

# Decision Notice 114/2020

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## Scottish Salmon Farm Survey 2018

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**Applicant: the Applicant**

**Public authority: Scottish Ministers**

**Case Ref: 201902185**



Scottish Information  
Commissioner

## Summary

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The Ministers were asked for the data collected as part of the 2018 Scottish Salmon Farm Survey. The Ministers refused to supply the information on the grounds that disclosure would harm the parties that provided the information. The Commissioner investigated and found that the Ministers were entitled to refuse to make the information available.

## Relevant statutory provisions

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Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) and (6) (General entitlement); 2(1)(b) (Effect of exemptions); 39(2) (Health, safety and the environment)

The Environmental Information (Scotland) Regulations 2004 (the EIRs) regulations 2(1)(a) and (c) (Interpretation); 5(1) and (2)(b) (Duty to make available environmental information on request); 10(1), (2), (5)(f) and (6) (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

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1. On 2 September 2019, the Applicant made a request for information to the Ministers. The information requested was:

*With reference to the data collected for the 2018 Scottish Salmon Farm Survey, please provide all of the following information that is held by Marine Scotland:*

- (i) *A list of all sea water salmon farms that completed and returned forms [listed below and attached] for the survey year 2018*

*“Annual return of information from Scottish fish farms for the period 1 January to 31 December 2018, atlantic salmon – smolt data”*

*“Annual return of information from Scottish fish farms for the period 1 January to 31 December 2018, atlantic salmon – production data”*

- (ii) *Please provide copies of the forms completed by each site/operator.*
- (iii) *Please provide datasets held/used by Marine Scotland which show fish numbers and weights site by site and/or by operator.*
- (iv) *Please provide datasets held/used by Marine Scotland which show employee numbers by site and/or by operator.*

2. By way of background, these are survey returns issued and collected by Marine Scotland Science (part of the Scottish Government) which are aggregated, analysed and published annually<sup>1</sup>.

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<sup>1</sup> <https://www.gov.scot/collections/scottish-fish-farm-production-surveys/>

3. The Ministers responded on 19 September 2019, and cited section 39(2) of FOISA, confirming they would deal with this request under the EIRs, as all of the information caught was environmental information. The Ministers provided information in response to request (i), but they withheld information falling within the scope of requests (ii), (iii) and (iv), under regulation 10(5)(f) of the EIRs.
4. On 24 September 2019, the Applicant wrote to the Ministers requesting a review of their decision of requests (ii) and (iii) on the basis that regulation 10(5)(f) of the EIRs can only apply where the person was not under, and could not have been put under, any legal obligation to supply the information. The Applicant argued that this condition is not met because, in his view, fish farmers are, in effect, under an obligation to submit this data. The Applicant noted that there was already a lot of information about a farm's production in the public domain.
5. The Ministers notified the Applicant of the outcome of their review on 22 October 2019. They upheld the application of regulation 10(5)(f) of the EIRs in relation to requests (ii) and (iii).
6. On 28 November 2019, the Applicant wrote to the Commissioner, applying for a decision in terms of section 47(1) of 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 he was dissatisfied with the outcome of the Ministers' review. He considered regulation 10(5)(f) could not apply because:
  - the Ministers had not demonstrated that disclosure would lead to substantial prejudice to the interests of a third party
  - the farms could be put under an obligation to submit the data and
  - the information related to emissions.

## Investigation

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7. 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.
8. On 3 December 2019, the Ministers were notified in writing that the Applicant had made a valid application. The Ministers were asked to send the Commissioner the information withheld from the Applicant. The Ministers provided the information and the case was allocated to an investigating officer.
9. Section 49(3)(a) of FOISA requires the Commissioner to give public authorities an opportunity to provide comments on an application. The Ministers were invited to comment on this application and to answer specific questions regarding their reliance on regulation 10(5)(f) of the EIRs.

## Commissioner's analysis and findings

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10. 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 Ministers. He is satisfied that no matter of relevance has been overlooked.

