

Decision Notice 164/2020

Wildfowling at Montrose Basin

Applicant: The Applicant

Public authority: Angus Alive

Case Ref: 202000782



Scottish Information
Commissioner

Summary

Angus Alive was asked about wildfowling at Montrose Basin.

Angus Alive told the Applicant it could not access the information at that time, as the location where it was held was locked down due to the impact of the COVID-19 pandemic. Angus Alive subsequently provided the information.

The Commissioner investigated and found that Angus Alive had breached the EIRs by failing to provide the information requested.

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) (paragraphs (a) and (c) of definition of “environmental information”) (Interpretation); 5(1) and (2)(a) (Duty to make available environmental information on request)

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 29 February 2020, the Applicant made a 15-part request for information to Angus Alive concerning wildfowling at Montrose Basin over the previous 10 seasons 2009/10 to 2018/19, which included the following requests:
Part 2 – The number of flights wardened by the Angus Council’s Countryside Ranger/Angus Alive Ranger for each season.
Part 3 – The number of incidents recorded during wardening carried out by the Angus Council’s Countryside Ranger/Angus Alive Ranger. This to include verbal warnings and written warnings.
2. Angus Alive acknowledged receipt of the request on 2 March 2020, stating it would advise in writing if it was unable to respond within 20 working days.
3. On 25 March 2020, Angus Alive again wrote to the Applicant stating it was unable to provide a full response due to the impact of the COVID-19 crisis. It apologised for the delay, stating it aimed to respond as soon as possible, and by 30 April 2020.
4. Angus Alive responded on 6 May 2020, having identified the request as a request for environmental information in terms of the EIRs. It provided some approximated information for parts 2 and 3 of the request.
5. On 8 June 2020, the Applicant wrote to Angus Alive, requesting a review of its decision on the basis that he was dissatisfied with the information provided: he expected an exact figure to be identified for each season.
6. On 7 July 2020, the Applicant wrote again to Angus Alive, as he was dissatisfied that it had failed to provide a response to his request for review within 20 working days.

7. Angus Alive informed the Applicant of the outcome of its review on 9 July 2020. It explained that the COVID-19 pandemic had resulted in no access to buildings, the majority of the Countryside Adventure Team were on furlough, and the ranger involved in this activity had not fully returned to work. As a result, Angus Alive was unable to access the information. It informed the Applicant that it aimed to provide the outstanding information as soon as it became accessible.
8. On 16 July 2020, the Applicant wrote to the Commissioner, applying 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. The Applicant stated he was dissatisfied with the delays in Angus Alive providing its response, which he considered to be unacceptable.

Investigation

9. 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.
10. On 21 August 2020, Angus Alive was notified in writing that the Applicant had made a valid application and the case was subsequently allocated to an investigating officer.
11. At the start of the investigation, the Applicant informed the Commissioner that he had received further correspondence from Angus Alive, but was not satisfied that this contained the full information originally requested. He provided the Commissioner with a copy of this further response on 12 October 2020.
12. On examination of Angus Alive's further response, it became apparent to the investigating officer that Angus Alive had written to the Applicant on 5 August 2020, apologising for the delay in responding (which, it explained, was due to the impact of the Coronavirus pandemic), and fully disclosing the annual data for parts 2 and 3 of the request.
13. Section 49(3)(a) of FOISA requires the Commissioner to give public authorities an opportunity to provide comments on an application. Angus Alive was invited to comment on this application and to answer specific questions. These focused on Angus Alive's apparent failure to provide a full response within statutory timescales, and the searches carried out to identify and locate the information held.

Commissioner's analysis and findings

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

Handling in terms of the EIRs

15. Angus Alive considered the Applicant's request under the EIRs, having concluded that the information requested was environmental information as defined in regulation 2(1) of the EIRs.
16. Where information falls within the scope of this definition, a person has a right to access it (and the public authority has a corresponding obligation to respond) under the EIRs, subject to the various restrictions and exceptions contained in the EIRs.

17. Having considered the terms of the request and Angus Alive's submissions, it is clear that any information falling within the scope of the request would be environmental information, as defined in regulation 2(1) of the EIRs. The information in question concerns measures relating to wildfowling at a natural site (a nature reserve), and so the Commissioner is satisfied that it would fall within paragraphs (a) and (c) of that definition.

Section 39(2) of FOISA - Environmental information

18. 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 Angus Alive was entitled to apply the exemption to the information withheld under FOISA, given his conclusion that it is properly classified as environmental information.
19. As there is a statutory right of access to environmental information available to the Applicant 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.
20. The Commissioner therefore concludes that Angus Alive was correct to apply section 39(2) of FOISA, and consider the Applicant's information request under the EIRs.

