

Decision Notice 008/2021

Use and operation of Environmental Management Plans

Applicant: The Applicant

Public authority: Argyll District Salmon Fishery Board

Case Ref: 202100061



Scottish Information
Commissioner

Summary

The Board was asked for information, covering the last three years, relating to the use and operation of Environmental Management Plans (EMPs) in relation to managing interactions with wild fish as a result of the operation of marine cage fish farms.

The Board provided some information, initially withheld some information it believed to be internal communications, then withheld it under alternative exceptions, and informed the Applicant it did not hold the remainder of the information it had requested.

The Commissioner investigated and found that the Board had breached the EIRs in responding to the request as it was not entitled to withhold information under the exception relating to commercial confidentiality. The Commissioner required the Board to disclose the withheld information falling within part (ii) of the request.

Relevant statutory provisions

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

1. On 25 November 2020, the Applicant made a request for information to Argyll District Salmon Fishery Board (the Board). The information requested was for the last three years:
 - (i) Copies of all existing Environmental Management Plans (EMPs) in the Board’s area
 - (ii) Copies of minutes of Board meetings held with relevant fish farmers under or in relation to existing or proposed EMPs
 - (iii) Copies of all requests for action (or similar) made to fish farmers pursuant to those EMPs by the Board or by any other party to the EMPs
 - (iv) Any assessments of whether those requests had been adhered to by the fish farmers concerned
 - (v) Any assessment of the effect of any actions taken by the fish farmers in response to a request for action (or similar)
 - (vi) Copies of any reports (such as end of production cycle reports) as might be required by the EMPs.

The Applicant asked that all relevant email correspondence, letters, notes of phone messages, records of web conferences or similar were included.

2. The Board responded to the Applicant on 3 December 2020 in relation to each of its six points, as follows:

- (i) A copy of an existing EMP was provided.
 - (ii) In terms of regulation 10(4)(a) of the EIRs, it gave notice that it held no minutes relating to the signed EMP provided at (i). Some information relating to proposed EMPs was withheld under regulation 10(4)(e) of the EIRs (internal communications).
 - (iii)–(iv) In terms of regulation 10(4)(a) of the EIRs, it gave notice that no information was held.
3. On 8 December 2021, the Applicant wrote to the Board, requesting a review of its decision in response to point (ii) of the request only, on the basis that it did not agree with the application of regulation 10(4)(e) and that, in any case, the public interest favoured disclosure. It also noted that the exception had been applied to “some of the information”, and so requested the information to which it did not apply.
 4. The Board notified the Applicant of the outcome of its review on 15 December 2020. The Board accepted that regulation 10(4)(e) could not be applied to the information requested at point (ii), i.e. minutes of meetings held with relevant fish farmers, but submitted that the exceptions in regulation 10(4)(d) and 10(5)(e) did apply.
 5. On 13 January 2021, the Applicant wrote to the Commissioner, applying 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. The Applicant stated it was dissatisfied with the outcome of the Board’s review because it did not agree with the application of regulations 10(4)(d) and 10(5)(e) of the EIRs.

Investigation

6. The application was accepted as valid. The Commissioner confirmed that the Applicant 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.
7. On 19 February 2021, the Board was notified in writing that the Applicant had made a valid application. The Board was asked to send the Commissioner the information withheld from the Applicant. The Board 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 Board was invited to comment on this application and to answer specific questions. These related to its searches and its reasons for applying regulation 10(4)(d) and 10(5)(e) to the withheld information.

Commissioner’s analysis and findings

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 him by both the Applicant and the Board. He is satisfied that no matter of relevance has been overlooked.

Handling in terms of the EIRs

10. Having considered the terms of the request, it is clear that any information falling within the scope would be environmental information, as defined in regulation 2(1) of the EIRs. The

information in question concerns the development of Environmental Management Plans in relation to the operation of fish farms and their impact on the wild salmonid population. The Commissioner is satisfied that this would fall within paragraphs (a), (b) and (c) of the definition. The Applicant has not challenged the Board'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 5(1) and 2(b) of the EIRs – Duty to make available environmental information on request

11. 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. This obligation relates to information that is held by the authority when it receives the request.
12. On receipt of a request for environmental information, therefore, the authority must ascertain what information it holds falling within the scope of the request. Having done so, regulation 5(1) requires the authority to provide that information to the requester, unless a qualification in regulation 6 to 12 applies (regulation 5(2)(b)).
13. Under the EIRs, a public authority may refuse to make environmental information available if one or more of the exceptions in regulation 10 applies.

