

Decision Notice

Decision 209/2016: Mr Nick Kempe and Loch Lomond and The Trossachs National Park Authority

“Your Park” camping development proposals

Reference No: 201600611

Decision Date: 4 October 2016



Scottish Information
Commissioner

Summary

On 9 December 2015, Mr Kempe asked Loch Lomond and The Trossachs National Park Authority (LLTNPA) for information produced for 10 Board Briefing Sessions concerning the “Your Park” camping development proposals.

LLTNPA responded under both FOISA and the EIRs, informing Mr Kempe that some information was publicly available and that it was withholding some information under FOISA exemptions and EIRs exceptions.

The Commissioner investigated and found that LLTNPA had not been entitled to withhold some of the information. She ordered LLTNPA to disclose this information to Mr Kempe.

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), (b) and (c) of definition of “environmental information”) (Interpretation); 5(1) and (2) (Duty to make available environmental information on request); 6(1)(b) (Form and format of information); 10(1), (2), (4)(d), (4)(e) and (5)(e) (Exceptions from duty to make environmental information available)

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 9 December 2015, Mr Kempe made a three-part request for information to LLTNPA for information concerning the “Your Park” camping development proposals. This included a request for any material (e.g. presentations), other than meeting notes and minutes, that might have been produced for 10 specified Board Briefing Sessions that considered the “Your Park” proposals.
2. LLTNPA responded on 12 January 2016, informing Mr Kempe that presentations and briefing documents were produced for some of the Board Briefing Sessions. It stated that some of the information was publicly available, applying section 25 (Information otherwise accessible) of FOISA, and withheld other information under the exemptions in sections 30(b)(i) (Prejudice to effective conduct of public affairs), 33(1)(b) (Commercial interests and the economy) and 36(1) (Confidentiality) of FOISA.
3. While LLTNPA had considered the request under FOISA, it believed the information could also fall under the EIRs, given that camping management plans could be seen as having an impact on the environment. In this regard, LLTNPA relied on the exceptions in regulations 10(4)(d) (Material still in the course of completion etc.) and 10(4)(e) (Internal communications) of the EIRs.

4. Acknowledging the strong public interest in its plans for the development of sustainable camping within the National Park, LLTNPA believed the public interest (in relation to some of the information) lay in protecting the commercial interests of landowners, to ensure the best possible results could be achieved for camping provision within the Park. For other information, LLTNPA believed there was a greater public interest in protecting the effective communication of advice between the Board and the Project Team, rather than releasing early drafts of information now in the public domain regarding the wording of byelaws and the proposed camping management zones.
5. On 18 January 2016, Mr Kempe wrote to LLTNPA, requesting a review of its decision and explaining he did not believe the exemptions and exceptions applied, and why he disagreed with LLTNPA on the public interest.
6. LLTNPA notified Mr Kempe of the outcome of its review on 15 February 2016. Whilst it provided further explanation, it upheld its original decision without modification.
7. On 5 April 2016, Mr Kempe 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. Mr Kempe stated he was dissatisfied with the outcome of LLTNPA's review because he did not believe the exemptions applied, nor did he believe that it was in the public interest to withhold the information requested.
8. Mr Kempe considered that the public interest lay in knowing whether the Board Briefing Sessions were indeed merely briefings and did not involve any decision-making by Board members, whether these sessions were of a nature that they should have taken place in public, and what part certain Board members played in these meetings. He believed all of this would be established by disclosure of the information requested.

Investigation

9. The application was accepted as valid. The Commissioner confirmed that Mr Kempe made a request for information to a Scottish public authority and asked the authority to review its response to that request before applying to her for a decision.
10. On 29 April 2016, LLTNPA was notified in writing that Mr Kempe had made a valid application and was asked to send the Commissioner the information withheld from Mr Kempe. LLTNPA provided the information and the case was allocated to an investigating officer.
11. Section 49(3)(a) of FOISA requires the Commissioner to give public authorities an opportunity to provide comments on an application. LLTNPA was invited to comment on this application and answer specific questions, including reference to the steps taken to identify and locate what information it held. In particular, LLTNPA was asked to comment on the application of the EIRs to any of the information, and to justify its reliance on any provisions of FOISA or the EIRs it considered applicable to withheld information. Due to anomalies between the withheld information and that recorded on the corresponding schedule, LLTNPA was also asked to provide further clarification on this point.
12. LLTNPA responded and provided submissions to the effect that it wished to rely upon section 39(2) of FOISA, as the request properly fell to be considered under the EIRs. It also provided a revised schedule of withheld information, comprising 119 slides. Clarification of aspects of these was sought, and obtained, during the investigation.

