

Decision Notice



Decision 193/2012 Global Alliance Against Industrial Aquaculture and the
Scottish Ministers

Seal killing licences and killings under licence

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Summary

Global Alliance Against Industrial Aquaculture (GAAIA) asked the Scottish Ministers (the Ministers) for information about seals killed under seal killing licences issued by the Ministers, including to which companies had licences been issued and how many seals were actually killed. The Ministers disclosed some information about the killings, but withheld other information.

Following an investigation, the Commissioner found that the Ministers had wrongly withheld information on seal killings and required it to be disclosed.

Relevant statutory provisions

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) (Interpretation) (definitions (a) and (c) of "environmental information"); 5(1) and (2)(b) (Duty to make environmental information available on request); 10(1), (2), (5)(a) and (g) (Exceptions from duty to make environmental information available on request)

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

Background

1. On 3 April 2012, GAAIA asked the Ministers for information on seal killings under licence by salmon farmers in Scotland during 2011 and 2012, specifically:
 - a. To which companies did the Scottish Government issue licences?
 - b. How many seals were actually killed, by which salmon farming companies at which sites?
2. The Ministers responded on 3 May 2012. They provided a list of companies that had been issued with seal killing licences for 2011 and 2012 and the total numbers of seals shot in the first three quarters of 2011.

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3. On 14 May 2012, GAAIA requested a review of the Ministers' decision in relation to part b. of the request as GAAIA considered that it had not been answered.
4. The Ministers notified GAAIA of the outcome of their review on 13 June 2012. The Ministers disclosed the total number of seals killed by each company in 2011 and the same information received to date for 2012. The Ministers withheld the remaining information (the number of seals shot in each location by which company) under regulations 10(5)(a) and 10(5)(g) of the EIRs.
5. On 14 June 2012, GAAIA emailed the Commissioner, stating that it was dissatisfied with the outcome of the Ministers' review and applying to the Commissioner 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 certain specified modifications.
6. The application was validated by establishing that GAAIA had made a request for information to a Scottish public authority and had applied to the Commissioner for a decision only after asking the authority to review its response to that request.

Investigation

7. On 20 June 2012, the Ministers were notified in writing that an application had been received from GAAIA and were asked to provide the Commissioner with the information withheld from GAAIA. The Ministers provided the information and the case was then allocated to an investigating officer.
8. The investigating officer confirmed with GAAIA that the Commissioner could consider only the information held by the Ministers at the date they received GAAIA's request, and would exclude any information received by the Ministers after this date.
9. The investigating officer subsequently contacted the Ministers, giving them an opportunity to provide comments on the application (as required by section 49(3)(a) of FOISA) and asking them to respond to specific questions. In particular, the Ministers were asked to justify their reliance on any provisions of the EIRs they considered applicable to the information requested.



10. In addition to their submissions as to why the information should be withheld, the Ministers advised the Commissioner that, when they received the request, they had only received the figures for 2011 from the salmon farmers and that the figures for the first quarter of 2012 had been received after the date of the request. However, during the investigation, when the figures for 2011 and 2012 were considered in detail, it was noted that some of the figures for 2011 were received *after* GAAIA had made the request, while some figures for 2012 were received before that date. Both FOISA and the EIRs apply to information which is held by a Scottish public authority when a request is received (section 1(4) of FOISA and regulation 5(1) of the EIRs). The Commissioner has therefore based her findings on the information held at the date of the Ministers received GAAIA's request.
11. The investigating officer also contacted GAAIA during the investigation, seeking its submissions on matters to be considered in the case. GAAIA's submissions, along with those of the Ministers, are summarised and considered (where relevant) in the Commissioner's analysis and findings section below.

Commissioner's analysis and findings

12. In coming to a decision on this matter, the Commissioner has considered all of the withheld information and the submissions made to her by both GAAIA and the Ministers and is satisfied that no matter of relevance has been overlooked.
13. The information withheld from GAAIA is: the number of seals killed; the sites at which the killings took place, and which company carried out the killings. The Ministers have withheld this information under regulations 10(5)(a) and 10(5)(g) of the EIRs. Before considering these exceptions, the Commissioner will consider whether the withheld information is environmental information.

FOISA or EIRs?

14. The Ministers' review response was issued on the basis that the information requested was environmental information, as defined in regulation 2(1) of the EIRs. The information in question concerns the killing of seals, and the Commissioner is satisfied that it falls within paragraph (c) of the definition of environmental information contained in regulation 2(1) of the EIRs, being information on measures and activities affecting or likely to affect the state of those elements of the environment referred to in paragraph (a) of the definition.

