

# Decision Notice

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**Decision 131/2016: Mr James Wight and North Lanarkshire Council**

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## **Designation of land**

Reference No: 201600137

Decision Date: 23 June 2016



Scottish Information  
Commissioner

## Summary

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On 14 October 2015, Mr James Wight asked North Lanarkshire Council (the Council) for information relating to the designation of land as a Site of Importance for Nature Conservation (SINC).

The Council stated that some of the information sought was covered by legal professional privilege and excepted from disclosure. Following a review, Mr Wight remained dissatisfied and applied to the Commissioner for a decision.

The Commissioner investigated and found that the Council had properly responded to Mr Wight's request for information in accordance with the EIRs.

## Relevant statutory provisions

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

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1. On 14 October 2015, Mr Wight's solicitors made a request for information to the Council on his behalf. The information requested was:
  - (i) All communications relating to advice the Council received and requested, which was referred to in a letter dated 15 May 2015 sent to Mr Wight.
  - (ii) Details of all correspondence and other communications regarding the consultation process which the Council undertook at the point Mr Wight's land was being considered for classification as an SINC.
  - (iii) Full details of all attempts made to contact Mr Wight, and consult with him in relation to the designation.
  - (iv) Copies of the National Guidance and Planning Policy referred to in the letter of 15 May 2015.
2. The Council responded on 12 November 2015, stating that the request was being handled under the terms of the EIRs. In relation to each part of the request, it responded as follows:
  - (i) The information sought in relation to this request constitutes legal advice and was therefore exempt from disclosure under regulations 10(5)(b) and 10(5)(d) of the EIRs.
  - (ii) The information covered by this part of the request is not held by the Council. The land was considered for classification as a SINC in 1999/2000, a timeframe for which the Council no longer held related correspondence. The Council provided links to information which might be of assistance to Mr Wight.

- (iii) The Council did not hold any specific records. It went on to explain its consultation processes.
  - (iv) The Council explained to Mr Wight that the information was available to download from the Scottish Natural Heritage website and provided a link to the information.
3. On 2 December 2015, Mr Wight wrote to the Council requesting a review of its decision in relation to its response to request (i). Other concerns were raised within this correspondence, but these did not relate to the handling of the information request.
  4. The Council notified Mr Wight of the outcome of its review on 6 January 2016. The Council upheld its reliance on regulations 10(5)(b) and 10(5)(d) of the EIRs, but identified further information it considered to fall within the scope of the request which it released to Mr Wight.
  5. On 18 January 2016, Mr Wight 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. Mr Wight stated he was dissatisfied with the outcome of the Council's review, as he did not accept the application of regulations 10(5)(b) and 10(5)(d) to withhold the information requested.

## **Investigation**

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6. The application was accepted as valid. The Commissioner confirmed that Mr Wight 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.
7. On 10 February 2016, the Council was notified in writing that Mr Wight had made a valid application. The Council was asked to send the Commissioner the information withheld from Mr Wight. The Council provided the information 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 the EIRs it considered applicable to the information requested.

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

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9. 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 Mr Wight and the Council. She is satisfied that no matter of relevance has been overlooked.
10. It is clear from the Council's correspondence with Mr Wight and the Commissioner, and from the information itself, that the information sought by Mr Wight is properly considered to be environmental information, as defined in regulation 2(1) of the EIRs. Mr Wight made no comment on the Council's application of the EIRs in this case and the Commissioner will consider the request in what follows solely in terms of the EIRs.

### **Regulation 10(5)(b)**

11. Regulation 10(5)(b) 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 course of justice, the ability of a person to receive a fair trial or the ability of any public authority to conduct an inquiry of a criminal or disciplinary nature. As with all exceptions in regulation 10, it is subject to the public interest test in regulation 10(1)(b).

