

Decision Notice 161/2019

Minutes and Agendas – Carrbridge Capercaillie Working Group and Cairngorm Capercaillie Project Board

Applicant: The Applicant

Public authority: Cairngorms National Park Authority

Case Ref: 201900570



Summary

CNPA was asked for agendas and minutes of Carrbridge Capercaillie Working Group and Cairngorm Capercaillie Project Board.

CNPA provided some of the information requested, confirming it did not hold the remainder. During the Commissioner's investigation, CNPA located and disclosed some further information.

The Commissioner found that CNPA had partially breached the EIRs in responding to the request by failing to provide, at the outset, all the information it held falling within the scope of the request. The Commissioner also found that CNPA had failed in its duty to provide sufficient advice and assistance in relation to the handling of the request.

Relevant statutory provisions

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)(b) (Duty to make available environmental information on request); 9(1) and (3) (Duty to provide advice and assistance)

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 5 February 2019, the Applicant made a request for information to Cairngorms National Park Authority (CNPA). The information requested was:
 - (i) *All agendas, minutes (or if not minuted then notes taken) for ALL meetings held by Carrbridge Capercaillie Working Group (CCWG) as mentioned on your website page <https://cairngorms.co.uk/caring-future/cairngorms-nature-2/capercaillie/latest-actions/>*
 - (ii) *All agendas, minutes for ALL meetings held by Cairngorm Capercaillie Project Board (CCPB) as mentioned on your website page <https://cairngorms.co.uk/caring-future/cairngorms-nature-2/capercaillie/latest-actions/>*

Or if these records are available for me to view online, please direct me to where I may do so as I have been unable to find them, hence this request.
2. CNPA responded on 1 March 2019, having considered the request under the EIRs. It explained that the purposes of both groups were set out on CNPA's website, accessible via the link provided in the Applicant's request. It explained the make-up of the groups, how often they met and that any actions from meetings were publicly and permanently available via the links provided in CNPA's response.
3. On 3 March 2019, the Applicant wrote to CNPA, requesting a review of its decision on the basis that it had failed to provide the information requested, and had given no satisfactory reason for doing so. Acknowledging that CNPA had provided links to "actions" for both groups, the Applicant argued that this was not what she had asked for. She provided CNPA

with a page of notes from a particular CCWG meeting as an example of the information she required.

4. CNPA notified the Applicant of the outcome of its review on 28 March 2019, partially upholding its original decision, and disclosing some information now identified. CNPA acknowledged that there were omissions in the information previously disclosed. For CCWG meetings, CNPA explained that, prior to the online publication of “actions” from January 2019, some notes had been taken of initial meetings and these had been published on the village notice board. CNPA also stated that agendas for both groups had now been identified. CNPA confirmed the information (now disclosed) represented the information it held, acknowledging this ought to have been released in its initial response.
5. On 28 March 2019, 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. The Applicant stated she was dissatisfied with the outcome of CNPA’s review because she believed it did not fully satisfy her request, nor did it explain why this was. While CNPA had provided some information, the Applicant argued that other information remained missing. The Applicant was further dissatisfied as she believed CNPA had been deliberately obstructive and unhelpful, was not being open and transparent and was making it difficult to obtain access to documentation.
6. That same day, the Applicant wrote to CNPA pointing out that its review response omitted certain information, which she specified. She asked CNPA to provide this information.
7. CNPA responded on 1 April 2019. It apologised and provided a document listing CCWG actions and agendas for certain meetings.
8. The same day, the Applicant wrote to CNPA, highlighting minutes (for both groups) she still considered to be missing.
9. In response, CNPA stated that its review outcome, and the information disclosed therein, represented all information held falling within the scope of the Applicant’s request. It confirmed no further information was held, and none was being withheld.
10. The Applicant highlighted further information she had reason to believe CNPA held, along with concerns about what she perceived to be alterations to the documents disclosed.

Investigation

11. 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.
12. On 22 May 2019, CNPA was notified in writing that the Applicant had made a valid application and the case was allocated to an investigating officer.
13. Section 49(3)(a) of FOISA requires the Commissioner to give public authorities an opportunity to provide comments on an application. CNPA was invited to comment on this application and to answer specific questions. These focused on the searches carried out by CNPA to identify and locate the information it held falling within the scope of the request. CNPA was also asked to comment on the level of advice and assistance it had provided to

the Applicant in relation to the handling of her information request, and on the Applicant's concerns about alterations.

