

Decision Notice



Decision 046/2010 Fish Legal and Scottish Natural Heritage

Fish farming operations in Loch Ewe

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Summary

Fish Legal asked Scottish Natural Heritage (SNH) to provide certain information about fish farming in Loch Ewe and its environmental impact. SNH provided a large amount of information but withheld information in 10 documents under regulation 10(5)(f) of the Environmental Information (Scotland) Regulations 2004 (the EIRs). Fish Legal did not agree with this decision, which was upheld after review. Fish Legal remained dissatisfied and applied to the Commissioner for a decision.

After investigation, the Commissioner found that some of the information withheld did not fall within the scope of the request submitted by Fish Legal. He accepted that some personal data was exempt from disclosure under regulation 11(2) of the EIRs. In relation to the remaining information, he found that the exception in regulation 10(5)(f) of the EIRs had been wrongly applied to some of the information withheld by SNH, and ordered this information to be disclosed to Fish Legal. The Commissioner found that the remaining information was excepted from disclosure (and properly withheld) under regulation 10(5)(f) of the EIRs.

Relevant statutory provisions and other sources

The Environmental Information (Scotland) Regulations 2004 (the EIRs) regulations 5(1) and 5(2)(b) (Duty to make available environmental information on request); 10(1), 10(2) and 10(5)(f) (Exceptions from duty to make environmental information available); 11(2) and 11(3)(a)(i) and (b) (Personal data)

Data Protection Act 1998 (the DPA) section 1(1) (Basic interpretative provisions) (definition of personal data); Schedules 1 (The data protection principles) (the first principle) and 2 (Conditions relevant for purposes of the first principle: processing of any personal data) (Condition 6)

The full text of each of the statutory provisions cited above is reproduced in the Appendix to this decision. The Appendix forms part of this decision.

Background

1. On 30 April 2009, Fish Legal sent a letter to SNH containing 5 information requests about salmon farming operations in Loch Ewe. In summary, Fish Legal asked for:
 - reports, assessments or research about the environmental impacts of finfish farming operations; the native salmonid population of the Ewe/Maree catchment; and the suitability of Loch Ewe for finfish farming



- correspondence to or from the operators of any finfish farm on Loch Ewe or any third party in respect of the operations of the fish farm in Loch Ewe
 - any advice or consultation response issued by SNH in respect of the fish farm in Loch Ewe.
2. On 27 May 2009, SNH provided Fish Legal with a substantial number of documents. SNH explained that it had withheld minutes of the Area Management Group (AMG) and data about sea lice, because disclosure would jeopardise the mutual trust between members of the AMG and the information was therefore exempt from disclosure under regulation 10(5)(f)(i) and (ii) of the EIRs. SNH advised that sea lice data compiled under the auspices of the AMG was due to be released in Autumn 2009 and thereafter at regular intervals.
 3. On 4 June 2009, Fish Legal asked SNH to review its decision in respect of the withheld information. It commented that the data about sea lice released from fish farm cages into the marine environment related to information on emissions, and therefore regulation 10(6) of the EIRs applied. Regulation 10(6) states that “to the extent that the environmental information to be made available relates to information on emissions, a Scottish public authority shall not be entitled to refuse to make it available under an exception referred to in paragraph 5(d) to (g)”.
 4. On 24 June 2009, SNH wrote to Fish Legal to confirm it had carried out a review of its response, and had concluded that the response should be upheld. SNH advised that the documents withheld related to the overall management of the fish farming enterprise and did not provide detailed information about the levels of environmental emissions. SNH also stated that it had built up a good level of trust with the AMG and felt that the public interest lay in maintaining and developing that partnership, which existed solely for the betterment of the marine environment.
 5. On 9 July 2009, Fish Legal wrote to the Commissioner expressing dissatisfaction with the outcome of the review and applying for a decision in terms of section 47(1) of FOISA. Fish Legal asked the Commissioner to:
 - a) examine the refusal of SNH to provide AMG minutes and data about sea lice in Loch Ewe, and the application of regulation 10(f)(i) and (ii) of the EIRs;
 - b) determine what relevant information was actually held by SNH and was at the time of the request;
 - c) examine SNH’s application of Regulation 10(6) – emissions.
 6. Fish Legal provided detailed arguments and comments on each of the three points raised in its application, and on the public interest in disclosure. Where relevant to the Commissioner’s decision, these are discussed later in this Decision Notice.
 7. The application was validated by establishing that Fish Legal had made a request for information to a Scottish public authority and had applied to the Commissioner for a decision only after asking the authority to review its response to that request.



