

Decision Notice

Decision 042/2019: Mr M and Loch Lomond and the Trossachs National Park Authority

Camping byelaws

Reference No: 201800965

Decision Date: 13 March 2019



Scottish Information
Commissioner

Summary

LLTNPA was asked for camping permit data and ranger patrol records following the introduction of new camping byelaws. LLTNPA provided some information and withheld some, claiming several exceptions from disclosure under the EIRs: customers would not expect their feedback to be disclosed publicly, while disclosing ranger patrol data ran the risk of jeopardising the enforcement of the new byelaws.

Following investigation, the Commissioner decided that only some information was correctly excepted from disclosure. He found that other data should have been disclosed.

Relevant statutory provisions

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) (definition (a) (c) and (f) of “environmental information”); 5(1) and (2)(b) (Duty to make available information on request); 10(1), (2), (5)(b) and (f) (Exceptions from duty to make environmental information available)

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 2 October 2017, Mr M made a five-part request for information to Loch Lomond and the Trossachs National Park Authority (LLTNPA), relating to aspects of LLTNPA’s Camping Management Byelaws (the Byelaws). He subsequently agreed to narrow this request to three parts, on the basis of advice LLTNPA provided on available resources and records. As Mr M has only raised dissatisfaction with two of these three parts in his application, these are all the Commissioner need consider here.
2. The Byelaws apply between 1 March and 30 September in each calendar year and Mr M asked for information for this period in 2017, specifying:
 - (a) camping permit system data, and
 - (b) ranger patrol records.

Mr M also confirmed that he already had information for part (a) up to 26 June in PDF format, but he wished the whole season’s data in Excel format for analysis.
3. LLTNPA responded on 7 December 2017, applying the exemption in section 39(2) of FOISA and dealing with the request under the EIRs. It disclosed some information for part (a) but withheld other information, as personal data under regulation 11(2) or under the exception in regulation 10(5)(f). For part (b), LLTNPA withheld information under the exceptions in regulations 10(4)(e), 10(5)(b) and 10(5)(g) of the EIRs. It provided reasons for its application of the exceptions.

4. On 18 December 2017, Mr M wrote to LLTNPA, requesting a review of its decision. Mr M did not believe he had been provided with all the data headings covered by part (a). He disagreed with LLTNPA's decision to withhold information, providing reasons. He also made it clear that he was not seeking any personal data.
5. LLTNPA notified Mr M of the outcome of its review on 22 January 2018. A modified decision was substituted, resulting in additional data headings being disclosed, but otherwise upholding the previous decision.
6. On 6 June 2018, Mr M wrote to the Commissioner's Office. Mr M 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 M stated he was dissatisfied with the outcome of LLTNPA's review: he believed far more information was capable of being disclosed to the public in response to his request (and that it should be, in the public interest).

Investigation

7. The application was accepted as valid. The Commissioner confirmed that Mr M 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.
8. On 7 August 2018, LLTNPA was notified in writing that Mr M had made a valid application. LLTNPA was asked to send the Commissioner the information withheld from Mr M. LLTNPA provided the information and the case was allocated to an investigating officer.
9. 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 to answer specific questions, focusing on the exceptions applied by LLTNPA.

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 him by both Mr M and LLTNPA. He is satisfied that no matter of relevance has been overlooked.

Handling in terms of the EIRs

11. In its correspondence with Mr M, LLNTPA identified all of the information requested as being environmental information, as defined in regulation 2(1) of the EIRs. Having reached this conclusion, it applied section 39(2) of FOISA.
12. The exemption in section 39(2) of FOISA provides, in effect, 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. In this case, the Commissioner accepts that LLTNPA was entitled to apply the exemption to the information withheld in this case, given his conclusion that it is properly classified as environmental information.
13. As there is a statutory right of access to environmental information available to Mr M in this case, the Commissioner accepts, in all the circumstances, that the public interest in maintaining this exemption (and responding to the request under the EIRs) outweighs any

public interest in disclosing the information under FOISA. Both regimes are intended to promote public access to information and there would appear to be no reason why (in this particular case) disclosure of the information should be more likely under FOISA than under the EIRs.

14. The Commissioner therefore concludes that LLTNPA was correct to apply section 39(2) of FOISA, and consider Mr M's information request wholly under the EIRs. In what follows, the Commissioner will consider this case solely in terms of the EIRs.

Regulation 5(1) of the EIRs – Duty to make environmental information available

15. Regulation 5(1) of the EIRs (subject to the various qualifications contained in regulations 6 to 12) requires a Scottish public authority which 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.
16. Under the EIRs, a public authority may refuse to make environmental information available if one or more of the exceptions in regulation 10 apply and, in all the circumstances of the case, the public interest in maintaining the exception or exceptions outweighs the public interest in making the information available.

