

# Decision Notice

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**Decision 128/2016: Mr and Mrs Mark Liddiard and Perth and Kinross Council**

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**Planning permission for T in the Park event**

Reference No: 201501737

Decision Date: 17 June 2016



Scottish Information  
Commissioner

## Summary

On 26 June 2015, Mr and Mrs Mark Liddiard (the Liddiards) asked Perth and Kinross Council (the Council) for information relating to planning permission for the *T in the Park* music festival.

The Council disclosed some information in relation to the first part of their request but withheld other information. The Council found other parts of the request to be manifestly unreasonable in terms of regulation 10(4)(b) of the EIRs.

Following a review, the Liddiards remained dissatisfied and applied to the Commissioner for a decision.

The Commissioner found that some information was wrongly withheld and ordered its disclosure. She accepted that the Council had correctly applied the exception in regulation 10(4)(b) of the EIRs to other parts of the request.

## Relevant statutory provisions

The Environmental Information (Scotland) Regulations 2004 (the EIRs) The Environmental Information (Scotland) Regulations 2004 (the EIRs) regulations 2(1) (Interpretation) (definitions (a) and (c) of "environmental information"); 5(1) and (2)(b) (Duty to make environmental information available on request); 10(1), (2), (4)(b), (5)(e) and (g) (Exceptions from duty to make environmental information available on request)

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.

## Abbreviations used in this decision

Abbreviation	Explanation
Aarhus Implementation Guide	The Aarhus Convention: an Implementation Guide
Council	Perth and Kinross Council
DFC	DF Concerts Ltd
EIA	Environmental Impact Assessment
EIRs	Environmental Information (Scotland) Regulations 2004
ES	Environmental Statement
FOISA	Freedom of Information (Scotland) Act 2002
FOISA Fees Regulations	Freedom of Information (Fees for Required Disclosure) (Scotland) Regulations 2004
OMP	Osprey Management Plan
RSPB	Royal Society for the Protection of Birds
SNH	Scottish Natural Heritage
UK EIRs	Environmental Information Regulations 2004

## Background

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1. On 26 June 2015, solicitors acting on behalf of the Liddiards made a request for information to the Council. The Liddiards referred to the decision to grant planning permission to allow the *T in the Park* music festival to be held at Strathallan Castle Estate for three years, and requested:
  1. A copy of the confidential appendix in relation to ospreys which was submitted as part of the Supplemental Environmental Information
  2. Copies of all correspondence between the Council and the (planning permission) Applicant, any statutory consultees or any other person with respect to the pre-commencement conditions and/or information submitted by the Applicant pursuant to these conditions
  3. Copies of all internal correspondence, file notes or documents relating to the discharge of pre-commencement conditions
2. The Council responded on 27 July 2015.
  - (i) In relation to part 1 of the request, the Council withheld the confidential appendix (i.e. the Osprey Management Plan (OMP)) under regulation 10(5)(g) of the EIRs. It believed that it was in the public interest to withhold information which was sensitive and which, if disclosed, would endanger a rare species.
  - (ii) The Council considered that parts 2 and 3 of the request were manifestly unreasonable because of the number of documents involved, and so the information was excepted under regulation 10(4)(b) of the EIRs. The Council also indicated that a large number of documents associated with the planning application could be viewed on its website (a web link was supplied to the Liddiards).
3. On 20 August 2015, the Liddiards wrote to the Council requesting a review of its decision.
  - (i) They suggested that only a small part of the information covered by part 1 of the request might be sensitive as the location of the osprey nest was known at national level.
  - (ii) Given the public interest in understanding how local government had dealt with the *T in the Park* planning application, they also questioned the decision to apply the exception in regulation 10(4)(b) of the EIRs to parts 2 and 3 of their request.
4. The Council notified the Liddiards of the outcome of its review on 21 September 2015.
  - (i) In relation to part 1 of the request, the Council upheld its initial decision that the OMP should be withheld under regulation 10(5)(g) of the EIRs.
  - (ii) In relation to parts 2 and 3 of the request, the Council continued to rely on the exception in regulation 10(4)(b) and indicated that it had actually under-estimated the time it would take to process the information as it had not taken account of the time required to check and redact information in attachments to emails.
5. On 23 September 2015, the Liddiards applied to the Commissioner 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 Liddiards stated

they were dissatisfied with the outcome of the Council's review because they disagreed with the exceptions the Council had applied to their requests.

## **Investigation**

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6. The application was accepted as valid. The Commissioner confirmed that the Liddiards made a request for information to a Scottish public authority and asked the authority to review its response to those requests before applying to her for a decision.
7. On 9 October 2015, the Council was notified in writing that the Liddiards had made a valid application. The Council was asked to send the Commissioner the information withheld from them. The Council provided the information in relation to part 1 and the case was allocated to an investigating officer.
8. Section 49(3)(a) of FOISA requires the Commissioner to give public authorities an opportunity to provide comments on an application. The Council was invited to comment on this application and answer specific questions including justifying its reliance on any provisions of FOISA or the EIRs it considered applicable to the information requested.
9. The Council confirmed that it wished to continue to rely on the exceptions in regulations 10(4)(b) and 10(5)(g) of the EIRs, but also considered that regulation 10(5)(e) applied to confidential commercial information in the OMP. The Liddiards were informed of this and provided their comments.