Investigation

8. On 13 July 2009, SNH was notified in writing that an application had been received from Fish Legal and was asked to provide the Commissioner with any information withheld from Fish Legal. This information was provided on 27 July 2009 and the case was then allocated to an investigating officer.
9. After some correspondence about the way in which the withheld documents related to each other, on 17 August 2009 SNH was invited to comment on the application (as required by section 49(3)(a) of FOISA), and was asked to provide some additional information or explanation on a number of points relating to the case.
10. In particular, SNH was asked:
 - what data the AMG planned to release in the Autumn, whether it duplicated exactly the data withheld, and whether it would include any of the information in the draft minutes which had been withheld
 - why the AMG members regarded as confidential the information disseminated among the group
 - whether SNH accepted that data about the levels of sea lice should be regarded as data about an environmental emission
 - to comment upon the assertion by Fish Legal that, following the introduction of the Aquaculture and Fisheries (Scotland) Act 2007 (the Fisheries Act), the fish farming industry could be compelled to provide the information it had provided voluntarily to the AMG
 - to clarify which elements of the AMG minutes it considered to fall within the scope of Fish Legal's request, and whether any information in these minutes was intended for future publication.
11. SNH replied on 8 September 2009. It confirmed that there was no intention to publish copies of minutes or agendas of the Loch Ewe AMG, but added that information on the operation of the fish farm and the management of the wild fisheries (the main subject of AMG meeting minutes and agendas) was to be included in a report due to be published online. SNH advised that publication was intended to take place on 15 September 2009. (Publication was slightly delayed, but the report is now available online.¹)
12. In relation to the confidentiality of the information withheld, SNH explained that the purpose of the AMG was to negotiate and deliver an Area Management Agreement (AMA) which would restore and maintain healthy stocks of wild salmonids and farmed finfish. An overarching aim of the AMA was to build mutual trust and consensus between local wild fisheries interests and fish farmers, and to encourage an exchange of information between parties. Confidentiality was seen as fundamental to this process and a confidentiality clause had been built into the Ewe AMA.

¹ <http://www.tripartiteworkinggroup.com/article/uploaded/EweAMAReport.pdf>



13. SNH did not consider information about sea lice numbers to be information about an environmental emission. It stated that sea lice were a naturally occurring part of the marine ecosystem and were not emitted, discharged or released. Their numbers would fluctuate, and the AMG and various other research projects had been studying levels of sea lice to assess whether some fluctuations could be attributed directly to fish farming.
14. SNH noted that section 1(1) & (2) of the Aquaculture and Fisheries (Scotland) Act 2007 (the Fisheries Act) provided for Scottish Ministers serving an order on fish farms to provide information in relation to the prevention, control and reduction of parasites. It commented that this legislation was fisheries legislation, rather than conservation legislation, and therefore SNH could not make use of this provision. It noted that the Fisheries Act was silent on the publication of, or public access to, the information on parasites which Scottish Ministers could compel fish farm businesses to provide. SNH advised that the only way it could access the information was through its discretionary membership of AMGs whose members consented to releasing it.
15. SNH advised that it wished to rely upon regulation 10(5)(f) in full, rather than 10(5)(f)(i) and (ii) as previously stated in error, providing arguments as to why it believed the public interest to favour the maintenance of the exception.
16. SNH took the view that all of the withheld information fell within the scope of Fish Legal's request, while being happy for the Commissioner to take a different view if he chose to do so.
17. During the investigation SNH responded to further questions raised by the investigating officer, including questions about the searches it had carried out in order to retrieve all information relating to the request.
18. SNH was also asked whether it wished to consider regulation 11(2) of the EIRs in relation to personal data within the withheld information, and confirmed that it wished to apply this exception to some of the personal data in question.

Commissioner's analysis and findings

19. In coming to a decision on this matter, the Commissioner has considered all of the submissions made to him by both Fish Legal and SNH and is satisfied that no matter of relevance has been overlooked.

