

Decision Notice 135/2020

The Foveran Links SSSI and the Menie Estate

The Applicant

Public authority: Scottish Natural Heritage

Case Ref: 202000303



Scottish Information
Commissioner

Summary

NatureScot was asked to provide the information it held concerning the Foveran Links Site of Special Scientific Interest and the Menie Estate, including potential planning applications.

The Commissioner investigated and found that NatureScot held no further information than that which it had provided to the Applicant.

Relevant statutory provisions

The Environmental Information (Scotland) Regulations 2004 (the EIRs) regulations 2(1) (paragraphs (a) and (c) and of "environmental information") (Interpretation); 5(1) and (2)(b) (Duty to make available environmental information on request); 10(1), (2) and (4)(a) (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. Both Appendices form part of this decision.

Background

1. On 2 July 2019, the Applicant made a request for information to Scottish Natural Heritage (NatureScot). The information request is reproduced in full at Appendix 2 below.
2. NatureScot responded on 22 July 2019. It provided some information to the Applicant and withheld some information under several exceptions in the EIRs exceptions.
3. Following further correspondence between the parties, NatureScot disclosed a wide range of information to the Applicant. Again, it withheld some information under a number of exceptions in the EIRs.
4. On 29 October 2019, the Applicant wrote to NatureScot requesting a review of its decision. The Applicant did not dispute the application of the exceptions used to withhold information, but did believe that *further* information should be held. In this respect, the Applicant only disagreed with the application of the exception at regulation 10(4)(a) of the EIRs. The Applicant made specific reference to an embargoed press release in respect of the proposed partial denotification of the Site of Special Scientific Interest (SSSI).
5. NatureScot notified the Applicant of the outcome of its review on 26 November 2019. NatureScot accepted that its initial information searches had not identified all information held and provided one additional email sent by their Communications Team to the BBC to the Applicant. NatureScot stated that it had now provided all of the information that it held and relied on regulation 10(4)(a) in respect of any further information that the Applicant expected it to hold.
6. On 27 February 2020, the Applicant wrote to the Commissioner, applying for a decision in terms of section 47(1) of the Freedom of Information (Scotland) Act 2002 (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.
7. The Applicant stated it was dissatisfied with the outcome of Nature Scot's review because it was of the view that further information should be held. The Applicant referred specifically to

an embargoed press release which had been mentioned in one of the disclosed emails NatureScot had provided. The Applicant stated that this piece of information and any covering email had not been provided by NatureScot.

Investigation

8. The application was accepted as valid. The Commissioner confirmed that the Applicant 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.
9. On 13 March 2020, NatureScot was notified in writing that the Applicant had made a valid application. The case was then allocated to an investigating officer.
10. Section 49(3)(a) of FOISA requires the Commissioner to give public authorities an opportunity to provide comments on an application. NatureScot was invited to comment on this application and to answer specific questions. These related to the searches it had carried out to locate any information falling within the scope of the request, including the aforementioned press release.
11. Submissions were provided to the investigating officer by both NatureScot and the Applicant. These submissions included an explanation by NatureScot as to why it did not hold the email associated with the press release was not held by it.

Commissioner's analysis and findings

12. In coming to a decision on this matter, the Commissioner considered the relevant submissions, or parts of submissions, made to him by both the Applicant and NatureScot. He is satisfied that no matter of relevance has been overlooked.

Application of the EIRs

13. It is clear that information falling within the scope of this request would be environmental information as defined in regulation 2(1) of the EIRs, given that it relates to the the Foveran Links SSSI¹, the Menie Estate and potential development. As such, the Commissioner is satisfied that it would fall within paragraphs (a) and (c) of the definition in regulation 2(1) of the EIRs. In any event, the Applicant has not expressed dissatisfaction with NatureScot's dealing with this request under the EIRs and the Commissioner will therefore consider the application solely in terms of the EIRs.

Has all relevant information been identified, located and provided?

14. The Commissioner's remit is to investigate and reach a determination on recorded information, if held by a Scottish public authority. He cannot comment on what a public authority *ought* to hold, but he can consider whether a public authority took adequate, proportionate steps to establish what information, if any, it held falling within the scope of a request at the time of that request.
15. The standard of proof in considering whether a Scottish public authority holds information is the civil standard of the balance of probabilities. In determining this, the Commissioner will consider the scope, quality, thoroughness and results of the searches carried out by the

¹ <https://www.tellmesotland.gov.uk/notices/scottish-natural-heritage/general/00000212741>

public authority. He will also consider, where appropriate, any reason offered by the public authority to explain why the information was not held.

16. Regulation 10(4)(a) of the EIRs states that a Scottish public authority may refuse to make environmental information available to the extent that it did not hold the information when the applicant's request is received. This exception is subject to the public interest test in regulation 10(1)(b) of the EIRs, so can only apply if, in all the circumstances of the case, the public interest in maintaining the exception outweighs the public interest in making the information available (although, logically, it is highly unlikely that there can ever be a public interest in disclosing information which is not, in fact, held).

