, and provides a frank assessment of the business challenges and opportunities faced by the land manager or owner.
55. However, the Commissioner is not satisfied that all the information withheld under regulation 10(5)(e) of the EIRs is potentially capable of causing the detriment described by LLTNPA. The submissions from LLTNPA do not explain in detail why disclosure of some parts of the information would be useful to commercial competitors or why disclosure would otherwise cause detriment to the land managers or owners.
56. The Commissioner is therefore satisfied that a legally binding duty of confidence exists in relation to some but not all of the information which has the necessary quality of confidence. As a result, the exception in regulation 10(5)(e) cannot apply to all the information withheld from Mr Kempe.

Would disclosure of the information cause, or be likely to cause, substantial harm to a legitimate economic interest?

57. The term "legitimate economic interest" is not defined in the EIRs. In the Commissioner's view, the interest in question should be financial, commercial or otherwise "economic" in nature. The prejudice to that interest must be substantial: in other words, it must be of real and demonstrable significance.
58. As noted above, the Commissioner is not satisfied that LLTNPA has provided convincing arguments to show that disclosure of all parts of the withheld information would, or would be likely to, cause substantial harm to the economic interests of the land owners or managers. Some of the information appears innocuous and incapable of causing such harm. The Commissioner also notes that some of the information in the integrated land management plans appears to be several years old and relates to planned activities which may now have been completed.
59. The Commissioner is satisfied, therefore, that LLTNPA was not entitled to apply the exception in regulation 10(5)(e) to all the information in the integrated land management plans.
60. Where the exception in regulation 10(5)(e) was engaged, the Commissioner must consider the public interest test in regulation 10(1)(b) of the EIRs.

Public interest

61. LLTNPA identified the following public interest factors favouring disclosure of the information:
 - the public interest in individuals being able to exercise their rights under the EIRs in order to enhance their understanding of the work of a public authority
 - the public interest in members of the public knowing how a public body performs its functions, particularly in a context where the development of a land management plan may result in the creation of new tourism ventures, and planning applications which would have an impact on the local community
 - the public interest in ensuring openness, transparency and accountability in the use of public resources.

62. Against disclosure, it identified the following public interest considerations:
- most of the land managers for whom the LMPs were created for have clearly stated their objection to the release of this information
 - the public interest in the LLTNPA using integrated land management plans to achieve the key aims of the National Park in accordance with the National Park (Scotland) Act 2000
 - the likely harmful consequences of disclosure, resulting in the breakdown of professional working relationships between LLTNPA and land managers, which are vital to achieving the aims of the National Park (as evidenced by written objections from land managers).
63. Mr Kempe submitted that the land covered by the integrated land management plans is in a National Park, therefore it is in the public interest to disclose information about how it is being managed. Mr Kempe suggested that many areas within the National Park are not being managed according to the statutory objectives of the National Park. As an example, he argued that the majority of SSSIs within the National Park are in poor condition and the most common reason for this is overgrazing, whether by deer or sheep. He therefore believed it was in the public interest to know what agreements had been reached with landowners about how land should be used, including such details as the number of livestock grazing a particular piece of land, or the type of tree species being planted, and any public financial support the landowner receives for doing this.
64. Mr Kempe challenged the decision of the LLTNPA to withhold all information in the agreed integrated land management plans, in the public interest.
65. Mr Kempe also submitted that he had asked for plans which had been agreed, and commented: "SNH [Scottish Natural Heritage] ... publishes information in the form of operations requiring consent for each SSSI [Site of Special Scientific Interest] so the public can find out what they have agreed with landowners but the LLTNPA is saying that what they have agreed in such circumstances needs to be kept secret. Given the public does have a right of access it's even more incredible that the LLTNPA is claiming that what they are agreeing with landowners about this should be kept secret".
66. Paragraph 7 of the Commissioner's briefing on the public interest (under the EIRs)² states:
- The EIRs do not define the public interest, but it has been described elsewhere as "something which is of serious concern and benefit to the public", not merely something of individual interest. It has also been described as "something that is "in the interest of the public", not merely "of interest to the public." In other words, it serves the interests of the public.*
67. In considering the public interest in disclosure against that in maintaining the exception in regulation 10(5)(e), the Commissioner acknowledges the general public interest in transparency in environmental matters. He accepts that Mr Kempe has given good reasons why disclosure of information about the management of the land would be in the public interest. He also accepts the public interest in enabling scrutiny of the way LLTNPA interacts with businesses in relation to its statutory functions and aims.