## **Commissioner's analysis and findings**

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

### **Application of the EIRs**

11. The request made by the Liddiards specifically requested the information in terms of the EIRs, and the Council responded to the requests in terms of the EIRs. The Liddiards have not disputed this.
12. The Commissioner is satisfied that the information requested comprises environmental information as defined in regulation 2(1) of the EIRs. The information falls within paragraph (c) of the definition of environmental information contained in regulation 2(1) of the EIRs, being information on measures and activities affecting or likely to affect the state of those elements of the environment referred to in paragraph (a) of the definition. The Commissioner will consider the information in what follows solely in terms of the EIRs.

### **Regulation 5(1) of the EIRs - duty to make environmental information available**

13. 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 any applicant. This obligation relates to information that is held by the authority when it receives a request.
14. 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)).

## Part 1 of the request

15. The Council applied two exceptions to information covered by part 1 of the Liddiards' request:
  - (i) Regulation 10(5)(g) - protection of the environment
  - (ii) Regulation 10(4)(b) - prejudice to confidentiality of commercial or industrial information
16. The Commissioner will consider each of these in turn.

### Regulation 10(5)(g) - protection of the environment

17. Regulation 10(5)(g) of the EIRs states 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 protection of the environment to which the information relates. The Council applied this exception to the information in the OMP.
18. As with all the exceptions under regulation 10, a Scottish public authority applying this exception must interpret the exception in a restrictive way (regulation 10(2)(a)) and apply a presumption in favour of disclosure (regulation 10(2)(b)). Even where the exception applies, the information must be disclosed unless, in all the circumstances of the case, the public interest in making the information available is outweighed by that in maintaining the exception (regulation 10(1)(b)).
19. The Council submitted that the purpose of the OMP was to present the measures proposed by DF Concerts Ltd (DFC) to reduce the risk of disturbance to breeding ospreys adjacent to Strathallan Estate from the proposed *T in the Park* music festival. As a consequence, the Council considered that the information in the OMP is about the protection of the environment and its disclosure would provide "critical information about the environment it is designed to protect, and the measures to protect them, which is not currently in the general public domain".
20. The Council said that *T in the Park* will return to Strathallan and the plan will provide the basis for the management of the risk to ospreys in future years. Disclosure of the information would seriously jeopardise the organiser's ability to protect the ospreys during future events.
21. The Council considered that all information in the OMP about the actual management of the risk to the ospreys was covered by regulation 10(5)(g), but accepted that other, "more peripheral" information was unlikely to be covered. In practice, however, the Council thought that it was unlikely that any information that could be disclosed would actually inform the requesters about the OMP.
22. The Liddiards explained that ospreys are afforded the highest legal protection as a species by Annex I of the EU Birds Directive and Schedule 1 of the Wildlife & Countryside Act 1981. Amongst other things, it is an offence to disturb such a protected species. They said that it was public knowledge<sup>1</sup> that ospreys were present at Strathallan.
23. The Liddiards were concerned about the requirements for a buffer zone between the ospreys and the festival activities. They stated that, on 20 November 2014, the Royal Society for the Protection of Birds (RSPB) wrote to the Council commenting that a buffer zone of 750m was necessary to mitigate any possible disturbance. The Liddiards explained that Scottish

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<sup>1</sup> <http://www.bbc.co.uk/news/uk-scotland-tayside-central-32264345> and <http://www.bbc.co.uk/news/uk-scotland-tayside-central-32202516>

Natural Heritage (SNH) was aware of the significant risk of disturbance to ospreys. DFC had advised that a buffer zone of 750m would not be deliverable at the location as it would compromise festival operations. The Liddiards said that SNH had then changed its position, and the advice provided by Government agencies was that a buffer zone of 250m would be acceptable. The Liddiards said the change in the buffer zone distance “is very significant, however no explanation has been provided in the public domain substantiating why 250m could be considered acceptable.” They were:

*“...very concerned that the protection that should have been afforded to protect a European protected species was compromised in order to facilitate the festival.”*

24. The Council submitted that although it is generally known that ospreys nest on the Strathallan estate, the information in the OMP is not in the public domain. Whilst images of the tree and the nest are readily available and the specific location is known to members of the local action group, the Council did not consider that the location was readily identifiable to the majority of people, or known to the general public.
25. The Council submitted that as the exact location of the nest is not in the public domain, disclosure of information about the nesting site of a “Schedule 1 species” is highly unlikely to help protect it unless specific, long-term protection measures are implemented as, for example, at Loch of the Lowes and Loch Garten.
26. The Council’s comments about published information on the ospreys were based on a number of internet searches it had carried out in an attempt to identify what information was actually available in the public domain about ospreys at Strathallan.
27. The Liddiards were asked to substantiate their position that there was detailed information about the osprey nests at Strathallan in the public domain. They responded that, in addition to the links to BBC stories (above), they noted the following:
  - (i) They actually notified the Council of the location of nest originally as *T in the Park* were denying that any ospreys nested at Strathallan, and the developers’ original environmental report stated that no protected species were impacted upon by the festival.
  - (ii) As a result of the Liddiards’ involvement and persistence with the Scottish Government around the nesting osprey, the Ministers decided that the decision around the festival required to be subject to the planning process – this again was in all the press and raised public awareness of the fact that ospreys nest at Strathallan.
  - (iii) The developer, DFC, hired a cherry picker, attached balloons and a flag directly under the nest – thereby highlighting its location, which was picked up by the press and very publicly featured in all papers and online.
  - (iv) Numerous people were watching the nest along with journalists photographing the birds in May and June 2015.
  - (v) DFC put a 24-hour guard on the nest – thereby highlighting exactly where the nest could be located.