Submissions from the Applicant

17. The Applicant submitted that specific e-mail exchanges had been disclosed to it by NatureScot. These exchanges referred to further correspondence which was not disclosed. An email from NatureScot to the BBC on 25 June 2019 at 14:08 referred to NatureScot's intention to send over background information (a press release) to a BBC journalist, but the Applicant stated that it had not seen this information.
18. The Applicant stated that it seemed unusual that someone in the media/publicity team would refer to a press release, a common and understood tool in media and communications, as "background info" when communicating with a journalist. The Applicant was of the view that the covering e-mail may also have contained information which was relevant to the information request.
19. The Applicant's information request was submitted five days after the press release in question had been emailed. In the Applicant's view, it was hard to believe that there was no way of retrieving the e-mail in question. The Applicant submitted that NatureScot's review response had stated that there is no requirement to retain to correspondence on media interviews, which happened every week, as the information does not have a longer term business or corporate value. The Applicant questioned whether NatureScot was routinely deleting correspondence.

Submissions from NatureScot

20. NatureScot submitted that several attempts were made to email an attachment (the background information) to the BBC contact on the morning of Thursday 27 June 2019. The attached background information consisted of an embargoed press release. These sent emails with the attachment "bounced back" on each attempt. It was established during a telephone conversation, while the journalist was *en route* from Edinburgh Airport to the NatureScot office on the Thursday morning, that the BBC's email system had rejected these messages as spam.
21. When the journalist arrived at the NatureScot office, he was provided with a hard copy of the embargoed press release, and read this prior to conducting the interview. This was the first occasion where he had been provided with background details of the potential denotification of Foveran Links SSSI.
22. NatureScot advised the Commissioner that the fact that none of the emails reached the BBC rendered them redundant, and they were deleted shortly after the interview took place. Consequently, when NatureScot received the information request from the Applicant on 3 July 2019, it no longer held the "bounced back" emails.
23. NatureScot stated that the "background information" (the embargoed press release) was provided to the Applicant in response to the review requirement. A version of the press

release was also added to the NatureScot website on the morning of Friday 28 June:
<https://www.nature.scot/dunesmenie-golf-course-may-lose-protected-status>.

24. NatureScot stated that there was some additional information contained in the “for editors” section, after the main body of the press release. The Communications Officer advised that the “background info” reference was likely used partly with this in mind. The “for editors” section, for example, includes background detail on an aerial image of the site and the denotification process itself.
25. When media releases are published on NatureScot's website for public access, it is standard practice not to include the “for editors” section, as this usually includes contact details on availability of interviewees within the organisation, etc. This was the case when this media statement was released. However, the full media release, as supplied to media, was provided to the Applicant on review, as noted above.
26. The Communications Officer also advised that NatureScot had prepared a further background document (setting out the reasons for the proposed partial denotification of the Foveran Links SSSI). This document was then made publicly available the NatureScot website on Friday 28 June - <https://www.nature.scot/reasons-proposed-partial-denotification-foveran-links-sssi> - and was also sent to the Applicant.
27. NatureScot stated it was satisfied that the Applicant had been provided with all information that it held regarding the BBC exchanges.

Searches conducted by NatureScot

28. NatureScot submitted that it had carried out extensive searches to locate any information that it may have held falling within the scope of the request.
29. Key staff in the relevant business areas relating to Menie estate and Foveran Links SSSI were asked to carry out searches for any information.
30. The key staff were identified by a combination of searches on NatureScot’s electronic Records and Document Management System (eRDMS) (the system metadata shows who has created documents relating to Menie), its staff directory, discussion with local Tayside and Grampian staff in the Battleby office and knowledge from previous access to information requests about Menie.
31. The request was analysed in detail and appropriate searches carried out, consulting with staff to determine if the information was held and, if so, where it was held. The Freedom of Information Manager oversaw the searches.
32. The main searches were carried out on eRDMS. This is NatureScot’s corporate store for document based records and information and is integrated with a number of processes and corporate systems, including the Casework Management System. NatureScot explained that there are very limited alternative locations for staff to store documents and it would be very unlikely for records to be stored anywhere other than eRDMS.
33. NatureScot searched for all documents in files containing either "Menie" or "Foveran" in the file title and submitted that, given the date range of the information requested, all related records held would be in electronic format.
34. NatureScot explained that the initial search results identified over 900 documents, but after consulting with the Applicant as to the information it was specifically interested in, the number of documents falling within the scope of the request reduced from over 900 to 418.

