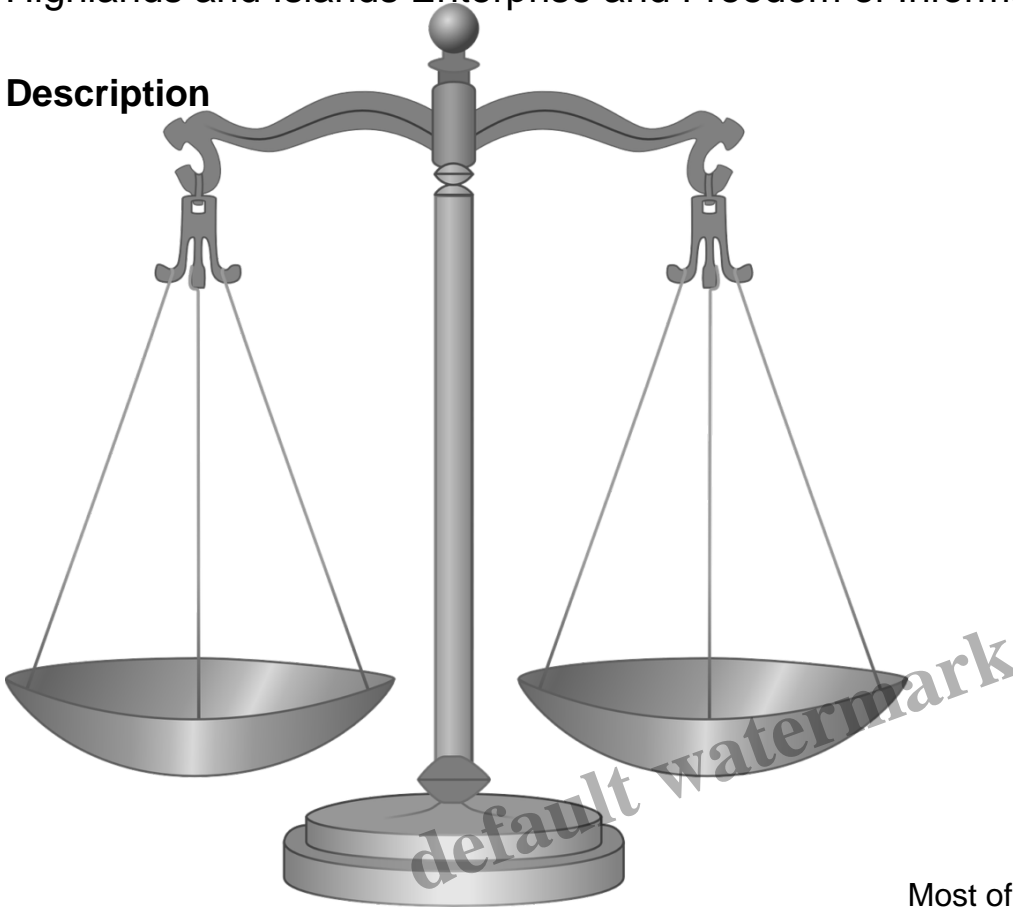


## Highlands and Islands Enterprise and Freedom of Information Legislation

### Description



Most of the Information Requests that

activists have submitted to Highlands and Islands Enterprise about Cairngorm are now being deal with under the Environmental Information [Scotland] Regulations 2014 rather than the Freedom of Information (Scotland) Act, though both pieces of legislation are broadly similar. The EIRs place a duty on public bodies to make environmental information available to the public, on request. Public bodies have up to 20 days to respond to information requests although this may be extended to 40 days if the request is complex and of high volume. An extension to the 20 day deadline must be notified, in advance, to the requester.

On 13 June 2018 the Scottish Information Commissioner was critical of the Scottish Government's handling of Information requests, from journalists in particular. The Commissioner found journalists' requests are treated differently from others, take longer to process and are more likely to be ignored. The Commissioner required the Scottish Government to come up with a draft action plan to reform its approach to Information Requests by September 2018.

How then does the Scottish Government's development agency in the Highlands and Islands, HIE respond to information requests made by the public?

Here are 2 examples to consider.