13. During the investigation, LLTNPA provided further submissions to the effect that the information in 52 of the slides originally withheld was now in the public domain. It informed the Commissioner that publicly available information on the “Your Park” project could be found on the “Your Park” website, and in Board papers published on LLTNPA’s website. As a result, LLTNPA stated that it wished to rely upon regulation 6(1)(b) of the EIRs for this information.
14. LLTNPA provided the Commissioner with a breakdown of the slides originally withheld (where it now considered the content to be in the public domain), together with a description of where the information could be located in each case.
15. From these descriptions, the investigating officer endeavoured to locate the information that was contained within the 52 slides for which LLTNPA wished to rely upon regulation 6(1)(b) of the EIRs. This, however, proved to be difficult, given the vast amount of information published on the “Your Park” website. While the information in question might well have been incorporated into various documents or webpages in a different form or format, the investigating officer was unable to locate the withheld information which LLTNPA was now claiming to be publicly available.
16. This was mainly attributable to the level of detail provided by LLTNPA describing where the information could be located. The lack of precise weblinks to specific areas or pages on websites, and the lack of detailed descriptions from which the information could be sourced, did not allow the investigating officer to locate the same information, in terms of wording and context, as recorded in the slides originally withheld.
17. LLTNPA was also asked to consider providing Mr Kempe with details of where he could locate the information (originally withheld) which it now considered to be publicly available. In response, LLTNPA stated it would prefer to wait until the conclusion of the investigation before contacting him again.
18. In further communication with the investigating officer, LLTNPA was asked to consider providing the 52 slides to Mr Kempe at that stage. LLTNPA submitted that, in the event that the Commissioner did not accept that the information it now considered to be in the public domain was in the public domain and otherwise available, it would seek to rely on the exceptions in regulations 10(4)(d) and (e) of the EIRs, since the slides were internal communications relating to work that was not complete.
19. LLTNPA was given the opportunity to provide further submissions regarding the application of regulations 10(4)(d) and (e) of the EIRs, in respect of these 52 slides, but did not do so.
20. LLTNPA informed the Commissioner that, in addition to its submissions regarding the 52 slides referred to above, a further 25 slides could now be made public. It again declined to provide these to Mr Kempe.
21. For the remaining 42 slides, LLTNPA confirmed that it wished to withhold this information, relying on the exceptions in regulations 10(4)(d), 10(4)(e) and 10(5)(e) of the EIRs. It provided a brief summary of the content of each slide, together with details of which exception(s) it was applying in each case. The Commissioner will consider the application of these exceptions later in this decision.
22. Mr Kempe also provided submissions on why he believed it was in the public interest for the information to be disclosed.

Commissioner's analysis and findings

23. In coming to a decision on this matter, the Commissioner has considered all of the withheld information and the relevant submissions, or parts of submissions, made to her by both LLTNPA and Mr Kempe. She is satisfied that no matter of relevance has been overlooked.

Application of the EIRs and section 39(2) of FOISA

24. The Commissioner's thinking on the relationship between FOISA and the EIRs is set out in detail in *Decision 218/2007 Professor A D Hawkins and Transport Scotland*¹ and need not be repeated it in full here.
25. In its submissions to the Commissioner, LLTNPA acknowledged that the request fell to be considered under the EIRs and stated that it wished to rely upon section 39(2) of FOISA in relation to the information being withheld. It provided submissions solely in terms of the EIRs. For this exemption to apply, the information would require to be environmental, as defined in regulation 2(1) of the EIRs.
26. LLTNPA explained that the information concerned plans to introduce byelaws and new camping facilities, with a view to protecting the environment following decades of long-term damage to some of the most sensitive places within the National Park. As the plans would impact upon the behaviour of visitors to the National Park, LLTNPA considered the information would relate to the state of the elements of the environment and the factors and measures likely to affect them (paragraphs (a), (b) and (c) of the definition of environmental information). These plans, LLTNPA continued, were designed to have a positive impact on the nature of the land and the environment.
27. Having considered LLTNPA's submissions on this point and the nature of the withheld information, the Commissioner is satisfied that it is environmental information as defined in paragraphs (a), (b) and (c) of the definition in regulation 2(1) of the EIRs (reproduced in Appendix 1 to this decision).
28. In this case, therefore, the Commissioner accepts that LLTNPA was entitled to apply the exemption in section 39(2) of FOISA to the withheld information, given her conclusion that it is properly considered to be environmental information.
29. This exemption is subject to the public interest test in section 2(1)(b) of FOISA. As there is a separate statutory right of access to environmental information available to the applicant in this case, the Commissioner 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. She has consequently proceeded to consider this case in what follows solely in terms of the EIRs.

Regulation 5(1) of the EIRs – Duty to make available environmental information on request

30. Regulation 5(1) of the EIRs, subject to the various qualifications contained in regulations 6 to 12 (regulation 5(2)(b)), requires a Scottish public authority which holds environmental information to make it available when requested to do so by any applicant.

