

# Decision Notice 012/2021

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## Attendees - Capercaillie Working Group

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**Applicant: The Applicant**

**Public authority: Cairngorms National Park Authority**

**Case Ref: 202000978**



Scottish Information  
Commissioner

## Summary

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CNPA was asked for the names of the members of the Capercaillie working group and the park/project officers who had participated in a group of meetings. CNPA provided the details of the CNPA staff who had attended, but said it did not hold the details of any other attendees.

The Commissioner found that CNPA had complied with FOISA in responding to the request. He accepted that CPNA did not hold any further recorded information falling with the request.

## Relevant statutory provisions

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Freedom of Information (Scotland) Act 2002 (FOISA) section 1(1) and (4) (General entitlement); 17(1) (Notice that information is not held); 73 (definition of “information”) (Interpretation)

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

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1. On 2 July 2020, the Applicant made a request for information to Cairngorms National Park Authority (CNPA). The Applicant commented that the Capercaillie Working Group’s notes from the eight meetings between 14 January 2020 and 26 May 2020 had recently been uploaded to CNPA’s project website. However, the note did not state who attended the meetings. The Applicant asked which members of the working group and which park/project officers participated in each of those meetings.
2. CNPA responded on 23 July 2020. It provided a link to the Capercaillie Project Group meetings and explained that in 2020 the format of the minutes had changed, no longer recording attendees, but only key action points. CNPA explained that it did not hold a separate record of attendance for these meetings. However, CNPA stated, by job title, which of its staff had attended each meeting. CNPA directed the Applicant to a page on the Cairngorms Capercaillie Project website<sup>1</sup> and told the Applicant that more information relevant to the request could be found there.
3. Later the same day, the Applicant wrote to CNPA, requesting a review of its decision on the basis that she was “incredulous that the CNPA is claiming that it is not known who attended these meetings, the outcome of which is said to form such a crucial element of this £2 million plus Heritage Lottery Funded project”. The Applicant stated that she believed that “the CNPA capercaillie project manager has a record of attendance which we believe for wider public interest should be shared”. The Applicant also referred to certain people who were involved with consultancies, and whom she believed could recall who were present at the meetings.
4. CNPA notified the Applicant of the outcome of its review on 20 August 2020. CPNA stated that no information was held for part of the request and that, for the other part CPNA “only holds a record on officer attendance of the meeting.” CPNA confirmed its initial response that the format of the Capercaillie Working Group notes does not contain information on

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1. <https://cairngormscapercaillie.scot/carrbridge/>

attendees at each individual meeting. CPNA was able to provide information on its staff attendance at the Group meetings on the basis of calendar records held.

5. CPNA said it had responded to the Applicant in terms of FOISA, and explained that, while the nature of the work of the group relates to capercaillie, their habitats, and the impacts of human behaviour on habitat, landscape and land uses - all of which may suggest the EIRs - in this specific instance, the scope of the request was limited to attendees at meetings. CPNA also stated that members of the Carrbridge Capercaillie Working Group, as a community led group, had decided to minimise administration and paperwork and agreed to structure their meeting notes as brief notes of main discussion points; actions required by the group; and of the resolution of actions. In providing a link to a relevant website, CPNA said it had gone beyond responding to the request on the basis of information held by directing the Applicant to published information which was relevant to the request as the webpage set out the current membership of the working group. Although CPNA's response did not provide the specific information, it directed the Applicant to published information on the full membership of the Group.
6. On 25 August 2020, the Applicant wrote to the Commissioner, applying for a decision in terms of section 47(1) of FOISA. The Applicant stated she was dissatisfied with the outcome of CNPA's review because she did not agree with CPNA's view that a record of who attended the specified meetings was not held.

## Investigation

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7. 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.
8. 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 related to how it had established what information it held that fell within the request.

## Commissioner's analysis and findings

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

### FOISA or the EIRs?

10. CPNA responded to the request under FOISA, and in its review explained why it had not responded in terms of the EIRs. "Environmental information" is defined in regulation 2(1) of the EIRs (the definition is reproduced in full in the Appendix to this decision). Where information falls within the scope of this definition, a person has a right to access the information under the EIRs, subject to qualifications and exceptions in the EIRs.
11. In a previous decision (*Decision 161/201*)<sup>2</sup>, which had related to all agendas and minutes for meetings held by Carrbridge Capercaillie Working Group and the Cairngorm Capercaillie Project Board, the Commissioner agreed with CPNA that the information requested fell within

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<sup>2</sup> <https://www.itspublicknowledge.info/ApplicationsandDecisions/Decisions/2019/201900570.aspx>

the definition of environmental information set out in regulation 2(1), in particular paragraphs (a) and (c) of that definition, of the EIRs.

12. In this case, given that the information requested focusses purely on the identities of attendees, and given that the outcome would be the same regardless of whether the request was dealt with under FOISA or the EIRs, the Commissioner is satisfied that it was reasonable for CPNA to deal with the case under FOISA. (The Commissioner also notes that the Applicant did not question whether the request fell within FOISA or the EIRs.)