12. The Commissioner is mindful that regulation 10(2) states that the exceptions in regulation 10(4) and (5) must be interpreted in a restrictive way, with a presumption in favour of disclosure.
13. Although there is no definition within the EIRs of what would constitute substantial prejudice, the standard to be met in applying this test is high. The word "substantial" is important here: the harm caused, or likely to be caused, by disclosure must be of some real and demonstrable significance. The risk of harm must be real or very likely, not simply a remote or hypothetical possibility.
14. The Council confirmed that it considered the information withheld to be exempt on the basis that disclosure would, or would be likely to, prejudice substantially the course of justice. The Council applied this exception on the basis that the information was subject to litigation privilege.
15. The Commissioner notes that, unlike section 36(1) of FOISA, the wording of regulation 10(5)(b) does not explicitly except from disclosure information in relation to which a claim to confidentiality of communications could be maintained in legal proceedings (subject to the public interest). However, in the Commissioner's view, this particular exception will often be applicable to information which is covered by legal professional privilege.

#### *Litigation privilege*

16. The Commissioner recognises that the course of justice requires that parties to litigation (including public authorities) are able to prepare fully for a case. The principle, derived from the adversarial nature of litigation, is that no party can recover material which another party has made in preparing its own case. Disclosure of information covered by litigation privilege will in many cases lead to substantial prejudice relevant to the exception in regulation 10(5)(b).
17. However, the Commissioner would also note that, even where information is subject to litigation privilege, an authority still must be satisfied that disclosure would, or would be likely to, cause substantial prejudice to the relevant interests before applying regulation 10(5)(b). Whether relevant harm is likely to occur will depend on the circumstances of the particular case under consideration; and the likelihood of substantial prejudice may fade over time.
18. Communications *post litem motam* (i.e. those subject to litigation privilege) are granted confidentiality in order to ensure that any person or organisation involved in or contemplating a court action can prepare their case as fully as possible, without the risk that their opponent/s or prospective opponent/s will gain access to the material generated by their preparations. The privilege covers communications at the stage when litigation is pending or in contemplation. Whether a particular document was prepared in contemplation of litigation will be a question of fact. The key question is whether litigation was actually in contemplation at a particular time.
19. For information to be covered by litigation privilege, it must have been created for the "dominant purpose" of obtaining legal advice on the litigation or for lawyers to use in preparing the case. Information created for another purpose before the litigation was anticipated may sometimes still be covered if brought together for the purpose of the

litigation. This may be the case if pre-existing documents are relevant to the case and the lawyer has exercised skill and judgement in selecting and compiling them, particularly if the selection of documents reveals the trend of the advice on the case. However, pre-existing documents will not become privileged just by being passed over to a lawyer.

20. Litigation privilege will apply to documents created by the party to the potential litigation, expert reports prepared on their behalf and legal advice given in relation to the potential litigation: the communication need not involve a lawyer to qualify. The litigation contemplated need never actually happen for the privilege to apply, and it will continue to apply after any litigation has been concluded.
21. The Council explained that Mr Wight's solicitors had written to the Council in March 2015, stating that, should the Council not remove the designation from Mr Wight's land, "this dispute will enter a new phase and is likely to involve significant further legal costs". The Council has continued to uphold its decision in relation to the designation of land as a SINC and Mr Wight's solicitors have continued to correspond with the Council to challenge this position. Consequently, it is the Council's view that it is entitled to assume that litigation is likely.
22. The Council considered that to disclose the advice received from its legal advisers in relation to this matter prior to litigation commencing, but with the expectation that this is likely to ensue, would substantially prejudice its ability to defend its position in that litigation. To require the Council to disclose this to Mr Wight prior to him raising proceedings clearly provides him with an advantage in that it provides him with notice of the Council's position at a much earlier stage than would normally occur in the litigation process. This advance notice, the Council argued, clearly translates to substantial prejudice to the Council.
23. The information cannot be privileged unless it is also confidential. A claim of confidentiality cannot be maintained where, prior to a public authority's consideration of an information request or conduct of review, information has been made public, either in full or in a summary sufficiently detailed to have the effect of disclosing the information. Where confidentiality has been lost in respect of part of or all of the information under consideration, any privilege associated with that information is also effectively lost.
24. The Commissioner has considered the withheld information in light of current circumstances and is satisfied that litigation privilege applies to it. The Commissioner accepts that the circumstances are such that the withheld information was (and remains) subject to litigation privilege. The course of justice requires that parties to litigation (including public authorities) are able to prepare fully for a case. The Commissioner is satisfied that it was reasonable for the Council to conclude that litigation was expected at the time the request was received and accepts that disclosure of this information would, or would be likely to, prejudice substantially the course of justice. She has reached this conclusion bearing in mind the general importance attached by the courts to maintaining confidentiality of communications on administration of justice grounds, and also the specific issues presented by the prospect of litigation in this particular case.
25. Having considered the withheld information in light of the information available in the public domain, the Commissioner is satisfied that privilege has not been waived.