¹ <http://www.itspublicknowledge.info/applicationsanddecisions/Decisions/2007/200600654.asp>

31. A Scottish public authority applying any of the exceptions under regulation 10 of the EIRs must interpret them in a restrictive way and apply a presumption in favour of disclosure (regulation 10(2)). Even where the exception applies, the information must be disclosed unless, in all the circumstances, the public interest in making the information available is outweighed by that in maintaining the exception (regulation 10(1)(b)).
32. In this case, LLTNPA submitted to the Commissioner that it wished to variously rely upon regulations 6(1)(b), 10(4)(d), 10(4)(e) and 10(5)(e) of the EIRs to withhold the information Mr Kempe requested.

Information held

33. In order to ascertain whether all relevant information had been identified, LLTNPA was asked to explain the steps it took to establish what relevant information it held and which fell within the terms of Mr Kempe's request. LLTNPA explained that the information requested was managed within its Governance and Legal Team, and therefore the Governance and Legal Manager had been asked to identify and locate the relevant information. LLTNPA submitted that no other searches were considered to be necessary as the information requested was easily identified due to its nature. LLTNPA explained that the information identified comprised six PowerPoint presentations used at Board Business Sessions to update Board members on the "Your Park" project.
34. Having considered the relevant submissions, the Commissioner accepts LLTNPA took adequate, proportionate steps in the circumstances to identify and locate any information relevant to the request.

LLTNPA's change of position during investigation

35. As explained above, during the investigation LLTNPA provided submissions to the effect that 25 of the slides, originally withheld, could now be disclosed.
36. LLTNPA provided no submissions, however, explaining why these slides were correctly withheld at the time it dealt with Mr Kempe's request, so the Commissioner can only conclude that LLTNPA was not entitled to withhold the information in them at that time.
37. As LLTNPA is no longer seeking to withhold the information in these 25 slides, the Commissioner requires LLTNPA to disclose this information to Mr Kempe.
38. The Commissioner will now consider whether or not LLTNPA was entitled to rely upon regulation 6(1)(b) of the EIRs in respect of the information in the 52 slides it now considers to be publicly available.

Regulation 6(1)(b) – Form and format of information

39. Regulation 6(1)(b) of the EIRs states that, where an applicant requests that information is made available in a particular form or format, a Scottish public authority shall comply with that request unless the information is already publicly available and easily accessible to the applicant in another form or format.
40. In order to determine whether LLTNPA dealt with Mr Kempe's request correctly, the Commissioner must be satisfied as to whether, at the time it responded to the request, the information held by LLTNPA (and which fell within the scope of the request) was both publicly available and easily accessible to Mr Kempe in another form or format.
41. LLTNPA submitted that, since receiving Mr Kempe's request, some of the information in the slides had been released into the public domain, either as a result of the Scottish Ministers'

decision (on 26 January 2016) to approve the byelaws, or as part of the content of papers for subsequent Board meetings.

42. LLTNPA was asked to confirm that the information it now considered to be in the public domain was exactly that, in terms of wording and context, recorded in the slides originally withheld.
43. In response, LLTNPA was unable to confirm that all of the wording, as recorded in the slides, was exactly the same as that which it now considered to be in the public domain. It argued that the exception in regulation 6(1)(b) stated that the information should be easily accessible to the applicant in another form or format, not that it must be exactly the same in terms of wording and context.
44. LLTNPA submitted that the information was the same in terms of overall subject matter, relating to specific areas of the “Your Park” project, from consultation through to final approval of the byelaws. It contended that the publicly available information was comprehensive, whereas the content of the slides was of limited value without the additional explanation delivered verbally to Board members, of which no record was held.

Commissioner’s conclusions – regulation 6(1)(b)

45. The Commissioner has carefully considered all relevant submissions made by LLTNPA, together with the corresponding information that LLTNPA now considers to be publicly available.
46. The Commissioner is somewhat confused by LLTNPA’s submissions. On the one hand, it considers the information in the 52 slides is now in the public domain. On the other, it has been unable to confirm that the information in the public domain is identical, or even substantially similar, to that recorded on the slides. All it can say is that it is about the same overall subject matter, and that the published information is comprehensive in relation to that subject matter.
47. It is also of concern to the Commissioner that LLTNPA’s submissions appear to seek to withhold the information under exceptions in the EIRs, should it not be found that it was publicly available and easily accessible. She does not understand why a public authority should seek to argue that it was not in the public interest, for reasons related to the content of the information (as would follow from the application of the exceptions claimed), to make information available if that information was already in the public domain.
48. However, there appears to be a fundamental misunderstanding here. LLTNPA appears to believe it is enough for the information to be about the same overall subject matter. The Commissioner does not accept this. Regulation 6(1)(b) is clearly intended to relate to the information the applicant has asked for. It is not enough that the published information is about the same things as that information: there might be circumstances in which it did not need to contain exactly the same words, but it would need to have the same import in all material respects. In addition, the Commissioner has difficulty with LLTNPA’s contention that the published information is “comprehensive” in relation to the subject matter concerned: if it were, in relation to all aspects of the process of completing the “Your Park” project, why would she be considering the application of exceptions in relation to the information LLTNPA still wishes to withhold?
49. The Commissioner would remind LLTNPA that regulation 5(1) of the EIRs confers a general right to environmental information held by Scottish public authorities , subject only to the qualifications identified in regulation 5(2)(b) – qualifications set out in detail elsewhere in the