## Handling in terms of the EIRs

11. In their correspondence with the Applicant, the Ministers identified all of the information requested as being environmental information, as defined in regulation 2(1) of the EIRs. Having reached this conclusion, they applied section 39(2) of FOISA.
12. The Commissioner is satisfied that the withheld information, relating to salmon and smolt production for fish farms in Scotland, falls within the definition of environmental information in regulation 2(1) of the EIRs, particularly paragraphs (a) or (c) (see Appendix 1).
13. The exemption in section 39(2) of FOISA provides, in effect, that environmental information (as defined by regulation 2(1) of the EIRs) is exempt from disclosure under FOISA, thereby allowing any such information to be considered solely in terms of the EIRs. In this case, the Commissioner accepts that the Ministers were entitled to apply the exemption to the information withheld in this case, given his conclusion that it is properly classified as environmental information.
14. The exception in section 39(2) is subject to the public interest test in section 2(1)(b) of FOISA. As there is a statutory right of access to environmental information available to the Applicant in this case, the Commissioner accepts, in all the circumstances, that the public interest in maintaining this exemption (and responding to the request under the EIRs) outweighs any public interest in disclosing the information under FOISA. Both regimes are intended to promote public access to information and there would appear to be no reason why (in this particular case) disclosure of the information should be more likely under FOISA than under the EIRs.
15. The Commissioner therefore concludes that the Ministers were correct to apply section 39(2) of FOISA, and consider the Applicant's information request wholly under the EIRs. In what follows, the Commissioner will consider this case solely in terms of the EIRs.

### *Scope of the Investigation*

16. In this decision notice, the Commissioner will only consider whether the Ministers correctly responded to parts (ii) and (iii) of the Applicant's request, as this is the focus of the Applicant's requirement for review.

### *Withheld information*

17. The Ministers provided the Commissioner with copies of the returned survey forms, and they explained that, when the completed survey returns are received, Marine Scotland transfers the information supplied via the forms into their Fish Farm Survey Database. The Ministers submitted that it is possible to run reports from this database to extract the datasets requested in part (iii) of the request. However, the Ministers explained that any information extracted from the database would be identical to the information contained within the completed survey forms. The Ministers submitted that they did not provide the Commissioner with extracts from the database as they would be a duplicate of the information already contained in the forms.
18. The Commissioner is satisfied that the database only provides a searchable forum for the information already provided in the survey returns and that the only withheld information in this case is that contained within the completed survey forms.

## Regulation 10(6) of the EIRs: emissions

19. As noted above, the Applicant argued that the Ministers were not entitled to apply the exception in regulation 10(5)(f) of the EIRs because the information related to emissions: regulation 10(6) states that, to the extent that the environmental information to be made available relates to information on emissions, authorities shall not be entitled to refuse to make it available under the exceptions in regulations 10(5)(d) to (g).
20. The Applicant argued that information falling within the scope of request (iii) relates directly to the ability to calculate the emissions of sea lice, uneaten feed, faeces and medicinal treatments from salmon farms. He commented that absolute emissions from salmon farms are a direct function of the number of fish on a farm. The Applicant argued that production figures and data sets relating to request (iii) are the most direct method by which a measurement of the emissions from salmon farms can be calculated.
21. The Ministers note that, while emissions are not explicitly defined in the EIRs, the definition of emissions as cited in the European Directive on Integrated Pollution Prevention and Control is “*direct or indirect release of substances, vibrations, heat or noise from individual or diffuse sources in the installation into the air, water or land.*” As the information in request (iii) is specifically for datasets held/used by Marine Scotland which show fish numbers and weights site by site and/or by operator only, it does not, in their view, fall within the definition of emissions and, consequently, regulation 10(6) does not apply here.