² <http://www.itspublicknowledge.info/Law/FOISA-EIRsGuidance/ThePublicInterestTest/ThePublicInterestTestEIRs.aspx>

68. Against this, the Commissioner must balance the public interest in avoiding harm to the interests of third parties and the LLTNPA. It is clear that the land managers were not obliged to provide the detailed information in the integrated land management plans, and did so voluntarily, on the understanding that the development of the plan would benefit their business as well as supporting the aims of the LLTNPA.
69. The Commissioner has borne in mind that LLTNPA's effectiveness in achieving the aims set out in the National Parks (Scotland) Act 2000 depends to a significant extent on good relationships with the land owners and managers within the park boundaries, including the free flow of information. The Commissioner accepts that there would be a genuine risk to those relationships if the information under consideration here was to be disclosed. This is evidenced by the written objections from land owners and managers to the proposed disclosure of the integrated land management plans.
70. Having examined the withheld information to which regulation 10(5)(e) applies, the Commissioner accepts that it goes beyond information about the management of the land itself, and includes financial and personal information, and other information of a confidential nature.
71. Taking all of these matters into consideration, the Commissioner finds that disclosure of the information would not be in the public interest. The public interest in maintaining the exception in regulation 10(5)(e) of the EIRs outweighs the public interest in disclosure of the withheld information, and therefore LLTNPA was entitled to withhold the information in question under regulation 10(5)(e) of the EIRs.

Regulation 10(5)(f) - prejudice to the interests of the person who provided information

72. As set out above, the Commissioner found that LLTNPA had wrongly applied the exception in regulation 10(5)(e) to some information in the integrated land management reports. The Commissioner will go on to consider whether the exception in regulation 10(5)(f) was correctly applied to the information not excepted under regulation 10(5)(e).

Does regulation 10(5)(f) apply in this case?

73. A number of factors should be addressed in considering whether this exception applies. These include:

- Was the information provided by a third party?
- Was the provider, or could the provider be, required by law to provide it?
- Is the information otherwise publicly available?
- Has the provider consented to disclosure?
- Would disclosure of the information cause, or be likely to cause, substantial harm to the interests of the provider?

74. The Commissioner has considered similar tests above, in relation to regulation 10(5)(e). For the reasons already stated, he accepts that the information was provided by a third party who was not and could not be required by law to provide it. He is satisfied that, for the most part, the information is not otherwise publicly available, and that the providers have not consented to disclosure.

75. The Commissioner has already considered whether disclosure of the information would, or would be likely to cause substantial harm to the providers, in terms of their commercial interests, as required by regulation 10(5)(e). In relation to regulation 10(5)(f), he is considering only the information which, in his view, did not meet the test required by regulation 10(5)(e), i.e. commercial or industrial information to which a duty of confidence exists in order to protect a legitimate economic interest.
76. The submissions from LLTNPA relating to the harm test required by regulation 10(5)(f) were broadly similar to those already considered in relation to regulation 10(5)(e). The Commissioner did not accept the arguments in relation to regulation 10(5)(e) and does not accept them in relation to regulation 10(5)(f).
77. The only additional argument provided in relation to regulation 10(5)(f) (in the context of public interest factors favouring withholding the information) was that disclosure would damage protection of rare and endangered species and the protection of public rights of access under the Land Reform (Scotland) Act 2003. The Commissioner's view is that these arguments have little direct relevance when considering whether disclosure of the withheld information in question would cause substantial harm to the interests of the information providers, and are more appropriately considered in relation to regulation 10(5)(g).
78. The Commissioner therefore does not accept that regulation 10(5)(f) is engaged by the information which was found not to be excepted under regulation 10(5)(e) of the EIRs.
79. Having found that the exception was not engaged, he is not required to consider the public interest test in relation to information withheld under regulation 10(5)(f).

Regulation 10(5)(g) - prejudice to the protection of the environment to which the information relates

80. Some information was also withheld under regulation 10(5)(g) of the EIRs. This excepts information from disclosure if it would, or would be likely to, prejudice substantially the protection of the environment to which the information relates.
81. 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)).
82. The Commissioner accepts that some of the information in the integrated land management plans relates to species which are rare, declining or endangered. Where disclosure of the information has the potential to lead to harm such species through additional disturbance, he has accepted that this exception was correctly applied. He has therefore accepted that regulation 10(5)(g) applies to information which describes the possible location of Water Vole (a protected species), and the locations of a Black Grouse lek and habitat.
83. The Commissioner has not accepted that 10(5)(g) applies to other references to wildlife (including general references to the presence of protected species), either because of the general nature of the information, or because similar information is already publicly available.
84. The exception in regulation 10(5)(g) is subject to the public interest test: even where the exception applies, the information must be disclosed 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)).
85. LLTNPA argued that the public interest in keeping secret the locations of rare species, in order to avoid their exploitation, outweighs any public interest in disclosure.