14. During the investigation, CNPA carried out a further review which identified additional information falling within the scope of the Applicant's request. CNPA disclosed this information to the Applicant on 9 July 2019, together with an explanation of the extent of information held and an apology for the way in which it had handled her request.
15. On 10 July 2019, the Applicant wrote to the Commissioner, as she remained dissatisfied that CNPA's further response still did not fulfil her original request. She believed she had still not received all the information she requested and that CNPA was being deliberately obstructive and misleading.

Commissioner's analysis and findings

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

Handling in terms of the EIRs

17. CNPA 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.
18. 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.
19. CNPA submitted that, while the Applicant had requested agendas and minutes, it considered the underlying subject of that information to be environmental in nature, being the development, delivery and governance of the Cairngorms Capercaillie Project. It explained that this project focused on the conservation of the capercaillie and the protection and enhancement of its habitat, and explored ways of working with communities and other stakeholders in conservation and environmental management. CNPA considered the information related to natural sites and biodiversity, and proposed measures likely to impact these and, as such, it would fall within the definition of environmental information in regulation 2(1) of the EIRs.
20. The Commissioner accepts this as a reasonable description and, in the circumstances, is satisfied that the information requested by the Applicant falls within the definition of environmental information set out in regulation 2(1), in particular paragraphs (a) and (c) of that definition. The Applicant has not challenged CNPA's decision to deal with the information as environmental information and the Commissioner will consider the handling of the request in what follows solely in terms of the EIRs.

Regulation 5(1) of the EIRs - Duty to make environmental information available

21. 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 the requester. This obligation relates to information that is held by the authority when it receives a request.

22. 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 a requester believes the authority should hold.
23. 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, unless a qualification in regulations 6 to 12 applies (regulation 5(2)(b)).

Whether CNPA held any further information

24. The standard of proof to determine whether a Scottish public authority holds information is the civil standard of the balance of probabilities. In determining where the balance of probabilities lies, the Commissioner considers the scope, quality, thoroughness and results of the searches carried out by the public authority. He also considers, where appropriate, any reason offered by the public authority to explain why it does not hold the information. While it may be relevant as part of this exercise to explore expectations about what information the authority should hold, ultimately the Commissioner's role is to determine what relevant recorded information is (or was, at the time the request was received) actually held by the public authority.

Interpretation of request

25. In its initial submissions to the Commissioner, CNPA explained it had carried out a further review following the Applicant's application to the Commissioner, which had highlighted the following:
 - Recognising the high level of community involvement in this project, CNPA had transferred all key project documents and information (since the project's formal start date of 22 June 2019) from its network to a "Basecamp" web-based information system, giving community stakeholders in the project fuller access to this information.
 - CNPA's initial searches for information had primarily focussed on Basecamp records (where CCWG and CCPB records are maintained), but it subsequently identified that one record (namely a note of the August 2018 CCWG meeting) had not transferred as it pre-dated the implementation of the Basecamp system, and so had been missed from these searches.
 - The formal start date for the project, authorised by main funders (the National Lottery Heritage Fund) was 22 June 2018. CNPA staff had this date as their clear term of reference for project delivery and so did not consider undertaking searches for information prior to this date, given this would relate to development work rather than project delivery. CNPA accepted this was an oversight. Staff involved in handling the initial request and request for review did not consider clarifying what seemed to be a straightforward information request, and therefore no information prior to the date of project commencement was originally considered.
26. CNPA acknowledged that these factors might have contributed to it not meeting the expected standards on this occasion.
27. As stated above, CNPA's further review identified further information which it disclosed to the Applicant on 9 July 2019. In doing so, CNPA provided her with explanation in the above terms, together with an apology.

28. In its subsequent submissions to the Commissioner, CNPA stated that it had believed the Applicant's request, on the face of it, to have been straightforward, and there appeared to be no requirement to seek any clarification or to provide any additional assistance to the Applicant in relation to her request at that time. It submitted that it aimed to release all information held which fell within scope, without any requirement to withhold any information under any of the exceptions in the EIRs. CNPA acknowledged, however, that it was only through subsequent interactions with the Commissioner's office (following the Applicant's application to the Commissioner) that it became apparent that the request also covered information pre-dating the project start date. As a result, CNPA revised its position and carried out a further review, as previously referenced.

