



**Decision 065/2006- Loch Lomond Angling
Improvement Association and Loch Lomond and
The Trossachs National Park Authority**

Request for correspondence between legal adviser and client

**Applicant: Loch Lomond Angling Improvement Association
Authority: Loch Lomond and The Trossachs National Park
Authority.**

Case No: 200503039

Decision Date: 19 April 2006

**Kevin Dunion
Scottish Information Commissioner**

Kinburn Castle
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Decision 065/2006 – Loch Lomond Angling Improvement Association and Loch Lomond and the Trossachs National Park Authority

Request for Counsels opinion obtained by authority –withheld on the basis of section 36(1) of the Freedom of Information (Scotland) Act 2002 (FOISA) – confidentiality – section 35(1)(g) of FOISA – law enforcement

Facts

Peter Lyons of the Management Committee of the Loch Lomond Angling Improvement Association (LLAIA) submitted an information request to Loch Lomond and The Trossachs National Park Authority (NPA) on 9 August 2005. The request was made in relation to proposed amendments that the NPA are seeking to make to byelaws in relation to Public Rights of Navigation on Loch Lomond. Information was provided to the Management Committee of the LLAIA in response to their request, but a copy of legal advice to the NPA from Sir Crispin Agnew QC was withheld. The Opinion was withheld on the basis that the information was information for which a claim to confidentiality of communications could be maintained in legal proceedings under section 36(1) of the Freedom of Information (Scotland) Act 2002 (FOISA). The NPA also argued that the release of the information would prejudice substantially the exercise by the public authority of its functions to ascertain whether circumstances which would justify regulatory action in pursuance of any enactment exist or may arise as mentioned in section 35(1)(g) and 35(2)(c) of FOISA. This decision was upheld by the NPA on review and Mr Lyons of the Management Committee of LLAIA applied to the Commissioner for a decision.



Outcome

The Commissioner found that the NPA had complied with Part 1 of the Freedom of Information (Scotland) Act 2002 (FOISA) in withholding the legal advice from Mr Lyons. However, the Commissioner also found that the NPA had breached Part 1 of FOISA by indicating to Mr Lyons that the refusal notice that they issued to him was issued under section 18, when in fact it was issued under section 16.

Appeal

Should either Mr Lyons or the Loch Lomond and The Trossachs National Park Authority wish to appeal against this decision, there is an appeal to the Court of Session on a point of law only. Any such appeal must be made within 42 days of receipt of this notice.

Background

1. On 9 August 2005, Mr Peter Lyons submitted a request for information to the National Park Authority asking for four pieces of information:
 - All information held relating to the Public Right of Navigation on Loch Lomond.
 - Reference to the relationship between this right and the Legal Right of Angling in Loch Lomond (both salmon rights and freshwater fishing rights) presently held by the LLAIA.
 - Information showing how Loch Lomond Angling Improvement Association's rights were taken into account in the formation of the new byelaw proposals.
 - Information, studies, legal opinions sought or obtained by the NPA confirming, or not, that the Public Right of Navigation extends to all loch users in pleasure crafts.



2. The National Park Authority replied to Mr Lyons on 8 September 2005. The NPA provided Mr Lyons with information in relation to the Public Right of Navigation on Loch Lomond. The NPA advised Mr Lyon that it did not hold information in relation to the second and third pieces of information he had requested. The NPA withheld the Counsel's opinion on the basis that it would be exempt under sections 36(1) (on the basis that the information was information in respect of which a claim to confidentiality of communications could be maintained in legal proceedings) and 35(1)(g) (on the basis that release of this information would, or would be likely to, prejudice substantially the exercise by a public authority of its functions of ascertaining whether circumstances which would justify regulatory action in pursuance of any enactment existed or might arise) of FOISA. In doing so the NPA purported to issue a refusal notice to Mr Lyons under section 18 of FOISA.
3. Mr Lyons was dissatisfied with the response from the NPA and asked the NPA to review its original decision to withhold Counsel's opinion on 3 October 2005.
4. The NPA issued its review decision on 31 October 2005. The NPA upheld its decision to withhold the Counsel's opinion from Mr Lyons under sections 36(1) and sections 35(1)(g) of FOISA. .
5. On 7 November 2005, I received an application for a decision from Mr Lyons concerning the NPA withholding the Counsel's opinion that he had requested. The case was allocated to an investigating officer within my Office.