Section 39(2) of FOISA – environmental information

15. The exemption in section 39(2) of FOISA provides, in effect, that environmental information (as defined by regulation 2(1)) 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 withheld information, given her conclusion that it is properly classified as environmental information.



16. As there is a separate statutory right of access to environmental information available to GAAIA in this case, the Commissioner also accepts that the public interest in maintaining this exemption and in dealing with the request in line with the requirements of the EIRs outweighs any public interest in disclosing the information under FOISA.

Regulation 5(1) of the EIRs

17. Regulation 5(1) of the EIRs (subject to the various qualifications contained in regulations 6 to 12) requires a Scottish public authority which holds environmental information to make it available when requested to do so by any applicant. It is important to bear in mind that this obligation relates to information actually held by an authority when it receives the request, as discussed in paragraph 10 above.
18. Under the EIRs, a public authority may refuse to make environmental information available if one or more of the exceptions in regulation 10 apply and, in all the circumstances of the case, the public interest in maintaining the exception or exceptions outweighs the public interest in making the information available.

Regulation 10(5)(a) – public safety

19. In terms of regulation 10(5)(a) of the EIRs, a Scottish public authority may refuse to make information available to the extent that its disclosure would, or would be likely to, prejudice substantially international relations, defence, national security or public safety. In terms of regulation 10(2) of the EIRs, this exception must be interpreted in a restrictive way (regulation 10(2)(a)) and the public authority must apply a presumption in favour of disclosure (regulation 10(2)(b)).
20. In their submissions the Ministers advised that if the requested information was disclosed, the harm likely to be caused was to public safety.

The Ministers' submissions

21. The Ministers believe there is a strong likelihood that disclosing information about the sites where seal killings have taken place will lead to direct action being taken by some Non-Governmental Organisations (NGOs) against those sites and against individuals employed at sites where seals have been shot. The Ministers commented that seal management is a highly sensitive issue which arouses extremely strong emotions amongst many people, given that it involves lethal measures.

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22. The Ministers made it clear they did not wish to suggest that GAAIA would initiate any direct action, but advised the Commissioner they had information indicating that other organisations were likely to do so. The Ministers provided an example of protestors who had confronted a Costa Rican ship in Guatemalan waters which they alleged was engaged in illegal shark-finning¹. The Ministers also advised that in the early 1980s, when actual culling of seals to control their populations was still permitted in Scotland, environmental and animal welfare activists had stationed themselves between the marksmen undertaking the seal cull and their targets. This action had forced the cancellation of an Orkney seal cull because of the risks to public safety. (This example is understood to refer to the aborted Orkney seal cull of 1978.)
23. The Ministers provided other examples of direct action by unnamed animal rights groups, including the targeting of individuals implicated (either directly or indirectly) in shooting seals through verbal abuse, hate mail, unpleasant and noxious parcels, physical intimidation and even assault or property damage. They considered that more recent cases of direct action in response to a Canadian seal cull and Japanese whaling activity demonstrate that the risk of direct action is still very much present. However, the Ministers acknowledged that there is no longer any culling in Scotland to control seal populations, and the incidents described above were provided only as an example of the type of direct action that might occur.
24. The Ministers were made aware that some of the companies whose names had already been released had farms at only a very few locations, and no direct action had occurred at any of those locations. The Ministers responded that it was the number of seals shot which was sensitive: they realised that it might be possible to identify possible locations of shooting, but believed it would be difficult for activists to target such sites for direct action if they could not establish without doubt that seals had been actually shot there. The Ministers believed there was a strong likelihood of direct action being taken by some NGOs against specific sites and against individuals employed at sites where it was known that seals had been shot.
25. The Ministers were invited to comment on GAAIA's comment that, in the interests of public safety, the public – including tourist operators, ramblers, bird-watchers, fishermen and fish farmers – should be informed of the locations at which seals will be shot and a safety cordon be placed around the seal-killing area, with farmers required to wear-bullet proof jackets in case they are caught in the cross-fire.
26. The Ministers responded that GAAIA's comment shows little knowledge of the general restrictions on the use of firearms or of the seal licensing system in Scotland. In most cases, fish farms are located in remote areas and there is little likelihood of members of the public being present when seals are shot. Nevertheless, the seal licensing system follows a Scottish Seal Management Code of Practice developed with input from the police, the British Association for Shooting and Conservation and the Scottish SPCA; seal marksmen complete a Professional Development Award in Seal Management developed by the Scottish Qualifications Authority. This ensures that any seal shooting is undertaken with minimum risk to public safety.