35. NatureScot explained that each document stored in the eRDMS can be ascribed a "corporate value status". Documents with a "declared record" corporate value status may only be deleted from the eRDMS via a controlled formal process, which is fully audited. Non corporate value (not a "declared record") document deletions on eRDMS by staff are also audited.
36. Nature Scot stated that its email server is backed up for a period of 3 months. Deleted emails are sent to a folder in the user's Outlook account where they are stored for 14 days prior to auto deletion. However, if a staff member chooses to do so, they can empty the folder and the information will be deleted from their account immediately and not be recoverable by them or by technical staff. This might be done as part of routine practice, or to free up mailbox space when needed.
37. NatureScot explained that its staff members are required to save emails forming part of the record to eRDMS for management as part of NatureScot's corporate record, and in line with its information lifecycle and retention and disposal policies. Staff members are not required to retain all emails in either eRDMS or their email accounts. Email account sizes are capped so it would not be possible to keep all emails – at the time of dealing with this request the standard mailbox size was 100MB.
38. NatureScot stated that it had also carried out a search of its email server, but that this search failed to identify any relevant emails.

The Commissioner's conclusions

39. As indicated above, the Commissioner's remit here extends only to the consideration of whether NatureScot actually held the information requested *at the time of the request*, and whether it complied with the EIRs in responding to the request.
40. Having considered all the relevant submissions, the Commissioner accepts that NatureScot provided to the Applicant with all of the information it held at the time of the request. He is of the view that the searches carried out by NatureScot to identify any information were robust and thorough.
41. The Commissioner has considered the reasoning provided by NatureScot as to why it did not hold the "bounced-back" emails and he notes that each staff member has the right to delete sent or received emails in order to reduce the size of their mail-boxes. The rationale by which emails are either kept or deleted hinges on whether or not they are considered to be of business value and if emails are considered to have corporate value status then they cannot be deleted unless a formal process has been followed. In this case, the emails did not fall within that category. The document attached to the emails had subsequently been provided to the BBC journalist in hard copy format, so the emails containing it as an attachment became redundant.
42. With regard to why the embargoed press release was referred to by NatureScot as "background information", the Commissioner considers the explanation provided by NatureScot on this point to be reasonable. He also notes that the press release was disclosed in full to the Applicant by NatureScot.
43. The Commissioner recognises that the Applicant believes NatureScot *should have held* the emails in question but he can only reach a finding on whether or not information *was actually held* at the time of the request. NatureScot's records retention policy does not require it to retain emails that are not considered to be of business value.

44. In all the circumstances, therefore, the Commissioner is satisfied, on balance of probabilities, and having interpreted the exception in a restrictive manner, that NatureScot does not, and did not on receipt of the information request, hold additional information. The Commissioner is therefore satisfied that the exception in regulation 10(4)(a) of the EIRs applies.

Public interest

45. The question of whether or not a public authority holds the information is a factual matter on the balance of probabilities. If a public authority does not hold the information, there is no meaningful public interest balancing exercise that can be undertaken.
46. Given that the Commissioner is satisfied that no further information was held by NatureScot at the time of the request, he is satisfied that NatureScot was entitled to refuse the Applicant's request under regulation 10(4)(a) of the EIRs.

Decision

The Commissioner finds that Scottish Natural Heritage complied with the Environmental Information (Scotland) Regulations 2004 in responding to the information request made by the Applicant.

Appeal

Should either the Applicant or Scottish Natural Heritage 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.

Margaret Keyse
Head of Enforcement

28 October 2020

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;

...

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.

...

- (4) A Scottish public authority may refuse to make environmental information available to the extent that
 - (a) it does not hold that information when an applicant's request is received;
 - ...

Appendix 2: Information request

Under the terms of FOISA and the EIR, we hereby request that Scottish Natural Heritage (“SNH”) provides the following information in respect of the topics identified later in this letter:

1. All communications (including letters, e-mail communications, SMS text messages and instant messages) between or involving employees, board members or other parties acting on behalf of SNH, including (without limitation) communications with the following, and employees or representatives of the following:
 - (i) The Scottish Government.
 - (ii) Aberdeenshire Council.
 - (iii) Any Member of Parliament, Member of the Scottish Parliament or Councillor.
 - (iv) Scottish Environment Protection Agency.
 - (v) The BBC.
 - (vi) Any other print, broadcast or internet media outlet.
 - (vii) Pressure groups, campaign groups and lobbyists.
 - (viii) Community bodies, including community councils, and members of the public.
2. All agendas, minutes and notes of meetings or discussions.
3. All reports and other documents produced by SNH or those appointed by or acting on behalf of SNH.

The topics on which we are requesting the above information are:

- a) The Foveran Links Site of Special Scientific Interest.
- b) Trump International Golf Links, Scotland (“TIGLS”) (or any other Trump entity), including their employees.
- c) Any consultants and advisers of TIGLS.
- d) The Menie Estate, Aberdeenshire.
- e) Any application submitted by, or permission granted to, TIGLS under the Town and Country Planning (Scotland) Act 1997 in respect of the Menie Estate.
- f) Any development or other works carried out by or on behalf of TIGLS at the Menie Estate, Aberdeenshire.
- g) The Menie Environmental Management Advisory Group, more commonly referred to as MEM AG

For the avoidance of doubt, we are not requesting any formal consultation responses submitted to Aberdeenshire Council or the Scottish Ministers in respect of any of the applications referred to in paragraph e) above.

We also restrict the timeframe of our request to the last 10 years.

Scottish Information Commissioner

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