The Investigation

6. Mr Lyons appeal was validated by establishing that he had made a valid information request to a Scottish public authority under FOISA and had appealed to me only after asking the NPA to review its response to his request.
7. A letter was sent by the investigating officer to the NPA on 10 November 2005, asking for its comments in terms of section 49(3)(a) of FOISA. The NPA was asked to provide information to allow the Investigating Officer to carry out the investigation, including:
 - A copy of the information withheld and
 - Detailed analysis of the application of the exemptions applied and the public interest test.



8. A full response was received from the NPA on 25 November 2005.

Submissions from the National Parks Authority

9. In its submissions to my office the NPA has cited the following exemptions under FOISA to justify withholding the information:
- Section 35(1)(g) (the exercise by any public authority or Scottish public authority of its functions for any of the purposes mentioned in subsection (2)). In this connection, it has identified the relevant purposes as being those contained in section 35(2)(c) (to ascertain whether circumstances which would justify regulatory action in pursuance of any enactment exist or may arise)
 - Section 36(1) Confidentiality (information in respect of which a claim to confidentiality could be maintained in legal proceedings)

I will consider the NPA's reasoning for relying on each exemption further in my Analysis and Findings.

10. The NPA has described the legal background to its review of the byelaws on Loch Lomond and the process followed. This has involved informal public consultation (involving a wide range of stakeholders) prior to making proposed changes to the byelaws, formal statutory consultation thereafter, submission to the Scottish Executive and the possibility of a public local inquiry prior to confirmation..

Submissions from Mr Lyons

11. Mr Lyons has stated the view of the Management Committee of LLAIA that public knowledge of the information requested has a direct bearing on the proposed byelaw amendments, the consultative period for which ended on 28 October 2005.
12. Mr Lyons goes on to state that the Management Committee has pressed the NPA on various occasions giving their reasons as to why proceeding further with byelaws without first clarifying the legality of their assumption of a universal Public Right of Navigation would be folly. Mr Lyons has indicated that the LLAIA have been unsuccessful in achieving any delay in the progression of the byelaws.



13. The LLAIA also feel that the definitive answer to the Public Right of Navigation problem is the first step to enshrining the protection of the National Park within the byelaws. Mr Lyons contends that the NPA is fully aware of the substantial doubt that exists as to the legal extent of the Public Right of Navigation, but appears to consider it ethical to ignore this issue and to proceed further without solving this basic problem.
14. Mr Lyons contends that NPA is not acting within the spirit and intention of the Freedom of Information (Scotland) Act 2002 and that the LLAIA see no evidence that the NPA is applying the public interest test as it was intended.
15. Mr Lyons submits that the overriding interest has to be the public interest and that LLAIA see no evidence that the NPA has taken this into account in an impartial fashion.
16. Mr Lyons goes on to state that the NPA is actually refusing to disclose this information to protect itself from having to explain why the legal position was not established as a first principle, before it attempted to enforce byelaws protecting craft which have no legal rights under the Public Right of Navigation.
17. Mr Lyons states that it is not good enough for the NPA to say that there is an issue of confidentiality and rest upon that, and also the possible embarrassment of the NPA is not an excuse that should be used to withhold the information.
18. Mr Lyons is of the belief that it should not be the responsibility of the organisation withholding the information to decide where the public interest lies, especially when, by the NPA's own admission there is an almost equal case for disclosure.
19. Mr Lyons indicates that this appears to be exactly the situation that FOISA was designed to address. The LLAIA states that public bodies should be open, transparent and accountable and that public scrutiny of procedures should be encouraged and not necessarily blocked, delayed or denied.
20. Mr Lyons suggests that the public interest test still applies even when a case has been made for substantial prejudice and asks what possible harm could come from release of the requested information. Mr Lyons states that even if there is some harm to the NPA arising from disclosure there is still an overriding public interest, and it has to be demonstrated to be real harm, not just theoretical possibility, and it must happen in the near future not at some indeterminate point or maybe never.