### *Commissioner’s view on emissions*

22. The Commissioner has issued several decisions regarding emissions in relation to salmon farming, such as *Decision 199/2017 Salmon and Trout Protection Agency and the Scottish Environment Protection Agency*<sup>2</sup>, which looked at chemical feeds in salmon aquaculture, specifically Slice, which are discharged as residue onto the seabed. In that case, the Commissioner concluded that the information being requested was an emission and could not be excepted under regulations 10(5)(d) to (g) of the EIRs.
23. In request (iii) in this case, the Applicant has asked for “*...datasets held/used by Marine Scotland which show fish numbers and weights site by site and/or by operator.*” The Applicant has argued that disclosure of this information would enable someone to calculate the emissions of sea lice, uneaten feed, faeces and medicinal treatments from salmon farms. However, while it may be possible to carry out such calculations, the information that falls within the scope of request (iii) does not contain any such data and does not, in the Commissioners’ view, comprise or relate to information about emissions. The Commissioner is satisfied that regulation 10(6) does not apply to request (iii) and the Ministers were entitled to seek to withhold it under regulation 10(5)(f) of the EIRs.

## Regulation 10(5)(f) of the EIRs: third party interests

24. 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 put under, any legal obligation to supply the information;

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<sup>2</sup> <https://www.itspublicknowledge.info/ApplicationsandDecisions/Decisions/2017/201701419.aspx>

- (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.
25. Regulation 10(2) of the EIRs provides that this exception must be interpreted in a restrictive way and that the public authority shall apply a presumption in favour of disclosure. The exception is also subject to the public interest test in regulation 10(1)(b).
26. In the Commissioner's guidance on regulation 10(5)(f)<sup>3</sup>, he states that a number of factors should be addressed in considering whether this exception 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?
  - Is the information otherwise publicly available?
  - Has the provider consented to disclosure?
  - Would release of the information cause, or be likely to cause, substantial harm to the interests of the provider?
27. The Commissioner will go on to consider whether the fish farms were under any obligation to provide the information contained in the Annual Fish Farm Production Survey 2018 to Marine Scotland.

#### *Applicant's views*

28. The Applicant argued that much of the specific data that Marine Scotland collects for the Annual Fish Farm Production Survey (the Survey) is data that is already collected, and salmon farming companies are legally obliged to provide, should they be asked for it as part of a routine fish health inspection carried out by Marine Scotland for the prevention of disease.
29. The Applicant disagreed with the Ministers' position that fish farms cannot be legally compelled to provide them with the data he has requested. He argued that Marine Scotland could, and does, require salmon farmers to provide any or all of the information that is in the Survey at any time during the production cycle, when a fish health inspection takes place at individual sites.
30. The Applicant contended that Marine Scotland could, and does, store and aggregate the exact type of data required for the Survey, as part of the fish health inspection programme. He argued that the information in the Survey could be derived from the data collected by Marine Scotland during salmon farm inspections, if Marine Scotland chose to inspect all required locations and gather all data or require that the data be submitted at the end of each production cycle. The Applicant contended that all of this meant that an obligation could be placed on a salmon farm operator to provide data of this kind.

#### *Ministers' submissions*

31. In their submissions, the Ministers explained that the withheld information is site specific (i.e. farm specific) production data for all active fish farms operated by Aquaculture Production

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<sup>3</sup> [https://www.itspublicknowledge.info/Law/FOISA-EIRsGuidance/EIRsexceptionbriefings/Regulation10\(5\)\(f\)/Regulation10\(5\)\(f\)Thirdpartyinterests.aspx](https://www.itspublicknowledge.info/Law/FOISA-EIRsGuidance/EIRsexceptionbriefings/Regulation10(5)(f)/Regulation10(5)(f)Thirdpartyinterests.aspx)

Businesses (APBs) in Scotland. They submitted that the data are aggregated, analysed and published annually by Marine Scotland Science (MSS), part of the Scottish Government, and that the aggregated data are also published as open data<sup>4</sup>.