EIRs. Provided information held by the authority falls within the scope of the request; it is not for a Scottish public authority to determine, by reference to its own criteria rather than the specific qualifications in the EIRs, that some of that information is more suitable for disclosure than other information.

50. In any event, LLTNPA has been asked to identify where in the publicly available information the information in the 52 slides is to be found. It has been unable to do so with any remotely appropriate degree of specification. The Commissioner can only therefore conclude that the information in the slides is not publicly available, never mind easily accessible to Mr Kempe: some of it may be, but the onus must be on the publicly authority to satisfy the Commissioner that this is the case. It has failed to do so.
51. Additionally, the Commissioner notes that it was only during the investigation that LLTNPA considered this information to be publicly available – on the basis that it had become so available at that time, after receipt of Mr Kempe’s request. LLTNPA has never provided any basis for concluding that the information was publicly available at the time LLTNPA received the request, as it would need to be for regulation 6(1)(b) to apply.
52. The Commissioner cannot, therefore, accept LLTNPA’s reliance on regulation 6(1)(b) in responding to Mr Kempe’s request, in respect of that information (contained in 52 slides) originally withheld when responding to the request.
53. The Commissioner notes that, in the event that she did not accept LLTNPA’s reliance on regulation 6(1)(b) for this information, LLTNPA sought to rely on the exceptions in regulations 10(4)(d) and (e). Despite being asked to provide submissions to support its reliance on these exceptions in respect of these specific slides, LLTNPA has not done so.
54. In the absence of specific submissions from LLTNPA in support of its reliance on the exceptions in regulations 10(4)(d) and (e) for this particular information, the Commissioner has no option but to conclude that LLTNPA was not entitled to withhold the information (in the 52 slides) under these exceptions. She does not believe any other conclusion can be reached in the absence of arguments to the contrary.
55. The Commissioner therefore requires LLTNPA to disclose to Mr Kempe the information in the 52 slides withheld under regulation 6(1)(b) of the EIRs.

Regulation 10(4)(d) – Information in the course of completion

56. In its submissions, LLTNPA informed the Commissioner that it was relying on the exception in regulation 10(4)(d) for information contained in 27 slides.
57. Regulation 10(4)(d) of the EIRs provides an exception from the duty to make environmental information available, where the request relates to material which is still in the course of completion, to unfinished documents or to incomplete data. Where a Scottish public authority refuses to make information available on this basis, it must state the time by which the information will be finished or completed (regulation 13(d)).
58. The Aarhus Convention Implementation Guide², (produced by the United Nations Economic Commission for Europe as guidance on the international convention from which the EIRs are derived) provides guidance as to the type of material this exception is intended to cover. It states that the mere status of something as a draft alone does not automatically bring it within the exception. It indicates that the use of the term "materials in the course of

² http://www.unece.org/fileadmin/DAM/env/pp/Publications/Aarhus_Implementation_Guide_interactive_eng.pdf

"completion" (the Convention does not refer to "unfinished documents") suggests individual documents that are actively being worked on by the public authority. Once those documents are no longer "in the course of completion" they may be released, even if they are still unfinished and even if the decision to which they pertain has not yet been resolved.

59. The Guidance goes on to say that "in the course of completion" suggests that a document will have more work done on it in a reasonable time-frame.
60. In its submissions to the Commissioner, LLTNPA explained that, at the time of Mr Kempe's request, it was awaiting a decision from the Scottish Ministers regarding its submission for approval of plans to introduce new byelaws and camping management plans for the National Park, some aspects of which could not be progressed until Ministerial approval was granted.
61. LLTNPA explained that the slides were used in presentations to Board Briefing Sessions to enable the Project Team to update Board members on the progress of the "Your Park" project.
62. Acknowledging that the actual slides had not been worked on since being used at the Board Briefing Sessions, LLTNPA argued that the information and the points referenced on the slides related to work that was incomplete. LLTNPA submitted that the matters in question were continually being worked on and were therefore considered to be material still in the course of completion.
63. The Commissioner considers LLTNPA was incorrect in its application of the exception in regulation 10(4)(d). Although she accepts that the matters referred in the slides may have been subject to further development and may therefore have not been finalised at the time the slides were presented at the Board Briefing Sessions, or at the time of Mr Kempe's request, the slides are complete in themselves and are not (and were not at the time LLTNPA dealt with Mr Kempe's request) actively being worked on.
64. For these reasons, the Commissioner does not accept that the exception in regulation 10(4)(d) has been engaged in this case.
65. As the Commissioner has found that the exception contained in regulation 10(4)(d) does not apply, she is not required to consider the public interest test in regulation 10(1)(b) of the EIRs.
66. Where LLTNPA has not applied any further exceptions to the information withheld under regulation 10(4)(d), the Commissioner requires it to disclose this information to Mr Kempe.
67. Where LLTNPA has applied the exceptions in regulation 10(4)(e) and/or regulation 10(5)(e), the Commissioner will now go on to consider whether either of these exceptions apply to any of the remaining withheld information.