The Commissioner's Analysis and Findings

The application of section 35(1)(g) – law enforcement

21. In refusing to disclose the information requested by Mr Lyons, the NPA cited the exemption under section 35(1)(g) as applying to the information. In order for a public authority to be able to rely on this exemption, it would have to show that disclosure of the information requested would, or would be likely to, prejudice substantially the exercise by any public authority or Scottish public authority of its functions for any of the purposes mentioned in subsection (2).
22. The NPA cited the following purpose under section 35(2) of FOISA as being relevant in this case – (c) to ascertain whether circumstances which would justify regulatory action in pursuance of any enactment exist or may arise.
23. In relying on this exemption the public authority is required to identify a function of a public authority or Scottish public authority (not necessarily itself) which would be at risk of substantial prejudice if the information were to be disclosed. The purpose of the function must be as stated at paragraph 18 above: in other words, establishing the presence or likely presence of circumstances justifying regulatory action (i.e. action involving the making, application or enforcement of rules) under some enactment or other.
24. In its submissions to my office the NPA has indicated that it makes and reviews byelaws in respect of Loch Lomond under the terms of the National Parks (Scotland) Act 2000, schedule 2, section 8, and the Loch Lomond and the Trossachs National Park Designation, Transitional and Consequential Provisions (Scotland) Order 2002. The NPA indicates that the byelaws are also made partly under the Land Reform (Scotland) Act 2003, section 12, and under section 121 of the Civic Government (Scotland) Act 1981. The NPA has advised my Office that it is obliged to carry out a review of the byelaws in two respects, these being that firstly under the Local Government (Scotland) Act 1973, section 202A the Authority must carry out a review of the byelaws within a 10-year period of the byelaws being confirmed. This review was due in 2005. The NPA also indicate that under the Land Reform (Scotland) Act 2003 section 30 they must review all byelaws within a two year period of the Act coming into force and that this must be no later than the end of 2006.



25. Having taken into consideration the submissions made by the NPA and Mr Lyons, I accept that the making and review of byelaws under the various provisions the NPA has cited is a function falling within the scope of section 35(1)(g) read along with section 35(2)(c). I now have to consider whether the exercise of this function would or would be likely to be substantially prejudiced by the release of the Counsel's Opinion. There is no definition under FOISA for what is deemed to be substantial prejudice, but it is my view that for an authority to be able to show that release of the information would be substantially prejudicial it would have to show that the damage caused by disclosing the information would be real or very likely, not hypothetical. The NPA would also have to show that the harm caused by such a release would be significant, not marginal, and it would have to occur in the near future not at some distant time.
26. The NPA has submitted that part of its review of the byelaws involved a public policy consultation (not a statutory requirement placed on the authority) to ascertain the range of views on the management of the Loch, followed by meetings with user and interest groups, landowners and communities. The NPA then considered the views gathered in the course of this consultation and went on to formulate proposals for amending the byelaws. The NPA states that it approved these proposals for consultation in September 2005 and that the twelve week statutory consultation period began shortly after this. The statutory consultation involved every Community Council within the area affected by the byelaws, local and national interest groups such as Friends of Loch Lomond and the LLAIA, all landowners owning land within the area of the proposed byelaws, local authorities, statutory undertakers, all registered boat owners on Loch Lomond and local businesses. The NPA advised my Office that the consultation papers were also made available on the NPA's own website and also in local libraries.
27. Following the statutory consultation process the NPA states that it analyses the responses to the consultation and considers whether further amendment is required to the proposed revisions to the byelaws. The NPA advises that the byelaws are then submitted to the Scottish Executive and at this stage adverts are placed in the media and for a twelve week period the public can make objection to the byelaws directly to the Scottish Executive. Before confirming the byelaws, the Scottish Ministers can direct that a local inquiry be held into any matter concerning them. This is likely, the NPA suggests, if there is a large body of opinion against the byelaws: at an inquiry, it is likely that the basis on which the NPA is producing the byelaws will be under scrutiny.