Scope of the request

20. In its application to the Commissioner, Fish Legal asked him to investigate what information SNH held in relation to its request. Fish Legal expressed concerns about apparently contradictory statements made by SNH in its initial response and review response in relation to data about sea lice.



21. After examining the information withheld, the Commissioner is satisfied that the information held and considered by SNH at the time of the request and the time of the review response was the same, and that the apparent discrepancy detected by Fish Legal can be traced back to the different interpretations Fish Legal and SNH placed on the word “emissions”.
22. During the investigation, the Commissioner made enquiries about the way in which SNH identified all information covered by Fish Legal’s wide-ranging request. SNH provided details of the searches carried out and explained why the search strategy adopted was relevant in terms of the request. The Commissioner is satisfied that the searches and enquiries carried out were sufficient to successfully identify all information held by SNH which was covered by Fish Legal’s request.
23. SNH withheld information from 10 documents when responding to Fish Legal’s information request. These documents included the draft agenda for one AMG meeting and the draft minutes of two AMG meetings. SNH was asked why it considered the information in these documents to fall within the scope of the request, as summarised above in paragraph 1. SNH replied that the minutes and agenda formed part of the correspondence described in Fish Legal’s request; that is, “correspondence from and to the operators of any finfish farm on Loch Ewe or any third party in respect of the operations of the fish farm in Loch Ewe”.
24. The Commissioner accepts that the draft agenda and minutes circulated to AMG members form part of the “correspondence from and to the operators...”, in that it was open to AMG members to respond with comments on the draft documents.
25. However, the Commissioner finds that some of the contents of the withheld documents are unrelated to the operations of the fish farm in Loch Ewe, and therefore fall outside the scope of Fish Legal’s request. The Commissioner has interpreted broadly the phrase “the operations of the fish farm in Loch Ewe”, and considers that the scope of the request includes information about the effects, or potential effects, of the fish farm on the wider environment, and actions taken to limit or monitor these effects on wild fish stocks.
26. In relation to the information which falls within the scope of the request, the Commissioner will go on to consider whether SNH was correct to withhold information from ten documents under regulation 10(5)(f) of the EIRs.

Application of regulation 10(5)(f)

27. In terms of regulation 10(5)(f) of the EIRs, 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 interests of the person who provided the information where that person (i) was not under, and could not have been under, any legal obligation to supply the information; (ii) did not supply it in circumstances such that it could, apart from [the EIRs], be made available; and (iii) has not consented to its disclosure.



28. Regulation 10(2) of the EIRs provides that this exception must be interpreted in a restrictive way (regulation 10(2)(a)) and that the public authority shall apply a presumption in favour of disclosure (regulation 10(2)(b)). The exception is also subject to the public interest test in regulation 10(1)(b).
29. In his guidance on regulation 10(5)(f)², the Commissioner states that certain points should be addressed in considering whether this exemption applies. These include:
- Was the information provided by a third party?
 - Was the provider, or could the provider be, required by law to provide it?
 - Has the information provider consented to disclosure?
 - Would release of the information cause, or be likely to cause, substantial harm to the interests of the information provider?
 - Is the information otherwise publicly available?

Does regulation 10(5)(f) apply in this case?

30. The Commissioner accepts that all the withheld information was provided to SNH by a third party, the AMG.
31. In its application for a decision from the Commissioner, Fish Legal argued that, following the introduction of the Fisheries Act, the fish farming industry could be compelled to provide the information it had provided voluntarily to the AMG, and regulation 10(5)(f)(i) was therefore not applicable.
32. The Commissioner accepts that the Fisheries Act gives Scottish Ministers the power to compel fish farming businesses to provide certain information about their operations. However, in this case the information in question was provided to SNH by the AMG. The legal obligation created by the Fisheries Act does not apply to the AMG as a body, even though it applies to the fish farming businesses represented among its membership.
33. The Commissioner therefore accepts that the requirement laid down in regulation 10(5)(f)(i) is met, and the exception in regulation 10(5)(f) can be entertained in relation to the information provided to SNH by the AMG. He will go on to consider the other tests in regulation 10(5)(f) before deciding whether SNH was correct to withhold the information under this exception.