- (vi) A number of Osprey forums<sup>2</sup> were talking about the nest at Strathallan and the decision to allow *T in the Park* to go ahead without sufficient protection for these birds.
  - (vii) The Woodland Trust started a petition which gained 3,000 signatures regarding the protection of the osprey at Strathallan, and they ran a campaign to all their members and raised the issue on their website.
28. The withheld OMP is, as the Council described, a plan with measures proposed to reduce the risk of disturbance to breeding ospreys adjacent to Strathallan Estate from the proposed *T in the Park* music festival. The risk that the Council identifies in disclosure of these measures is that disclosure would, or would be likely to, prejudice substantially the protection of the environment to which the information relates i.e. the ospreys in question. The Council refers to that risk with respect to future events at the same location.
29. The Liddiards have acknowledged that the OMP may contain “genuinely sensitive” information, but believe this is likely to be only a small part of the document. They said that nest site locations are but one aspect of what is anticipated may be contained within the 'confidential' annex, and as such there is no reason why remaining information cannot be disclosed.
30. Both the Council and the Liddiards acknowledged the protected status of such birds.
31. The Council has not gone into detail about why it believes that harm that would befall the ospreys, if the information in the OMP was disclosed. However, the Commissioner accepts that disclosure of specific locations (or possible locations) of nest sites into the public domain could be used by persons intent on disrupting the species, or result in increased disruption to the birds before or during the festival in future years. Whilst the location of the ospreys may be well known to those familiar with Strathallan or with an interest in the festival or the Strathallan estate, the exact location of the nest does not appear to be in the public domain or obtainable from information in the public domain without the benefit of local knowledge.
32. Consequently, the Commissioner has concluded that the Council has demonstrated that disclosure of *some* of the withheld information (e.g. the exact location of a nest site) would, or would be likely to, prejudice substantially the environment to which the information relates. She will go on to consider the public interest test in regulation 10(1)(b) in relation to this information.
33. In relation to other information in the OMP withheld under regulation 10(5)(g), the Commissioner has concluded that the Council has not provided sufficient evidence for her to accept its arguments. The Council has not succeeded in showing that disclosure of other information in the OMP would have the same prejudicial consequences for the ospreys as disclosure of nest locations. Consequently, the Commissioner has not upheld the application of the exception contained in regulation 10(5)(g) for all information in the OMP.
34. Having found that the exception in regulation 10(5)(g) has not been shown to apply in the circumstances of this case, the Commissioner is not required to consider the public interest test in regulation 10(1)(b) in relation to some of the withheld information.

*Public interest - Regulation 10(5)(g)*

35. In common with all the other exceptions in the EIRs, regulation 10(5)(g) is subject to the public interest test set out in regulation 10(1)(b). Consequently, information can be withheld

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<sup>2</sup> <http://www.rspb.org.uk/community/placestovisit/lochgartenospreys/ft/915/t/133220.aspx?pi2132219858=10>

under the exception only where, in all the circumstances, the public interest in making the information available is outweighed by that in maintaining the exception.

36. The information being considered here is only that to which the exception in regulation 10(5)(g) has been found to apply, i.e. information which would identify the nest location.
37. The Council's arguments on the public interest test are summarised as follows:
  - (i) In favour of making the information available:
    - Disclosure would provide general access to information held by a public authority, and in particular access to environmental information
    - Disclosure would enable public scrutiny of measures designed to protect the environment (while noting that the measures have been scrutinised by two statutory bodies).
  - (ii) In favour of maintaining the exception:
    - The information is of limited interest to the public
    - Disclosure is unlikely to add to a matter of current public debate
    - Disclosure would put at risk the environment the information is meant to protect and there is significant public interest in protecting the environment.
38. Weighing up the public interest arguments, the Council concluded that the public interest in maintaining the exemption outweighed the public interest in making the information available.
39. The Liddiards' application pointed to the public interest in understanding whether statutory agencies (such as the Council) had proceeded correctly and had taken sufficient mitigation measures to protect the ospreys and expressed their concern.
40. The Liddiards submitted that the strategy for protection of the osprey should have been contained within the Environmental Statement (ES) for the project. They submitted that the information about the ospreys should be made available so that the mitigation strategy of the developer and the corresponding permission of the Council can be scrutinised and checked as to whether they comply with EU and national law.
41. The Commissioner has weighed up the public interest arguments both for and against disclosure in this case, as required to do by regulation 10(1)(b) of the EIRs. She considers that the Liddiards have identified a strong public interest in disclosure of the information. She agrees that disclosure would enable assessment of the adequacy of conservation measures, and inform debate on an event which matters deeply to them and many others. Each of these factors carries considerable weight, in terms of the public interest in disclosure. She accepts that disclosure of the specific location information of the nest would enable and inform scrutiny of the conservation and protection measures put in place by DFC.
42. The Commissioner does not accept the Council's public interest argument that the information would be of limited interest. Whether that is true or not, what must be balanced is whether something is *in the* interests of the public, not *of* interest. That said, the other public interest arguments put forward by the Council are strong. The OMP was created to protect the ospreys, a schedule 1 species. The conferring of this protected status carries with it an inherent public interest argument. The Commissioner has accepted that disclosure of the information in the OMP about the nest location would be likely to put the ospreys at



increased risk of disturbance. To disclose the information would be contrary to the public interest that led to the giving of protection aimed at safeguarding against such disturbance.

