



Scottish Information
Commissioner

**Decision 182/2006 Mr Bruce Sandison and the
Fisheries Research Services**

*Request for information relating to the escape of salmon from an
Orkney fish farm*

**Applicant: Mr Bruce Sandison
Authority: Fisheries Research Services
Case No: 200601180
Decision Date: 9 October 2006**

**Kevin Dunion
Scottish Information Commissioner**

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Decision 182/2006 Mr Sandison and the Fisheries Research Services

Request for information relating to the escape of salmon at an Orkney fish farm. Two aspects of request dealt with under the Environmental Information (Scotland) Regulations 2004. Name of fish farm withheld under section 26(a) (Prohibitions on disclosure) of the Freedom of Information (Scotland) Act 2002

Relevant Statutory Provisions and other Sources

The Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) (General entitlement); section 26(a) (Prohibitions on disclosure).

The Environmental Information (Scotland) Regulations 2004 (EIRs) regulation 2(1) (Interpretations) and regulations 5(1) and 5(3) (Duty to make available environmental information on request).

Disease of Fish Act 1983 sections 7(1), 7(3) and 9.

The Registration of Fish Farming and Shellfish Farming Businesses Order 1985 (as amended by the Registration of Fish Farming and Shellfish Farming Businesses Amendment (Scotland) Order 2002) article 4A.

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

Facts

Mr Sandison requested from the Fisheries Research Services (FRS), an agency of the Scottish Executive, the number of farm salmon which escaped from a fish farm in Orkney (as reported on Radio Orkney on 1 June 2006); he also requested the name of the farm from which they had escaped and details as to how the escape happened.

FRS supplied Mr Sandison with information on the number of salmon which escaped, details as to how the escape happened and the location of the fish farm from which they had escaped.

FRS dealt with Mr Sandison's request under both the EIRs and FOISA.



FRS withheld the name of the fish farm on the grounds that this information was exempt by virtue of section 26(a) (Prohibitions on disclosure) of FOISA.

Mr Sandison was dissatisfied with this response and requested a review of the decision made by FRS.

The original decision to withhold the name of the fish farm under section 26(a) of FOISA was upheld by FRS after a review had been carried out.

After investigation, the Commissioner found that FRS had fully complied with the requirements of the EIRs in supplying Mr Sandison with the number of fish that had escaped and details as to how the escaped happened.

However, the Commissioner found that FRS was incorrect in its application of section 26(a) of FOISA in withholding the name of the fish farm. The Commissioner decided that the name of the fish farm should have been considered as environmental information and, thus, the EIRs should have been applied.

In accordance with the EIRs the Commissioner requires FRS to provide the site name for the fish farm in question.

Background

1. On 1 June 2006, Mr Sandison requested by email from FRS, the number of salmon that escaped from a fish farm in the last few days in May (as reported by Radio Orkney on 1 June 2006); the name of the fish farm from which they had escaped and details as to how the escape happened.
2. FRS responded to Mr Sandison's request on 8 June 2006, stating that it had dealt with his request under both FOISA and EIRs. FRS supplied Mr Sandison with the number of salmon that had escaped from the fish farm, details of how the salmon escaped and the general location of the farm from which they had escaped.
3. FRS withheld the name of the fish farm on the basis that it was exempt under section 26(a) of FOISA.
4. Mr Sandison was dissatisfied with this response and requested, on 10 June 2006, that FRS review its decision.



5. FRS responded to Mr Sandison's request for review on 20 June 2006. It concluded that the original decision to withhold the name of the fish farm under the exemption contained in section 26(a) was appropriate. It also supplied Mr Sandison with revised figures for the number of salmon that had escaped. (This revised figure had not been available at the time of Mr Sandison's original request.)
6. On 12 July 2006, Mr Sandison applied to my Office for a decision. He indicated that he believed that the name of the fish farm should be released and that such escapes should be subject to public scrutiny.
7. This case was then allocated to an investigating officer and Mr Sandison's appeal was validated by establishing that he had made a valid request to a Scottish public authority, and had appealed to me only after asking the authority to review its response to his request.

The Investigation

8. A letter was sent to the FRS on 12 July 2006, giving notice that an appeal had been received and that an investigation into the matter had begun. FRS was invited to comment on matters raised by Mr Sandison in terms of section 49(3)(a) of FOISA (which covers applications made to me under both the EIRs and FOISA) and on the application as a whole. FRS was also asked to provide:
 - An explanation as to why parts of this request were dealt with under FOISA as opposed to the EIRs;
 - A full explanation of the application of section 26(a) of FOISA.
9. FRS replied to my Office on 4 August 2006, enclosing its statements on the case.