² <http://www.itspublicknowledge.info/nmsruntime/saveasdialog.asp?IID=2583&SID=123>



34. Regulation 10(5)(f)(ii) states that the exception can only apply to information which was not supplied in circumstances such that it could, apart from under the EIRs, be made available. The Commissioner notes that since Fish Legal made its information request, the AMG has published certain data about sea lice levels in Loch Ewe, and has recorded its intention to continue to do so in future. SNH has not put forward any explanation why the information now published could not have been made available prior to publication in September 2009. In the absence of any such explanation or arguments, and given the relative proximity of publication to the review carried out by SNH in relation to Fish Legal's request, the Commissioner believes it is fair to conclude that the information in the withheld documents which has now been published could have been made available at the time of the request, and therefore that the test in regulation 10(5)(f)(ii) cannot be met in relation to this information.
35. Having studied the sea lice data and other information published by the Loch Ewe AMG, the Commissioner notes that there is not a complete match between the data published and the data in the withheld documents, which appear to present the data in a more detailed statistical format than the "graphical description" available in the published report. The Commissioner notes too that the withheld documents contain additional information on "operations of the fish farm in Loch Ewe", as specified in Fish Legal's request. The Commissioner finds that any information which is present in the withheld documents but is not duplicated in the AMG's published report should be regarded as information which is not publicly available by other means, and which meets the test in regulation 10(5)(f)(ii).
36. The documents withheld include other information which falls within the scope of Fish Legal's request, but which has not been made publicly available. As indicated in paragraph 25, the Commissioner has interpreted broadly Fish Legal's request for "correspondence... in respect of the operations of the fish farm in Loch Ewe", and considers that it includes information about the control of sea lice, the monitoring of wild fish stock in relation to sea lice presumed to emanate from the fish farm, and other information relating to the effects (or potential effects) of the fish farm on the wider environment.
37. Regulation 10(5)(f)(iii) stipulates that the exception can only apply where the person supplying the information has not consented to its disclosure. It is clear that the AMG members have not consented to the disclosure of the information provided to SNH: some of the members have expressed strong views about the need to treat confidentially any information shared within the group.
38. As the withheld documents contain certain information in respect of which the tests in regulation 10(5)(f)(i), (ii) and (iii) have been satisfied, the Commissioner must go on to consider whether disclosure of this information would prejudice substantially the interests of the person who provided the information (as required for regulation 10(5)(f) to apply).
39. In this case, the information was provided by the AMG, so the interests of the AMG itself (rather than those of its individual members) must be considered in relation to disclosure of the information.



40. The AMG was set up under the Tripartite Working Group (TWG), which was established under the chairmanship of the Scottish Government to address problems common to salmon farming and wild salmon fisheries and to seek solutions for ensuring the maintenance of a healthy stock of wild fish whilst at the same time promoting a sustainable aquaculture industry. Building trust and consensus, and encouraging an exchange of information, among wild fisheries interests and fish farmers is one of the key issues identified by the TWG.³
41. SNH takes the view that disclosure of the information withheld would jeopardise the mutual trust built up among the AMG partners. SNH understands that the confidentiality of information and proceedings is a fundamental part of enabling dialogue to be established between parties which were previously polarised: it believes that without a commitment to confidentiality those parties with interests in fish farming, wild fisheries and conservation could not be persuaded to work together.
42. SNH has commented that all working within the TWG process accept that there is value in working towards a situation where the process is more open and transparent, and that the decision to produce and publish a report is in line with this principle and was brought to a head by the information request submitted by Fish Legal. (The reference is to the report published by the AMG in September 2009, as referenced previously in this Decision Notice.)
43. SNH explained the concern of AMG members that if incomplete information was made available, there would be a high probability of data being misunderstood and misinterpreted. SNH reported that the AMG had sought to avoid this outcome by producing a comprehensive report.
44. The Commissioner is aware that the AMG seeks to build confidence among its members and to encourage collaborative working to the mutual benefit of the health of both farmed and wild fish. The Loch Ewe Area Management Agreement⁴ contains clear statements on the need for members to treat information confidentially, clause 7.1 providing in particular that:
 - All data generated by or submitted to the AMG will remain confidential to the AMG
 - Information will only be submitted to organisations external to the AMG if there is the agreement of all members of the AMG
 - Any breach of confidentiality, which the AMG regards as significant, will result in the individual being required to resign from the AMG or the disbandment of the AMG.
45. The Commissioner accepts that the preservation of mutual trust among the AMG members is an ongoing issue, given evidence of the differing views which the members hold on some issues relating to fish farming and its impact on the wider environment. He acknowledges that if the mutual trust among members was to break down to the extent where the AMG could no longer operate, this would have significant consequences for the collaborative working which has developed under its auspices.