32. The Ministers argued that the Scottish Government has no legal power to collect the information falling within the scope of requests (ii), (iii) or (iv).
33. The Ministers provided a summary of the information that can be compelled from fish farms.
34. They noted that legal obligations under the Aquatic Animal Health (Scotland) Regulations 2009 (“the 2009 Regulations”) require APBs to report and record certain information, with regards to salmon. The reporting aspect – set out in regulation 31B and Schedule 1A, requires APBs to report
  - The number of, and the number of consignments of –
    - (a) Ova;
    - (b) Fry, parr or smolts; and
    - (c) Post smolts;that were moved on to the site, and of the site for the purpose of stocking other waters.
  - A statement whether fish, dead or alive, have been moved on to the site to be eviscerated or processed.
35. The Ministers also noted that the recording of information is covered in the 2009 Regulations at regulations 6(2)(a)(i) and (ii), which are detailed in the authorisation issued to the APB. These records must be available for inspection and may be copied or removed during inspection. The records do not include the information required by the production survey. They are;
  - A record of live animal or animal product movements on and off site
  - The number of aquaculture animals that have died within each epidemiological unit within the facility.
36. The Ministers explained that a copy of the record of movements of live animals is collected during surveillance visits conducted by Marine Scotland’s Fish health Inspectorate (FHI), which may be either annually, or every two or three years depending on the surveillance frequency for each site. Not all details of mortality records are collected during surveillance, therefore FHI do not hold comprehensive data on mortalities within the industry.
37. The Ministers submitted that the 2009 Regulations do not require the reporting of any other information. The information covered in the production survey returns is far more than is required under the legislation, and APBs are not under a legal obligation to supply that information to Marine Scotland. Further, the reporting of information under the 2009 Regulations is for a period of 12 months, ending on 30 November, whereas the production survey is for a calendar year.
38. The Ministers contended that APBs are not under a statutory obligation to provide production information, i.e. the information provided in the forms, under the 2009 Regulations, and nor could these regulations be used to put them under such an obligation.

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<sup>4</sup> <https://data.marine.gov.scot/dataset/scottish-fish-farm-production-survey-data>

39. The Ministers submitted that Marine Scotland has consulted with APBs on a number of occasions regarding the disclosure of this information under the EIRs. In relation to the Applicant's specific request, the Ministers contacted all of the APBs and received responses from four companies, all of which refused to give consent for disclosure. The Ministers noted that they had also contacted all of the APBs in November 2018, in response to a request made by the same Applicant for the 2017 survey results, and on that occasion they received responses from nine companies, which constitute 91% of the aquaculture industry in Scotland. All of the nine responses refused consent to release the information. The Ministers provided the Commissioner with copies of this correspondence.
40. The Ministers also disagreed with the Applicant's assertions that Marine Scotland could produce the Survey from data collected during FHI Inspections. The Ministers maintained that this was not the case and that APBs are not required to report the information contained within the survey returns, and are only required to record some of it for the purposes of inspection. The Ministers explained that information that APBs are required to record is inspected on site (copies may be made, but are not always made) and is not held by Marine Scotland. They noted that the FHI do not inspect all fish farms in any one year and that the return forms are the only source of information that Marine Scotland can use to produce the Survey, which covers 100% of the APBs and sites operating in Scotland.

*Commissioner's conclusions on the legal requirement to supply information*

41. The Commissioner has carefully considered the arguments put forward by the Applicant, including the Applicant's view that the Ministers could require APBs to provide them with the same information that is supplied in the Survey, when undertaking a fish health inspection. However, the Commissioner notes that the information requested by the Applicant is not information that the Ministers obtained as a result of a fish health inspection, but rather it is information that was provided by the fish farms voluntarily in response to the Survey.
42. The Commissioner has reviewed the statutory requirements referred to by the Ministers and, taking into account the relevant provisions of the 2009 Regulations, the Commissioner is satisfied that the Ministers have no powers to require fish farm operators to record and provide them with the level of data requested in the Survey. The Commissioner is satisfied that the survey questionnaires were completed on a purely voluntary basis, and that the fish farms that provided the withheld information were not (and could not be put) under any legal obligation to supply those data. He is therefore satisfied that the first requirement of regulation (10)(5)(f) is met in this case.
43. The Commissioner cannot identify any other legal obligation, apart from those under the EIRs, which would require the disclosure of the withheld information. He therefore accepts that the second requirement of regulation 10(5)(f) is met in this case.
44. From the evidence of objection to disclosure provided by the Ministers, the Commissioner is satisfied that those providing the information do not consent to its disclosure. Consequently, he concludes that the third requirement of regulation 10(5)(f) applies to the withheld information.
45. Since the tests in regulation 10(5)(f)(i), (ii) and (iii) have been satisfied, the Commissioner must go on to consider whether disclosure of the information would, or would be likely to, prejudice substantially the interests of the persons who provided the information.