## **Section 1 - General entitlement**

13. In terms of section 1(4) of FOISA, the information to be provided in response to a request under section 1(1) is that falling within the scope of the request and held by the authority at the time the request is received, subject to certain qualifications which are not applicable in this case. Under section 17(1) of FOISA, where an authority receives a request for information it does not hold, it must give an applicant notice in writing to that effect. "Information" is defined in section 73 of FOISA as "information recorded in any form". Given this definition, it is clear that FOISA does not usually require a public authority to create recorded information in order to respond to a request, or to provide information which is not held in a recorded form (e.g. from a person's memory).
14. In this case, the Applicant disputed CPNA's claim not to hold a record of attendees of specified meetings. The Applicant said that CPNA had received a list of names of park officials who attended the meetings as listed. She had been informed that there was no official record kept of any other attendees, and was pointed to a list of names of members of the working group. The Applicant said that she already had a list of these names and the response was not a satisfactory answer to her request.
15. The Applicant also stated that the meetings referred to, some of which were held virtually, were to draw up a capercaillie conservation strategy, said to be fundamental to the Heritage Lottery funding of a £3 million Cairngorms National Park conservation project. There was a great deal of public interest in who actually attended each of these crucial meetings. The Applicant indicated that it was important to know who actually attended the meetings: who from CPNA, which (if any) members of the working group.
16. The Applicant disputed CNPA's claim that there is no record of attendees, particularly as some of the meetings were held virtually under COVID restrictions. She said:

"I would argue that the information would also be easily available and obtainable from the project manager as it would be fair to assume that accurate records would have to be kept by the CNPA seeing as the meetings were to draw up a strategy key to the spending of £3 million of public money."
17. The question whether recorded information is held is a factual question. CPNA had provided staff details of attendees. It was asked how it had established that it held no recorded information that showed other attendees.
18. CPNA said that an attendance list is not compiled at these meetings, following a decision by the Group to record only action points. This detail of agreed record holding was in CPNA's

response to the Applicant. The action points are then published on CPNA's website<sup>3</sup>. There is no separate list held of attendees at meetings.

19. CPNA explained that a discussion with the Capercaillie Project Manager confirmed that no further notes are taken of attendees. The Project Manager reviewed her written notes of the most recent meetings she had attended and confirmed she had not recorded attendees, in order to abide by decisions taken by the community led group. The Project Manager undertook an email search and confirmed there was no further record of meeting attendees within her email. CPNA commented that group names are listed at the weblink as part of information on the group. CPNA also confirmed that it had asked its other staff who may have held relevant records if they held information falling within the request. This included the Project Manager and Head of Conservation.
20. CPNA was also asked if it had considered whether it held information that – whilst not a list of attendees – may identify individuals who attended the meetings: for example, emails, etc indicating any persons who were present at the meeting.
21. In response to this, CPNA said the Capercaillie Project manager did review emails to ascertain if an indication of attendance could be drawn from any email correspondence. However, no information was held that showed members indicated their intention to attend or their attendance. CPNA commented:

“In any event confirmation of availability would not constitute confirmation of attendance. The request was dated 2nd July 2020 and the majority of emails related to the meetings between 14th January 2020 and 26th May 2020 would have been deleted during regular house-keeping. It was not felt that on balance a reliable attendance list could be compiled from any information held.”
22. The Commissioner must decide whether CPNA complied with section 1 of FOISA in locating all relevant information falling within the Applicant's request. In doing so, he must assess whether any recorded information was held by CPNA that shows the attendance of persons other than CPNA staff at the listed meetings. The standard of proof to determine 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 public authority. He will also consider, where appropriate, any reason offered by the public authority to explain why the information is not held.
23. Having considered all the relevant submissions, the Commissioner accepts that CPNA has taken adequate and proportionate steps to establish the information it held that fell within the scope of the Applicant's request. 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.
24. In reaching this conclusion, the Commissioner has taken into account the following:
  - CPNA staff involved in assessing what information was held by the authority had experience and knowledge of the subject matter of the request, reducing the likelihood of error and misunderstanding in locating the information requested.

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2. <https://cairngormscapercaillie.scot/carrbridge/>

- CPNA has identified information and this shows that its searches were capable of locating the appropriate information, and it is likely that similar information would also have been identifiable by such searches as being similarly filed, stored or categorised.
- CPNA has highlighted a decision by the group only to provide minutes that relate to action points, and do not include names. Not having a list of attendees is therefore consistent with this policy.
- CPNA is correct to state that any correspondence indicating an intention to attend a meeting is not an indication of attendance.

25. The Commissioner is satisfied, on the balance of probabilities, that the Applicant has received all the information held by CPNA that falls within the scope of the request.

## **Decision**

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The Commissioner finds that Cairngorms National Park Authority complied with Part 1 of the Freedom of Information (Scotland) Act 2002 in responding to the information request made by the Applicant.

## **Appeal**

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Should either the Applicant or CPNA 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**

**22 January 2021**

## Appendix 1: Relevant statutory provisions

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### 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.

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- (4) The information to be given by the authority is that held by it at the time the request is received, except that, subject to subsection (5), any amendment or deletion which would have been made, regardless of the receipt of the request, between that time and the time it gives the information may be made before the information is given.

...

#### 17 Notice that information is not held

- (1) Where-

(a) a Scottish public authority receives a request which would require it either-

(i) to comply with section 1(1); or

(ii) to determine any question arising by virtue of paragraph (a) or (b) of section 2(1),

if it held the information to which the request relates; but

(b) the authority does not hold that information,

it must, within the time allowed by or by virtue of section 10 for complying with the request, give the applicant notice in writing that it does not hold it.

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#### 73 Interpretation

In this Act, unless the context requires a different interpretation –

“information” (subject to sections 50(9) and 64(2)) means information recorded in any form;

...

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