

Environmental Information Regulations 2004 (EIR)

Decision notice

Date: 7 September 2015

Public Authority: Forestry Commission Scotland

Address: Silvan House
231 Corstorphine Road
Edinburgh
EH12 7AT

Decision (including any steps ordered)

1. The complainant has requested from Forestry Commissioner Scotland ("FCS") information relating to the proposed planting of trees at the RSPB forest reserve at Abernethy, Scotland.
2. FCS provided some of the information but redacted the names and the job titles of the individuals involved under regulation 13 of the EIR. FCS also applied regulation 12(4)(a) to parts of the request.
3. The Commissioner's decision is that the FCS has correctly applied regulation 13 and regulation 12(4)(a) of the EIR to the relevant parts of the request. There are no steps to be taken.

Request and response

4. On 5 January 2015, the complainant wrote to FCS and requested information in the following terms:

"1. COMMUNICATIONS

For the purpose of this Freedom of Information Request the term 'communications' means any communication (electronic or paper) between FCS and RSPB Scotland and between FCS and SNH about (or relating) to the intention of RSPB Scotland to plant trees on the Abernethy Forest Reserve (including, but not limited to) those :

- *between Bob McIntosh and senior RSPB Scotland staff (including, but not limited to) [named individuals] between Bob McIntosh and senior SNH staff (including, but not limited to) [named individuals]*

requesting meetings whether initiated by FCS, or SNH, or RSPB Scotland

- discussing the scheduling and location of meetings*
- meeting records (minutes or summaries)*

2. INITIATION OF DIALOGUE BETWEEN RSPB SCOTLAND AND FCS

2.1 Who (name and job title) at RSPB Scotland initiated the dialogue?

2.2 When was the dialogue initiated?

2.3 What form did that initiation take?

2.4 Include copies of communications and documentation (as above)

3. FCS VISITS TO ABERNETHY

3.1 How many visits (dates, duration, and purpose) have? FCS made to the 'consent area' at Abernethy between 22 March 2006 and 24 August 2011?

3.2 Who (names, job titles, and qualifications) from FCS have visited the 'consent area' at Abernethy between 22 March 2006 and 24 August 2011?

3.3 How much time (hours) did FCS spend surveying the 'consent area' at Abernethy?

3.4 Include copies of communications and documentation (as above)

4. OBSERVATIONS, CHARACTERISATIONS, CONCLUSIONS

RSPB Scotland have characterised the Caledonian Pinewood at Abernethy as 'struggling to survive' and generally giving the impression that regeneration has failed, and that without planting, the pinewood will cease to be.

4.1 How do you characterise the state of regeneration across the 'consent area'?

4.2 Include copies of communications and documentation (as above)

5. OBJECTIVE FACTS

In The Management of Semi-natural Woodlands: 7. Native Pinewoods? I read "that planting should be the last resort". In this context, my understanding of what 'last resort' means suggests a pinewood in which there is no regeneration and no possibility of regeneration (in any timescale). However, as a direct result of? RSPB Scotland's own actions to reduce? Red-deer numbers both? [named individuals] have (rightly) boasted about how well

the pinewood is regenerating while claiming full responsibility for 800 hectares of regeneration. In my superficial survey of 2013 I saw that Birch, Willow, Rowan, Juniper, and Scots Pine seedlings of all ages are well represented across the consent area.

Given "that planting should be the last resort":

5.1 What objective facts about the regeneration in the consent area led you to conclude that the 'last resort' condition had been reached (and that consent should be granted)?

5.2 What objective facts about the regeneration in the consent area would have led you to conclude that the 'last resort' condition had not been reached (and that consent should be refused)?

5.3 Include copies of communications and documentation (as above)

6. ENVIRONMENTAL IMPACT ASSESSMENT

Although the first meeting between FCS and RSPB to discuss 'the plan' appears to have been in 2006, FCS did not ask RSPB Scotland to conduct an environmental impact assessment until 2010. It appears that 'the plan' had changed enough by 2010 for someone at FCS to decide that RSPB Scotland would (now) be required to conduct an EIA.

