

# Decision Notice

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## Decision 148/2018: Mr N and the Crofting Commission

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### Information about a croft and surrounding areas

Reference No: 201800530

Decision Date: 3 October 2018



## Summary

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The Crofting Commission was asked for information about a croft and surrounding areas. The Crofting Commission disclosed information in response.

The Commissioner was asked to decide whether the Crofting Commission held more information. After investigation, he was satisfied that the Crofting Commission had carried out appropriate searches and did not hold any other relevant information.

## Relevant statutory provisions

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The Environmental Information (Scotland) Regulations 2004 (the EIRs) regulations 2(1) (paragraphs (a), and (c) of definition of “environmental information”); 5(1) (Duty to make available environmental information 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.

## Background

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1. On 31 May 2017, Mr N made a request for information to the Crofting Commission. The information requested was:
  1. All maps, diagrams and identification information and communications and information relating to, and defining the Common grazing Croft Registration Croft Number C1501, Commission Number 16884, common grazing of Corpach, Banavie, Camaghael & Lochyside in the parish of Kilmallie.
  2. The total area (in Ha or Acres) of Common grazing for the Croft Registration Croft Number C1501, Commission Number 16884, common grazing of Corpach, Banavie, Camaghael & Lochyside in the parish of Kilmallie.
  3. All maps, diagrams and identification information and any other communications and information relating to disputed areas (including who the disputes are between) of the Common grazing Croft Registration Croft Number C1501, Commission Number 16884, common grazing of Corpach, Banavie, Camaghael & Lochyside in the parish of Kilmallie.
  4. The total area (in Ha or Acres) of Common grazing Croft Registration Croft Number C1501, Commission Number 16884, common grazing of Corpach, Banavie, Camaghael & Lochyside in the parish of Kilmallie that is presently in dispute; and confirmation of if this land area is presently included in the total land area for the common grazing or not.
  5. All maps, diagrams and identification information and any other communications and information relating to the legal ownership of land relating to the Common grazing Croft Registration Croft Number C1501, Commission Number 16884, common grazing of Corpach, Banavie, Camaghael & Lochyside in the parish of Kilmallie.

6. All maps, diagrams and identification information and any other communications or information relating to the access points, for exercising my [Mr N's] rights as a tenant crofter, to the land relating to the Common grazing Croft Registration Croft Number C1501, Commission Number 16884, common grazing of Corpach, Banavie, Camaghael & Lochyside in the parish of Kilmallie (including access to all land parcels).
2. Mr N included other requests which are not the subject of this decision as they related to information he believed to be held by the Common Grazings Committee, not the Crofting Commission, and were addressed to that body.
3. On 29 June 2017, the Crofting Commission responded to the requests above and disclosed a range of documents to Mr N.
4. Later that day, Mr N emailed the Crofting Commission requesting a review of its decision. He considered that it was likely to hold more information than had been disclosed. Mr N identified certain information which had not been provided, in relation to some parts of his request.
5. The Crofting Commission notified Mr N of the outcome of its review on 28 July 2017. It disclosed further information to Mr N, identifying the parts of his request to which the information related.
6. On 28 August 2017, Mr N submitted an application to the Commissioner regarding his request for information to the Crofting Commission and Common Grazing Committee. The Commissioner accepted this as a valid application in relation to those parts of the request which related to the Crofting Commission (see paragraph 1 above). After discussion with Mr N, the Commissioner investigated only whether the Crofting Commission held a map falling within part 1 of the request. Mr N withdrew his application after this map was located and provided to him.
7. On 16 March 2018, Mr N contacted the Commissioner to express concerns that he had not received all information covered by his request of 31 May 2017.
8. On 21 March 2018, Mr N 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 N considered that the Crofting Commission had not furnished him with all the information he had requested, and provided examples of the types of information he would have expected to be disclosed.
9. In terms of section 47(4) of FOISA, an application to the Commissioner must be made within six months of receiving an authority's review response, or, if no review response is received, within six months of after the end of the twenty working-day period allowed for such a response.
10. The Commissioner may, however, by virtue of section 47(5) of FOISA, consider an application after the expiry of the six month period if he considers it appropriate to do so. In this case, and after having considered the circumstances surrounding Mr N's application, the Commissioner applied the discretion granted to him under section 47(5) of FOISA and agreed to consider Mr N's application in full.