86. Mr Kempe has not put forward any arguments to support the view that disclosure of such information would be in the public interest.
87. The Commissioner accepts that the public interest in avoiding substantial prejudice to the protection of the environment outweighs any public interest in disclosure, such as the general public interest in transparency and the public interest in increasing awareness of where these species' habitats exist. He accepts that there is a strong public interest in protecting the environments in which rare, declining or endangered species exist.

Regulation 11(2) – personal information

88. As explained in paragraph 10, in terms of the personal data in the integrated land management plans withheld under regulation 11(2) of the EIRs, the Commissioner is required to consider whether LLTPNA was entitled to withhold the names of landowners. This was the only personal data which Mr Kempe specified should be included in the Commissioner's decision. As some plans refer not to the land owner but to a tenant or land manager, the Commissioner has also considered disclosure of these names.
89. Mr Kempe did not give reasons why the names of the landowner should be disclosed, other than considering it was in the public interest for this information to be in the public domain.
90. The Commissioner has found that, in relation to the withheld plans, the names of the landowners or estate/farm managers can be easily discovered through internet searches. Given that LLTNPA has already offered to provide Mr Kempe with a list of the estates/farms it is working with, in relation to land management plans, the Commissioner cannot see any objection to LLTNPA providing the names of the estates or farms for which plans have been agreed. This will allow Mr Kempe access to the names of the landowners or land managers in each case, without requiring disclosure of the information under the EIRs.
91. In addition to the names of the land owners/managers, the Commissioner has considered whether information about emissions in one of the plans is personal data and whether it should be withheld under regulation 11(2).
92. As noted, the Commissioner found that some of withheld information related to emissions. Under regulation 10(6), this information could not be excepted under regulation 10(5)(e), (f) or (g). LLTNPA has accepted that this information is covered by regulation 10(6), but has argued that it is personal data excepted from disclosure under regulation 11(2).
93. LLTNPA submitted that the information in question was the personal data of the landowner, who was identifiable from the information in the land management plan and to whom the information related. LLTNPA argued that disclosure of this information would breach the first data protection principle in the DPA 1998, which states that disclosure of personal data must be fair, lawful, and meet a condition for processing in Schedule 2 to the DPA 1998.
94. LLTNPA stated that the landowner would not reasonably expect their personal data to be disclosed into the public domain, which is the legal effect of a disclosure under the EIRs. The information was provided in the expectation of confidentiality.
95. The Commissioner accepts that the information in question is the personal data of the land owner, in that it relates to the planned actions of an identifiable individual. The Commissioner must decide whether disclosure of the information would breach the first data protection principle, as LLTNPA has argued.

96. The Commissioner accepts that the landowner had no expectation that this information would be disclosed when it was included in the land management plan. The inclusion of regulation 10(6) in the EIRs indicates an inherent public interest in making available information about emissions into the environment. However, after making further inquiries, the Commissioner has established that the information no longer reflects the current situation as action was taken some years ago to prevent the emissions.
97. In the circumstances, the Commissioner accepts that disclosure of the information, at the time of Mr Kempe's request, would have been unfair to the landowner, and, accordingly, would have breached the first data protection principle.
98. The Commissioner therefore does not require disclosure of this information, finding it is excepted under regulation 11(2) of the EIRs.

Data Protection Act 2018 (Transitional provisions)

99. On 25 May 2018, the DPA 1998 was repealed by the DPA 2018. The DPA 2018 amended regulation 11(2) of the EIRs and also introduced a set of transitional provisions, which set out what should happen where a public authority dealt with an information request before the EIRs were amended on 25 May 2018 but where the matter is being considered by the Commissioner after that date.
100. In line with paragraph 61 of Schedule 20 of the DPA 2018 (see Appendix 1), if an information request was dealt with before 25 May 2018 (as is the case here – the review outcome was issued on 14 August 2017), the Commissioner must consider the law as it was before 25 May 2018 when determining whether the authority dealt with the request in accordance with the EIRs.
101. Paragraph 56 of Schedule 20 goes on to say that, if the Commissioner concludes that the request was not dealt with in accordance with the EIRs (as they stood before 25 May 2018), he cannot require the authority to take steps it would not be required to take in order to comply with the EIRs on or after 25 May 2018.
102. As the Commissioner has found that LLTNPA complied with the EIRs (as they stood before 25 May 2018) in responding to the request by Mr Kempe, he is not required to go on to consider whether disclosure of the personal data would breach the EIRs as they currently stand.