43. Having considered all the circumstances of the case, the Commissioner is satisfied that the public interest in making information about the nest location available is outweighed by that in maintaining the exception. The Commissioner therefore accepts that the Council was correct to withhold this information under regulation 10(5)(g) of the EIRs.

### **Regulation 10(5)(e) - prejudice to confidentiality of commercial or industrial information**

44. 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. The Council applied this exception to the OMP in its entirety. The Commissioner will consider its application to all information which she has not found to be excepted from disclosure under regulation 10(5)(g) of the EIRs (i.e. all information about details of the ospreys' location).
45. A Scottish public authority applying an exception must interpret it 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)).
46. *The Aarhus Convention: an Implementation Guide*<sup>3</sup>, which offers guidance on the interpretation of the convention from which the EIRs are derived, notes (at 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.
47. 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) Does a legally binding duty of confidence exist in relation to the information?
  - (iii) Is the information publicly available?
  - (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?*

48. The Council submitted that the OMP is about the protection of ospreys at Strathallan and represents a commercial investment by DFC. The Council said it was DFC's stated intention to use this OMP as the basis for the management of ospreys in future, since there is currently planning permission for the *T in the Park* event for a further two years.

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<sup>3</sup> [http://www.unece.org/env/pp/implementation\\_guide.html](http://www.unece.org/env/pp/implementation_guide.html)

49. The Council said it was recognised that DFC have considerable experience and expertise in staging major events and festivals. This has been developed over a considerable period and they are keen to protect their commercial information from potential competitors. The OMP, by its nature, is likely to be unique in the UK since the likelihood of any other major event taking place in the close proximity of an osprey nesting site is exceedingly low. As a consequence, there are unlikely to be any other detailed reference sources for the development of such a plan.
50. The Liddiards commented that DFC was required under law to carry out an Environmental Impact Assessment (EIA) and to publish the corresponding Environmental Statement (in terms of Part 5 of The Town and Country Planning (Environmental Impact Assessment) (Scotland) Regulations 2011<sup>4</sup>). A key component of EIA law is the requirement for public participation in environmental decision-making, which stems from the UN Aarhus Convention, the EU Public Participation Directive, which in turn augmented the public participation requirement of the EU EIA Directive (and corresponding legislation in Scotland).
51. The Liddiards said that other EIA information for the festival had been provided to the planning authority, agencies and the public (information about visual impact, noise impact, etc.), and at no stage was the provision of that information seen as prejudicing the commercial confidentiality of the festival. Rather, its provision was in line with the publicity requirements of EIA law. A developer is required to disclose information about environmental impacts, and the Liddiards did not see why the “confidential” annex should be treated differently.
52. The Liddiards commented that there was no basis for the developer to “hide behind” commercial confidentiality provisions. They submitted that the issue in this case is not about the developer protecting its “legitimate economic interests”, but whether or not a European protected species is being afforded an “acceptable, legally-compliant level of protection from the high levels of noise and disturbance that Scotland's largest outdoor music festival creates, and whether those impacts have been properly quantified and an appropriate mitigation strategy adopted”.
53. The Commissioner accepts that the OMP was created in the context of obtaining planning permission for the *T in the Park* festival. *T in the Park* is a commercial event, and DFC have clear commercial interests in relation to the festival's planning, organisation and delivery. Whilst the OMP may contain information not easily regarded as commercial or industrial (inasmuch as it relates to ospreys) the document was put together as part of the information required in order to obtain planning permission for the festival. Without planning permission, the event could not take place. The OMP outlines measures intended to minimise and manage the risk to the ospreys as a direct consequence of the festival, and not in relation to their existence apart from that event. The Commissioner is therefore satisfied that, in this context, the information in the OMP relates to DFC's proposals for the development and management of the site and that the information is commercial in nature.

*Is the information publicly available?*

54. The Liddiards argued that the location of the ospreys was public knowledge. They said that in other projects grid references of bird nest locations have been blacked out from ornithological annexes available to the public; similar measures may have been suitable here had the location of the osprey nests not been so well publicised. The Liddiards also pointed

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<sup>4</sup> [http://www.legislation.gov.uk/ssi/2011/139/pdfs/ssi\\_20110139\\_en.pdf](http://www.legislation.gov.uk/ssi/2011/139/pdfs/ssi_20110139_en.pdf)

out that nest site locations are just one aspect of the information anticipated to be within the 'confidential' annex, and saw no reason why the remaining information could not be disclosed.

55. After investigation, the Commissioner accepts that the detailed information in the OMP was not publicly available when the Council responded to the Liddiards' request or requirement for review (nor, indeed, is it so available now). Some of the information within the OMP may be in the public domain, in the sense that the OMP includes factual information about the festival or the nesting habits of the species, or has been commented upon in public documents (for example, SNH's letter of 24 April 2015 to the Council). However, the Commissioner accepts that, generally, the information presented in OMP is not in the public domain.

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

56. 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.
57. The Council submitted that the OMP document clearly states that it was provided by DFC in confidence to the Council and SNH as part of the planning conditions. The Liddiards questioned this confidentiality: they said that a developer is required to disclose information about environmental impacts and they did not see why the "confidential" annex should be treated otherwise.
58. For a duty of confidence to be owed under the common law, it is necessary for certain criteria to be met. These are:
- (i) the information must have the necessary quality of confidence about it. It must not be generally accessible to the public already.
  - (ii) the information must have been communicated in circumstances importing an obligation of confidentiality. The obligation may be express (for example, in a contract or other agreement), or implied from the circumstances or the nature of the relationship between the parties; and
  - (iii) there must have been unauthorised use or disclosure of the information to the detriment of the party communicating it. Detriment may be potential rather than actual and need not be financial.