#### *The public interest*

26. Having found that the Council correctly applied the exception in regulation 10(5)(b) to the information withheld, the Commissioner is required to consider the public interest test in

regulation 10(1)(b). 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.

#### *Submissions from Mr Wight*

27. Mr Wight argued that this was not a case where any significant prejudice would appear to arise as a result of disclosure. He argued that if the Council had any doubt whether its actions were lawful then it should disclose this. He argued that even if the Council has acted unlawfully, there is a clear remedy: it could simply remove the classification on the land and then follow correct procedures.
28. Mr Wight argued that there was a clear public interest in showing that the Council acted lawfully during its process of designating the land in question. He argued that if the withheld legal advice shows that the Council acted lawfully, then there is no public interest in withholding this information and the Council has a duty to act transparently.

#### *Submissions from the Council*

29. The Council submitted that there is a strong public interest in maintaining the confidentiality of communications between legal adviser and client and in ensuring that it can receive comprehensive legal advice.
30. The Council stated that this particular instance is not “a highly compelling case” where there is sufficient public interest in disclosing the communications from the Council’s legal adviser into the public domain and that the substantial public interest in a local authority being able to receive full, frank and confidential legal advice on its actions favours withholding the information.

#### *The Commissioner’s consideration*

31. The Commissioner has considered the submissions from both Mr Wight and the Council regarding the public interest arguments in relation to the information that has been withheld.
32. In considering the public interest test, she accepts that there is a general public interest in making information available to the public and that there is also a public interest in transparency and accountability in relation to the Council’s decision making processes. However, these interests must be balanced against any detriment to the public interest as a consequence of disclosure: there is an inherent, and well-established, public interest in maintaining the confidentiality of legally privileged material.
33. The Commissioner acknowledges that there may be occasions on which the significant public interest in withholding legally privileged communications will be outweighed by a compelling public interest in making the information available. However, having considered the public interest arguments advanced on both sides, the Commissioner is not satisfied that, in this case, there is a sufficiently compelling case to allow her to find that the public interest in making the information available outweighs the public interest in maintaining the confidentiality of legally privileged material.
34. In all the circumstances, therefore, the Commissioner concludes that the strong public interest in maintaining the exception outweighs such public interest as exists in making the information available. She is, therefore, satisfied that the Council was entitled to withhold the information requested under regulation 10(5)(b) of the EIRs.
35. As she has concluded that the Council was entitled to rely on regulation 10(5)(b), she is not required to consider the Council’s reliance on regulation 10(5)(d) of the EIRs.

## **Decision**

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The Commissioner finds that North Lanarkshire Council complied with the Environmental Information (Scotland) Regulations 2004 in responding to the information request made by Mr Wight.

## **Appeal**

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Should either Mr Wight or North Lanarkshire 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.

**Margaret Keyse**  
**Head of Enforcement**

**23 June 2016**

### The Environmental Information (Scotland) Regulations 2004

#### 2 Interpretation

(1) ...

"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;

...

(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.

...



(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-

...

(b) the course of justice, the ability of a person to receive a fair trial or the ability of any public authority to conduct an inquiry of a criminal or disciplinary nature;

...

**Scottish Information Commissioner**

Kinburn Castle  
Doubledykes Road  
St Andrews, Fife  
KY16 9DS

t 01334 464610

f 01334 464611

[enquiries@itspublicknowledge.info](mailto:enquiries@itspublicknowledge.info)

**[www.itspublicknowledge.info](http://www.itspublicknowledge.info)**