³ Tripartite Working Group website - <http://www.tripartiteworkinggroup.com/content.asp?ArticleCode=2>

⁴ Loch Ewe Area Management Agreement (<http://www.tripartiteworkinggroup.com/article/uploaded/LOCHEWEAMA.doc>)



46. While sympathetic to the circumstances in which the AMG operates, the Commissioner cannot overlook the fact that information held by SNH is information to which access rights are provided under the EIRs. As noted previously, SNH has advised that all working within the TWG process accept that there is value in working towards a situation where the process is more open and transparent. In the Commissioner's view, this process must take into account the existence of FOI legislation and the fact that Scottish public authorities must comply with its requirements.

Regulation 10(5)(f) – Documents 1 and 3

47. The Commissioner questions whether disclosure of the statistical data withheld from Fish Legal is likely to lead to a breakdown of trust among AMG members. He notes that when SNH advised the AMG that it had received Fish Legal's request for information, the AMG decided to issue a published report based on the data circulated to members. Given that the AMG was willing to publish this information, albeit in graphical form, the Commissioner cannot accept that it would be reasonable for the AMG members to regard disclosure of the more detailed statistical version of the data as a significant breach of trust.
48. The Commissioner notes SNH's view that publication of a "comprehensive report" was intended to avoid potential problems caused by misinterpretation of the data. There is no indication that the data presented in documents 1 and 3, which is predominantly statistical in nature, is incomplete. It appears that the inclusion of some commentary in the published report was sufficient to allay any fears of misinterpretation. The Commissioner takes the view that similar commentary could have been provided at the time of the request, had this been thought necessary to avoid potential misinterpretation of the information withheld.
49. Against the background of publication and a commitment to future publication, the Commissioner does not accept that disclosure of the information in documents 1 and 3 would be likely to lead to a breakdown in mutual trust, and consequently of the operating arrangements for the AMG. He therefore does not accept that disclosure of this information would substantially prejudice the interests of the AMG, or that the exception in regulation 10(5)(f) should be upheld in relation to the information in these documents.
50. The Commissioner therefore finds that the information in documents 1 and 3 should be disclosed, subject to the exception in regulation 11(2) in relation to information which is personal data. Regulation 11(2) is considered later in this Decision Notice.

Regulation 10(5)(f) – Documents 4, 6, 7, 9 and 10

51. Documents 6, 7, 9 and 10 are covering emails for (respectively) documents 5, 4, 2 and 3. The information in these documents is of a routine administrative nature, and the Commissioner does not consider that its disclosure would be capable of causing a breakdown in trust among AMG members. He therefore does not accept that disclosure of this information would substantially prejudice the interests of the AMG, or that the exception in regulation 10(5)(f) should be upheld in relation to the information in these documents.



52. Document 4 is the draft agenda for a meeting of the AMG. The agenda lists the main points for discussion without revealing any further information relating to those subjects. The Commissioner does not accept that disclosure of information about the broad topics to be discussed at the AMG meeting would be capable of causing a breakdown in trust among AMG members and so cause substantial prejudice to the interests of the AMG.
53. The Commissioner therefore finds that the information in documents 4, 6, 7, 9 and 10 should be disclosed, subject to the exception in regulation 11(2) in relation to information which is personal data. Regulation 11(2) is considered later in this Decision Notice.

Regulation 10(5)(f) - Document 8

54. Document 8 differs from documents 1 and 3 in containing information which is not predominantly statistical in nature, and which for the most part is not included in the published report. The Commissioner has given careful consideration to the effects that disclosure of this information might have. He takes the view that the information in document 8 would, if disclosed, be capable of causing a breakdown in trust among members of the AMG, to the substantial detriment of its operating arrangements, in that it presents the views and opinions of some of the members in relation to certain aspects of the fish farming operations.
55. The Commissioner accepts that disclosure of the information in document 8 would be likely to prejudice substantially the interests of the AMG, and therefore that the exception in regulation 10(5)(f) applies to this information. The Commissioner will consider the balance of public interest in relation to withholding or disclosing this information later in this decision notice.