¹ <http://www.bbc.co.uk/news/world-europe-18996972>



GAAIA submissions

27. In its submissions, GAAIA stated that it was asking for information about shootings which had already taken place, so there would be no opportunity to disrupt the killing of seals in future. It argued that there is no evidence to suggest that anyone has ever disrupted the killing of seals at salmon farms. In its view, the Ministers' claims with regards to "direct action" were blatant fear-mongering and did not hold water. GAAIA pointed out that the Orkney Seal Cull cited by the Ministers occurred some 30 years ago, and was intended to be a mass slaughter of seals, while salmon farmers claim by their own admission to kill only the occasional "rogue" seal as a last resort.
28. GAAIA stated that most, if not all, salmon farming companies are engaged in the killing of seals, which, it believed, negates the argument that particular companies would be targeted following disclosure of the requested information. It argued that many people want to be able to buy salmon from sites where seals are not shot, in the same way that people choose to buy "dolphin-friendly" tuna, and that site specific information was required in order to make such purchasing decisions.

The Commissioner's view

29. The Commissioner has carefully considered the arguments made by GAAIA and the Ministers, in deciding whether disclosure of the number of seals killed at each location and the name of the company involved would, or would be likely to, prejudice substantially public safety in the manner suggested by the Ministers.
30. GAAIA has commented that it was not seeking to be informed of any forthcoming seal shootings and was seeking only retrospective information. The Commissioner does not accept that the retrospective nature of the information would prevent its use by protestors, who might protest about the shooting having taken place, once details were released. The fact that the figures are retrospective does not guarantee that the shootings will take place in a different location in the following years; it may be just as likely that the shootings will take place in the same location, so the possibility of prejudice to public safety is still a relevant consideration.
31. However, the Commissioner is not satisfied that the Ministers have demonstrated that disclosure of the information would, or would be likely to, prejudice substantially public safety. During the investigation, the Ministers were asked to detail the harm that would (or would be likely to) be caused to public safety by disclosure of the information. The Ministers were advised that, for this to be accepted by the Commissioner, they should demonstrate that there is a real risk or likelihood that actual harm will occur at some time in the near (certainly foreseeable) future, not simply that the harm is a remote or hypothetical possibility.



32. Having considered the Ministers' submissions, the Commissioner accepts that the killing of seals is an emotive subject, and one which could conceivably lead to direct action by protestors. However, in relation to a potential threat to public safety, the Ministers have not provided any specific examples or evidence which would support their view that public safety would, or would be likely to be, threatened, if information about killings carried out under licence is made known. The examples provided by the Ministers, described above, are tenuous and bear little relation to the issues or situations under consideration. The Ministers have made reference to a protest over the Canadian seal cull (a general cull to reduce seal numbers) and a protest over Japanese whaling, but these do not relate directly to the shooting of individual seals to reduce the damage to salmon farm stock.
33. The Ministers also made reference to the Orkney seal cull in the 1980's which was stopped by protestors. (As noted previously, this is understood to be a reference to the planned cull of 1978.) Again, this protest, which took place more than 30 years ago, related to a general seal cull and the particular circumstances in which it was to take place, rather than the present-day licensed killing of individual seals to stop them damaging fish stocks. The Commissioner has not been presented with any information or news articles which support the Ministers' submissions on the threat posed to public safety through protestors' actions relating to the shooting of seals at salmon farms, or any similar scenario.
34. The Commissioner asked the Ministers to provide evidence that disclosure would, or would be likely to, create a genuine and realistic threat to public safety, and expected to receive examples from similar situations, from other countries if none was available from the UK. However, the Ministers did not provide any such example-based evidence.
35. The Ministers referred to threats made by protestors, but did not provide either specific proof of these threats occurring in situations similar to the licensed shooting of seals at salmon farms or evidence of behaviour or activity from which threats could be implied. The Commissioner would also have been pleased to consider evidence from (for example) police reports or press articles, but again no such examples were provided to support the assertions made by the Ministers.
36. The Commissioner notes that details of the companies that have licences and have shot seals was disclosed in May 2012 in response to GAAIA's initial request. The Ministers have not provided any evidence that these companies have been targeted by activists since the information was disclosed in May 2012. The Commissioner is aware of various campaigns to raise the standard of how animals are farmed, but the Ministers have not provided any evidence to demonstrate that direct action of the type feared in this situation has resulted from such campaigns.
37. The Commissioner has concluded that the Ministers have failed to demonstrate a real risk or likelihood that the harm they anticipated was likely to occur at some time in the near (certainly foreseeable) future. She is disappointed that the Ministers continue to rely on general arguments to explain why they considered the information to be exempt under regulation 10(5)(a), without providing evidence to support their conclusions in the specific circumstances of this case.