Conclusions

103. The Commissioner has upheld the decision to withhold some personal data under regulation 11(2) of the EIRs. He has accepted that some information was correctly withheld under regulation 10(5)(e) or regulation 10(5)(g) of the EIRs. He has not accepted that these exceptions, or the exception in regulation 10(5)(f), apply to some of the information in the withheld ILMPs. He therefore requires LLTNPA to provide Mr Kempe with the information which was wrongly withheld. The Commissioner will provide LLTNPA with a marked up copy of each plan, showing what information should be disclosed.

Decision

The Commissioner finds that Loch Lomond and the Trossachs National Park Authority (LLTNPA) partially complied with the Environmental Information (Scotland) Regulations 2004 (the EIRs) in responding to the information request made by Mr Kempe.

The Commissioner finds that LLTNPA correctly withheld some information under regulation 10(5)(e) and regulation 10(5)(g) of the EIRs.

Some personal data was correctly excepted from disclosure under regulation 11(2).

However, none of the exceptions cited by LLTNPA were upheld in relation to the remaining information.

The Commissioner therefore requires LLTNPA to provide the information which was wrongly withheld by 28 March 2019.

Appeal

Should either Mr Kempe or LLTNPA 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 LLTNPA fails to comply with this decision, the Commissioner has the right to certify to the Court of Session that LLTNPA has failed to comply. The Court has the right to inquire into the matter and may deal with LLTNPA as if it had committed a contempt of court.

Daren Fitzhenry
Scottish Information Commissioner

11 February 2019

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 –

...

- (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 -

- (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;
- ...
- (e) costs benefit and other economic analyses and assumptions used within the framework of the measures and activities referred to in paragraph (c); and
- ...

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)-
 - (a) shall be complied with as soon as possible and in any event no later than 20 working days after the date of receipt of the request; and
 - (b) is subject to regulations 6 to 12.

...

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-

...

- (e) the confidentiality of commercial or industrial information where such confidentiality is provided for by law to protect a legitimate economic interest;
- (f) the interests of the person who provided the information where that person-
 - (i) was not under, and could not have been put under, any legal obligation to supply the information;

- (ii) did not supply it in circumstances such that it could, apart from these Regulations, be made available; and
 - (iii) has not consented to its disclosure; or
 - (g) the protection of the environment to which the information relates.
- (6) To the extent that the environmental information to be made available relates to information on emissions, a Scottish public authority shall not be entitled to refuse to make it available under an exception referred to in paragraph (5)(d) to (g).

...

11 Personal data

...

- (2) To the extent that environmental information requested includes personal data of which the applicant is not the data subject and in relation to which either the first or second condition set out in paragraphs (3) and (4) is satisfied, a Scottish public authority shall not make the personal data available.

...

Data Protection Act 1998

1 Basic interpretative provisions

- (1) In this Act, unless the context otherwise requires –

...

“personal data” means data which relate to a living individual who can be identified –

- (a) from those data, or
- (b) from those data and other information which is in the possession of, or is likely to come into the possession of, the data controller,

and includes any expression of opinion about the individual and any indication of the intentions of the data controller or any other person in respect of the individual;

...

Schedule 1 – The data protection principles

Part I – The principles

1. Personal data shall be processed fairly and lawfully and, in particular, shall not be processed unless –
- (a) at least one of the conditions in Schedule 2 is met, and

...

Data Protection Act 2018

Schedule 20 – Transitional provision etc

61 Environmental Information (Scotland) Regulations 2004 (S.S.I. 2004/520)

- (1) This paragraph applies where a request for information was made to a Scottish public authority under the Environmental Information (Scotland) Regulations 2004 (“the 2004 Regulations”) before the relevant time.
- (2) To the extent that the request is dealt with after the relevant time, the amendments of the 2004 Regulations in Schedule 19 to this Act have effect for the purposes of determining whether the authority deals with the request in accordance with those Regulations.
- (3) To the extent that the request was dealt with before the relevant time –
 - (a) the amendments of the 2004 Regulations in Schedule 19 to this Act do not have effect for the purposes of determining whether the authority dealt with the request in accordance with those Regulations, but
 - (b) the powers of the Scottish Information Commissioner and the Court of Session, on an application or appeal under the 2002 Act (as applied by the 2004 Regulations), do not include power to require the authority to take steps which it would not be required to take in order to comply with those Regulations as amended by Schedule 19 to this Act.
- (4) In this paragraph -

“Scottish public authority” has the same meaning as in the 2004 Regulations;

“the relevant time” means the time when the amendments of the 2004 Regulations in Schedule 19 to this Act come into force.

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