Searches

29. The Commissioner has taken account of the arguments in the Applicant's requirement for review, her application and subsequent correspondence with the Commissioner's office, in which she provides reasons as to why she considers CNPA ought to have held further information falling within the scope of her request.
30. In these, the Applicant argued that the information she requested – agendas and minutes – were basic documents that attendees at meetings were familiar with, particularly in an organisation such as CNPA. In her view, being directed to “actions” was not the same thing. She contended that CNPA's review responses had not satisfied her original request, and some information still remained missing. The Applicant disagreed with CNPA's statement that it did not hold certain information, on the basis that she was aware that specific meetings had been held for which no information had been disclosed.
31. As stated above, CNPA was asked to provide the Commissioner with details of the searches it had undertaken to identify the information falling within the scope of the request.
32. In response, CNPA provided an overview of the searches it had carried out. It explained it operated a structured digital filing system, and also used an internet-based document sharing system (“Basecamp”) to better fit the project's community involvement ethos. It provided copies of internal emails evidencing the searches conducted on both of these systems, including the key search terms used. CNPA explained these systems held any formal notes supporting CCWG and CCPB, plus any internal file notes or staff notes.
33. These searches identified that further information was held falling within the scope of the Applicant's request, which CNPA disclosed to her on 9 July 2019.
34. In its submissions to the Commissioner, CNPA explained that the funding decision for the project was confirmed in April 2018, so there was no CCWG in place prior to that time. The project was community-based and, as such, not all record keeping was in line with traditional public body styles. CNPA explained that, as a group relying on volunteers, decisions had been taken - at the instigation of CCWG and CCPB - to move away from traditional meeting-style notes to producing summary actions only. This was with a view to limiting record-keeping and administration, and to better suit the community-based nature of the project and the amount of volunteer time put into its delivery. As such, records of more recent meetings were limited to “action notes” only.
35. CNPA confirmed it did not hold any additional information falling within scope, further to that which it had already disclosed to the Applicant, or which was publicly available. With reference to the Applicant's concerns about alterations, CNPA noted that these appeared to derive from a document posted on the village noticeboard: it suggested that this might have

been a draft, posted with a view to helping speedy local communications, the version held by CNPA and disclosed to the Applicant being the final version. It commented that, in a community-based project such as this, it could not control all information provision.

The Commissioner's views

36. The Commissioner recognises that the Applicant has submitted valid arguments to support her belief about what information CNPA should hold. However, he can only comment on what information is actually held.
37. The Commissioner has considered the terms of the Applicant's request carefully and is satisfied that it encompasses more information than was originally disclosed to her by CNPA in its original review outcome. The scope is clearly not limited to information held from the formal project start date, as was applied by CNPA when conducting its initial searches, nor does it specify a timescale for the information, as CNPA had originally interpreted it. All of this is evident from reading the request itself.
38. The Commissioner notes CNPA's explanation surrounding its initial interpretation of the scope of the request, which formed the basis of its initial searches and led to the identification and disclosure of the information in its original review outcome. However, he is disappointed to note that some of the information that fell within the scope of this initial interpretation was not identified and disclosed until during his investigation.
39. It is therefore clear to the Commissioner, from examination of the information identified as a result of the further searches carried out by CNPA during the investigation, that it held more information, falling within the scope of the request, than was originally identified. He is also satisfied, however, from the explanation provided by CNPA regarding the extent of the information held, that the subsequent searches were (by the conclusion of his investigation) capable of identifying all relevant information held by CNPA and falling within the scope of the Applicant's request. He notes CNPA's explanation regarding apparent alterations, which appears reasonable given the nature of the project.
40. As noted above, CNPA identified and located additional information during the investigation, which it disclosed to the Applicant. This was all information which ought to have been disclosed to the Applicant at the time it dealt with her information request. The Commissioner therefore finds that, in failing to do so, CNPA failed to comply with regulation 5(1) of the EIRs.
41. While CNPA has itself acknowledged that its handling of the Applicant's request failed to meet the expected standards, the Commissioner can see no evidence that CNPA deliberately sought to withhold, or delay in disclosing, any of the in-scope information to the Applicant. Further consideration of CNPA's handling of the request, in relation to the provision of advice and assistance, can be found below.

Regulation 9 of the EIRS – Duty to provide advice and assistance

42. Regulation 9(1) of the EIRs provides that a Scottish public authority must, so far as it would be reasonable to expect it do so, provide advice and assistance to applicants and potential applicants. Regulation 9(3) provides that a Scottish public authority shall be taken to have complied with this duty if it conforms with the relevant Code of Practice (in relation to the provision of advice and assistance).

43. The Scottish Ministers' Code of Practice on the discharge of functions by Scottish public authorities under FOISA and the EIRs (the Section 60 Code¹) states (at paragraph 5.1 in Part 2):

Authorities should offer advice and assistance at all stages of a request

Authorities have a duty to provide advice and assistance at all stages of a request. It can be given either before a request is made, or to clarify what information an Applicant wants after a request has been made, whilst the authority is handling the request, or after it has responded.