Information disclosed previously

17. For part (a) of the request, it is apparent that Mr M already received a sub-set of the information specified in this request of 2 October 2017, i.e. the data from 1 March until 26 June 2017 inclusive. This data is already in the public domain as it was previously disclosed under the EIRs.
18. LLTNPA does not appear to have raised any objections to re-supplying data in Excel format. The Commissioner requires LLTNPA to re-supply the data spanning 1 March to 26 June 2017 inclusive in Excel format, if it has not already done so, subject to the following points regarding personal data and whether it is within scope.

Scope of request – regulation 11(2)

19. LLTNPA confirmed in its submissions that it was continuing to withhold some data in relation to part (a) of the request which it considered to be the personal data of third parties and of its employees. It cited regulation 11(2) of the EIRs.
20. For part (a), it withheld columns (highlighted in red) in Appendices A and B.
21. Mr M stated in his application that his request was framed so that it would only capture anonymous information. He confirmed he was not interested in obtaining personal data (a position he had also made clear at review).
22. Given Mr M's stated position, it is apparent that he does not require the spreadsheet columns holding personal data. For this reason, Mr M does not require the data in the following columns:
 - Booking customer's title, first and last names, initials, full address, contact details (all phone, fax and email details, mailing list)
 - Booking customer's nationality/currency/language/car details
 - Detailed comments from customers
 - Names of staff creating or updating bookings.

23. As the Commissioner is satisfied that the above personal data are not in scope, he considers LLNTPA incorrectly applied regulation 11(2) of the EIRs to this information (and to that extent failed to comply fully with regulation 5(1)). The Commissioner will now go on to consider any remaining information sought by Mr M.

Part (a) - Regulation 10(5)(f)

24. Mr M did not accept that regulation 10(5)(f) of the EIRs was correctly applied by LLNTPA to the information he described in part (a) of his request. He did not accept there was the required harm in disclosing these particular camping permit data.

25. The withheld information is located in two columns in Appendix B (relating to customer feedback) with the following titles:

- *You can provide more detail to your answer here if necessary* [relating to a question regarding the provision of information about how the Byelaws operate]
- *If you could improve anything about your experience of either buying a camping/motorhome permit or staying in a permit area what would it be?*

26. LLNTPA clarified which information falling within the scope of this part had been disclosed to Mr M already. It believed it had disclosed anonymised information as far as it was possible to do so.

27. LLNTPA contended that disclosing data in these two additional columns would result in the substantial prejudice required by regulation 10(5)(f).

28. Regulation 10(5)(f) of the EIRs 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 interests of the person who provided that information, where that person -

- was not under, and could not have been put under, any legal obligation to supply the information;
- did not supply it in circumstances such that it could, apart from the EIRs, be made available; and
- has not consented to its disclosure.

29. As with all exceptions in regulation 10, this exception is subject to the public interest test in regulation 10(1)(b) and, in line with regulation 10(1)(a), must be interpreted in a restrictive way with a presumption in favour of disclosure.

Was there any legal obligation to supply the information?

30. LLNTPA submitted, and Mr M does not appear to dispute, that this information was provided by members of the public on a voluntary basis, having been invited as customer feedback.

31. The Commissioner accepts that the information withheld by LLNTPA was provided by the public, i.e. persons outwith the authority, of their own accord. He can identify no legal obligation for them to do so.

Is the information otherwise publicly available?

32. LLTNPA submitted that the information in question was not publicly available. LLTNPA did not dispute that information of this kind had been disclosed previously, but explained it now had to consider such information in the context of its importance in keeping the Byelaws under review.
33. As noted above, however, LLNTPA disclosed information for the period covered by this request (a period during which the Byelaws were in force) previously, in pdf format. That information was clearly publicly available when Mr M later submitted this request in October 2018 and so could not be subject to regulation 10(5)(f). There can be no objection under that exception, therefore, to its disclosure in Excel format.
34. The Commissioner is satisfied, however, that the information for the period 27 June until 30 September 2019 inclusive was not otherwise publicly available at the time of Mr M's request and requirement for review, and will now consider this information further below.

Has the provider consented to disclosure?

35. LLTNPA has not addressed the question of consent directly in any of its submissions. As will be apparent from previous decisions of the Commissioner on this exception (see, for example *Decision 142/2017: Salmon and Trout Conservation Scotland and the Scottish Ministers*¹) it is essential, if the exception is to apply, for specific consent to be sought from the affected persons and specific denial of that consent obtained. From the submissions received in the case, the Commissioner cannot be satisfied that the requisite consent has been sought and denied, and therefore cannot accept that the exception in regulation 10(5)(f) has been correctly applied.