Regulation 10(5)(f) – Documents 2 and 5

56. Documents 2 and 5 are draft copies of minutes of AMG meetings. The Commissioner finds that not all the information in these documents is covered by the scope of the request, as described in paragraph 36 above. He will only consider the application of the exception in regulation 10(5)(f) to the information which falls within the scope of the request.
57. In considering whether disclosure of this information would prejudice substantially the interests of the AMG, the Commissioner first examined whether the information, or information which was substantially similar in terms of source and content, was already available in the public domain. He found that some of the withheld information was included in published reports from the AMG, the TWG and the Wester Ross Fisheries Trust,⁵ while in some cases those reports also contained information of a similar nature to parts of the withheld information, such as equivalent data for previous years. The Commissioner did not find it likely that disclosure of such information would lead to the breakdown of trust between AMG members and thus cause substantial detriment to its operating arrangements. The Commissioner therefore finds that the exception in regulation 10(f)(5) could not apply to such information.

⁵ <http://www.tripartiteworkinggroup.com/article/uploaded/EweAMAReport.pdf> (Loch Ewe AMA Report 2008)
<http://www.tripartiteworkinggroup.com/content.asp?ArticleCode=108> (Tripartite Working Group: West Sutherland and Wester Ross sea lice monitoring)
<http://www.wrft.org.uk/files/WRFT%20Review%202009.pdf> (Wester Ross Fisheries Trust Review May 2009)



58. The Commissioner also finds that the Wester Ross Fisheries Trust regularly publishes reports which include data on sea lice monitoring activities in the Ewe area. He has therefore concluded that disclosure of information in the minutes relating to monitoring of wild fish stocks would be unlikely to lead to a breakdown of trust among AMG members, given that it is established practice for some members to publish information about their activities.
59. The Commissioner has gone on to consider the remaining information, which mainly consists of operational information about the fish farm in Loch Ewe. The Commissioner accepts that the fish farm company differs from the other members of the AMG in being a commercial operation, albeit one which operates in an environment subject to some regulation. The Commissioner accepts that the disclosure of information relating to the commercial activities and decisions of the fish farm business may well lead to a breakdown of trust within the AMG and discourage the fish farm company from participating in the group.
60. The Commissioner has therefore accepted that the exception in regulation 10(5)(f) can apply to information in the AMG minutes about the commercial activities and decisions of the fish farm company. The Commissioner will go on to consider the balance of public interest in relation to withholding or disclosing this information.

Regulation 10(5)(f) - the public interest test

61. The exception in regulation 10(5)(f) is subject to the public interest test in regulation 10(1)(b) of the EIRs. A Scottish public authority may only refuse a request to make environmental information available if, in all the circumstances, the public interest in making the information available is outweighed by that in maintaining the exception (that is, by withholding the information).
62. Fish Legal has submitted general arguments relating to the public interest in disclosure of the information withheld by SNH.
63. Fish Legal pointed to the purpose of Directive 2003/4/EC on public access to environmental information, from which the EIRs derive:
“Increased public access to environmental information and the dissemination of such information contributes to a greater awareness of environmental matters, a free exchange of views, more effective participation by the public in environmental decision-making and, eventually, a better environment.”⁶
64. Fish Legal stated: “It is clearly not in the public interest for the information to be withheld, merely because the Scottish Government – and SNH by default – wishes to preserve what an outside observer might consider to be an unduly or overly confidential relationship with the fish-farming sector”.

