

Decision Notice



Decision 221/2013 Mr Robert Robb and Scottish Natural Heritage

Licence relating to peregrine falcons at a specified site

Reference No: 201301642

Decision Date: 7 October 2013

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Rosemary Agnew

Scottish Information Commissioner

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Summary

On 6 May 2013, Mr Robb asked Scottish Natural Heritage (SNH) for information concerning a licence issued in respect of activities relating to peregrine falcons at a specified site. SNH informed Mr Robb that it did not hold the requested information.

Following an investigation, the Commissioner found that the information was not held by SNH, nor was it held on its behalf by another body.

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”) and 2(2)(b) (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)

Wildlife and Countryside Act 1981 (the WCA) sections 16(5)(b) and (9) (Power to grant licences); 16A(1)(a) (Delegation of licence granting power: Scotland)

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

1. On 6 May 2013, Mr Robb emailed SNH requesting information concerning a licence issued to an individual in respect of monitoring, photographing and ringing a pair of nesting peregrine falcons at a specified location. Mr Robb specifically sought information regarding the extent and conditions of any such licence and the identity of the licensee.



2. SNH responded on 31 May 2013. SNH informed Mr Robb that it had not issued a licence of the type described by him. Accordingly, SNH gave notice (in terms of regulation 10(4)(a) of the EIRs) that it did not hold the requested information. SNH also explained that permission to carry out bird ringing activities would have been granted by the British Trust for Ornithology (BTO) under powers delegated by SNH.
3. On 18 June 2013, Mr Robb emailed SNH requesting a review of its decision. Mr Robb considered that SNH should have obtained the relevant information from BTO and disclosed it to him.
4. SNH notified Mr Robb of the outcome of its review on 15 July 2013. SNH upheld its previous decision without modification.
5. On 17 July 2013, Mr Robb wrote to the Commissioner, stating that he was dissatisfied with the outcome of SNH'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 Robb had made a request for information to a Scottish public authority and had applied to the Commissioner for a decision only after asking the authority to review its response to that request. The case was then allocated to an investigating officer.

Investigation

7. The investigating officer subsequently contacted SNH, 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, SNH was asked to justify its reliance on any provisions of the EIRs it considered applicable to the information requested. SNH was also asked to explain what steps it had taken to establish whether it held any relevant information. Additionally, SNH was asked to provide its views on whether the information sought by Mr Robb may be held on SNH's behalf by BTO, in terms of regulation 2(2)(b) of the EIRs.
8. SNH responded on 30 August 2013, explaining the searches that it had undertaken and why it believed BTO did not hold the information on its behalf.



Commissioner's analysis and findings

9. 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 her by both Mr Robb and SNH. She is satisfied that no matter of relevance has been overlooked.

FOISA or EIRs

10. In this case, SNH has considered Mr Robb's request as one seeking environmental information in terms of the EIRs. Environmental information is defined in regulation 2(1) of the EIRs (the relevant parts of the definition are reproduced in the Appendix to this decision). Where information falls within the scope of this definition, a person has a right to access it under the EIRs, subject to various restrictions and exceptions contained in the EIRs
11. Having considered the nature of the withheld information, the Commissioner is satisfied that it comprises environmental information as defined in regulation 2(1) of the EIRs. As the requested information concerns activities relating to wildlife, the Commissioner is satisfied that it falls within paragraph (c) of the definition of environmental information contained in regulation 2(1) of the EIRs, being information on measures and activities affecting or likely to affect the state of those elements of the environment referred to in paragraph (a) of the definition.

Section 39(2) of FOISA – environmental information

12. The exemption in section 39(2) of FOISA provides 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. This exemption is subject to the public interest test required by section 2(1)(b) of FOISA. In this case the Commissioner finds that SNH was entitled to apply the exemption to the withheld information, given her conclusion that it is properly considered to be environmental information.
13. As there is a separate statutory right of access to environmental information available to the applicant in this case, the Commissioner also accepts that the public interest in maintaining this exemption and dealing with the request in line with the requirements of the EIRs outweighs any public interest in disclosure of the information under FOISA. The Commissioner has consequently proceeded to consider this case in what follows solely in terms of the EIRs.

Consideration of regulation 2(2)(b) – information held on behalf of a Scottish public authority

14. Regulation 2(2)(b) provides that environmental information is held by a Scottish public authority for the purposes of the EIRs if it is held by another person on that authority's behalf (subject to certain conditions that are not relevant in this case).