### *Substantial prejudice*

46. The Applicant argued that much of the information was already in the public domain, meaning that disclosure would not, or would not be likely to, cause substantial prejudice.
47. The Applicant submitted that the Scottish Environment Protection Agency (SEPA) provides data on feed use, weight of salmon on site and mortalities, by month, for each salmon farm, stretching as far back as 2002. He argued that this data indicates the beginning and end of a production cycle on a salmon farm with absolute accuracy. He contended that feed use correlates exceptionally strongly with the weight of fish produced on site and he explained that he uses this publicly accessible data to deduce mortality during the production cycle. The Applicant acknowledges that he has to make an assumption about Feed Conversion, but notes that the ration of 1.1:1 is well established and accepted by industry. From this, the Applicant argues that a gross figure for the biomass of fish produced on site can be made.
48. The Applicant also submitted that transfers of fish on to the site during the production cycle can also be tracked via information held by the FHI, and that all of this information can be used to determine what the “harvest” during a production cycle was. The Applicant contended that he can refine this further with the use of data from FHI, such as inspections from the salmon farm and/or mortality events, both of which will often state the precise numbers and weights of salmon on site at a given time. He noted that he has undertaken this work and published it, often, on a social media outlet concerned with salmon farming, with weekly readers in excess of 30,000. He submitted that neither the fish farming industry nor the Ministers appear to have challenged such publication.
49. The Ministers disputed the Applicant’s arguments. They claimed that the Applicant’s assertions are not correct, and the publicly available data cannot be used in the ways that he suggests. The Ministers argued that the information in the survey returns cannot be deduced or calculated from what is already available.
50. The Ministers explained that the beginning and end of production cycles cannot be estimated with absolute accuracy. They noted that scientists working with Marine Scotland have attempted this, and it is not possible since a period of occupation can only be identified if following both before stocking and after harvesting coincides with a calendar month; even this is not necessarily a production cycle as fish may be moved part-grown between sites.
51. Furthermore, because production cycles cannot be estimated based on either the publicly available data or the information provided in the annual production survey return forms, estimates of mortality during the production cycle cannot be made. The Ministers acknowledged that the SEPA data may be used to calculate annual mortalities, but nothing more. The information in the survey returns may be used to calculate survival rates, but not mortality rates – survival rates can be calculated from the number of fish coming in and leaving individual sites. The Ministers stressed that it was important to note that survival rate does not equal mortality rate.
52. They explained that while the FHI does collect movement records as part of inspections, this information for 2018 is partial as not every site was visited in 2018. As such, information other than that provided in the survey returns cannot be used to calculate survival rates. The Ministers contended that no information held by Marine Scotland may be used to calculate mortality during the production cycle. Losses can be estimated at the national level, but these are more than mortality. At the regional level there is actually a case of negative losses in one area (harvest = 109% of input south west region 2008) because part-grown fish were

moved into the region. At the site level, losses are even more subject to this, so site mortality cannot be calculated.