## Investigation

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11. The application was accepted as valid. The Commissioner confirmed that Mr N made a request for information to a Scottish public authority and asked the authority to review its response to that request before applying to him for a decision.
12. On 18 April 2018, the Crofting Commission was notified in writing that Mr N had made a valid application.
13. On 9 May 2018, Mr N was informed that the Commissioner's investigation would focus on his request dated 31 May 2017 to the Crofting Commission and whether it held further information falling within scope of this request.
14. Section 49(3)(a) of FOISA requires the Commissioner to give public authorities an opportunity to provide comments on an application. The Crofting Commission was invited to comment on this application and answer specific questions. These questions focused on the searches undertaken by the Crofting Commission and the information it held.
15. The Crofting Commission responded on 14 June 2018. It addressed the questions about its searches, and acknowledged that it should have responded to Mr N's request under the EIRs.
16. The Crofting Commission was asked to send the Commissioner the files it held on:
  - Common grazing Croft Registration Croft Number C1501, Commission Number 16884; and
  - Common grazing of Corpach, Banavie, Camaghael & Lochyside in the parish of Kilmallie.
17. On 26 June 2018, the Crofting Commission provided a CD containing this information.
18. On 3 August 2018, the Crofting Commission provided another CD which included copies of the information disclosed to Mr N in response to the request under consideration and other requests he had submitted subsequently to the Crofting Commission.
19. On 7 August 2018, the investigating officer asked Mr N for a discussion of his request, explaining that the Crofting Commission had provided copies of the files it held (as detailed above) and asking what additional information he required. In response, Mr N referred to his requests regarding Common Grazing and the Common Grazing Committee, but did not otherwise discuss his requirements.
20. On 30 August 2018, the Crofting Commission confirmed that it was relying on section 39(2) of FOISA, so that the decision could be considered solely under the EIRs.

## Commissioner's analysis and findings

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

### Application of the EIRs

22. The Commissioner is satisfied that the information covered by this request is environmental information, as defined in regulation 2(1) of the EIRs. Any information covered by the

request would relate to measures affecting or likely to affect the elements of the environment, and therefore falls within paragraphs (a) and (c) of the definition in regulation 2(1) of the EIRs.

23. Mr N has not disputed the Crofting Commission's decision to handle the request under the EIRs and the Commissioner will consider the information in what follows solely in terms of the EIRs.

### **Was all relevant information identified, located and provided by the Crofting Commission?**

24. 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. It is important to bear in mind that this obligation relates to information actually held by an authority when it receives the request, as opposed to information an applicant believes the authority should hold (but which it does not in fact hold).
25. Mr N has explained in detail why he is dissatisfied with the Crofting Commission's response, and why he believes the Crofting Commission should hold further information.
26. The standard of proof to determine whether a Scottish public authority holds information is the civil standard of the balance of probabilities. In determining this, the Commissioner will consider the scope, quality, thoroughness and results of the searches carried out by the public authority. He will also consider, where appropriate, any reason offered by the public authority to explain why the information is not held.

#### *The Crofting Commission's submissions*

##### Types of information held

27. The Crofting Commission explained that it typically holds the following information in relation to common grazings:
- Grazings Regulations
  - Committee Elections/Appointments
  - Copies of Apportionment Orders
  - Copies of Land Court Applications/Orders (i.e. Resumptions)
  - Crofter Forestry Applications
  - Grazings Registration
  - Appointments of Grazings Constables
  - General Enquiries
28. The Crofting Commission was asked to explain whether it held any information on apportionment and resumption (which Mr N had referred to in his application), falling within the scope of Mr N's request.
29. The Crofting Commission explained that:
- Apportionment is a Commission process used when someone who shares in a common grazing wants to take part of the common grazing for their own exclusive use.

