

Decision Notice 208/2021

Details of use and operation of Environmental Management Plans

Applicant: The Applicant

Public authority: Lochaber District Salmon Fishery Board

Case Ref: 202100052



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 and, after initially purporting to withhold other information under exceptions in the EIRs (regulations 10(4)(d) and 10(4)(e)), stated that no further information was held.

The Commissioner investigated and found that the Board had breached the EIRs in responding to the request as, after maintaining that no further information was held, information was disclosed during the investigation.

Relevant statutory provisions

The Environmental Information (Scotland) Regulations 2004 (the EIRs) regulations 2(1) (paragraphs (a), (b) and (c) of definition of “environmental information”) and (2)(a) (definition of “information held”) (Interpretation); 5(1) and 2(b) (Duty to make available environmental information on request); 10 (1), (2), (4)(a), (4)(d) and (4)(e) (Exceptions from duty to make environmental information available); 13(e) (Refusal to make 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 Lochaber 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 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 on 26 November 2020. With regard to existing EMPs, one completed EMP was provided and the Applicant was informed that no information was held in relation to points (ii) – (vi) of its request. With regard to proposed EMPs, the Board sought to apply the exceptions in regulation 10(4)(d) (material in the course of completion, unfinished documents

or incomplete data) and 10(4)(e) (internal communications). The Board highlighted its limited budget and staffing (one part-time clerk) and informed the Applicant that further requests would be charged at a rate of £300 per day. No information on the right to request a review was provided.

3. On 8 December 2020, the Applicant wrote to the Board, requesting a review of its decision on the basis that:
 - (i) the exceptions it had sought to apply were subject to the public interest test but this had not been applied;
 - (ii) it was not clear to the Applicant which part of the requested information (points (ii) – (vi)) was being withheld under which exception;
 - (iii) the Applicant did not agree that regulation 10(4)(d) and (e) had been correctly engaged
4. The Board notified the Applicant of the outcome of its review on 20 December 2020, upholding its original decision in all respects and emphasising there was no further information to provide. It informed the Applicant of its right to appeal to the Commissioner if it remained dissatisfied, but provided no indication of the timescale in which this appeal must be made or contact details for the Commissioner.
5. On 11 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 Board's general compliance with the EIRs in its response and review outcome; the outcome of the Board's review because no public interest argument was provided, no explanation on the application of either exception was given, and no completion date was given for material withheld under regulation 10(4)(d), as required by regulation 13(d) 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 11 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.
8. In response, on 15 February 2021, the Board provided further information to the Applicant (and the Commissioner), reiterating that it held no information in addition to this and noting that any discussions would have taken place before the Commissioner's *Decision 097/2021 Lochaber District Salmon Fishery Board*¹ that determined the Board was a Scottish public authority for the purposes of the EIRs.
9. On receipt of this further, previously unmentioned, information and accompanying statement from the Board, on 1 March 2021 the Applicant raised further dissatisfaction with the

¹ [Decision 097/2020 \(itspublicknowledge.info\)](https://itspublicknowledge.info)

Commissioner, including an apparent contradiction between the application of exceptions at an earlier stage and the later position that no information was held.

10. The case was allocated to an investigating officer.
11. 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 the handling of the request and obligations under the EIRs, searches carried out, the regulations sought to be applied and the information to which these were being applied.

Commissioner's analysis and findings

12. 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

13. 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 EMPs in relation to the operation of fish farms and their impact on the wild salmon 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 so the Commissioner will consider the request in what follows solely in terms of the EIRs.

General handling of request

14. As noted above, the Board did not inform the Applicant of its right to seek a review when responding to its request. Neither did it inform the Applicant in its review outcome of the timescale in which the Applicant had to apply to the Commissioner, nor provide the Commissioner's contact details as required by regulation 13(e) of the EIRs.
15. In its reply, when asked for the withheld information, the Board indicated its impression that only information it held from the date of the Commissioner's *Decision 097/2021 Lochaber District Salmon Fishery Board*¹ (finding that it was a Scottish public authority) would fall within the scope of this request.
16. The Board also emphasised several times in its correspondence, both with the Applicant and the investigating officer, its relatively small size and the resource at its disposal, and the consequent difficulty this posed in responding to requests under the EIRs.
17. Whilst the Commissioner does have some sympathy for smaller organisations having to manage their responsibilities under the EIRs, he must also highlight that the EIRs can apply to any body that falls within the statutory definition of a Scottish public authority, whatever its size, and will apply to any environmental information that body holds, regardless of age. The Board (and the Commissioner would emphasise that ultimate responsibility rests there, not with the Clerk) should ensure that any staff member it expects to respond to requests under the EIRs has had sufficient training to allow them to fully understand how to do this. The Commissioner recommends the learning resources which are available on both his

website² and that of the Scottish Government (specifically, the Ministers' Code of Practice on the discharge of functions by Scottish public authorities under FOISA and the EIRs)³.