⁶ <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2003:041:0026:0032:EN:PDF>



65. SNH has argued that the public interest lies in maintaining regulation 10(5)(f) in order to preserve the working practices of the AMG, including the confidential sharing of information. SNH believes that the confidential sharing of information amongst AMG members is a valid way of ensuring that natural heritage issues are sufficiently considered in the operation of the fish farm in Loch Ewe, a view it believes to be shared by the other AMG members. From the fact that the Natural Heritage (Scotland) Act 1991 made provision for SNH to be brought into existence (to secure the conservation and enhancement of the natural heritage of Scotland), SNH infers that there is a public interest in conservation and in preserving structures created to facilitate conservation. In this case the structure is the AMG, and SNH argues that the working practices of the AMG reflect the wish of some of its members that their data should not be disseminated.
66. SNH has emphasised that confidentiality is seen as fundamental to the exchange of information within the AMG, without which some members would be unlikely to share the information.
67. The Commissioner has considered the general public interest arguments presented by both SNH and Fish Legal, and has also considered whether there is a specific public interest in disclosing or withholding the information in documents 2, 5 and 8 to which regulation 10(5)(f) was found to apply. On balance, he has found that the public interest in maintaining the exception in regulation 10(5)(f) outweighs the public interest in disclosure of the information. The Commissioner finds that there is an identifiable public interest in disclosure of the information, in making available information about environmental regulation. However, on this occasion the Commissioner finds this to be outweighed by the public interest in preventing a breakdown of trust among AMG members, which he has accepted would be a likely outcome of disclosure.
68. The Commissioner therefore finds that the information in documents 2, 5 and 8 to which regulation 10(5)(f) has been found to apply was correctly withheld under that exception.
69. The Commissioner would reiterate that, while he acknowledges the difficulties the AMG faces in developing trust between its members, there must be acknowledgement that information held by SNH is covered by the EIRs, and, if requested, must be disclosed in line with those regulations. In this respect the AMG finds itself in the same situation as any other body doing business with Scottish public authorities. If SNH is correct in stating that all working within the TWG process accept that there is value in working towards a situation where the process is more open and transparent, the AMG should be able to find a way to continue its work while accommodating SNH's responsibilities under the EIRs.

Regulation 11(2) – personal data

70. Regulation 11(2) of the EIRs excepts personal data from disclosure if either "the first condition" (set out in regulation 11(3)) or "the second condition" (set out in regulation 11(4)) applies to the information. (See the Appendix for the relevant provisions in full.)



71. In this case the arguments relate to “the first condition” as SNH concluded that disclosure of the identified information would breach the first data protection principle (as set out in Schedule 1 to the DPA), and on this basis claimed the exception under regulation 11(2) of the EIRs.
72. SNH has withheld certain specified information under regulation 11(2), comprising personal phone numbers and email addresses of some of the AMG members. SNH noted that the individuals concerned had not given their consent for the processing (in this case, by disclosure) of this personal data, and SNH could not identify any legitimate interest that Fish Legal might have in receiving this information.
73. The Commissioner is satisfied that, in each instance, the information has been correctly identified as personal data in terms of the DPA, in being information which relates to living individuals and would permit their identification.
74. Fish Legal was asked whether it was content for this information to be withheld. Fish Legal advised that it was content for email addresses and phone numbers to be withheld, provided it was still possible to identify the organisation which the individual represented.
75. The Commissioner finds that in most instances it is possible to identify the organisation represented by the individual without disclosure of personal phone numbers or complete email addresses (i.e. by redacting the personal element of the email address, after which the Commissioner accepts that the remaining part of the email address would no longer be personal data). Given the views expressed by Fish Legal (see previous paragraph), this (personal) information can therefore be withheld without further consideration.
76. However, there are a couple of instances where the withheld personal data does not indicate which organisation is represented by the individual, the email address listed being clearly personal rather than professional. In such cases, the Commissioner does not find that disclosure of the email address would serve to show which organisation is represented by the named individual. (He notes that it is possible to identify the organisations represented by the named individuals through other information in the public domain.)
77. The first data protection principle states that the processing of personal data (here, processing being the disclosure of the data in response to a request made under the EIRs) must be fair and lawful and, in particular, that personal data shall not be processed unless at least one of the conditions in Schedule 2 to the DPA is met. In the case of sensitive personal data, a condition in Schedule 3 to the DPA would also require to be met: here, the Commissioner is satisfied (having considered the relevant definition in section 2 of the DPA) that none of the personal data under consideration are sensitive personal data. The Commissioner takes the view that only condition 6 in Schedule 2 could potentially be applicable in this instance. Condition 6 allows personal data to be processed if the processing is necessary for the purposes of legitimate interests pursued by the data controller or the third party or parties to whom the data are disclosed, except where the processing is unwarranted in any particular case by reason of prejudice to the rights and freedoms or legitimate interests of the data subject.