28. In justifying its assertion that release of this information would, or would be likely to prejudice substantially the exercise of certain functions the NPA argues that the release of the information at the stage following consultation and subsequent analysis would have led to further debates on some of the issues raised in the consultation, including in the media and at a local level. In its submissions the NPA believes that this might have raised issues as to whether further time for responses should be allowed and as a result might have prompted late responses being submitted. The NPA argues that it would have been difficult for it to consider the timeous consultation responses objectively if such a debate were ongoing. It is likely, the NPA argues, that release of the information would have resulted in requests to suspend the analysis exercise or allow late consultations, although it concedes that its response to such an eventuality cannot be known with any certainty and might in fact have been different. There was, however, a likelihood that the byelaw process would have been interrupted and that this would have impacted on the NPA carrying out its statutory duty to determine if regulatory action was appropriate within the timescales already given to the public.
29. In its submissions the NPA has stated that release of Counsel's Opinion would have substantially prejudiced its ability to properly assess the consultation responses and make an informed decision on the amendment/revisal of the byelaws, preventing the timeous completion of the review process. The NPA contend that release of the information would prejudice substantially its ability to promote byelaws and submit them for Ministerial consideration. During further communications with the NPA it became apparent that the statute which gives powers to the NPA to carry out a review of byelaws requires that a public consultation be carried out and that this public consultation must be of at least 12 weeks duration. In this instance the NPA made a decision that the public consultation would last for 12 weeks. Having made this decision, the NPA contends that if any responses were received after the expiry of the 12 week period it would be required to determine whether it was reasonable in all the circumstances to consider them, taking account of factors such as the issues raised, the reasons for the response being late and the circumstances surrounding the consultation . Although the statute indicates that the public consultation must be at least 12 weeks, thereby giving scope for a longer consultation, the NPA asserts that where it has made a decision as to the timescale for the consultation it cannot simply extend the consultation period to allow late responses. It does, however, accept that it does require to consider whether any given late response should be received and that if a late response is made and not considered then the person submitting the response could seek a judicial review.



30. I am not satisfied that the Opinion would be exempt under section 35(1)(g). I am satisfied that the NPA was carrying out a function, namely the consultation on the revision of byelaws which they have a statutory duty to carry out, further I accept that the NPA was carrying out this function with a view to ascertaining whether any amendments/ revisions should be made to these byelaws and that this was regulatory action which is derived from its powers to review the byelaws. However, I am not persuaded by the arguments given by the NPA to the effect that disclosure would be substantially prejudicial as it could lead to the authority being unable to comply with relevant timescales in relation to the review of the byelaws. I am not satisfied that release would be substantially prejudicial as it is clear from the submissions from the NPA that it would be able to consider late consultation responses which may be made in light of Counsel's opinion becoming known if it was reasonable in all the circumstances to do so. Equally, it would be able to determine that late responses should not be considered, should that be reasonable in all the circumstances. It would not appear to follow from the possibility of late responses being submitted that these would, of necessity, cause significant delay to the process of making the byelaws. All things considered, I am not satisfied that the NPA has shown that any harm that might be caused by the disclosure of this information would be of sufficient significance to engage the exemption.
31. As I am not satisfied that the Opinion being withheld by the NPA is exempt under section 35(1)(g) and 35(2)(c) I am not required to go on to consider the application of the public interest test.

The application of section 36(1) – claim to confidentiality of communications

32. In order for a public authority to be able to rely on this exemption, it would have to show that the information requested by Mr Lyons was information to which a claim of confidentiality of communications could be maintained in legal proceedings.
33. One type of communication covered by this exemption is communications between legal adviser and client. For the exemption to apply to this particular type of communication, certain conditions must be fulfilled.

For example:

- The information withheld must relate to communications with a legal adviser. This clearly includes communications with Counsel
- The legal adviser must be acting in his/her professional capacity and the communications must occur in the context of his/her professional relationship with his/her client



- The privilege does not extend to matters known to the legal adviser through sources other than the client or to matters in respect of which there is no reason for secrecy
 - The privilege does not extend to communications which relate to fraud or the commission of an offence
34. The information which the NPA has withheld from Mr Lyons is an Opinion from Senior Counsel to the NPA regarding the powers of the NPA to make byelaws in relation to the Public Right of Navigation on Loch Lomond. The Opinion comprises legal advice from Senior Counsel to the NPA. I am satisfied that it was provided within a professional relationship between legal adviser and client (the NPA) and, having read the Opinion, that it comprises information in respect of which a claim to confidentiality of communications could be maintained in legal proceedings. As a result, I am satisfied that the Opinion is covered by the exemption contained in section 36(1) of FOISA.
35. Having satisfied myself that the information falls within the exemption, I am required to consider whether the public interest in disclosing the information is outweighed by the public interest in maintaining the exemption.
36. In its submissions to my office the NPA has submitted that Counsel's Opinion was obtained in connection with the review of byelaws on Loch Lomond which the NPA is entitled (and for some purposes required) to carry out under a number of enactments (see paragraph 24 above).
37. The NPA contends that it requires to ensure that it receives high quality legal advice in order that it carries out its role in revising the byelaws. Without this comprehensive and high quality advice, the Authority's decision-making process would be reduced significantly, which would not be in the interest of the public. The NPA goes on to state that the underlying rationale relating to confidentiality of legal communications is to permit public authorities to take the best possible legal advice. The NPA believes that this rationale is important to ensure that public authorities act lawfully, make a frank disclosure of facts to legal advisors, understand the weaknesses in their cases and act accordingly.
38. The NPA points out that the Opinion raises areas of weakness and uncertainty from its perspective and provides comment that it has taken into account in minimising risk of legal challenge, such as judicial review. It submits that the Opinion could therefore be perceived as showing weaknesses in the NPA's position and therefore that disclosure is not in the public interest.



