

# Decision Notice



Decision 081/2011 Mr James Graham and Loch Lomond and The Trossachs  
National Park Authority

Pontoon moorings on River Leven

Reference No: 201100110  
Decision Date: 21 April 2011

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**Kevin Dunion**  
Scottish Information Commissioner

Kinburn Castle  
Doubledykes Road  
St Andrews KY16 9DS  
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## Summary

Mr Graham requested from Loch Lomond and The Trossachs National Park Authority (the Authority) scientific and other specified information relating to the granting of planning permission for pontoon moorings on the River Leven. The Authority responded by releasing information to Mr Graham. Following a review, Mr Graham remained dissatisfied that more information had not been supplied and applied to the Commissioner for a decision.

Following an investigation, the Commissioner found that the Authority had partially failed to deal with Mr Graham's request for information in accordance with the EIRs, by omitting a small amount of information which was no longer readily accessible online. Given that the information was released during the investigation, he did not require the Authority to take any action.

## Relevant statutory provisions and other sources

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The Environmental Information (Scotland) Regulations 2004 (the EIRs) regulations 5(1) (Duty to make available environmental information on request)

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

## Background

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1. On 30 September 2010, Mr Graham wrote to the Authority requesting the following information:
  - a) A copy of the scientific papers or reports which demonstrate that there is evidence the planning permissions ... for pontoon moorings and other types of moorings, on the River Leven, support the first statutory aim of the national park and, therefore, positively contribute towards the enhancement and conservation of the natural heritage of the River Leven, inside the national park. That is the scientific papers and reports which the national park has produced, holds or has accessed for these purposes.



- b) A copy of the scientific papers and reports the national park has produced, holds of has accessed, which demonstrate permitting large numbers of boats to congregate in close proximity to each other in a small sized river, such as the River Leven, positively contributes towards the enhancement and conservation of the natural heritage of the river.
  - c) A copy of the legal advice, which the national park has accepted, in connection with the national park's powers to ignore the existence of salmon fishings as a registrable interest in land and a land use interest for planning purposes – and to render those salmon fishings inoperative and inaccessible, on the R. Leven.
  - d) A copy of the information which the national park produced, holds or has accessed, which demonstrates the national park has applied the precautionary principle to any matter arising on the River Leven and in connection with moorings and boating issues at Balloch, in particular, bearing in mind that is a material consideration for planning purposes.
  - e) Any information whatsoever which demonstrates that the national park has provided any material support which has served to enhance or conserve the natural heritage on the River Leven, directly.
2. The Authority acknowledged receipt of the requests on 1 October 2010, later responding by means of two letters providing information, both dated 27 October 2010.
  3. On 12 November 2010, Mr Graham wrote to the Authority requesting a review of its decision. He indicated why he did not believe the information he had received met his requests in full.
  4. The Authority notified Mr Graham of the outcome of its review on 24 December 2010, confirming that it was satisfied it had provided him with all the relevant information it held.
  5. On 18 January 2011 Mr Graham wrote to the Commissioner, stating that he was dissatisfied with the outcome of the Authority's review and applying 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 certain specified modifications.
  6. The application was validated by establishing that Mr Graham had made requests for environmental information to a Scottish public authority and had applied to the Commissioner for a decision only after asking the authority to review its responses to those requests. The case was then allocated to an investigating officer.



## Investigation

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7. On 17 February 2011 the investigating officer contacted the Authority, giving it an opportunity to provide comments on the application (as required by section 49(3)(a) of FOISA) and asking it to respond to specific questions. In particular, the Authority was asked to detail the steps it had taken to identify and locate information falling within the scope of Mr Graham's requests and also to comment on its understanding of the scope of the requests.
8. The Authority responded with its comments, further clarification on certain points being sought and obtained in the course of the investigation. During the investigation, the investigating officer alerted the Authority to some information falling within the scope of Mr Graham's requests, which had been published online but which was no longer published in this way by the time the request was received. The Authority provided Mr Graham with this information during the investigation.
9. All comments received from the Authority and Mr Graham, insofar as relevant, will be considered fully in the Commissioner's analysis and findings below.

## Commissioner's analysis and findings

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10. In coming to a decision on this matter, the Commissioner has considered all of the withheld information and the submissions made to him by both Mr Graham and the Authority and is satisfied that no matter of relevance has been overlooked.
11. Mr Graham's requests sought certain information on planning permissions for pontoon moorings on the River Leven, in particular information which could evidence the appropriateness of the planning decision in question. The Commissioner cannot consider whether the information held by the Authority in fact served this purpose, only whether the Authority provided Mr Graham with all of the information it held and which fell within the scope of these requests.

### Regulation 5(1) of the EIRs

12. Regulation 5(1) of the EIRs requires a Scottish public authority which holds environmental information to make it available when requested to do so by any applicant. It is important to bear in mind that this obligation relates to information actually held by an authority when it receives the request, as opposed to information it should (but in fact does not) hold.
13. Mr Graham questioned the relevance of much of the information disclosed to his requests. He understood the authority's decisions on the matters in question to have been based on material evidence and directly relevant scientific information, and noted what he considered to be the absence of information of either description from what had been disclosed.



14. In course of the investigation, the Authority acknowledged that the information in one consultation response (from SEPA) should have been considered to fall within the scope of Mr Graham's requests a) and b) and released to him. It also acknowledged that while the information had been published on its website in June 2010, it was no longer available there by the time these requests were received. As indicated above, this information was disclosed to Mr Graham during the investigation. The Commissioner must find, however, that in not providing the information to Mr Graham in response to his information requests or his request for review, the Authority failed to deal with the requests in accordance with regulation 5(1) of the EIRs.
15. The Commissioner has considered carefully the terms of Mr Graham's requests, together with his submissions, the Authority's explanation of its interpretation of the requests and the information the Authority provided in response to them. He has also considered carefully the submissions provided by the Authority on the searches and enquiries it conducted in connection with the requests, and its explanations of what it recorded and retained in connection with the subject matter of the requests. He has taken into account the explanations provided by the Authority on the expert advice taken in respect of the relevant planning applications, and on the application of the precautionary principle to their determination.
16. In all the circumstances, the Commissioner has concluded that (subject to the failure identified in paragraph 14 above) the Authority dealt with Mr Graham's requests in accordance with Regulation 5(1) of the EIRs, by providing him with all the information it held which fell within the scope of those requests. The information referred to in paragraph 14 having been provided to Mr Graham, he does not require the Authority to take any further action.

## DECISION

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

The Commissioner finds that by releasing the majority of the information it held to Mr Graham, the Authority complied with the EIRs.

However, by omitting to release a small amount of relevant information which was held at the time of Mr Graham's request (but no longer publicly available) the Authority failed to comply fully with regulation 5(1) of the EIRs.

Given that the information in question was subsequently released by the Authority during the investigation, the Commissioner does not require the Authority to take any action in response to this failure.

Decision 081/2011  
James Graham  
and Loch Lomond and The Trossachs National  
Park Authority



## Appeal

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Should either Mr Graham or 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 after the date of intimation of this decision notice.

**Margaret Keyse**  
**Head of Enforcement**  
**21 April 2011**



## Appendix

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### Relevant statutory provisions

#### The Environmental Information (Scotland) Regulations 2004

##### 5 Duty to make available environmental information on request

- (1) Subject to paragraph (2), a Scottish public authority that holds environmental information shall make it available when requested to do so by any applicant.

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