53. The Ministers asserted that the Applicant has to make a lot of assumptions about the data (that is in the public domain) to draw his conclusions and Marine Scotland do not accept that these assumptions can be made. The Ministers reiterated that information collected by the FHI for 2018 does not represent a full picture across Scotland because the FHI have not visited all farms in Scotland during 2018. The Survey is a production census for all sites in Scotland. The Ministers submitted that the information collected as part of the FHI inspections is published, and is not the sensitive information that the survey would reveal.
54. The Ministers explained that because of the length of the production cycle, the data requested by the Applicant (and contained in the survey questionnaires) reveal not only details of past production but also future projected production and smolt purchases for each site. They argued that this information is commercially sensitive as it reveals details of companies' production strategies, and it can also be used to reveal differences between individual sites' production and year on year trends at the site level. The Ministers submitted that, to their knowledge, this information is not released anywhere else in the world, nor is it released by any APBs.
55. The Ministers explained that disclosure of the information, at this level of detail, could be used by seafood buyers to influence the price that they are willing to pay for the product. They noted that MSS have been contacted by a large buyer in the past, asking about access to this data for this precise reason. The Ministers argued that this demonstrates the substantial prejudice to the interests of the people who provided the information, as they would be likely to have to accept lower prices for their product, than if only aggregated data were available as is the case currently.
56. The Ministers argued that aquaculture is a global business and many of the companies operating in Scotland, operate internationally. They contended that disclosure of the information would place companies operating in Scotland at a disadvantage within the global marketplace, as competition would be unequal, with Scottish operators not having the same level of detail about their competitors available to them.

#### *Commissioner's view on substantial prejudice*

57. Having researched the websites of the various fish farm operators and having looked at the information provided by the Applicant, the Commissioner has been unable to locate any published data at the detailed level of that contained in the survey questionnaires. He acknowledges that the assumptions and calculations used by the Applicant may be a useful interpretation of the publicly available data available, but he cannot accept that this is the same level of data contained in the questionnaire responses. Indeed, if the Applicant could deduce (with a degree of accuracy) the information contained in the survey questionnaires, it is likely that he would not need to request the data under the EIRs at all. The Commissioner acknowledges that some fish mortality figures are published, but mostly at national level. He is satisfied that the level of detail contained in the survey responses is not otherwise publicly available.
58. The Commissioner has also considered the submissions made by both the Ministers and the Applicant, and he accepts there is potential for the requested information (once in the public domain, which would be the effect of disclosure under the EIRs) being used to the commercial disadvantage of Scottish fish farming operators, which would be likely to prejudice their interests substantially.

59. The Commissioner accepts that the information conveys production strategies and the yields of different sites. He accepts that this information could be used by buyers to influence the price of the product. The Commissioner accepts that this could result in lower prices, putting companies operating in Scotland at a substantial commercial disadvantage in the global marketplace.
60. The Commissioner therefore finds, having interpreted the exception in a restrictive way, that the Ministers correctly applied the exception in regulation 10(5)(f) to the information under consideration. He must now go on to consider the balance of the public interest in relation to this information.

#### *Public interest*

61. The Applicant referred to *Decision 128/2014 Protect Wild Scotland and the Scottish Ministers*<sup>5</sup> which considered a request for the Scottish Fish Farms Annual Production Survey 2012, and was seeking essentially similar information to that requested by the Applicant in this case. The Applicant noted that the Commissioner upheld regulation 10(5)(f) in the 2014 decision, but argued that the need for meaningful information demanded by the general public and civil society in such matters has increased dramatically since that decision was published.
62. The Applicant submitted that open cage salmon farming and the issues associated with it features regularly in the national press and have been subject to scrutiny by Panorama and other mainstream prime television productions. The Applicant noted that there have been two Scottish Parliamentary inquiries into salmon farming in Scotland, the findings of which remain in wide debate. The Applicant argued that all of this combined alters the balance of the public interest. He maintained that it is of greater benefit to society that information is freely available than it is withheld, in order to facilitate discourse at a level that is well informed.
63. The Applicant referred to the public interest arguments made by Marine Scotland in its review outcome, in which it argued that disclosure would undermine the fish farms' trust in the Government and make them reluctant to share information on aquaculture production. Marine Scotland suggested that, if this happened, it could lead to it being unable to publish the Survey. The Applicant dismissed these arguments, arguing that the loss of the Survey would have no effect on the ability of bodies to carry out their statutory functions in Scotland, nor would it significantly reduce transparency, given the abundance of other data sets published by industry bodies and information published by those salmon farming companies listed on stock exchanges.
64. The Applicant argued that there is a far greater public interest in having free and open access to information held by the Scottish Government that relates directly to the emissions of sea lice, organic waste, etc. from individual salmon farms, than in the Scottish Government being able to produce a report of aggregated data which, in his view, serves no regulatory purpose and does not result in any meaningful transparency.
65. The Applicant also noted that, since the 2014 decision, the Crown Estate has been devolved, so that Crown Estate Scotland (CES), which owns the seabed off Scotland, is now part of the Scottish Government. Pursuant to the various leases that all fish farmers have from CES, the farmers are required to provide production data under the terms of their leases, in order to allow the CES to set the annual rent payable to the Scottish public purse. The Applicant argued that, in light of this, the Commissioner can no longer give weight to the public interest

