

Decision Notice

Decision 203/2018: Salmon and Trout Conservation Scotland and the Scottish Ministers

Fish Health inspections – Scadabay

Reference No: 201801153

Decision Date: 12 December 2018



Summary

The Ministers were asked for two inspection reports on escapes from a marine fish farm at Scadabay, Isle of Harris, in 2016.

The Commissioner found that the Ministers misapplied regulation 10(4)(d) of the EIRs: the withheld information could not be said to be unfinished or incomplete. He notes that information has subsequently been disclosed but considers staff training is required, given the case handling issues highlighted by this case.

Relevant statutory provisions

The Environmental Information (Scotland) Regulations 2004 (the EIRs) regulations 5(1) and (2)(b) (Duty to make available environmental information on request); 9(1) (Duty to provide advice and assistance); 10(1), (2), (4)(d) (Exceptions from duty to make environmental information available)

The full text of each of the statutory provisions cited above is reproduced in Appendix 1 to this decision. The Appendix forms part of this decision.

Background

1. On 4 April 2018, via their solicitor, Salmon and Trout Conservation Scotland (S&TCS) made a request for information to the Fish Health Inspectorate at Marine Scotland, a Directorate of the Scottish Ministers (the Ministers). S&TCS asked the Ministers for two unpublished Fish Health Inspectorate (FHI) inspection reports from 2016, for Scadabay, Isle of Harris, with unique references 2016-208 and 2016-244 (request 1).
2. On 4 April 2018, S&TCS wrote to the Ministers again, also via their solicitor, seeking copies of the initial and final notifications as submitted in relation to escapes from marine fish farms, together with all correspondence and information held relating to any such escapes, covering 2016 and 2017 (request 2).
3. Subsequent references in this decision to S&TCS should be read as including their solicitors, acting on their behalf.
4. The Ministers wrote to S&TCS in relation to request 1 on 4 May 2018, confirming that “both of these cases are complete” but also that there were cross-referencing issues still to be resolved. The Ministers stated that they would be included in the next publication on the Marine Scotland website and that copies would be disclosed to S&TCS once the outstanding issues had been resolved: the Ministers anticipated this being “early next week”. At this point, no indication was given as to the access to information regime being applied or the provisions (if any) considered relevant.
5. On 7 May 2018, S&TCS emailed the Ministers, requesting a review in respect of request 1 on the basis that twenty working days had elapsed without an appropriate response. S&TCS emailed the Ministers again on 10 May and 11 and 14 June 2018, drawing attention to the delay in disclosure. The 10 May communication also included a requirement for review in respect of request 2, which had not been responded to, while the 11 June communication noted that a response had been received to request 2, on 25 May 2018.

6. On 14 June 2018, the Ministers issued their review outcome, explaining that the requested information was interpreted as being the case sheets, notes, etc. The Ministers applied regulation 10(4)(d) of the EIRs to this material, stating that the cases remained open. Advice was given that the data would be ready at the end of August 2018, once the cases were closed. Further explanations were given as to why the Ministers erroneously stated earlier that they would disclose the information in May 2018, with an apology. On the same date, the Ministers wrote to S&TCS with a review outcome in respect of request 2, apologising for the delay in responding to that request.
7. On 6 July 2018, following further correspondence with the Ministers, S&TCS wrote to the Commissioner. S&TCS applied to the Commissioner 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. S&TCS stated that it was dissatisfied with the outcome of the Ministers' reviews: S&TCS noted that the requested reports (request 1) remained unpublished and had not been supplied, and was not satisfied that there was any valid reason for this. In respect of request 2, S&TCS submitted that the review outcome was late.

Investigation

8. The application was accepted as valid. The Commissioner confirmed that S&TCS made requests for information to a Scottish public authority and asked the authority to review its response to those requests before applying to him for a decision.
9. On 17 July 2018, the Ministers were notified in writing that S&TCS had made a valid application. The case was allocated to an investigating officer.
10. 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, with reference to the points raised by S&TCS in its application.
11. The information for request 1 was disclosed to S&TCS on 31 July 2018, with redactions of personal data which were not of concern to S&TCS.

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 S&TCS and the Ministers. He is satisfied that no matter of relevance has been overlooked.

Request 1 – regulation 10(4)(d) of the EIRs

13. The Ministers withheld the two FHI inspections under this exception in response to S&TCS's request and requirement for review. S&TCS disagreed with the application of this exception, noting that it was applied retrospectively after they had been led to believe that both cases were complete.
14. Regulation 10(4)(d) of the EIRs provides an exception from the duty to make environmental information available, where the request relates to material which is still in the course of completion, to unfinished documents or to incomplete data. Where a Scottish public

authority refuses to make information available on this basis, it must state the time by which the information will be finished or completed (regulation 13(d)).