15. In Mr Robb's view, SNH had vicarious responsibility for the issuing of the type of licence under consideration and could not abdicate responsibility to other organisations such as BTO. Mr Robb considered it was a matter of great concern that SNH did not hold the requested information.
16. SNH submitted that the relevant information was not held by BTO on behalf of SNH for the following reasons.
 - There is no statutory obligation on SNH or on BTO to ring wild birds.
 - There is no statutory obligation on BTO to submit ringing information to SNH.
 - SNH does not use ringing permit information for any of its statutory or non-statutory functions.
 - SNH does not make use of BTO services to hold ringing permit information on its behalf and there is no contract in place between BTO and SNH relating to this.
 - Ringing permit information is not covered by any of SNH's records management policies and SNH has not provided BTO with guidance on management or retention arrangements for this information.
 - Ringing permit information is created by BTO independently of SNH, held solely by BTO and used by BTO for the purpose of the operation of the ringing programme.
17. SNH explained that it had delegated the licencing of bird ringing to BTO under section 16(5)(b) of the Wildlife and Countryside Act 1981 (the WCA). SNH explained that the WCA allows the appropriate authority to do so and section 16(9) of the WCA names the appropriate authority as the Scottish Ministers or a person nominated by them; in this case, SNH.
18. SNH stated that, under a Memorandum of Agreement (the MOA) with BTO, BTO is required to provide reports to SNH about the ringing programme generally, but not details of specific permits issued.
19. The Commissioner has considered the submissions of both SNH and Mr Robb. Having done so, she has concluded that any relevant information held by BTO is not held on behalf of SNH. The Commissioner accepts that SNH is entitled to delegate this function in terms of section 16 of the WCA (having itself been delegated this function by the Scottish Ministers under section 16A of the WCA).
20. The Commissioner notes that there is no requirement within the MOA or the WCA which would oblige BTO to provide SNH with information of the type sought by Mr Robb. Nor is there any obligation on SNH to obtain that information. The Commissioner accepts, therefore, that the information is held by BTO independently of SNH and not on its behalf.

Searches undertaken by SNH

21. SNH also provided details of the searches it had undertaken in order to identify any relevant information falling within the scope of Mr Robb's request.



22. SNH explained that it is the appropriate authority under the WCA which is allowed to grant licences to permit activities that would otherwise constitute an offence under the WCA. SNH explained that licences are processed through a web-based database that holds the information on all licences issued. SNH stated that licence applications and outputs from the licencing database are held in its electronic record and document management system (eRDM). Accordingly, since all licence applications are managed using the licencing database, all licences are issued using the database and any related documents are held in the eRDM, SNH determined that no other information stores needed to be searched for relevant information.
23. SNH explained the search terms and parameters that had been used to interrogate its database. It noted that the searches did not return any information relevant to Mr Robb's request. SNH reiterated that it had not issued a license of the type described by Mr Robb, and that it had delegated such licencing to the BTO.
24. The Commissioner notes that her remit in carrying out this investigation extends to the consideration of whether SNH actually holds the information requested by Mr Robb. She cannot comment on whether a public authority *ought* to hold any recorded information about a particular event or procedure. Consequently, in this instance, she cannot comment on Mr Robb's assertion that SNH should hold the information that he is seeking.
25. The Commissioner has considered SNH's submissions and its explanation of why it does not hold the information sought by Mr Robb. The Commissioner is satisfied that SNH has conducted proportionate searches to establish whether it holds any relevant information.
26. The Commissioner is therefore satisfied that SNH was correct to give Mr Robb notice, in terms of regulation 10(4)(a) of the EIRs, that it held no information falling within the scope of his request.

Public interest test

27. The exception in regulation 10(4)(a) is subject to the public interest test in regulation 10(1)(b) of the EIRs.
28. The Commissioner does not consider there to be any public interest in requiring SNH to make available any information covered by the request. She accepts that no such information is (or was) held by SNH. The Commissioner therefore concludes that, in all the circumstances of this case, the public interest in making the requested information available is outweighed by that in maintaining the exception in regulation 10(4)(a) of the EIRs.



DECISION

The Commissioner finds that Scottish Natural Heritage complied with Part 1 of the Freedom of Information (Scotland) Act 2002 and with the Environmental Information (Scotland) Regulations 2004 in responding to the information request made by Mr Robb.

Appeal

Should either Mr Robb 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
7 October 2013



Appendix

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;

...

(2) For the purpose of these Regulations, environmental information is held by a Scottish public authority if it is-

...

(b) held by another person on that authority's behalf,

...

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;
- ...

Wildlife and Countryside Act 1981

16 Power to grant licences

- ...
- (5) Subject to subsections (5A) and (6), a license under the foregoing provisions of this section-
- ...
- (b) may be granted either to persons of a class or to a particular person;
- ...
- (9) In this section "*the appropriate authority*" means the Scottish Ministers or such other person to whom the Scottish Ministers delegate power under section 16A
- ...



16A Delegation of licence-granting power: Scotland

- (1) The Scottish Ministers may delegate their functions in relation to licences under section 16 to-
 - (a) Scottish Natural Heritage; or
 - ...