6.1 When was that decision made?

6.2 Who (name(s) and job-title(s)) made that decision?

6.3 What changed in 'the plan' that led to that decision?

6.4 Include copies of communications and documentation (as above)

7. EC HABITATS DIRECTIVE

I understood that the provisions of the EC Habitats Directive protected the authenticity and naturalness of the Caledonian Pinewood at Abernethy. By definition, planted woodlands are neither authentic nor natural.

7.1 Do the provisions of the EC Habitats Directive protect the authenticity and naturalness of the Caledonian Pinewood at Abernethy (or not)?

7.2 If the provisions of the EC Habitats Directive do protect the authenticity and naturalness of the Caledonian Pinewood at Abernethy (7.2). In what sense is FCS discharging the obligations of the Scottish Government by permitting unnecessary planting?

7.3 If the provisions of the EC Habitats Directive do not protect the authenticity and naturalness of the Caledonian Pinewood at Abernethy (7.3) How is FCS protecting the Caledonian Pinewood at Abernethy by permitting planting within it?

7.4 Include copies of communications and documentation (as above)''

5. On 2 February 2015 FCS responded. It informed the complainant that it was responding to the request in accordance with the provisions of the EIR as it is environmental information for the purposes of the EIR. FCS confirmed that it held information related to some of his questions and provided the complainant with some of the information. However, FCS relied on regulation 13 of the EIR to withhold some of the information that fell under questions 1 and 2 of the request. It relied on regulation 12(4)(a) to questions 3.4 and 4.2 on the basis that that information was not held.
6. On 2 February 2015 the complainant asked for an internal review.
7. Following an internal review FCS wrote to the complainant on 5 March 2015 and upheld its original decision.

Scope of the case

8. The complainant contacted the Commissioner on 6 April 2015 to complain about the way his request for information had been handled.
9. The Commissioner considers the scope of the case to be to determine whether FCS was correct to apply regulation 13 of the EIR to questions 1 and 2. Also to consider whether regulation 12(4)(a) was correctly applied to questions 3.4 and 4.2 of the request.

Reasons for decision

Regulation 13 – personal data

10. This exception provides that third party personal data is excepted from disclosure under the EIR if its disclosure would contravene any of the data protection principles set out in Schedule 1 of the data protection Act (DPA).
11. 'Personal data' is defined under section 1(1) of the DPA as data which relates to a living individual who can be identified from that data, or from that data or other information which is in the possession of the

data controller or is likely to come into the possession of the data controller.

12. The Commissioner is satisfied that the names and job titles of the relevant individuals constitutes personal data.
13. FCS confirmed that the only personal data which had been withheld from the information provided to the complainant are names and job titles. It explained that these are both of FCS personnel and personnel from other parts of the Scottish Government.
14. FCS further explained that the request was broader than the consent decision and included reference to correspondence between the named personnel in relation to the planting of trees. Therefore, FCS redacted the personal data of a broader group of personnel and not just those involved in the decision to grant consent to the planting of trees on the Abernethy Forest Reserve.
15. FCS added that it had also redacted names and other identifying information (e.g. job titles) of a number of individuals who were party to correspondence with FCS, including those from RSPB Scotland and Scottish Natural Heritage.
16. FCS argued that the redacted information consists of the personal data of the individuals concerned, for the purposes of the DPA. It considered contexts which disclosure of a job title and/or qualifications could identify an individual where there is only one post-holder within an organisation with that job title or qualification. FCS gave examples of "Head of Marketing", "Chief Executive" or "Head of Legal" and it said that the latter for example, may be the only member of staff within the organisation who holds an "LL.B degree."
17. FCS stated that the purpose for which it holds the redacted name, job title and qualifications data is antecedent to the making, or influencing the making, of decisions affecting individuals concerning the planting of trees. It argued that any such decision would have an impact on the rights of individuals in connection with the same.
18. FCS said that regarding questions 1 and 2 of the request the individuals (whose details have been redacted) would not reasonably expect their personal data to be made publicly available in response to EIR requests. FCS explained that this is because the individuals concerned are junior members of staff of FCS and other public authorities and organisations which FCS is engaged with, as part of the decision to plant trees in this case.
19. FCS added that in assessing the fairness of disclosure, it had taken into account the fact that a number of the junior members of staff whose