### CASE 1

1. 10 March 2018, HIE were requested to provide a copy of the 2017 Report concerning lift infrastructure on CairnGorm Mountain as written by ADAC Structures because a number of people were concerned about the obvious lack of maintenance ([see here for example](#)).
2. 6 April 2018, HIE responded confirming that the information that it held for this request was a 'Conditions Report' into foundations of various tows at CairnGorm Mountain dated July 2017. Having considered the request under the EIRs, HIE refused to provide the information under regulation 10(5)(e) as it considered it to be commercially sensitive. HIE deemed the Report to be a working document and claimed disclosure would have a direct impact on the then operator of Cairngorm Mountain Ltd, Natural Retreats, on the basis that actions were still being carried out.
3. 11 April 2018, HIE were requested to review their decision on the basis that the information was not commercially sensitive, unless work recommended in previous years had not been completed.
4. 4 May 2018, HIE provided the result of its review. HIE changed the reason for withholding the information to regulation 10(5)(c), considering the information to be the intellectual property of the report's author. HIE claimed disclosure would cause substantial harm to the legitimate economic interests of both ADAC and CairnGorm Mountain Ltd and the public interest favoured non disclosure.
5. 13 May 2018, in response to HIE, it was pointed out that as the infrastructure was owned by HIE and not CML, disclosure of the report could not affect CML's economic interests, unless it highlighted faults which required closing the infrastructure for repair or removal. While ADAC might hold copyright, the reports were the property of HIE. It was also noted that the corresponding reports for 2015 and 2016 had been publicly disclosed, concluding that the only reason for non-disclosure of the 2017 report was that recommendations in the earlier reports had not been rectified.
6. 13 May 2018, an appeal was submitted to the Information Commissioners office on the basis that the outcome of HIE's review was unsatisfactory because disclosure would not cause any economic problem for either ADAC or CML given that the reports for the two previous years had been disclosed.

The application to the Commissioner was accepted as valid.

The Information Commissioner investigated and found that HIE was not entitled to withhold the information under the exceptions claimed and so had failed to respond to the request for information in accordance with the EIRs. The Commissioner required HIE to disclose the report.

It subsequently became clear that HIE's contention that the 2017 report was '*a working document*' and '*actions were still being carried out*' was demonstrably untrue and that no actions from the 2015, 2016 or 2017 reports had in fact taken place ([see here](#)). For example: in relation to the Ptarmigan T-Bar. "*Base 1, bolts grade 4. Missing washer on one bolt, so this is ineffective, meaning second bolt has twice the stress, this could fail under load. Action required.*"



No action had in fact been taken by the Autumn of 2018.



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remedial work was done in either 2015, 2016 or 2017.

Additionally, HIE's argument that it could not release the report because the intellectual property rights remained with the reports author was thrown out. If that had been the case then it would have meant that every consultant report, commissioned by a public body in Scotland could not be release to the public. That was a ridiculous assertion made by HIE and quite spurious.

It is very clear that HIE were very deliberately trying to hide the evidence. Were they misguidedly trying to cover up for their tenant or trying to cover their own ineffectiveness, or both? Whatever the reason, it's completely unacceptable and a public body should not be behaving in this way.

It might have been expected that HIE would then treat FOI requests more seriously, following their refusal to provide the ADAC Structures 2017 report and having suffered the acute embarrassment of having the Information Commissioner order them to release it.

## **CASE 2**

1. 25 October 2018, an Information Request was submitted asking for a copy of the SE Group report as submitted by the consultants [The SE Group having been commissioned to conduct an uplift review study on CairnGorm]

2. 28 November. HIE had failed to respond within the 20 day deadline. After allowing 4 additional days for them to respond, an email was sent on 28 November asking for the report to be released immediately given that it wasn't a complex request that would require HIE to undertake any research and also informing them that it was known that they'd been in possession of the completed report since September.
3. HIE then failed to respond to that email.
4. 30 November: a further email was sent to HIE to inform them that due to their failure to provide the report within the 20 day deadline and their subsequent failure to respond to the email then it would be considered that they were refusing to release the report and that they were now being formally asked to review their decision.
5. 4 December, HIE replied to the effect that they were not refusing to release the report and that they had not yet made a decision with respect to the request but that they were prioritizing it. That was on the 29<sup>th</sup> day since the original FOI request was made....hardly '*prioritising your request*' HIE stated that they expected to respond by 10 December.
6. 10 December: No response from HIE which precipitated further email to ask why.
7. 11 December: HIE responded '*having considered this further, I can confirm as requested on the 4<sup>th</sup> December, HIE will carry out the review*'.
8. 17 December, an email was received which had the result of HIE's 'review' attached. The CEO, Charlotte Wright, had decided to release the report and the document was now accessible electronically.
9. 18 December, the SE Group Report was release into the public domain by HIE.

The evidence shows that HIE ignored the legal requirement for them to release the report within 20 working days, despite the fact that the final report had been in their possession since September. They then quite deliberately manipulated it's release by failing to respond, by saying that a review wasn't required and then by going back on that and saying that they would conduct a review. It was all designed to waste time so that the report wasn't released until the 37<sup>th</sup> working day after it had been requested which was just 1 day prior to it being publicly released.

## What needs to happen

The Scottish Government are being negligent here by failing to bring HIE under control. When it reaches a stage where a public body is in breach of legislation and also manipulates the timeframes to suit its own warped agenda then the time for action has arrived. Without decisive intervention then it can be expected that HIE will simply be empowered to continue to do as it pleases....to the extent of ignoring its legal obligations. If the Cabinet Secretary with responsibility for HIE, Fergus Ewing MSP, is unable or unwilling to make the changes necessary then it is down to the First Minister to appoint someone who will act in the public interest and sort it out.

## Category

1. Cairngorms

## Tags

1. Freedom of Information
2. Governance
3. HIE

4. Scottish Government

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