*Necessary quality of confidence*

59. To have the necessary quality of confidence, the information should not be generally accessible. The Commissioner has already considered this above. In this case, the Commissioner notes that the Council is withholding information which has not already been disclosed under the EIRs. Whilst some of the information within the OMP is likely to be in the public domain, the OMP itself is not. The Commissioner accepts that the majority of the information is confidential in that it has not previously been put into the public domain. The remaining information will only have been viewed by a limited number of individuals and was clearly received under circumstances from which it would reasonably have been inferred that it was confidential.
60. The Commissioner is satisfied that when DFC provided the withheld information to the Council, it did so in the expectation that the information would not be disclosed into the public domain.

### *Obligation to maintain confidentiality*

61. The Council must also have received the information in circumstances which imposed an obligation on it to maintain confidentiality.
62. The Commissioner accepts that markings on the OMP document indicate that it should be treated confidentially. The Council has referred to it elsewhere as a confidential document (see, for example, the Council's Development Management Committee (12 May 2015): Report of Handling<sup>5</sup> by Development Quality Manager, where paragraph 331 of that Report states that "A further Osprey Management Plan has been submitted, as part of a confidential annex to the ES Addendum." Similarly, the Council's approval of the OMP (on 22 June 2015) states: "The document has been allocated the reference number 15/00081/50 but will not be available on public access due to the sensitive nature of its contents". The Council viewed the document as one not to be circulated.
63. An email from the Council which has been publicly disclosed<sup>6</sup> indicates that DFC did not wish the updated OMP to be circulated beyond the Council and SNH.
64. The OMP was created as a result of the Council's decision on the planning application (condition 41 of the Council's decision letter of 14 May 2015 for application 15/00081/FLM). However, the Commissioner notes there is nothing in this condition to indicate that the OMP would be received in confidence.
65. In *Decision 033/2009 Mr Paul Drury and East Renfrewshire Council*<sup>7</sup>, the Commissioner did not accept that the existence of a confidentiality agreement will, in itself, mean that all information captured by such a clause should be, or will be, automatically considered confidential. To accept such a proposition would essentially give public authorities the ability to contract out of their obligations under the EIRs, regardless of whether the information in question is actually confidential. The Commissioner has stated a similar view about the use of confidentiality markings on documents. The Commissioner is required to look beyond the confidentiality clause or the expression of confidentiality and to focus on the nature of any withheld information to determine whether the duty of confidence should stand.
66. In this case, the Commissioner accepts that DFC made it clear to the Council that the OMP contained confidential information, and expected it to be treated accordingly. The Council appears to have complied with this, in limiting circulation of the document and referring to it as confidential information. The Commissioner accepts that the information was received under an obligation to maintain confidentiality.

### *Unauthorised disclosure would cause detriment*

67. The third requirement is that that disclosure of the information must be unauthorised by, and cause detriment to, the person who communicated it. Here, detriment need only be potential for the test to be met.
68. In its submissions, the Council outlined the harm which it considered would result from disclosure of the information. This is considered in more detail below. In essence, the Council argued that the information in the OMP was based on expertise developed by DFC

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<sup>5</sup> <http://www.pkc.gov.uk/CHttpHandler.ashx?id=30809&p=0>

<sup>6</sup>

<https://www.whatdotheyknow.com/request/276734/response/696163/attach/2/Information%20Request%20Mackintosh%20Information%20Released%201%20A1704610.pdf>

<sup>7</sup> <http://www.itspublicknowledge.info/ApplicationsandDecisions/Decisions/2009/200800429.aspx>

over a number of years and the information would be of commercial use to competitors of DFC.

69. The Commissioner is not satisfied that the disclosure of the information in this case is potentially capable of causing detriment to DFC or any other third party. The information indicates what is to be done or considered in the planning and running of a festival. It does so in the context of options for action to mitigate the risk to a protected species. Although the OMP necessarily includes details about the organisation of the event, the Commissioner does not accept that the Council has provided evidence or compelling argument to show that disclosure of such detail would cause detriment to DFC. She notes that the Council has argued that the likelihood of any other major event taking place in the close proximity of an osprey nesting site is exceedingly low. The Commissioner therefore finds it unlikely that disclosure of information in the OMP would be commercially useful to any of DFC's competitors, in relation to events taking place in other locations.
70. The Commissioner is therefore not satisfied that a legally binding duty of confidence exists in relation to the information which has the necessary quality of confidence. As a result, the exception in regulation 10(5)(e) cannot apply. However, for completeness, the Commissioner will go on to decide if an implied duty of confidence existed in relation to this document.