Regulation 10(4)(e) – Internal communications

68. Regulation 10(4)(e) of the EIRs provides that a Scottish public authority may refuse to make environmental information available to the extent that the request involves making available internal communications. For information to fall within the scope of the exception in regulation 10(4)(e), it need only be established that the information is an internal communication.
69. LLTNPA informed the Commissioner that it was relying on this exception for information contained in 36 slides.

70. In its submissions, LLTNPA explained that the withheld information comprised internal PowerPoint presentations which were created and used for internal business sessions, where the “Your Park” Project Team provided updates and information about the progress of the project to Board members in advance of Board meetings. It submitted that the information in the slides was not intended for circulation at the time of Mr Kempe’s request, and it was therefore information that comprised internal communications for the purposes of regulation 10(4)(e).
71. The Commissioner is satisfied that the information in the slides under consideration is clearly internal communications in each case. The slides were prepared within the Park Authority and not circulated anywhere else. The Commissioner therefore finds that LLTNPA was entitled to apply the exception in regulation 10(4)(e).
72. Having reached this conclusion, the Commissioner is required to consider the public interest test required by regulation 10(1)(b) of the EIRs. This specifies that a public authority may only withhold information to which an exception applies where, in all the circumstances, the public interest in making the information available is outweighed by the public interest in maintaining the exception.

Consideration of the public interest – regulation 10(4)(e)

73. In considering the public interest, the Commissioner has taken account of the submissions received from both parties.

LLTNPA’s submissions

74. In its response to Mr Kempe’s requirement for review, LLTNPA acknowledged the public interest in the “Your Park” plans. However, it considered there was a greater public interest in preserving its ability to seek legal advice where necessary and in protecting the commercial interests of those involved in discussions, given that further work was still ongoing to fully implement the proposals. It considered the public interest lay in preserving the ongoing sharing of information between the Project Team and the Board, as opposed to disclosing information, most of which was publicly available but aspects of which comprised sensitive internal material relating to camping management plans still in the course of completion.
75. In its submissions to the Commissioner, LLTNPA again acknowledged the considerable public interest in the “Your Park” proposals, referring to the large response to the public consultation carried out in January 2015. It also explained that a percentage of the information that formed the slide presentations was subsequently released, as part of the content of Board papers, as information posted on the “Your Park” website or as part of the consultation documentation.
76. As the “Your Park” project was a continually changing and complex one, LLTNPA believed the public interest lay in safeguarding the means by which the Project Team could update Board members on the progress of key aspects of the project at development stage, and in enabling the properly considered implementation and development of policies and decisions.
77. LLTNPA explained that much of the withheld information had been superseded following Ministerial approval of the “Your Park” plans. In its view, there was no public interest in disclosing information that would result in staff being drawn away from their duties, into counter-productive public debate on matters raised in earlier considerations, such as every change considered to the wording of the byelaws and aspects of the camping development plan.

78. LLTNPA believed the public interest lay in ensuring that information about the project was up to date, and there was no public benefit in releasing information which was incomplete and had been overtaken by new information now in the public domain.
79. Had the information had been made publicly available in advance of the Ministers' decision, LLTNPA considered there was a risk that that policy formulation and decisions on the implementation of the camping development plan would have been further complicated and potentially jeopardised. This, LLTNPA argued, was not in the public interest, given the short timescale for implementing the byelaws and the camping development plan.
80. Acknowledging the presumption in favour of making information available under the EIRs, LLTNPA considered there was a public interest in keeping Board members fully informed on the progress of the "Your Park" project, in the expectation that early drafts, ideas and points, which would likely change over time, would not necessarily be made available. LLTNPA believed that making the information available would likely lead to staff, in future, being less inclined to present such updates to the Board, with the result that the involvement of Board members, which was crucial to the process of formulating proposals, would be greatly inhibited.
81. Recognising that Mr Kempe might have a personal interest in this information, LLTNPA did not consider its disclosure to be of wider public interest. That public interest, it believed, lay in allowing it to progress this significant project. LLTNPA believed making available information relating to the development of byelaws served no useful purpose and was more likely to add to existing negative debate and misinformation on the subject.