- Resumption is a Scottish Land Court process under which a landlord can, with the approval of the Land Court remove land from crofting tenure.

30. The Crofting Commission stated that information on apportionment and resumption were not provided to Mr N as these matters were not seen to fall within the scope of his request.

### Searches

31. The Crofting Commission explained that its database was searched thoroughly for any information which was deemed to be relevant to Mr N's request. The database lists all the grazings in alphabetical order with links to all the stored information relevant to that particular grazing. This information includes all the maps, diagrams and any correspondence between landowners, clerks and other interested parties. The database is continually being added to as and when any new information is obtained in relation to the grazing, and so is considered "live" information.
32. The Crofting Commission explained that any maps or documents considered relevant to the request were viewed, extracted and redacted in line with the EIRs.
33. The Crofting Commission stated that it had worked closely with one of its Grazings Officers, experienced in dealing with the Corpach Grazings, to ensure that it was providing as much information to Mr N as possible.
34. The review of the response to Mr N's request was conducted by a member of the Crofting Commission's GIS Team. The officer reviewed all the original files and checked whether any information had been missed. All the files were then reorganised into sections relating to each of the six requests for clarity, as requested by Mr N. The Commission was unable to provide information relating to one of the requests, as it does not hold information on access points to the specified Common Grazings.
35. The Crofting Commission confirmed that all information falling within the scope of Mr N's request of 31 May 2017 had been provided.

### Further information falling in scope

36. As part of the investigation, the investigating officer provided the Crofting Commission with a selection of documents from the first CD of information which appeared to fall within scope of Mr N's request. The Crofting Commission was asked to explain whether the information had been disclosed to Mr N and, if not, why it had not been disclosed.
37. The Crofting Commission confirmed what information had been provided to Mr N, and submitted that the documents it had been asked to consider did not fall within scope of the request, as they did not relate to the common grazing specified in the request and / or did not relate to the specific information requested by Mr N.

### *The Commissioner's conclusions*

38. The Commissioner can only consider what information is actually held by the Crofting Commission, not what information Mr N might expect it to hold.
39. Mr N has frequently referred to information held about "Common Grazing / Common Grazing Committee". The Commissioner can only investigate and reach a decision as to whether information held by the Crofting Commission in *its own right*. Common Grazings Committees are separate from the Crofting Commission, and information which they hold is not held by the Crofting Commission. (In a separate investigation, the Commissioner concluded that Common Grazing Committees are not public authorities for the purposes of the EIRs.)

40. In his correspondence with the investigating officer, Mr N frequently referred to the fact that apportionment information had not been disclosed. However, Mr N's request of 31 May 2017 did not include a request for information regarding apportionment.
41. Having considered all the relevant submissions and the information requested by Mr N, the Commissioner is satisfied that the Crofting Commission took adequate, proportionate steps to establish whether it held any further information falling within the scope of the request.
42. The Commissioner notes that some information from the first CD of documents he received from the Crofting Commission was provided to Mr N in response to his request of 31 May 2017.
43. The Crofting Commission has consistently confirmed, with supporting arguments and evidence of searches, that it does not hold any further information falling within scope of Mr N's request. Mr N has not offered any detailed explanation of what information he considers to be missing from the responses he has received.
44. Taking all of the above into consideration, the Commissioner is satisfied, on the balance of probabilities, that the Crofting Commission does not hold any more information falling within the scope of Mr N's request than it has already provided.

## Decision

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The Commissioner finds that the Crofting Commission complied with the Environmental Information (Scotland) Regulations 2004 in responding to the information request made by Mr N.

## Appeal

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Should either Mr N or the Crofting Commission 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**

**3 October 2018**

### 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.

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