Substantial prejudice

36. For the sake of completeness, the Commissioner will also consider this element of the requirements of regulation 10(5)(f). LLTNPA submitted that visitors who provided this feedback would not have expected the fuller detail of their responses to be made public. It believed disclosure might deter those persons from providing voluntary information in the future.
37. Noting that Mr M required the feedback information to be linked to the booking information, LLTNPA considered the persons providing the information might be concerned they could be identified from their comments. Noting that there were no guarantees of anonymity, LLTNPA submitted that the additional information in the feedback log, specifically the unique customer reference number, could be cross-matched with the camping permit booking information to identify time and location of stay and, by extension, the identities of individuals mentioned in the feedback and others staying at the same location. The unique customer reference was reused for the same customer for return bookings and LLTNPA was concerned that the withheld information could be used with other information already disclosed to build up a picture of individuals.
38. LLTNPA also highlighted the relevance of other parts of the Aarhus Convention (from which the EIRs are derived), in addition to those providing for access to information. In particular, it referred to Pillar 2 of the Convention (which relates to public participation in decision-making) and submitted that the likelihood of future participation would be reduced by the "chilling effect" of disclosing the withheld information.

¹ <http://www.itspublicknowledge.info/ApplicationsandDecisions/Decisions/2017/201700453.aspx>

39. The Commissioner would emphasise that the substantial prejudice required for this exception to apply is prejudice to the interests of the person(s) who provided the information to the public authority. Harm to the effective conduct of public affairs, in terms of the discharge of the authority's functions or wider considerations, may be relevant in considering the public interest, but before that stage is reached the public authority must be able to establish the requisite harm to the interests of those third parties. The Commissioner acknowledges that substantial prejudice may accrue to the person providing the information if they are deterred from doing so to the extent that they are effectively prevented from participation in environmental decision-making (or a particular aspect of such decision-making), but such an effect would need to be considered and argued on a case-by-case basis, focused on the circumstances of that particular case. The Commissioner is not satisfied that has been done here, from the unspecific, speculative arguments he has been presented with. Neither is he satisfied that he has been presented with a realistic prospect of identifying individuals from the withheld information, or at least a prospect of such identification being feasible by anyone other than by the individuals themselves.
40. From the submissions provided, the Commissioner is not sufficiently convinced that the degree of harm is as substantial as LLTNPA suggests here. He is not persuaded of the risk of either wider identification or deterrence from participation in environmental decision-making, to the extent that either could amount to substantial prejudice to the interests of the individuals concerned. With the exception of personal data, therefore (which has already been found to be outwith the scope of the request), the Commissioner finds that the exception in regulation 10(5)(f) of the EIRs does not apply to this information, which should be disclosed
41. As he has found that the exception does not apply, the Commissioner need not consider the public interest test in regulation 10(1)(b) of the EIRs. He will now go on to consider part (b) of the request.

Part (b) - Regulation 10(5)(b)

42. LLNTPA withheld the ranger patrol records (Appendix C) for the dates in question under regulation 10(5)(b). It had already provided Mr M with the "data headings" themselves at review stage.
43. LLNTPA confirmed it had previously disclosed ranger patrol data but, crucially, not for the dates specified here and not since the Byelaws came into effect. The logs kept by rangers for the period in question contained information not recorded previously and were used for different purposes following the introduction of the Byelaws. The information was now used for reporting byelaw contraventions to the Procurator Fiscal (PF), as opposed to informal engagement with the public as previously.
44. Regulation 10(5)(b) of the EIRs 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 course of justice, the ability of an individual to receive a fair trial or the ability of any public authority to conduct an inquiry or a criminal or disciplinary nature.
45. As with all exceptions in regulation 10, this exception is subject to the public interest test in regulation 10(1)(b) and, in line with regulation 10(1)(a), must be interpreted in a restrictive way with a presumption in favour of disclosure.
46. LLNTPA provided submissions to the effect that disclosure of the withheld information would adversely affect criminal proceedings which, it stated, were ongoing at the time of the

request and requirement for review. LLTNPA also confirmed in its submissions the number of proceedings which were live.

47. LLTNPA submitted that there were harmful consequences of disclosure of the scale and frequency of ranger patrols, which this information would reveal. If operational details of the dates and locations of patrols were in put into the public domain, LLTNPA submitted that the risk of confrontation would be increased and the planning of enforcement of the Byelaws made more difficult. There was also a real risk that potential prosecution evidence could be published, to the prejudice of the outcome of related proceedings
48. Mr M did not accept that the information he sought would have the effects described by the LLTNPA. He submitted that people expected ranger patrols to conduct checks in any case. He also referred to Board minutes online: these minutes, in his view, reflected adjustments to the patrols during the season. Mr M also stated that the data he sought pre-dated those adjustments. For these reasons, he believed there was not the level of risk suggested by LLTPNA.