78. The first question the Commissioner must consider, therefore, is whether the applicant (Fish Legal) has a legitimate interest in obtaining the withheld personal data. In this case, taking account of the arguments presented by Fish Legal in favour of disclosing the withheld information, the Commissioner can identify no legitimate interest which Fish Legal might have in personal email addresses which do not serve to show the organisation represented by the named individual. As the Commissioner has not found Fish Legal to have a legitimate interest in the personal data in question, he finds that condition 6 cannot be met, and therefore disclosure would breach the first data protection principle. He therefore finds that the information was properly withheld under regulation 11(2) of the EIRs.

Conclusion

79. The Commissioner therefore requires SNH to provide Fish Legal with the information in documents 1, 3, 6, 7, 9 and 10, after redacting the personal phone numbers, any purely personal email addresses, and the personal element of the business email addresses which have been withheld under regulation 11(2). He also requires SNH to provide Fish Legal with the information in document 4, and with certain information in documents 2 and 5 (marked up copies will be provided to SNH to show which information is accepted to be exempt from disclosure and which should be released).

DECISION

The Commissioner finds that SNH partially complied with the Environmental Information (Scotland) Regulations 2004 (the EIRs) in responding to the information request made by Fish Legal.

The Commissioner finds that SNH was entitled to withhold certain information from Fish Legal in terms of regulations 10(5)(f) and 11(2) of the EIRs.

However, the Commissioner finds that SNH failed to comply with the EIRs (and in particular regulation 5(1)) by wrongly withholding certain information under regulation 10(5)(f) and 11(2). The Commissioner requires SNH to provide this information (as specified in paragraph 79 above) to Fish Legal by 29 April 2010.



Appeal

Should either Fish Legal or Scottish Natural Heritage wish to appeal against this decision, there is an 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 notice.

Kevin Dunion
Scottish Information Commissioner
15 March 2010



Appendix

Relevant statutory provisions

Environmental Information (Scotland) Regulations 2004

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-
...
(f) the interests of the person who provided the information where that person-



- (i) was not under, and could not have been put under, any legal obligation to supply the information;
- (ii) did not supply it in circumstances such that it could, apart from these Regulations, be made available; and
- (iii) has not consented to its disclosure; or

...

11 Personal data

...

- (2) To the extent that environmental information requested includes personal data of which the applicant is not the data subject and in relation to which either the first or second condition set out in paragraphs (3) and (4) is satisfied, a Scottish public authority shall not make the personal data available.
- (3) The first condition is-
 - (a) in a case where the information falls within paragraphs (a) to (d) of the definition of "data" in section 1(1) of the Data Protection Act 1998^[6] that making the information available otherwise than under these Regulations would contravene-
 - (i) any of the data protection principles; or
 - ...
 - (b) in any other case, that making the information available otherwise than under these Regulations would contravene any of the data protection principles if the exemptions in section 33A(1) of the Data Protection Act 1998 (which relate to manual data held by public authorities) were disregarded.

Data Protection Act 1998

1 Basic interpretative provisions

- (1) In this Act, unless the context otherwise requires –

...

“personal data” means data which relate to a living individual who can be identified –

- (a) from those data, or



- (b) from those data and other information which is in the possession of, or is likely to come into the possession of, the data controller,

and includes any expression of opinion about the individual and any indication of the intentions of the data controller or any other person in respect of the individual;

...

Schedule 1 – The data protection principles

Part I – The principles

1. Personal data shall be processed fairly and lawfully and, in particular, shall not be processed unless –
 - (a) at least one of the conditions in Schedule 2 is met, and
 - (b) in the case of sensitive personal data, at least one of the conditions in Schedule 3 is also met.

...

Schedule 2 – Conditions relevant for purposes of the first principle: processing of any personal data

...

6. (1) The processing is necessary for the purposes of legitimate interests pursued by the data controller or by the third party or parties to whom the data are disclosed, except where the processing is unwarranted in any particular case by reason of prejudice to the rights and freedoms or legitimate interests of the data subject.

...