personal data had been redacted, work in both geographically and operationally isolated environments. FCS explained that the release of their personal data in response to an information request would unreasonably attribute their involvement in and contribution towards the matters leading up to the making of the decision to grant consent to planting trees. Although, FCS clarified, the decision was ultimately taken by a senior member of staff, who assumed overall accountability, signed and authorised the consent notice and was the “public face” for the decision taken.

20. FCS argued that any disclosure would have significant implications for FCS’s ability to deliver its policies and programmes across Scotland, if junior staff in other regions felt that their personal data could be subject to disclosure following an information request.
21. FCS considers that it is in the public interest that its confidence is not undermined. It stated that the nature of the forestry sector and the limited number of staff employed in each region means that stakeholders and landowners will often have a personal relationship with staff over many years.
22. FCS said that it had consulted with the affected staff about the qualifications data. They considered that it would be unreasonable to release this information due to concerns that it would undermine and question their ability to do their jobs and provide advice on such matters. Particularly, where the qualifications do not match with the area on which they are offering advice. FCS stated that it is of the view that this is not relevant to the consent decision made at Abernethy as the proposals had been through an extensive consultation process.
23. FCS argued that the forestry environmental impact assessment (EIA) process is subject to extensive consultation and any member of the public has the opportunity to comment on proposals before a decision is made by FCS. Also, that there is a wider public interest in forestry management and tree planting operations.
24. FCS explained that the junior staff would not expect their views on their proposals being made publicly available in response to an information request. FCS argued that this could result in staff being unwilling to explore innovative options at the proposal formulation stage, should their approach be disclosed. FCS said that this could have a detrimental impact upon the ability of such staff to perform their employment duties to the fullest extent.
25. It is FCS’s view that disclosure of the redacted personal data relating to junior staff would be unfair and in breach of the first data protection principle within the DPA.

26. FCS recognised that the complainant has a legitimate interest in obtaining access to the redacted personal data. It argued that this is because disclosure would allow him to determine who within the relevant public authorities was involved in the process leading up to the making of a decision relating to consent to plant trees.

The complainant's view

27. The complainant explained that the key element of his request was to know the names, job titles ("*and thereby assess the competence*") of FCS and RSPB staff and other staff members involved with the consent granting decision to the planting of trees on the Abernethy Forest Reserve.
28. He expressed his concerns about the impact that RSPB Scotland's planting agenda for Abernethy will have on the authenticity and naturalness of the Caledonian Pinewood. He said that he wanted to understand the process by which FCS arrived at the decision to grant consent to plant trees on the reserve at Abernethy.
29. The complainant is of the view that FCS had not complied with the FOIA and he argued that if he does not know who wrote what to whom, he cannot ask follow-up questions. Therefore, he considers that if he cannot ask follow-up questions, FCS will have "*thwarted my attempts to learn which FCS officials did-what or decided-what, and which of them (if any did) failed to follow existing FCS policies.*" The complainant stated that he already knows the names of the people involved in the decision relating to the consent to plant trees and he argued that FCS's decision to redact the information requested is "*obstructive obfuscation.*"

The Commissioner's view

30. The Commissioner has viewed the information withheld under regulation 13 and FCS's explanation that it contains the names and other identifying information of junior FCS staff members. The Commissioner considers that this is information which relates to living individuals and is personal data.
31. The Commissioner considered whether disclosure would be fair. He is satisfied that junior staff members, who are not public-facing, would not expect their names and identifying information to be disclosed.
32. He recognises that the name of the senior FCS staff member involved in this case, has been released to the complainant, and this could be argued that this has somewhat gone to satisfying the legitimate interest in disclosure.