Searches – information falling within point two of the request

14. The standard of proof to determine whether a Scottish public authority holds information is the civil standard of the balance of probabilities. In determining where the balance of probabilities lies, the Commissioner considers the scope, quality, thoroughness and results of the searches carried out by the public authority. He also considers, where appropriate, any reasons offered by the public authority to explain why it does not hold information. While it may be relevant as part of this exercise to explore expectations about what information the authority should hold, ultimately the Commissioner's role is to determine what relevant recorded information is (or was, at the time of the request was received) actually held by the public authority.
15. The Board was asked to describe the searches it carried out to determine what information was held falling within point (ii) of the Applicant's request. It explained that the work of the Board in respect of aquaculture was done principally by two volunteers, who were able to identify the limited number of documents falling within the scope of the request readily.
16. Having considered the submissions provided, the Commissioner accepts that, on the balance of probabilities, the Board identified the information it held and which fell within point (ii) of the Applicant's request.

Withheld information falling within the scope of point two of the request

17. The Board identified 10 documents to the Commissioner as falling within the scope of point (ii) of the Applicant's request.
18. The Commissioner, having considered both the request and the withheld information, does not agree that all of the withheld information falls within the scope of the request. The Commissioner's view on the withheld information is as follows:

Documents one and two – out of scope

Document three – in scope

Document four and five – only paragraphs two and three in scope

Document six and seven – only paragraphs three and four in scope

Document eight – in scope

Document nine – in scope

Document ten – in scope

Regulation 10(4)(d) of the EIRs – Material still in the course of completion, unfinished documents or incomplete data

19. The Board withheld information under this exception in response to the Applicant's requirement for review. In its submissions to the Commissioner, it clarified that documents one and two only were being withheld under this exception.
20. Given that the Commissioner has determined that documents one and two do not fall within the scope of point (ii) of the Applicant's request, he need not consider the use of this exception any further in this case.

Regulation 10(5)(e) of the EIRs – Confidentiality of commercial or industrial information

21. Regulation 10(5)(e) 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 confidentiality of commercial or industrial information where such confidentiality is provided for by law to protect a legitimate economic interest.
22. *The Aarhus Convention: An Implementation Guide*¹, which offers guidance on the interpretation of the Convention from which the EIRs derived, notes (at page 88) that the first test for considering this exception is whether national law expressly protects the confidentiality of the withheld information. The law must explicitly protect the type of information in question as commercial or industrial secrets. Secondly, the confidentiality must protect a "legitimate economic interest": this term is not defined in the Convention, but its meaning is further considered below.
23. Having taken this guidance into consideration, the Commissioner's view is that, before regulation 10(5)(e) can be engaged, authorities must consider the following matters:
 - (i) Is the information publicly available?
 - (ii) Is the information industrial or commercial in nature?
 - (iii) Does a legally binding duty of confidence exist in relation to the information – express or implied?
 - (iv) Would disclosure of the information cause, or be likely to cause, substantial harm to a legitimate economic interest?

Submissions from the Applicant

24. In its submissions, the Applicant acknowledged that the Board might refuse to provide information by virtue of regulation 10(5)(e) if its disclosure would, or would be likely to, cause substantial prejudice to the confidentiality of commercial or industrial information, where such confidentiality was provided for by law to protect a legitimate economic interest, but pointed

¹ [The Aarhus Convention: An Implementation Guide \(second edition\) | UNECE](#)

out that the Board provided no explanation as to how the substantial prejudice would occur to the fish farm companies involved if the information were disclosed.

25. The Applicant also noted that the Board relied on the issue of “trust and confidence” between the parties to support its decision to apply regulation 10(5)(e), but the Applicant believed this should only be considered after the authority had decided if regulation 10(5)(e) had been properly applied in the first place. The Applicant’s view was that “trust and confidence” should more correctly be taken into account in balancing the competing public interests, rather than in deciding whether regulation 10(5)(e) was engaged.

Submissions from the Board

26. In its submissions (provided on its behalf by Fisheries Management Scotland (FMS)²), the Board noted that the information was to be found principally in the draft EMP, which in turn comprise plans of action a fish farm might take in relation to evidence of transmission of lice from the fish farm to the local wild salmon populations. It viewed this information as commercial in nature as actions taken under the EMPs were material to both the functioning of the fish farms and the local wild fisheries.
27. The Board explained that, under a typical EMP planning condition, the fish farmer is obliged to enter into consultation with the local Board in order to draft the EMP.
28. The Board considered the material discussed in these consultations was not trivial, nor was it in the public domain. It also submitted that the information was shared in circumstances where it was expected by both parties (fish farmer and Board) that confidence would be kept for the duration of the consultation period. The Board described how the confidential nature of the discussions would be made explicit, for example, either verbally or by having password protected documents.
29. The Board believed the legitimate economic interest was the health of local wild salmonids, which in turn supported the local wild salmonid fisheries. It believed confidential negotiations would result in the strongest possible EMP being agreed, as they provided circumstances in which concessions from fish farmers could be negotiated and agreed. In the Board’s view, in the current regulatory framework, EMPs provided the best means of protecting wild fish, and that confidentiality provides the essential circumstance in which concessions by the farmer could be negotiated and agreed.
30. The Board noted a historic low level of trust between fish farmers and the Boards, and considered it in its best interests to build on the trust established to gain the maximum benefit to wild fisheries.
31. The Board submitted that disclosure would allow the intervention of parties with a different agenda, which would potentially make it harder for Boards to negotiate the best possible EMP.