The Commissioner's conclusions

49. Whether relevant harm is likely to occur for the purposes of this exception will depend on the circumstances of the particular case under consideration, and the likelihood of disclosure causing the required substantial prejudice may change over time.
50. Having considered carefully all the circumstances, the Commissioner accepts that disclosure of the ranger patrol data for the dates specified by Mr M would be likely to impact adversely on the course of justice, and the ability of enforcement agencies (specifically LLTNPA) to conduct an inquiry or a criminal or disciplinary nature. By extension, its disclosure would also be likely to impact adversely on the ability of any accused individual to receive a fair trial. The information remained of potential relevance to prosecutions under the Byelaws at the time it was requested and at the time of the review, with the associated real potential for its disclosure to impact substantially on all of these things.
51. Accordingly, the Commissioner is satisfied that the ranger patrol information sought by Mr M is excepted from disclosure in terms of regulation 10(5)(b) of the EIRs.
52. Having found that the exception in regulation 10(5)(b) is engaged, the Commissioner must now go on to consider the public interest test in regulation 10(1)(b) in relation to the withheld information.

Public interest

53. Mr M submitted that 828 warnings had been issued for breach of the Byelaws, but this did not explain how the Byelaws worked or how many people camping without a permit had been warned. He believed there was an overwhelming interest in this information being disclosed.
54. LLTNPA recognised a public interest in the implementation of the Byelaws and the number of prosecutions made as a result, but also identified a greater public interest in withholding information forming the basis of reports to the PF and which would be used for the completion of witness statements. LLNTPA stated it was seeking to educate and inform the public in camping responsibly, prosecutions for contravention of the Byelaws being seen as a last resort, but the value of the Byelaws would be diluted if the information gathered by rangers (and used to make the cases for prosecutions) was released into the public domain prior to or during any legal proceedings taking place.

55. The Commissioner has considered carefully the arguments from Mr M and LLTNPA as to where the public interest lies here. There is no doubt that the information Mr M is seeking would inform the public, by facilitating detailed analysis of emerging trends or issues. That said, there is already in place a three-year review period, culminating in a report to Ministers on the effects of the Byelaws. The Commissioner is not convinced that the public requires the level of detail Mr M has specified in advance of that report: it is understandable that Mr M may wish to conduct his own detailed analysis, but there are mechanisms already in place, specifically designed to inform the public over a longer term. To an extent, Mr M's request pre-empts this reporting process.
56. On the other hand, the Commissioner can identify a clear public interest in ensuring that the Byelaws can be enforced effectively. He has already concluded that disclosing the withheld information would be likely to prejudice that process substantially.
57. On balance, the Commissioner is not satisfied that the public interest in making this particular information available to Mr M and the wider public outweighs the public interest in maintaining the exception. He is satisfied, therefore, that LLTNPA was entitled to withhold the information requested under regulation 10(5)(b) of the EIRs.
58. Given these findings, the Commissioner need not go on to consider the other exceptions under LLTNPA applied to this same information.

Decision

The Commissioner finds that, in respect of the matters specified in the application, Loch Lomond and the Trossachs National Park Authority (LLTNPA) partially failed to comply with the Environmental Information (Scotland) Regulations 2004 (the EIRs) in responding to the information request made by Mr M.

The Commissioner finds that LLTNPA correctly withheld information for part (b) of the request under regulation 10(5)(b) of the EIRs. However, for part (a), LLTNPA:

- wrongly withheld some information under regulation 10(5)(f) of the EIRs
- wrongly withheld personal data as it was not within the scope of Mr M's request.

The Commissioner therefore requires LLTNPA to supply, in Excel where reasonably possible, camping permit data in Appendix B as set out above (for the period 1 March until 30 September 2017) by **6 May 2019**.

Appeal

Should either Mr M 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.

Margaret Keyse
Head of Enforcement

13 March 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.

...

- (4) The information to be given by the authority is that held by it at the time the request is received, except that, subject to subsection (5), any amendment or deletion which would have been made, regardless of the receipt of the request, between that time and the time it gives the information may be made before the information is given.

...

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;

...

(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.

(2) The duty under paragraph (1)-

...

(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-

...

(b) the course of justice, the ability of a person to receive a fair trial or the ability of any public authority to conduct an inquiry of a criminal or disciplinary nature;

...

(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

...

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