Mr Kempe's submissions

82. In his application to the Commissioner, Mr Kempe believed it was in the public interest to know if decisions about matters concerning the "Your Park" project were being taken at meetings described as "briefings" involving Board members. Recognising that the camping byelaw proposals were developed over a period of time, Mr Kempe believed it was in the public interest to know how these proposals had developed and if any decisions had been taken outwith formal Board meetings.
83. Mr Kempe made reference to three Board members residing in areas where the Board had recommended that camping be banned, and who had allegedly failed to declare this as an interest at the Board meeting that approved the plan. He submitted it was in the public interest to know what part these three Board members played in the Board Briefing Sessions, believing this might be established through making the information available.
84. Mr Kempe also argued that making the information available would enhance scrutiny and improve accountability of the Park Authority. He believed that, had the information been made public at the time, recreational organisations would have engaged in the process at a much earlier stage, with the result that they would have been better informed. Given the governance issues associated with the development of the byelaws, Mr Kempe believed making the information available was in the public interest.
85. Mr Kempe also believed there was a public interest in the accountability for public funds. He submitted that while LLTNPA had still not made public its camping development plans, it was known that a campsite was being proposed in an area where none was needed. Mr Kempe believed making the information available would allow public debate on such matters.

Commissioner's conclusions on the public interest – regulation 10(4)(e)

86. The Commissioner has considered all of these submissions carefully, alongside the withheld information which comprises internal communications.
87. The Commissioner recognises there is a public interest in ensuring LLTNPA is accountable and transparent for its actions and decisions, particularly in relation to a project of this nature which is of considerable public interest, given its impact on the environment and the community.
88. On the other hand, the Commissioner recognises there is a strong public interest in ensuring that Board members are kept up to date with the progress of projects such as this, and are able to make the best possible decisions and give appropriate advice on matters brought to their attention. She accepts that Board members need to make fully informed decisions, and this may require the free and frank deliberation and discussion of the options presented.
89. The Commissioner notes that the withheld information contains some information which, over the course of time, has since changed and has been superseded by new, updated information now in the public domain. She notes LLTNPA's belief that making earlier information available would lead to staff being drawn in to counter-productive public debate on matters which have since moved on. She also notes LLTNPA's arguments that making the information available would likely lead to fewer updates being provided to Board members, resulting in their involvement in matters, such as the formulation of policies, becoming inhibited.
90. In the circumstances of this case, the Commissioner considers the arguments put forward by LLTNPA are unsubstantiated and hypothetical. It is inevitable in projects of this size and nature that earlier versions of information will change and develop over the course of time and through the development of the proposals. Whilst recognising that making the information available might generate some public debate surrounding earlier versions, the Commissioner does not necessarily consider this to be harmful, as suggested by LLTNPA. Rather, she considers it would promote transparency surrounding LLTNPA's development of the proposals. Neither does she accept LLTNPA's arguments that making the information available would impair the provision of future updates to Board members. She considers this unlikely in the circumstances.
91. In reaching these conclusions, the Commissioner has considered the content and focus of the information withheld in this particular case. It is information provided to keep the Board up to date, rather than to generate or inform debate, and this is reflected in its nature. The Commissioner also notes that the Scottish Ministers had approved the byelaws by the time LLTNPA carried out its review, even if they were not yet in force. There would appear to have been scope for managing public debate on the issues.
92. In conclusion, with one exception, the Commissioner does not accept that making available the information withheld under regulation 10(4)(e) would result in the harm suggested by LLTNPA. That exception is the projected costing information in slide 21 presented to the Briefing on 8 December 2014: she accepts that making this information (which was clearly of some commercial sensitivity in the context of ongoing negotiations in relation to camping provision) available would have been likely to inhibit the sharing of potentially valuable information with the Board, to the detriment of the effective performance of their role.

93. The Commissioner considers there is a strong public interest in allowing public scrutiny of the information withheld under this exception. In her view, this would add to the public's understanding of how the proposals for the camping development plan and byelaws were progressed, particularly in light of their impact on the environment and the community. There is a public interest in ensuring that LLTNPA is accountable and transparent, and in understanding what matters were presented to Board members at Board Briefing Sessions, in this process.
94. The Commissioner has taken account of the terms of regulation 10(2)(b) of the EIRs (applying a presumption in favour of disclosure) and has considered carefully the submissions made by both parties. Having done so, she is satisfied that the public interest in making the majority of the information available is not outweighed by that in maintaining the exception in regulation 10(4)(e): she is not satisfied, however, that the public interest in disclosure is sufficiently strong to outweigh the public interest she has identified in paragraph 92 above.
95. Consequently, the Commissioner finds that LLTNPA was not entitled to withhold the majority of the information to which it applied regulation 10(4)(e) of the EIRs. The information described in paragraph 92 can, however, be withheld under that exception.
96. Where LLTNPA has not applied any further exceptions to the information for which she has not upheld this exception, the Commissioner requires it to make this information available to Mr Kempe.
97. Where LLTNPA has applied the exception in regulation 10(5)(e) of the EIRs, the Commissioner will go on to consider whether this exception applies to any of the remaining withheld information.