44. The full text of Section 5 of the Section 60 Code gives more detailed guidance on good practice in offering advice and assistance in relation to various stages and aspects of a request, including seeking clarification from an applicant if the authority is unsure about what information the applicant wants.
45. In her application and subsequent correspondence to the Commissioner, the Applicant was dissatisfied with the way in which CNPA had handled her information request. She believed that CNPA had been deliberately obstructive in enabling her to obtain the information sought, by intentionally misunderstanding simple and straightforward communications. She also contended CNPA was not being open and transparent, was not making information available and was making attempts to access information difficult. Neither did she accept the explanations provided by CNPA in its further review of 9 July 2019 surrounding timescales and “Basecamp”.
46. CNPA was asked to comment on these matters. In response, CNPA refuted it had been obstructive in any way, disagreeing with any suggestion that it had deliberately sought to delay the release of information.
47. While it agreed that the Applicant’s information request was clear, CNPA submitted that it was unfortunate that this “clarity” had been taken to mean different things to different people: a specific project delivery commencing from the project approval date (by staff working on the project) versus a different timeframe (in the Applicant’s view) extending to the point of conception of a project idea. CNPA recognised it was unfortunate that true clarity on this point had not been achieved until now, but given that it had been achieved there appeared to be no requirement to seek any further clarification.
48. CNPA further acknowledged that the factors referred to in paragraph 25 above may have contributed to it not meeting the expected standards on this occasion.

The Commissioner’s views

49. The Commissioner is of the view that it ought to have been clear to CNPA, from the wording of the Applicant’s request, that the request’s scope could have been wider than CNPA originally interpreted it to be. Where there is any doubt as to what information is being requested, a Scottish public authority should discuss with the Applicant the terms and parameters of the request (including any time period to be applied to the information requested). It may have been fair for CNPA to deem the formal project start date as a reasonable point from which to search for information. However, had CNPA taken this course of action and sought confirmation of this at an early stage, rather than making its own judgement on these terms and parameters, this may have avoided the need for the Applicant to make an application to the Commissioner.

¹ <https://www.gov.scot/publications/foi-eir-section-60-code-of-practice/>

50. The Commissioner also questions the adequacy of the advice and assistance it gave to the Applicant to aid her understanding of what information was, or was not, held. At the very least, CNPA ought to have, at the outset, provided a full response explaining what information was held for each of the groups named in her request. In the absence of this, the Applicant's consequent dissatisfaction was understandable.
51. The Commissioner considers it would have been reasonable (and desirable) for CNPA to have engaged with the Applicant at an early stage, to ascertain exactly what time period the request covered. Without a clear view of what is being sought, the Commissioner cannot see how any Scottish public authority could properly take a considered view of what information is covered by a request, and so fulfil its duties under the EIRs.
52. The Commissioner is also of the view that, to some degree, CNPA failed to clearly address some parts of the Applicant's request, both at initial response and review stages. While the request clearly set out the information sought (which was further clarified by the Applicant in her request for review), CNPA's original review response failed not only to address some information, or explain if or why the information was not held, but also to fully identify all in-scope information (even based on its initial interpretation of the request). Even following the Applicant's application to the Commissioner (at which point she again wrote to CNPA contending it held more information), CNPA still maintained no further information was held. This turned out not to be the case, as rehearsed above.
53. The Commissioner therefore finds that, in the respects considered above, CNPA failed to comply with its duties to provide reasonable advice and assistance under regulation 9(1) of the EIRs.

Decision

The Commissioner finds that Cairngorms National Park Authority (CNPA) partially complied with the Environmental Information (Scotland) Regulations 2004 (the EIRs) in responding to the information request made by the Applicant.

The Commissioner finds that, by the end of the investigation, CNPA had identified all information falling within the scope of the request.

However, by only identifying some of that information after the Commissioner's investigation had started, he finds that CNPA failed to comply with regulation 5(1) of the EIRs.

The Commissioner also finds that CNPA failed in its duty to provide sufficient advice and assistance to the Applicant in relation to the handling of her information request, and in that respect, failed to comply with regulation 9(1) of the EIRs.

Given that CNPA has disclosed to the Applicant all of the information held falling within the scope of her request, including that identified during the investigation, the Commissioner does not require CNPA to take any action in respect of these failures, in response to the Applicant's application.

Appeal

Should either the Applicant or CNPA 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

30 October 2019

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

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- (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.

...

9 Duty to provide advice and assistance

- (1) A Scottish public authority shall provide advice and assistance, so far as it would be reasonable to expect the authority to do so, to Applicants and prospective Applicants.

...

- (3) To the extent that a Scottish public authority conforms to a code of practice under regulation 18 in relation to the provision of advice and assistance in a particular case, it shall be taken to have complied with the duty imposed by paragraph (1) in relation to that case.

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