*Would disclosure of the information cause, or be likely to cause, substantial harm to a legitimate economic interest?*

71. The term "legitimate economic interest" is not defined in the EIRs. In the Commissioner's view, the interest in question should be financial, commercial or otherwise "economic" in nature. The prejudice to that interest must be substantial: in other words, it must be of real and demonstrable significance.
72. The Council was asked on 16 December 2015 to supply any evidence that DFC would object to disclosure of the information, besides the confidentiality markings on the document. The Council referred to other management plans where DFC had indicated the information was commercially sensitive, but said it was unable to provide any evidence that DFC would object to the disclosure of the OMP other than the confidentiality markings on the document.
73. The Commissioner does not accept that there is sufficient evidence to show that disclosure of the information in the OMP would, or would be likely to, cause substantial harm to DFC's legitimate economic interests. In this respect, the Commissioner finds the Liddiards' arguments are more persuasive.
74. The Commissioner believes the plan is unlikely to be replicated to any great extent in relation to any other site, and would be of limited assistance to commercial competitors. The information withheld under regulation 10(5)(e) does not contain sensitive details of DFC's finance, methods, or technology, but instead contains general details of DFC's work in respect of addressing and mitigating the risk to a species. The Commissioner does not consider that disclosure of this type of operationally specific information would cause the commercial harm that the Council has claimed, nor does she see from the Council's submissions how any competitor of DFC could use this information to gain any real commercial advantage.
75. The Commissioner recognises that there are other persons whose interests are referred to within the OMP, although the Council's submissions do not cover this point. After considering the withheld information, she does not accept that its disclosure (be it technical ornithological

expertise or details of the Strathallan Estate) would affect the commercial interests of such third parties.

76. The Commissioner has taken into account that the request was made before the festival took place and that the sensitivity of some of the information might be increased by the timing of the request. However, even taking this into account, she is not satisfied that disclosure of the withheld information, in response to the Liddiards' request, would, or would have been likely to, cause substantial harm to a legitimate economic interest. In reaching this conclusion, she has not accepted the arguments presented by the Council.
77. The Commissioner is satisfied, therefore, that the Council was not entitled to apply the exception in regulation 10(5)(e) to information in the OMP. Having decided that, she is not required to go on to consider the public interest with respect to regulation 10(5)(e).

## **Parts 2 and 3 of the request**

### **Regulation 10(4)(b) - manifestly unreasonable**

78. The Council considered that parts 2 and 3 of the Liddiards' request were manifestly unreasonable because of the considerable cost, in terms of staff time, which would be incurred in making the information available.
79. At review, Mr and Mrs Liddiard questioned the decision to deem their requests "manifestly unreasonable" given the public interest in understanding the way in which local government dealt with the *T in the Park* planning application. They thought the time quoted was excessive and referred to the public interest in what they described as a nationally important matter. They also thought that only a small amount of genuinely sensitive information would need to be redacted before disclosure.
80. The Council said that parts 2 and 3 of the request were closely related as both referred to correspondence about the pre-commencement conditions (relating to the planning permission). Part 2 specifically referred to external correspondence and part 3 to internal correspondence (and other documentation), but both specifically related to the discharge of the planning conditions.
81. The Council stated that it does not hold internal and external correspondence separately. It explained that many of the email chains covered by parts 2 and 3 of the request contained a mix of internal and external correspondence. As a consequence, the Council did not think it was possible to separate the information relevant to each part of the request without processing the information in its entirety. This processing would have determined which part of the request was relevant, in relation to each item of information, but would also have included the potential application of exceptions and the associated redactions. The Council acknowledged that this was not explained to the Liddiards.
82. The Council argued that, although many of the emails would be duplicated in the email chains, the duplicate information would still need to be "processed" in order to respond to the Liddiards' request. The Council highlighted the "many problems of attempting to separate individual emails and remove duplication whilst maintaining the sense of the correspondence". The Council considered that this would probably take longer than simply processing the duplicates. The Council noted the Liddiards' comments about the likelihood that only a small amount of information would require to be redacted, but suggested that without actually reviewing the information in detail, it was not possible to identify which exceptions would apply or how much information would need redacted.

83. The Council estimated that parts 2 and 3 of the request would cover approximately 740 emails, which would have to be redacted, and this would entail about 62 hours of work (at five minutes per email). The Council's submission of 6 January 2016 clarified that, by 740 emails, it meant "740 email chains". The Council said it would have to redact personal information or information relating to wildlife, but did not indicate the extent of such redaction. In its review, the Council indicated that its estimate of time had been too small as it had not taken account of the time required to process attachments to the emails. The Council had identified 113 attachments and estimated that, allowing three minutes per attachment (the majority are single photographs but others are substantial documents) this would add a further 5.65 hours to the 61.66 hours stated in the original response.
84. The Council said that the time estimates were based on its FOI team's extensive experience in redacting information for disclosure, not on the results of a specific test exercise. It supplied a sample of 15 emails to the Commissioner. The Council commented that the estimated time required to process this information would be almost double that allowed (in terms of the associated cost) if the request were considered under the FOISA Fees Regulations and was equivalent to the average time required for the Council's FOI Team to process 22 requests.
85. There is no definition of "manifestly unreasonable" in the EIRs, or in Directive 2003/4/EC from which they are derived. The Commissioner's view is that "manifestly" implies that a request should be obviously or clearly unreasonable and she notes the opinion of the Information Tribunal in *Dr Kaye Little v Information Commissioner and Welsh Assembly Government* (EA/2010/0072)<sup>8</sup>, which considers the equivalent regulation to 10(4)(b) of the Environmental Information Regulations 2004 (the UK EIRs), and states:
- "From the ordinary meaning of the words "manifestly unreasonable", it is clear that the expression means something more than just "unreasonable". The word "manifestly" imports a quality of obviousness. What is in issue, therefore, is a request that is plainly or clearly unreasonable. It is a more stringent test than simply "unreasonable".*
86. This view was confirmed in the Appeal Court decision *Dransfield & Anor v The Information Commissioner & Anor* [2015] EWCA Civ 454<sup>9</sup> ("Dransfield") which comments:
- "The word "manifestly...means of course the unreasonableness must be clearly shown. This saves the authority from having to make any detailed investigation into matters which it does not know or are not in the public domain."*
87. *The Aarhus Convention Implementation Guide* states that "volume and complexity alone do not make a request manifestly unreasonable". The Commissioner recognises this, but considers that sometimes the time required and the cost incurred in complying with a request for a large volume of information will be the deciding factors in determining whether a request is manifestly unreasonable, as these are relevant considerations in assessing the burdensome effect of the request. In many cases, the cost of complying with a request will represent the amount of staff time required, which may well have an impact on other areas of work.