38. Taking account of the information being withheld, the observations above and the limitations of the submissions provided by the Ministers, the Commissioner is unable to see how or why disclosure of the information withheld in this case would, or would be likely to, prejudice substantially public safety. Consequently, she has concluded that the regulation 10(5)(a) of the EIRs does not apply to the withheld information.
39. Having found that the exception in regulation 10(5)(a) has not been shown to apply in the circumstances of this case, the Commissioner is not required to go on to consider the public interest test in regulation 10(1)(b) in relation to the withheld information.

Regulation 10(5)(g) – protection of the environment

40. Regulation 10(5)(g) of the EIRs states 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 protection of the environment to which the information relates.
41. As with all the exceptions under regulation 10, a Scottish public authority applying this exception must interpret the exception in a restrictive way (regulation 10(2)(a)) and apply a presumption in favour of disclosure (regulation 10(2)(b)). Even where the exception applies, the information must be released unless, in all the circumstances of the case, the public interest in making the information available is outweighed by that in maintaining the exception (regulation 10(1)(b)).
42. The Ministers argued that direct action by activists resulting from disclosure of information about seal shooting at individual sites might cause harm to the environment, both directly and indirectly. The Ministers considered that protestors might damage the fish farm cages resulting in fish escapes, with possible impacts on the wild fish population. The same consequences would occur if a fish farm was unable to protect its cages from damage by seal predation because of direct action by protestors.
43. The Ministers also considered that if the information was disclosed there was a risk of companies withdrawing from the controlled and monitored seal licensing system and shoot seals illegally. Such shooting would be unregulated and unreported and could have unforeseen impacts on seal populations across Scotland.
44. GAAIA presented similar arguments as detailed above in relation to regulation 10(5)(a), in that in not disclosing information about specific sites, it would be impossible to distinguish the salmon farms where seal shooting is not carried out, should consumers wish to do so. GAAIA submitted that people now request and expect food that is farmed to be packaged with information certifying its source right down to the individual farm level unit.
45. The Ministers provided scenarios of possible harm if the information on seal killings was disclosed, similar to those already considered above in relation to the exception in regulation 10(5)(a). The Commissioner accepts, as a possibility, that such consequences might occur, if the information was disclosed.



46. However, the Ministers have not provided any evidence to support their view that disclosure of the information would, or would be likely to, prejudice substantially the protection of the environment to which it relates. The Commissioner is not aware of any direct action being taken against the companies which are known to have previously shot seals to protect fish stocks.
47. The Ministers' comment that companies could withdraw from the controlled and monitored seal licensing system is noted. Again, the Ministers did not provide any evidence to support this assertion.
48. As discussed in detail above, the Commissioner is disappointed that the Ministers did not comply with the request for submissions and evidence that would demonstrate a real risk or likelihood that disclosure of the information would cause harm at some time in the near (certainly foreseeable) future, but instead continue to rely on general arguments or assertions to justify the decision to withhold information under regulation 10(5)(g).
49. Consequently, the Commissioner has concluded that the Ministers have not demonstrated that disclosure of the withheld information would, or would be likely to, prejudice substantially the environment to which the information relates. In particular, the Commissioner concluded that the arguments presented by the Ministers lacked evidence and cited examples too remote from the actual issues and situations under consideration. Consequently, the Commissioner has not upheld the application of the exception contained in regulation 10(5)(g).
50. Having found that the exception in regulation 10(5)(g) has not been shown to apply in the circumstances of this case, the Commissioner is not required to consider the public interest test in regulation 10(1)(b) in relation to the withheld information.

Information to be disclosed

51. The withheld information is contained within a large number of forms, and the forms contain information falling outside the scope of the request. The Commissioner suggests that, rather than seeking to provide redacted versions of the forms, the Ministers may prefer to consolidate the information within a single document for disclosure.

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DECISION

The Commissioner finds that the Scottish Ministers failed to comply with the Environmental Information (Scotland) Regulations 2004 (the EIRs) in responding to the information request made by the Global Alliance Against Industrial Aquaculture (GAAIA). The Commissioner finds that the exceptions in regulations 10(5)(a) and (g) of the EIRs do not apply to the information covered by the request.

The Commissioner therefore requires the Ministers to disclose the information held in relation to part b. of GAAIA's request of 3 April 2012 as at the date of receipt of the request by 10 January 2013.

Appeal

Should either the Global Alliance Against Industrial Aquaculture or the Scottish Ministers wish to appeal against this decision, there is an appeal to the Court of Session on a point of law only. Any such appeal must be made within 42 days after the date of intimation of this decision notice.

Rosemary Agnew
Scottish Information Commissioner
26 November 2012



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.

...

- (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 –

...

"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-
- (a) international relations, defence, national security or public safety;
- ...
- (g) the protection of the environment to which the information relates.