39. The NPA has cited a recent House of Lords case, *Three Rivers District Council & Others v Governor and Company of Bank of England* (2004) UKHL 48, as demonstrating that interference with confidentiality in legal proceedings will only take place if, for example, there is a dispute regarding lawyer/client relationship or some wrongdoing tainting the advice. The NPA contends that no such circumstances exist in this case and that it obtained the Opinion within the bounds of its lawyer/client relationship and in furtherance to its statutory duties.
40. There will always be a strong public interest in maintaining the right to confidentiality of communications between legal adviser and client. As a result, as I have stated in a number of previous decisions (for example decision 023/2005 and 033/2006), I will consider each case on an individual basis but am likely to order release of such communications only in highly compelling cases.
41. The public interest issues in favour of releasing the information might include enhancing scrutiny of the legality of the actions of a public body and, by extension, effective oversight of the discharge of its functions. It might also be in the public interest to order disclosure where it would make a significant contribution to debate on a matter of public interest (regarding which, see my comments in relation to the application of the section 35(1)(g) exemption). Against any public interest arguments for disclosure, however, must be weighed any consequent harm to the public interest. It is in the public interest that an authority can communicate its position to its advisers fully and frankly in confidence, in order to obtain the most comprehensive legal advice in relation to its projects and defend its position adequately should that become necessary. It is also in the public interest that a public authority can receive the most comprehensive legal advice about its proposed actions. There is an established means of scrutinising the legality of the decisions of public bodies, through judicial review in the courts. The courts have long recognised the strong public interest in maintaining the right to confidentiality of communications between legal adviser and client on administration of justice grounds and many of the arguments in favour of maintaining confidentiality of communications were discussed in the House of Lords case cited by the NPA.
42. Having considered the application of the public interest test and having taken into account the submissions from both the NPA and Mr Lyons I am satisfied that on balance there are no compelling reasons in this case for the Opinion to be released to Mr Lyons.
43. As noted in the background section of the report the NPA has provided Mr Lyons with a refusals notice under section 18 of FOISA. For the NPA to be able to issue a refusals notice under section 18 they would do so on the basis that to reveal if the information was held or exists would be contrary to the public interest. Also the information would have to be exempt under any of the following sections 28 to 35, 39(1) or 41.



44. When the NPA issued a refusal notice to Mr Lyons it advised him that it did hold Counsel's Opinion and it also indicated to Mr Lyons the fact that it was refusing to disclose the information to him as it was exempt. The NPA went on to advise Mr Lyons of the exemptions it was relying on in not disclosing this information to him. The NPA also provided an explanation as to why they believed that the information was exempt under these exemptions. This is the criteria which must be fulfilled when issuing a refusal notice under section 16 of FOISA. The NPA has quoted the wrong section in relation to its issuing of a refusal notice to Mr Lyons and should have advised him that the refusal notice was being issued under section 16.

Decision

I find that the Loch Lomond and The Trossachs National Park Authority (NPA) complied with Part 1 of the Freedom of Information (Scotland) Act 2002 (FOISA) in withholding from Mr Lyons a copy of the Counsel's Opinion requested by him. The exemption in section 36(1) was relied on correctly by the NPA and, as a result, section 1(1) was applied correctly.

I find that the NPA failed to comply with Part 1 of FOISA in withholding from Mr Lyons a copy of Counsel's Opinion requested by him. The exemption in section 35 was not relied upon correctly by the NPA and as a result, section 1(1) was not applied correctly. I do not require the NPA to take any action on this as the Counsel's Opinion has been found to be exempt under section 36(1).

I find that the NPA failed to comply with Part 1 of FOISA in that it misquoted to Mr Lyons the section relied on in issuing the refusal notice to him. The NPA quoted section 18 when it should have quoted section 16. However, I do not require any remedial action to be taken in relation to this breach as it did not hamper Mr Lyons from exercising his rights under FOISA.

Kevin Dunion
Scottish Information Commissioner
19 April 2006