15. The *Aarhus Convention: An Implementation Guide*¹ provides guidance (at page 85) as to the type of material this exception is intended to cover. It describes the expression “in the course of completion” as relating to the process of preparation of the information or document and not to any decision-making process for the purpose of which the information or document has been prepared. It also states that the words “in the course of completion” suggest that the term refers to individual documents that are actively being worked on by the public authority, and which will have more work done on them within some reasonable timeframe.
16. The Ministers were asked to confirm the dates on which the reports sought were in fact last worked on or “completed”, with any supporting documentation.
17. The Ministers confirmed they held information falling within the scope of request 1, contained in three reports. The last date on which any of these had been amended was 3 May 2018. The Ministers acknowledged, therefore, that the reports were completed by the time the request was received and no further work was scheduled or anticipated at that time. They acknowledged that there did not appear to have been grounds for applying this exception.
18. This appears to reflect the position stated by the Ministers in their initial (informal) response to S&TCS. It is not clear why their position changed subsequently: in other words, disclosure was delayed for no apparent reason.
19. In the circumstances, the Commissioner can see no justification for the Ministers applying the exception in regulation 10(4)(d). Given this finding, the Commissioner is not required to, and will not, consider the public interest test in regulation 10(1)(b) of the EIRs. He finds that the Ministers failed to deal with request 1 in accordance with regulation 5(1) of the EIRs.
20. S&TCS has confirmed that it now has the information, so the Commissioner will not require the Ministers to take any further action in respect of this breach, in response to S&TCS’s application.

Request 2 – regulation 16(4) of the EIRs

21. Regulation 16(4) of the EIRs requires a Scottish public authority to notify the applicant of its decision on a requirement for review, as soon as possible and no later than 20 working days after the date of receipt of the requirement. The Ministers did not purport to respond to request 2 until 14 June 2018, which was clearly outwith that timescale, so they failed to comply with regulation 16(4) in that respect. They could have treated their response of 25 May 2018 as the review outcome (a response to the request was the only option, the issue being that no response had been provided) but appear to have chosen not to do so: another learning point to be addressed below.

Other comments – handling of the request

22. While noting that there was much routine, informal contact between S&TCS and Marine Scotland, the Ministers acknowledged that such an approach had not been appropriate here. They had failed to provide all the information or respond on time. They had been asked for recorded information and should have dealt with both requests under the EIRs from the

¹ https://www.unece.org/fileadmin/DAM/env/pp/Publications/Aarhus_Implementation_Guide_interactive_eng.pdf

outset. The informal (“business as usual”) approach taken had failed to give due consideration to the S&TCS’s rights.

23. The Commissioner has also noted shortcomings in the Ministers’ handling of the requirement for review in respect of request 2, which would appear to reflect less than ideal practice.
24. In light of all these shortcomings, the Commissioner now asks the Ministers to review the staff training requirements in Marine Scotland, in relation to handling requests under FOISA and the EIRs, and address any training needs identified. He recommends that the Ministers use the learning resources which already exist on both the Commissioner’s website² and the Scottish Government website (specifically, the Ministers’ own Code of Practice on the discharge of functions by Scottish public authorities under FOISA and the EIRs³), to ensure that staff dealing with requests for information fully understand:
 - (i) statutory timescales for responding under the EIRs (and FOISA);
 - (ii) the requirements for responding to a request for review (in particular, when the complaint is that no response has been given to the information request), and
 - (iii) when to use, and when not to use, a “business as usual” approach.

Decision

The Commissioner finds that the Scottish Ministers (the Ministers) failed to comply with the Environmental Information (Scotland) Regulations 2004 (the EIRs) in responding to the information requests made by Salmon and Trout Conservation Scotland (S&TCS).

The Commissioner finds that the Ministers were not entitled to withhold information under the exception in regulation 10(4)(d) of the EIRs. In doing so, they failed to comply with regulation 5(1) of the EIRs. He also finds that the Ministers failed to respond to request 2 within the timescale required by regulation 16(4) of the EIRs.

Given that S&TCS has since confirmed it has received the information, the Commissioner does not require the Ministers to disclose any information in response to S&TCS’s application. However, the Commissioner requires the Ministers to review staff training requirements in Marine Scotland in line with paragraph 24 above. He would ask for evidence that these matters have been attended to by **31 March 2019**.

Appeal

Should either Salmon and Trout Conservation Scotland or the Scottish 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.

² <http://www.itspublicknowledge.info/Law/FOISA-EIRsGuidance/Briefings.aspx>

³ <https://www.gov.scot/publications/foi-eir-section-60-code-of-practice/>

Enforcement

If the Scottish Ministers (the Ministers) fail to comply with this decision, the Commissioner has the right to certify to the Court of Session that the Ministers have failed to comply. The Court has the right to inquire into the matter and may deal with the Ministers as if they had committed a contempt of court.

Margaret Keyse
Head of Enforcement

12 December 2018

The Environmental Information (Scotland) Regulations 2004

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.

...

9 Duty to provide advice and assistance

- (1) A Scottish public authority shall provide advice and assistance, so far as it would be reasonable to expect the authority to do so, to applicants and prospective applicants.

...

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
...
(d) the request relates to material which is still in the course of completion, to unfinished documents or to incomplete data; or

...

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