Regulation 10(5)(e) – Confidentiality of commercial or industrial information etc.

98. Regulation 10(5)(e) of the EIRs provides that a Scottish public authority may refuse to make environmental information available to the extent that its disclosure would, or would be likely to, prejudice substantially the confidentiality of commercial or industrial information, where such confidentiality is provided for by law to protect a legitimate economic interest.
99. LLTNPA informed the Commissioner that it was relying on this exception for information contained in 10 slides. That includes the information described in paragraph 92 above: as the Commissioner has found this information to have been properly withheld under regulation 10(4)(e) of the EIRs, she need not consider it further here.
100. The Aarhus Convention: an Implementation Guide notes (page 88) that the first test for considering this exception is whether national law expressly protects the confidentiality of the withheld information. The law must explicitly protect the type of information in question as commercial or industrial secrets. Secondly, the confidentiality must protect a "legitimate economic interest": this term is not defined in the Convention, but its meaning is considered further below.
101. Having taken this guidance into consideration, the Commissioner's view is that before regulation 10(5)(e) can be engaged, authorities must consider the following matters:
 - (i) Is the information commercial or industrial in nature?
 - (ii) Is the information publicly available?

- (iii) Does a legally binding duty of confidence exist in relation to the information?
- (iv) Would disclosure of the information cause, or be likely to cause, substantial harm to a legitimate economic interest?

Is the information commercial or industrial in nature?

- 102. LLTNPA explained that the withheld information was commercial in nature as it related to work being undertaken to negotiate with landowners within the National Park, to implement a camping management plan, involving the provision of camping through either managed campsites or the designation of areas of land where visitors purchasing a camping permit would be allowed to camp.
- 103. LLTNPA submitted that early disclosure of public commitment to providing camping facilities at specific locations would disadvantage its negotiations with landowners for these sites. Such disclosure, LLTNPA believed, would enable landowners to effectively negotiate this provision on a basis beneficial to themselves, which would not necessarily represent best value for public funds.
- 104. The Commissioner accepts that the information was created in the context of updating Board members regarding camping development plans, where LLTNPA has an economic interest in planning and delivering such provision. While the slides may contain information not easily regarded as commercial or industrial (inasmuch as it relates to matters relating to camping development), they outline matters under consideration for the provision of camping facilities in identified areas where negotiations with landowners are required to secure best value for public funds.
- 105. The Commissioner is therefore satisfied that, in this context, the slides withheld under regulation 10(5)(e) relate to LLTNPA's proposals for the development of camping provision and that the information is commercial in nature.

Is the information publicly available?

- 106. LLTNPA submitted that the information in the specific slides now being withheld was not publicly available.
- 107. The Commissioner is aware that a large amount of information on the "Your Park" proposals is publicly available, particularly on LLTNPA's website. While the information, as presented in the format of the slides being withheld here, is not in the public domain, some of the information in these slides may be in the public domain, in the sense that they also contain some more general information that is publicly available, such as maps. However, the Commissioner accepts that, generally, the information presented in the slides, in this particular format and context, is not in the public domain.

Does a legally binding duty of confidence exist in relation to the information?

- 108. In the Commissioner's view, confidentiality "provided for by law" will include confidentiality imposed on any person under the common law of confidence, under a contractual obligation or by statute.
- 109. LLTNPA presented the Commissioner with no specific submissions as to why a legally binding duty of confidence existed in relation to the information withheld under regulation 10(5)(e), other than to say there was an implied duty of confidence in relation to the information. As negotiations were currently underway with landowners and estates to secure the sites identified for developing camping facilities, LLTNPA believed early

disclosure of the identity of those involved in negotiations would have a negative impact on a successful outcome, with the result that best value for public money might not be achieved.

110. For a duty of confidence to be owed under the common law, LLTNPA must have received the information in circumstances which imposed an obligation on it to maintain confidentiality.
111. The Commissioner has considered this question carefully. It is quite conceivable that information relating to commercial negotiations for the lease of a campsite will be received by one of the negotiating parties in confidence, given the inherent nature of such negotiations. However, the Commissioner is not satisfied that any of the information withheld by LLTNPA under this exception can be described as having been “received” from anywhere outwith the authority, in confidence or otherwise. LLTNPA has offered nothing to suggest that any of it has been. It has focused, in particular, on which landowners and estates it is in negotiation with: while acknowledging that there may be circumstances in which some commercial sensitivity attaches to such information, details of landownership in Scotland do not generally require to be obtained from confidential sources.
112. In all the circumstances, therefore, the Commissioner cannot accept that the remaining information withheld under regulation 10(5)(e) was received by LLTNPA in circumstances which imposed an obligation on it to maintain confidentiality
113. The Commissioner is therefore not satisfied that a legally binding duty of confidence exists (or ever existed) in relation to this information, so she cannot accept that the exception in regulation 10(5)(e) can apply to it. She need not, in the circumstances, consider the question of harm or the public interest test.