Late response?

21. Regulation 5(2)(a) of the EIRs provides that the duty in regulation 5(1) (i.e. a Scottish public authority that holds environmental information shall make it available when requested to do so by any applicant) 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.
22. In his application to the Commissioner, the Applicant raised concern that Angus Alive had failed to provide a response to his request within this statutory timescale.
23. In its submissions to the Commissioner, Angus Alive acknowledged it had failed to comply with the statutory timescale for responding. At the time, and noting it was unable to extend the response timescale as provided for by regulation 7 of the EIRs (which provides for extending the response timescale where the information requested is voluminous and complex), it felt it should keep the Applicant apprised of the difficulties experienced at the time. Angus Alive referred to its review outcome of 9 July 2020 in which it outlined, to the Applicant, the difficulties in providing a timeous response.
24. Where a requester has received notice of the outcome of a review in relation to their information request, the role of an application to the Commissioner (under section 47(1) of FOISA and regulation 17 of the EIRs) is to address their dissatisfaction with that review outcome. The matter raised by the Applicant, in relation to the failure to comply with timescales, relates to dissatisfaction with the handling of his original request, and not that of the review. This matter was addressed by Angus Alive in its review outcome and subsequent disclosure of 5 August 2020, and so the Commissioner does not, in the circumstances, consider it to be within his remit to revisit it now as a potential breach of the EIRs.

Regulation 5(1) of the EIRs

25. 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. This obligation relates to information that is held by the authority when it receives a request.
26. 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 (subject to qualifications which are not relevant here).
27. In his application to the Commissioner, the Applicant was dissatisfied that Angus Alive had not provided a full response to parts 2 and 3 of his request.
28. In its submissions to the Commissioner, Angus Alive explained that, while it was aware of the location of the information, it was, at that time, unable to confirm the recorded information held, due to being unable to access the building in which it was held.
29. Angus Alive submitted that the information was recorded in manual format only, in a record book which was held securely in the building. Access to the building was therefore necessary, but it had been locked down by the Scottish Wildlife Trust, which manages the site, and the situation was further compounded by the ranger normally involved in this activity being on furlough.
30. Angus Alive submitted that the information subsequently disclosed to the Applicant had been manually extracted and collated from the record book. It recognised, in light of the pandemic, that more information needed to be centrally accessible, and confirmed it was taking steps to record information of this nature electronically in future.
31. Angus Alive again referred to its review response of 9 July 2020 in which had outlined, to the Applicant, the reasons why it could not access the information at that time.
32. Angus Alive submitted that further information was disclosed to the Applicant on 5 August 2020, evidence of which was provided to the Commissioner. In conclusion, Angus Alive took the view that it had fully disclosed all the information falling within the scope of the Applicant's request.
33. Having considered all of the relevant submissions, the Commissioner is satisfied that, by the start of his investigation, Angus Alive had taken adequate and proportionate steps to establish what information it held which fell within the scope of parts 2 and 3 of the request.
34. It is clear that, in this case, the circumstances surrounding Angus Alive's inability to access the information were somewhat out of its control. The Commissioner welcomes the steps now being taken by Angus Alive to make more information centrally accessible.
35. However, notwithstanding this, the Commissioner finds that Angus Alive failed to comply with regulation 5(1) of the EIRs in responding to parts 2 and 3 of the Applicant's request, by failing – either in response to the request or on review – to provide all the information it held and which was covered by those parts of the request. This information was later identified and disclosed to the Applicant, as evidenced by Angus Alive's subsequent disclosure of 5 August 2020.

36. In the circumstances, given he is now satisfied that Angus Alive has provided the Applicant with all relevant information held for parts 2 and 3 of the request, the Commissioner does not require Angus Alive to take any further action in this case, in response to the failure identified.

Decision

The Commissioner finds that Angus Alive failed to comply with the Environmental Information (Scotland) Regulations 2004 (the EIRs) in responding to parts 2 and 3 of the information request made by the Applicant.

The Commissioner finds that Angus Alive did not provide all of the information requested for parts 2 and 3 of the request, and therefore failed to comply with regulation 5(1) of the EIRs.

Given that, by the start of the investigation, Angus Alive had fully disclosed all the information falling within the scope of parts 2 and 3 of the request, the Commissioner does not require Angus Alive to take any action in respect to this failure, in response to the Applicant's request.

Appeal

Should either the Applicant or Angus Alive 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

10 December 2020

Appendix 1: Relevant statutory provisions

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;

...

- (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)-
 - (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

...

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