Regulation 5(1) – Duty to make environmental information available

18. 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 an Applicant. This obligation relates to information held by the authority when it receives the request.
19. It is important to bear in mind that this obligation relates to information actually held by the authority when it receives the request, as opposed to information an applicant believes the authority should hold.
20. 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 make that information available, unless a qualification in regulations 6 to 12 applies (regulation 5(2)(b)).

Regulation 10(4)(a) – Information not held

21. Regulation 10(4)(a) of the EIRs states that a Scottish public authority may refuse to make environmental information available to the extent that it does not hold that information when the request is received.
22. The standard of proof to determine whether a Scottish public authority holds the information is the civil standard on 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 the information. While it may be relevant as part of this exercise to explore the 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.

Submissions from the Board

23. The Board in its submissions sought to answer all of the questions posed by the investigating officer. As mentioned above, these related to the exceptions it had sought to apply in its response. It was assisted in this by its representative body, Fisheries Management Scotland (FMS).
24. The Board stated that it had provided the Applicant with all of the information it held and there was nothing more falling within the scope of the request.
25. However, the Board then sought to answer specific questions relating to the exception at 10(4)(d), citing a further exception and referring to arguments provided by FMS.
26. After further questions from the investigating officer, the Board confirmed its position that no further information was held and no other exceptions were being claimed. It described the searches it had carried out. By way of explanation as to why it held no further information, it highlighted, quite strongly, that it was a skeleton operation without the resources to conduct regular meetings with fish farm companies. It also commented that, before the

² [Briefings and guidance \(itspublicknowledge.info\)](https://itspublicknowledge.info)

³ [FOI/EIR: section 60 code of practice - gov.scot \(www.gov.scot\)](https://www.gov.scot/foi/eir/section-60-code-of-practice)

Commissioner found that the Board was a Scottish public authority, it had no reason to believe it would be asked for historical information.

Submissions by the Applicant

27. The Applicant's submissions focused on the exceptions initially relied upon by the Board in its response to withhold information falling within the scope of the request.
28. It highlighted the apparent contradiction in the Board's responses between applying exceptions to withhold information, then subsequently determining that there was no further information – but then being provided with additional information by the Board.

Commissioner's view

29. Having considered all the relevant submissions, it is apparent that the Board wrongly applied regulation 10(4)(a) in stating that it held no further information falling within the scope of the request, when subsequently additional information was provided to the Applicant.
30. The Commissioner is satisfied that, by the end of the investigation, the Applicant had been provided with all of the information held and falling within the scope of the request, and so does not require the Board to take any further action in relation to this breach.
31. As he has determined that no further information is held, and in the absence of any clear reasons why the information disclosed during the investigation should have been withheld earlier, the Commissioner must also find that the Board incorrectly applied the exceptions in regulations 10(4)(d) and 10(4)(e) in its initial response to the request, as confirmed in its review outcome. In all these respects, it failed to comply with regulation 5(1) of the EIRs.
32. The Commissioner would comment that the way the request was handled by the Board led to confusion as to its position, particularly as to what information it actually held at the time the request was received.
33. The Commissioner would further emphasise that, in future, the Board, despite its size, must find a way of meeting its statutory obligations under the EIRs.

Decision

The Commissioner finds that Lochaber 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.

The Commissioner finds that the Board was not entitled to rely on regulation 10(4)(a) of the EIRs and inform the Applicant that it held no further recorded information falling within the scope of the request. Neither was it entitled to rely on the exceptions in regulations 10(4)(d) and 10(4)(e) to withhold any information subsequently disclosed to the Applicant. In all of these respects, the Board failed to comply with regulation 5(1) of the EIRs.

Given that all of the information falling within the scope of the request was provided to the Applicant by the end of the investigation, the Commissioner does not require the Board to take any action in response to these failures, in response to the Applicant's application.

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.

Margaret Keyse
Head of Enforcement

22 December 2021

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;

...

(2) For the purpose of these Regulations, environmental information is held by a Scottish public authority if it is-

- (a) in its possession and it has been produced or received by that authority; or

...

and, in either case, it has not been supplied by a Minister of the Crown or department of the Government of the United Kingdom and held in confidence.

...

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.

...

- (4) A Scottish public authority may refuse to make environmental information available to the extent that
 - (a) it does not hold that information when an applicant's request is received;...
- (d) the request relates to material which is still in the course of completion, to unfinished documents or to incomplete data; or
- (e) the request involves making available internal communications.

...

13 Refusal to make information available

Subject to regulations 10(8) and 11(6), if a request to make environmental information available is refused by a Scottish public authority in accordance with regulation 10, the refusal shall-

...

- (e) inform the applicant of the review provisions under regulation 16 and of the enforcement and appeal provisions available in accordance with regulation 17.

Scottish Information Commissioner

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