The Commissioner’s view

Is the information publicly available?

32. The Commissioner accepts the Board’s position that the withheld information is not publicly available.

² [About – Fisheries Management Scotland \(fms.scot\)](https://www.fms.scot.nhs.uk/)

Is the information commercial or industrial in nature?

33. The withheld information comprises discussions relating to activities that affect the fish farmer and the local wild salmonid fisheries, both of which are commercial enterprises. In the circumstances, the Commissioner accepts that the withheld information is commercial in nature.

Does a legally binding duty of confidence exist in relation to the information?

34. In the Commissioner's view, confidentiality "provided by law" will include confidentiality imposed on any person under the common law of confidence, under a contractual obligation or by statute.
35. Although the Board explained why it considered discussions such as those contained within the withheld information should be kept confidential, and how this was done in practice, it did not provide evidence that there was an expectation of confidentiality "provided by law".
36. The Commissioner has considered the withheld information, as well as the submissions received, and finds nothing therein that evidences an explicit obligation of confidence. Neither is there sufficient evidence to support the assertion of an implied obligation of confidence. The two documents within the withheld information that were password protected, in the view of the Commissioner, do not fall within the scope of the request that forms the basis of this appeal.

Would disclosure of the information cause, or be likely to cause substantial harm to a legitimate economic interest

37. The term "legitimate interest" is not defined in the EIRs. In the Commissioner's view, the interest in question should be financial, commercial or otherwise economic in nature. The prejudice to that interest must be substantial; in other words, it must be real and of demonstrable significance.
38. As indicated above, the Board considers confidentiality to be an essential condition in order to gain concessions from the fish farmer, and ultimately, the best possible EMP. However, it has provided the Commissioner with no evidence to support this position. It has explained to the Commissioner that, where an EMP is a planning condition for granting planning consent, it will typically require the EMP to have been submitted and approved in writing by the Planning Authority before farming operations can commence.
39. The Commissioner accepts the Board's position, that the best possible EMP will benefit the legitimate economic interest of the local wild fisheries, but he has not been provided with sufficient evidence to show that disclosure of the withheld information will (or will be likely to) result in the substantial harm necessary for this exception to be engaged. The fish farmer, if required to do so as part of their planning consent, must engage with the local district salmon fishery board to agree an EMP. The Board has not demonstrated that, if it is not satisfied with the proposed EMP, it must accept a less than adequate EMP, resulting in the envisaged harm.
40. Taking account of the withheld information and the submissions provided by the Board, the Commissioner is unable to accept that disclosure would, or would be likely to, cause the substantial harm required by regulation 10(5)(e) of the EIRs. Consequently, he cannot accept that the Board can justify the application of regulation 10(5)(e) to the withheld information.

41. Given that the Commissioner has found that the exception in regulation 10(5)(e) was incorrectly applied to the information withheld by the Board, the Commissioner is not obliged to, and has not gone on to, consider the public interest test required by regulation 10(1)(b) of the EIRs.
42. The Commissioner finds that, by not making the information available, the Board failed to comply with regulation 5(1) of the EIRs. He requires the Board to disclose the information that falls within the scope of part (ii) of the request to the Applicant (redacting any personal data).

Regulation 10(6) of the EIRs – information on emissions

43. Regulation 10(6) of the EIRs states that a Scottish public authority is not entitled to refuse to make information available under a number of exceptions (including that in regulation 10(5)(e)) to the extent that it relates to information on emissions.
44. In its application, the Applicant submitted that the withheld information did relate to emissions, and so it did not consider that regulation 10(5)(e) could be engaged by the Board.
45. As the Commissioner has determined that the Board incorrectly applied regulation 10(5)(e), he does not have to consider whether regulation 10(6) could apply in this case.

Decision

The Commissioner finds that Argyll District Salmon Fishery Board (the Board) failed to comply with the Environmental Information (Scotland) Regulations 2004 (the EIRs) in responding to the information request made by the Applicant.

He finds that the Board was not entitled to withhold the information falling within the scope of point (ii) of the request under regulation 10(5)(e) of the EIRs and so the Board failed to comply with regulation 5(1) of the EIRs.

The Commissioner therefore requires the Board to provide the Applicant with the withheld information falling within the scope of point (ii) of the request (redacting any personal data), by **7 March 2022**.

Appeal

Should either the Applicant or the Board 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.

Enforcement

If the Board fails to comply with this decision, the Commissioner has the right to certify to the Court of Session that the Board has failed to comply. The Court has the right to inquire into the matter and may deal with the Board as if it had committed a contempt of court.

Margaret Keyse
Head of Enforcement

19 January 2022

Appendix 1: Relevant statutory provisions

The Environmental Information (Scotland) Regulations 2004

2 Interpretation

(1) In these Regulations –

...

"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;
- (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;

...

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-

...

(e) the confidentiality of commercial or industrial information where such confidentiality is provided for by law to protect a legitimate economic interest;

...

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