33. The Commissioner notes the explanation by FCS that this senior member manages the junior FCS staff members who were involved in the decision making and consent process. Also, that this staff member is the officer accountable for the Conservancy (the local FCS management unit).
34. The Commissioner accepts the complainant's concerns about the planting agenda for the forest reserve. He acknowledges the controversy surrounding the case for tree planting and the case against planting and he notes that there is a public interest in understanding the decision making behind forestry management and tree planting operations.
35. However, the Commissioner recognises the complainant's request is wider than the FCS's decision to grant consent to the planting of trees on the forest reserve and that it includes correspondence between the named personnel relating to this.
36. The Commissioner considers that there is a legitimate interest in knowing the identities of the individuals who contributed to the decisions relating to the consent to plant trees. This has to be balanced against individual's reasonable expectations and any unfair invasion of privacy. In addition, with the fact that FCS has released the name of the senior staff with overall responsibility for the decision, this disclosure fulfils the legitimate interest.
37. Having considered all the circumstances of this case, and the withheld information, the Commissioner has found that the disclosure of that personal data would be unfair and in breach of the first data protection principle. Therefore, the Commissioner finds the exception at regulation 13 of the EIR is engaged and that the information has been correctly withheld.

Regulation 12(4)(a) - information not held

38. The Commissioner notes that FCS had informed the complainant that it does not hold any relevant information to questions 3.4 and 4.2 of his request. However, in scenarios where there is some dispute between the amount of information located by a public authority and the amount of information that a complainant believes may be held, the ICO, following the lead of a number of Information Tribunal decisions, applies the civil standard of the balance of probabilities.
39. In other words, in order to determine such complaints the ICO must decide whether on the balance of probabilities a public authority holds any information which falls within the scope of the request (or was held at the time of the request).

40. To reach a decision in this case, the Commissioner has considered the context of the case, the nature of the requested information, the FCS's responses, the arguments provided by the complainant, and any evidence to suggest that further information is held by FCS.
41. The Commissioner asked FCS what searches were carried out for information falling within the scope of this request and why these searches would have been likely to retrieve any relevant information. FCS stated that it first identified the key personnel within FCS who were involved in the matters covered by the request. FCS considered that consultation with these key individuals would confirm the likely extent of any information held, where it was held or if it was not held at all.
42. Following key personnel being consulted, FCS said that it had asked them to make a search of their records and that these searches included email folders, shared IT file areas and paper files. FCS added that staff would have used appropriate search terms such as 'Abernethy, tree planting and RSPB' and that the case is well known to the relevant staff, so they would be familiar with the nature of information and its location.
43. FCS confirmed that these searches revealed that FCS did not hold any information relevant to questions 3.4 and 4.2 of the request and it verified that FCS held the communications that had already been disclosed to the complainant.

The Commissioner's view

44. On the balance of probabilities the Commissioner considers that FSC does not hold any further information relevant to the scope of the request, other than that which has been provided to the complainant.

Right of appeal

45. Either party has the right to appeal against this decision notice to the First-tier Tribunal (Information Rights). Information about the appeals process may be obtained from:

First-tier Tribunal (Information Rights)
GRC & GRP Tribunals,
PO Box 9300,
LEICESTER,
LE1 8DJ

Tel: 0300 1234504

Fax: 0116 249 4253

Email: GRC@hmcts.gsi.gov.uk

Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

46. If you wish to appeal against a decision notice, you can obtain information on how to appeal along with the relevant forms from the Information Tribunal website.
47. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

Signed

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