Commissioner's observations

114. The following observations are not part of the Commissioner's findings on compliance with the EIRs, but cover practice issues the Commissioner has identified during this investigation and about which she has concerns.
115. The Commissioner has concerns about LLTNPA's approach to this investigation. While these concerns do not amount to breaches of FOISA or the EIRs, she would ask LLTNPA to reflect on the following practice issues which, she hopes, will be helpful to all Scottish public authorities and requesters.
116. The Commissioner notes, from LLTNPA's submissions, that there appears to be a history of dialogue between Mr Kempe and LLTNPA, where Mr Kempe has asked questions, sought information and raised concerns regarding the “Your Park” project. LLTNPA submitted it had spent a considerable amount of time and staff resources engaging with Mr Kempe in an effort to answer his questions and address the concerns he raised, and had provided him with a considerable amount of information on the project over a protracted period of time.
117. The Commissioner is concerned that, in this case, LLTNPA has been unwilling to disclose to Mr Kempe the information which, during the investigation, it had identified as suitable for disclosure, and similarly unwilling to provide him with details describing where he could access other information which it claimed was now publicly available. This was not good practice.
118. Both FOISA and the EIRs encourage a more open culture across the public sector by conferring on Scottish public authorities a statutory right of access to information they hold. Regulation 5(2)(a) of the EIRs includes the requirement for a Scottish public authority to make environmental information available to an applicant as soon as possible. Where

information is identified, during an investigation, as being suitable for disclosure, this is the point at which the public authority should make that information available. The Commissioner can require the authority to do so, but good practice demands that public authorities continue to meet the spirit of the legislation when engaging with the applicant during an investigation.

Decision

The Commissioner finds that Loch Lomond and The Trossachs National Park Authority (LLTNPA) partially complied with Part 1 of the Freedom of Information (Scotland) Act 2002 (FOISA) / the Environmental Information (Scotland) Regulations 2004 (the EIRs) in responding to the information request made by Mr Kempe.

The Commissioner finds that LLTNPA complied with Part 1 of FOISA by correctly applying section 39(2) of FOISA to the withheld information, and considering it under the EIRs.

The Commissioner also finds that LLTNPA was entitled to withhold some information under regulation 10(4)(e) of the EIRs, and so complied with the EIRs in that respect.

However, the Commissioner also finds that LLTNPA failed to comply with the EIRs by incorrectly withholding information under regulations 6(1)(b), 10(4)(d), 10(4)(e) and 10(5)(e) of the EIRs. In these respects, it failed to comply with regulation 5(1).

The Commissioner therefore requires LLTNPA to provide Mr Kempe with:

- (i) information in the 52 slides LLTNPA incorrectly withheld under regulation 6(1)(b);
- (ii) information in the 25 slides which LLTNPA deemed suitable for disclosure; and
- (iii) information in the 41 slides LLTNPA incorrectly withheld under regulations 10(4)(d), 10(4)(e) and 10(5)(e) of the EIRs.

by **18 November 2016**.

Appeal

Should either Mr Kempe or Loch Lomond and The Trossachs National Park Authority (LLTNPA) 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.

Enforcement

If Loch Lomond and The Trossachs National Park Authority (LLTNPA) fails to comply with this decision, the Commissioner has the right to certify to the Court of Session that LLTNPA has failed to comply. The Court has the right to inquire into the matter and may deal with LLTNPA as if it had committed a contempt of court.

Margaret Keyse
Head of Enforcement

4 October 2016

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 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;
- (b) factors, such as substances, energy, noise, radiation or waste, including radioactive waste, emissions, discharges and other releases into the environment, affecting or likely to affect the elements of the environment referred to in paragraph (a);
- (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
- (b) is subject to regulations 6 to 12.

...

6 Form and format of information

- (1) Where an applicant requests that environmental information be made available in a particular form or format, a Scottish public authority shall comply with that request unless-

...

- (b) the information is already publicly available and easily accessible to the applicant in another form or format.

...

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
 - ...
 - (d) the request relates to material which is still in the course of completion, to unfinished documents or to incomplete data; or
 - (e) the request involves making available internal communications.
 - (5) A Scottish public authority may refuse to make environmental information available to the extent that its disclosure would, or would be likely to, prejudice substantially-
 - ...
 - (e) the confidentiality of commercial or industrial information where such confidentiality is provided for by law to protect a legitimate economic interest;
- ...

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