The Commissioner's Analysis and Findings

10. The investigation into this case focussed on whether it was correct to handle the information withheld under the terms of FOISA as opposed to EIRs.



11. If the information sought by an applicant is within the definition of “environmental information” the request should be processed in accordance with the EIRs, regardless of whether the applicant refers directly to the EIRs in the request.
12. ‘Environmental information’ is defined in regulation 2(1) of the EIRs. A full copy of this definition is contained within the Appendix of this decision.
13. FRS states that, despite Mr Sandison specifically citing FOISA in his request, it concluded that most of what he was seeking was “environmental information”. Accordingly, its response explained that it had dealt with his request under both FOISA and the EIRs.
14. FRS explains that, although this was not made clear in the letter, it was only the part of the request relating to the name of the farm which was dealt with under FOISA. This was because, in the context of the other information being provided, FRS did not consider the name of the farm to be environmental information.
15. I am satisfied that details of the number of salmon that escaped from the fish farm, details of how the escape happened and details of the location of the farm falls within the scope of the EIRs. Therefore, FRS was correct in its application of the EIRs in respect of these elements of Mr Sandison’s request.
16. As stated above, FRS did not regard Mr Sandison’s request for the name of the fish farm as a request for “environmental information”. FRS therefore dealt with this aspect of Mr Sandison’s request under FOISA.
17. FRS considered the name of the fish farm to be exempt by virtue of section 26(a) of FOISA.
18. Section 26(a) of FOISA provides that information is exempt information if its disclosure by a Scottish public authority (otherwise than under FOISA) is prohibited by or under an enactment. The exemption contained in section 26(a) applies to Acts of the Scottish Parliament and Acts of the UK Parliament and to both primary and secondary legislation.
19. FRS submits that, under section 9 of the Diseases of Fish Act 1983 (the 1983 Act), details collected under the 1983 Act can be disclosed only “with the written consent of the person by whom the information was provided” and that any person who discloses any such information in contravention of section 9 “shall be guilty of an offence and liable on summary conviction to a fine...”.



20. The sections of the 1983 Act referred to by FRS are contained within the Appendix of this case. It should be noted that the UK Department of Constitutional Affairs (DCA) has recognised that section 9 of the 1983 Act is a statutory prohibition to disclosure under the Freedom of Information Act 2000, as it is to disclosure under FOISA. The DCA has indicated that it intends to repeal this section. However, this has not yet happened, and so the prohibition remains in effect.
21. FRS has indicated that, prior to responding to the original request, FRS contacted the company in question and asked whether they were willing to let FRS divulge the name of the farm, but the company refused.
22. Having considered the legislation in question, I am satisfied that if section 9 applied in this case it would not afford the public authority any discretion to decide whether to withhold the information. Accordingly, the information would be exempt from release under section 26(a) of FOISA.
23. However, I am of the view that all the information requested (including the name of the farm) was environmental information and that the release of the name of the farm should therefore have been considered under the EIRs and not under FOISA. This is very important in this case. Although section 26(a) of FOISA exempts information from release if the release is prohibited by or under an enactment, there is no such exception in the EIRs. Indeed, regulation 5(3) of the EIRs specifically states that “any enactment or rule of law which would prevent the making available of information in accordance with these Regulations shall not apply.”
24. When an escape of fish from a fish farm occurs, the fish farmer is obliged under the Registration of Fish Farming and Shellfish Farming Businesses Order 1985 (as amended by the Registration of Fish Farming and Shellfish Farming Businesses (Amendment) (Scotland) Order 2002) to notify the Scottish Ministers. In so doing the farmer must supply the site name, the company name, and the exact location where the incident took place. Details of the fish species, number of fish lost etc must also be supplied.
25. The information sought by the applicant was clearly to do with an incident affecting or likely to affect elements of the environment, and which brought about a changed interaction between elements of the environment. The component parts of the request need to be considered within this context. The applicant was trying to establish what was the extent of the impact on the environment; where it occurred and why it had happened. In that respect the name of the farm, which is the site or location of the incident which caused the impact on the environment, is an integral part of the environmental information.



26. I am pleased to note that, in compliance with its duty to provide advice and assistance the FRS provided Mr Sandison with a general location of the fish farm from which the salmon escaped, despite the assumed application of the prohibition in the 1983 Act. However, for the reason set out above, I am of the view that the prohibition under the 1983 Act does not apply in this case as the information requested is environmental information. The FRS should therefore provide the site name for the fish farm in question, in compliance with the EIRs.