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[http://www.informationtribunal.gov.uk/DBFiles/Decision/i475/\[2010\]UKFTT\\_EA20100072\\_\(GRC\)\\_20101230.pdf](http://www.informationtribunal.gov.uk/DBFiles/Decision/i475/[2010]UKFTT_EA20100072_(GRC)_20101230.pdf)

<sup>9</sup> <http://www.bailii.org/ew/cases/EWCA/Civ/2015/454.html>

88. Whether a request is manifestly unreasonable will depend on the facts of each case. It may apply where it can be demonstrated that a request is vexatious, or where compliance would incur unreasonable costs for the public authority or an unreasonable diversion of public resources.
89. *Decision 024/2010 Mr N and the Scottish Ministers* established that the Commissioner was likely to take into account the same kinds of considerations in deciding whether a request was manifestly unreasonable under the EIRs as in reaching a decision as to whether a request was vexatious in terms of section 14(1) of FOISA. In *Dransfield*, Lady Justice Arden commented that while “manifestly unreasonable” differs on its face from “vexatious” (section 14(1) of FOISA), the difference between the two phrases is “vanishingly small”, if the approach to section 14 is objective and takes as its starting point the approach that “vexatious” means without any reasonable foundation for thinking that the information sought would be of value to the requester or the public.
90. In this case, the Council’s submissions to the Commissioner focus on the burden of compliance in terms of the effect on the staff who would be required to process the information. The Council also referred to the cost of compliance, in terms of staff time. In *Dransfield*, Lady Justice Arden commented that while there was no provision in the UK EIRs which would prevent an authority from taking the costs of compliance into account, in considering whether the request was manifestly unreasonable, those costs would have to be balanced against the benefits of disclosure in terms of the public interest test (equivalent to the public interest test in regulation 10(1)(b) of the EIRs).
91. The Commissioner considers the following factors to be relevant to a finding that a request (which may be the latest in a series of requests or other related correspondence) is manifestly unreasonable:
- it would impose a significant burden on the public authority
  - it does not have a serious purpose or value
  - it is designed to cause disruption or annoyance to the public authority
  - it has the effect of harassing the public authority
  - it would otherwise, in the opinion of a reasonable person, be considered to be manifestly unreasonable or disproportionate.
92. This is not an exhaustive list, and it is not necessary for all of the above criteria to be met. Other factors may be relevant, depending on the circumstances, taken with some or all of the above or separately. Some arguments may naturally fall under more than one heading. The Commissioner acknowledges the relevance of *The Aarhus Implementation Guide*, to which reference has already been made.
93. The Council has not suggested, and the Commissioner has not found, that the Liddiards’ requests were vexatious in any way: they were made with a serious purpose, and were not designed to cause disruption or annoyance. In deciding whether the requests were “manifestly unreasonable”, the only issue for the Commissioner is whether complying with the requests would have created an unreasonable burden for the Council in terms of the staff time required to process the information. Besides the costs involved, the Council has argued that the burden would be disproportionate, in terms of the effect it would have on the other work responsibilities of these members of staff.



94. The Council has explained what would be involved in providing the information requested by the Liddiards. The Council also provided the Commissioner with a representative sample of the email chains it was referring to in the context of this exception. The Commissioner accepts that the Council's estimate is a reasonable assessment of the time required to process the information.
95. Under the EIRs there is no cost ceiling for requests as there is in FOISA (under FOISA, public authorities do not have to comply with a request if the cost of compliance exceeds £600). However, the Commissioner recognises that there may be cases where any reasonable person would regard as excessive the time and expense involved in complying with a request for environmental information. The Commissioner accepts that this is such a case, given the time required to process the information captured by parts 2 and 3 of the request.
96. The Commissioner is not persuaded by the Council's arguments in relation to removing duplicate emails, but notwithstanding that accepts that parts 2 and 3 of the Liddiards' requests were manifestly unreasonable in terms only of burden. Consequently she finds that the Council correctly applied the exception in regulation 10(4)(b) in this case.

*Public interest test - Regulation 10(4)(b)*

97. In common with all the other exceptions in the EIRs, regulation 10(4)(b) is subject to the public interest test set out in regulation 10(1)(b). Consequently, information can be withheld under the exception only where, in all the circumstances, the public interest in making the information available is outweighed by that in maintaining the exception.