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<sup>5</sup> <https://www.itspublicknowledge.info/ApplicationsandDecisions/Decisions/2014/201400276.aspx>

being in favour of the continued voluntary provision of data contained in the forms, as production data is already supplied to CES in a way that it was not in 2013. The Applicant further argued that it does not matter whether the data is in a form produced for an aquaculture production survey or in a return to CES; the fact remains that the Scottish Government has this data and it is not supplied voluntarily.

66. The Ministers submitted that CES is not part of the Scottish Government, and that it is a Scottish public body that is classed as a public corporation and has a separate Board and Chief Executive. Given this, the Ministers argued that information held by CES cannot be considered to be held by the Ministers for the purposes of the EIRs. Additionally, the Ministers submitted that APBs are not under a legal obligation to now supply the Scottish Government with production information, that they were not in 2014.
67. The Ministers acknowledged that there are various factors in favour of disclosure of the information, including the need for government to be open and transparent where possible and, specifically, the right of the public to know details about fish farming and its impact. The Ministers argued that this public interest in fish farming is already partly met by the information published in the Survey, which provides significant data at a Scotland-wide level. However, the Ministers argued that the public interest in making the information available is outweighed by the factors against release, which include the breakdown of a cooperative and mutually beneficial relationship between the Scottish Government (specifically MSS) and the aquaculture industry that allows for the publication of the annual production survey and the continuation of an almost 40 year old data set. The data set itself is published, further helping to meet the public interest in this information.
68. The Ministers argued that there is a strong public interest in avoiding significant harm to the commercial interests of firms operating in Scotland which provide data for the survey, as this would be likely to affect their future profits and make it harder for them to compete with companies who do not operate in Scotland. The Ministers submitted that the production survey is recognised by many stakeholders as a dataset unique within the global aquaculture production industry. The Ministers stressed that the data set has been prepared with the full cooperation of all the fish farm companies in Scotland for almost 40 years, and can only continue in future if this cooperation continues. It is, according to the Ministers, clear that the voluntary provision of the data will cease if the data requested is disclosed.
69. The Ministers submitted that the survey itself was previously distributed in paper format to a mailing list of over 200 individuals and companies, and the electronic copies on the Scottish Government website for recent years have been downloaded several hundred times. Numerous examples exist of individuals and organisations requesting information on fish production which have been met through the information available in the production survey, and the survey has been referenced in a number of peer-reviewed publications.
70. The Ministers contended that the data are used to fulfil annual data obligations that the Scottish Government has from European and worldwide institutions such as the European Commission (Eurostat EC reg 762/2008 and DCF Aquaculture Economic Statistics EC 2017/1004), the world organisation for animal health (OIE), the organisation for economic co-operation and development (OECD) and the food and agriculture organisation of the united nations (FAO). These data also help advise Scottish Government's national marine plan in support of sustainable aquaculture production.
71. Taking all of the above information into account, it is clear to the Ministers that the survey is seen as a valuable resource by a range of stakeholders.

72. The Ministers also argued that there is a greater public interest in facilitating the continuation of the voluntary provision of data to provide a published reference to inform these areas, than there is in releasing one year's worth of returns and jeopardising future provision of data.