Decision

I find that the Fisheries Research Services (FRS) acted in accordance with Environmental Information (Scotland) Regulations 2004 when responding to Mr Sandison's request for the number of salmon that escaped and details as to how the escaped happened.

I find that FRS failed to comply with the Environmental Information (Scotland) Regulations 2004 (the EIRs) in applying the exemption contained in section 26(a) of the Freedom of Information (Scotland) Act 2002 to the name of the fish farm from which the salmon escaped.

In accordance with the EIRs, I require the FRS to provide the site name for the fish farm in question to Mr Sandison. This information must be provided to Mr Sandison within 45 days of receipt of this decision notice.

Appeal

Should either the FRS or Mr Sandison wish to appeal against my 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 of receipt of this notice.

Kevin Dunion
Scottish Information Commissioner
9 October 2006



APPENDIX

Relevant Statutory Provisions

Freedom of Information (Scotland) Act 2002

1 General entitlement

- (1) A person who requests information from a Scottish public authority which holds it is entitled to be given it by the authority.

26 Prohibitions on disclosure

Information is exempt information if its disclosure by a Scottish public authority (otherwise than under this Act)-

- (a) is prohibited by or under an enactment
- (b) ...
- (c) ...

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;
 - (b) factors, such as substances, energy, noise, radiation or waste, including radioactive waste, emissions, discharges and other releases into the environment, affecting or likely to affect the elements of the environment referred to in paragraph (a);
 - (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;



- (d) reports on the implementation of environmental legislation;
- (e) costs benefit and other economic analyses and assumptions used within the framework of the measures and activities referred to in paragraph (c); and
- (f) the state of human health and safety, including the contamination of the food chain, where relevant, conditions of human life, cultural sites and built structures inasmuch as they are or may be affected by the state of the elements of the environment referred to in paragraph (a) or, through those elements, by any of the matters referred to in paragraphs (b) and (c)

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) ...
- (3) Any enactment or rule of law which would prevent the making available of information in accordance with these Regulations shall not apply.

Diseases of Fish Act 1983

7 Power to require information

- (1) If it appears to the Minister necessary to do so for the purpose of obtaining information with a view to preventing the spread of disease among fish, he may make an order under this section.
- (2) ...
- (3) An order under this section may require any person who owns or possesses any cage, pontoon or other structure which is anchored or moored in marine waters and is used by him for the purposes of a business of fish farming carried on by him (whether or not for profit)-
 - (a) to register the business in a register kept for the purpose by the Minister,
 - (b) to furnish in writing to the Minister such information as may be specified in the order in relation to any such cage, pontoon or other structure and to fish, eggs of fish and foodstuff for fish,
 - (c) to compile such records as may be so specified in relation to the matters mentioned in paragraph (b) above, and



- (d) to retain for such period (not exceeding 3 years) as may be so specified any records compiled in accordance with paragraph (c) above.

9 Disclosure of information

- (1) Information (including information in records) obtained by any person in pursuance of section 7 above or an order under that section shall not be disclosed except-
 - (a) with the written consent of the person by whom the information was provided, or
 - (b) in the form of a summary of similar information obtained from a number of persons, where the summary is so framed as not to enable particulars relating to any one person or business to be ascertained from it, or
 - (c) for the purpose of any criminal proceedings or for the purpose of a report of any such proceedings.
- (2) Any person who discloses any information in contravention of subsection (1) above shall be guilty of an offence and liable on summary conviction to a fine not exceeding level 4 on the standard scale.
- (3) ...

The Registration of Fish Farming and Shellfish Farming Businesses Order 1985 (as amended by the Registration of Fish Farming and Shellfish Farming Businesses Amendment (Scotland) Order 2002)

4A Escapes from fish farms

- (1) A person who carries on a business of fish farming that is required by article 3 to be registered shall notify the Scottish Ministers forthwith of –
 - (a) the circumstances on, or in the vicinity of, the fish farm which caused, or are believed by that person to have caused, an escape of fish;
 - (b) any circumstances on, or in the vicinity of, the fish farm which gave rise to a significant risk of an escape of fish.
- (2) The notification required by paragraph (1) of this article shall be referred to in this Order as an initial notification and shall be in or as near as may be to the form, and shall contain the information, specified in Schedule 4 to this Order.