*The Council's submissions*

98. The Council identified the following factors to consider in relation to the public interest test:
- (i) In favour of making the information available
    - Disclosure would provide general access to information held by a public authority
    - Disclosure would provide access to environmental information held by a public authority
    - Disclosure would enable public scrutiny of measures designed to satisfy planning conditions
  - (ii) In favour of maintaining the exception
    - Disclosure is unlikely to add to a matter of current public debate
    - The information is of interest to a limited group
    - The cost associated with disclosing the information to the public is greater than the recognised maximum limit under FOISA
    - The Council has finite resources available for processing requests for information and it important that all requests are treated equitably.
99. The Council argued that this position is supported by the Commissioner's *Decision 126/2015 Royal Society for the Protection of Birds and The Scottish Ministers*<sup>10</sup> which states:

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<sup>10</sup> <http://www.itspublicknowledge.info/uploadedFiles/Decision126-2015.pdf>

“...the Commissioner accepts that it is in the public interest for Scottish public authorities to be able to carry out their functions without unwarranted disruption and diversion of resources”.

100. The Council commented that it was aware that the move of *T in the Park* to Strathallan was of considerable interest to the public and was given much media coverage. The Council was also aware that there was a local action group and that the requesters considered that they were adversely affected by the event. However, the Council considered it unlikely that the amount of interest expressed by the public in *T in the Park* is reflected to any real degree in the public interest in the Council absorbing excessive costs to disclose the requested information. Similarly, the Council considers that “it would be difficult to assess the interests of the local action group and the requesters as forming the substantial public interest in the matter”.
101. On balance, therefore, the Council concluded that the public interest in making the in favour of available was outweighed by the public interest in maintaining the exception in regulation 10(4)(b).
102. In their application to the Commissioner, Mr and Mrs Liddiard pointed to the public interest in understanding the adverse effect that the planning application had had on them. Given the impact of the festival upon the amenity of those in the surrounding area, the national interest in the festival, and also the considerable controversy surrounding the festival (for example Audit Scotland investigation, “the transport fiasco”, and whether or not it was mandatory for DFC to follow planning conditions), they submitted that their request for copy email correspondence relating to the discharge of planning conditions was not manifestly unreasonable. Rather, it was perfectly legitimate and democratic. They pointed out that the *T in the Park* event is of such a scale that it has a dedicated page on the planning and building control section of the Council’s website. For these reasons, the Liddiards considered that the disclosure of information they had asked for was in the public interest.
103. The Liddiards also argued that the information should be disclosed because it was in the public interest to ensure that the ospreys are properly protected and not become a victim of commercial and political pressure.
104. In the Commissioner's view, there is an inherent public interest in disclosure of information which would ensure transparency about the nature and extent of the information that a public authority holds, and which would permit adequate public scrutiny of its actions. In this case, there is a clear public interest in the disclosure of information which would permit scrutiny of the steps and decisions taken by the Council in respect of a planning application for a large event with the potential to affect many individuals as well as a protected species.
105. On the other hand, there is also a strong public interest in a Scottish public authority being able to carry out its statutory functions without unreasonable disruption. The Commissioner has accepted that complying with parts 2 and 3 of the request would create a significant burden for the Council, in terms of the staff time required. She also notes that some information associated with the planning application is available on the Council’s website, both within its planning section and its dedicated pages for *T in the Park*<sup>11</sup> (although the Commissioner is aware that not all of this information may have been available on the Council’s website at the date of the Liddiards’ request).

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<sup>11</sup> <http://www.pkc.gov.uk/titp>

106. The Commissioner considers there is a public interest in protecting the integrity of the EIRs and ensuring that they are used responsibly. While public authorities are encouraged to act in a transparent and accountable way, which benefits the public as a whole, it is not the intention of the legislation to require public authorities to devote excessive or disproportionate amounts of resource to one particular request, at the expense of other areas of work. The Council has a responsibility to respond to other requests it receives, as well as carrying out its other statutory functions, and there is a public interest in ensuring resources are not diverted away from this.
107. While there are strong arguments on both sides, on balance the Commissioner accepts that, in the circumstances of this case, the public interest in disclosure is outweighed by the public interest in preventing the disproportionate levels of disruption to the Council's statutory functions that would result from responding otherwise to the Liddiards' request. The Commissioner therefore concludes that the Council was entitled to withhold the information requested in parts 2 and 3 of the request under the exception in regulation 10(4)(b) of the EIRs.

## Decision

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The Commissioner finds that Perth and Kinross Council (the Council) partially complied with the Environmental Information (Scotland) Regulations 2004 (the EIRs) in responding to the information requests made on behalf of Mr and Mrs Liddiard.

In relation to part 1 of the request, the Commissioner finds that the Council correctly withheld some information under regulation 10(5)(g) of the EIRs, but was wrong to apply this exception to some information. It was also wrong to rely upon the exception in regulation 10(5)(e).

In relation to parts 2 and 3 of the request, the Commissioner accepts that the requests were manifestly unreasonable and that the Council correctly applied the exception in regulation 10(4)(b)

The Commissioner therefore requires the Council to provide the Liddiards with the information which was wrongly withheld by **2 August 2016**.

## **Appeal**

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Should either Mr and Mrs Liddiard or the Council 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**

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If the Council fails to comply with this decision, the Commissioner has the right to certify to the Court of Session that the Council has failed to comply. The Court has the right to inquire into the matter and may deal with the Council as if it had committed a contempt of court.

**Rosemary Agnew**  
**Scottish Information Commissioner**

**17 June 2016**

### The Environmental Information (Scotland) Regulations 2004

#### 2 Interpretation

(1) In these Regulations –

“the Act” means the Freedom of Information (Scotland) Act 2002;

...

“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.

...

#### 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

...

(b) the request for information is manifestly unreasonable;

...

(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;

...

(g) the protection of the environment to which the information relates.

...

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