*Commissioner's view on the public interest*

73. The Commissioner will firstly address the issue of CES, and whether information held by CES can be considered to be also held by the Ministers. CES was established as a distinct body in 2016 and was added to Schedule 1 of FOISA the same year. Section 3(1)(a)(i) (Scottish public authorities) of FOISA states "*In this Act, Scottish public authority*" means any body which, any other person who, or the holder of any office which is listed in schedule 1." As CES has its own entry in Schedule 1 to FOISA, the Commissioner is satisfied it comprises a Scottish public authority which is distinct from the Ministers, and that information held by CES cannot be considered to also be held by the Ministers.
74. In considering the public interest in disclosure against that in maintaining the exception, the Commissioner acknowledges that there is a legitimate public interest in transparency generally and that there is a strong public interest in transparency in environmental matters, such as the health and safety of fish farming operations. He acknowledges that fish farming has been a substantial focus of interest in the media over the last few years, and this clearly reflects the depth of public interest in the subject. The management of Scotland's environment and the production of its food sources is of interest not only to the people of Scotland but beyond, and it is clear that the information requested by the Applicant would be welcomed by many sections of society.
75. However, the Commissioner must also give weight to the public interest in the continued voluntary provision of the data contained in the survey returns, given that removal of the co-operation of the fish farms would risk the continuation of the Survey, which would limit the availability of information widely considered valuable.
76. The Commissioner notes the Ministers' arguments, that the survey results are used to fulfil annual data obligations that the Scottish Government has from European and worldwide institutions, but he is not persuaded by these arguments. The Commissioner does not accept that disclosure of the information would prevent the Scottish Government from being able to fulfil the requirements outlined by the Ministers. It is the Commissioner's view that if the Scottish Government required certain information from fish farms in order to meet European or global requirements, or to assist with its national marine plan, it would legislate to ensure it had access to such information.
77. However, the Commissioner has taken account of the fact that the substantial information which is published by the Ministers (such as the annual production survey and the dataset itself) goes some way towards addressing the issue of transparency, without adversely affecting the interests of either the Scottish fish farm operators or the wider public. While the Commissioner acknowledges the interests in transparency identified above, he is satisfied that the public disclosure of farm-specific information would (or would be likely to) harm the commercial interests of those farms and that this would not be in the public interest. If fish farms in Scotland could not compete on a level playing field with other farms, or if seafood buyers reduced their offers because they had obtained detailed knowledge of the production activities of individual sites, he considers it likely that profits would be reduced and that jobs may be lost. It is the Commissioner's view that such an occurrence would not be in the public interest

78. On balance, and having applied a presumption in favour of disclosure, the Commissioner has concluded that the public interest in maintaining the exception in regulation 10(5)(f) of the EIRs outweighs the public interest in making the information available. Therefore he finds that the Ministers were entitled to withhold the information under regulation 10(5)(f) of the EIRs.

## **Decision**

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The Commissioner finds that the Scottish Ministers complied with the Environmental Information (Scotland) Regulations 2004 in responding to the information request made by the Applicant.

## **Appeal**

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Should either the Applicant or the Ministers 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**  
**30 September 2020**

### 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.

...

- (6) This section is subject to sections 2, 9, 12 and 14.

#### 2 Effect of exemptions

- (1) To information which is exempt information by virtue of any provision of Part 2, section 1 applies only to the extent that –

...

- (b) in all the circumstances of the case, the public interest in disclosing the information is not outweighed by that in maintaining the exemption.

...

#### 39 Health, safety and the environment

...

- (2) Information is exempt information if a Scottish public authority-
- (a) is obliged by regulations under section 62 to make it available to the public in accordance with the regulations; or
- (b) would be so obliged but for any exemption contained in the regulations.

...

### The Environmental Information (Scotland) Regulations 2004

#### 2 Interpretation

- (1) In these Regulations –

“the Act” means the Freedom of Information (Scotland) Act 2002;

“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;

...

- (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-

...

- (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

...

- (6) 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).

**Scottish Information Commissioner**

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