

Decision Notice 005/2022

Use and operation of Environmental Management Plans

Applicant: The Applicant

Public authority: Wester Ross Area Salmon Fishery Board

Case Ref: 202100078



Scottish Information
Commissioner

Summary

The Board was asked about 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, covering the last three years. The Board initially withheld the information it held as internal communications, later claiming that communications with third parties were excepted as unfinished documents and that disclosure would cause substantial prejudice to commercial confidentiality. The Commissioner investigated and found that the Board had breached the EIRs in responding to the request as it was not entitled to withhold information under the exceptions claimed. He required the Board to disclose the withheld information.

Relevant statutory provisions

The Environmental Information (Scotland) Regulations 2004 (the EIRs) regulations 2(1) (paragraphs (a), (b) and (c) of definition of “environmental information”) (Interpretation); 5(1) and (2)(b) (Duty to make environmental information available on request); 10(1), (2), (4)(d) and (e), (5)(e) and (6) (Exceptions from duty to make environmental information available); 13(d) (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 Wester Ross Area Salmon Fishery Board (the Board). The Board is a district salmon fishery board for the purposes of section 43 of the Salmon and Freshwater Fisheries (Consolidation) (Scotland) Act 2003. The information requested was for the last three years:
 - (i) Copies of all existing Environmental Management Plans (EMPs) in the Board’s area
 - (ii) Copies of minutes of Board meetings held with relevant fish farmers under or in relation to existing or proposed EMPs
 - (iii) Copies of all requests for action (or similar) made to fish farmers pursuant to those EMPs, by the Board or by any other party to the EMPs
 - (iv) Any assessments of whether those requests had been adhered to by the fish farmers concerned
 - (v) Any assessment of the effect of any actions taken by the fish farmers in response to a request for action (or similar)
 - (vi) Copies of any reports (such as end of production cycle reports) as might be required by the EMPs.

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

2. The Board responded on 9 December 2020 giving notice under regulation 10(4)(a) of the EIRs in relation to points (i) and (iii) to (vi) inclusive, confirming that it held no information for these points. For point (ii), it confirmed it held a minute from a 2018 meeting for a proposed EMP, but withheld this under regulation 10(4)(e) (internal communications) of the EIRs.

3. On 9 December 2020, the Applicant wrote to the Board, requesting a review of its decision as it did not agree with the application of regulation 10(4)(e) and questioned whether there was further information, falling within the scope of point (ii) of the request, that this exception was not being applied to.
4. The Board notified the Applicant of the outcome of its review on 7 January 2021. It agreed with the Applicant that regulation 10(4)(e) could not apply to minutes of meetings with fish farmers, but instead wished to withhold the information under regulations 10(4)(d) (material in the course of completion) and 10(5)(e) (commercial confidentiality) of the EIRs. It upheld the remainder of its initial decision in relation to points (i) and (iii) to (vi), that no information was held.
5. On 15 January 2021, the Applicant wrote to the Commissioner, applying for a decision in terms of section 47(1) of the Freedom of Information (Scotland) Act 2002 (FOISA). By virtue of regulation 17 of the EIRs, Part 4 of FOISA applies to the enforcement of the EIRs as it applies to the enforcement of FOISA, subject to specified modifications. The Applicant stated it was dissatisfied with the outcome of the Board's review because it was unclear if all of the information falling within the scope of point (ii) of the request had been identified and it disagreed with the exceptions applied to the withheld information.

Investigation

6. The application was accepted as valid. The Commissioner confirmed that the Applicant made a request for information to a Scottish public authority and asked the authority to review its response to that request before applying to him for a decision.
7. On 19 February 2021, the Board was notified in writing that the Applicant had made a valid application. The Board was asked to send the Commissioner the information withheld from the Applicant. The Board provided the information and the case was allocated to an investigating officer.
8. Section 49(3)(a) of FOISA requires the Commissioner to give public authorities an opportunity to provide comments on an application. The Board was invited to comment on this application and to answer specific questions. These related to the searches carried out to identify and locate information falling within the scope of the request and the Board's reasons for applying the exceptions at regulation 10(4)(d) and 10(5)(e) of the EIRs.

Commissioner's analysis and findings

9. In coming to a decision on this matter, the Commissioner considered all of the withheld information and the relevant submissions, or parts of submissions, made to him by both the Applicant and the Board. He is satisfied that no matter of relevance has been overlooked.

Handling in terms of the EIRs

10. Having considered the terms of the request, it is clear that any information falling within the scope would be environmental information, as defined in regulation 2(1) of the EIRs. The information in question concerns the development of EMPs in relation to the operation of fish farms and their impact on the wild salmonid population. The Commissioner is satisfied that this would fall within paragraphs (a), (b) and (c) of the definition. The Applicant has not challenged the Board's application of the EIRs in this case and the Commissioner will consider the request in what follows solely in terms of the EIRs.

Regulation 5(1) and 2(b) of the EIRs – Duty to make available environmental information on request

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

Searches – information falling within point two of the request

14. The standard of proof to determine whether a Scottish public authority holds information is the civil standard of the balance of probabilities. In determining where the balance of probabilities lies, the Commissioner considers the scope, quality, thoroughness and results of the searches carried out by the public authority. He also considers, where appropriate, any reason 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 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 the request was received) actually held by the public authority.

Submissions from the Applicant

15. The Applicant explained that the Board's response to its request was not clear about whether the minute from a meeting in 2018 was the only information it held falling within the scope of point (ii) of its request.
16. The Applicant highlights that in response to its request for review, the Board discussed draft EMPs and exceptions that would apply to these. It considered the review outcome was not clear about whether, with regard to point (ii), other than the 2018 meeting minute already mentioned, any other information existed and was held. Indeed, it believed the response suggested further information was held.

Submissions from the Board

17. The Board was asked to describe the searches it carried out to determine what information it held falling within point (ii) of the Applicant's request.
18. The Board explained that it was a small entity with one part-time employee and therefore that employee had full knowledge of the activities that had taken place and the relevant filing system. The employee was therefore able to search the filing system for the year in question with ease, to identify the material falling within the scope of the request. The Board confirmed that the 2018 meeting minute was the only information held falling within the scope of the request.
19. Having considered the relevant submissions provided, the Commissioner accepts that, on the balance of probabilities, the Board has identified the information falling within point (ii) of the Applicant's request (i.e. 2018 meeting minute).

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

20. The Board withheld information under this exception in response to the Applicant's requirement for review. The Applicant disagreed with the application of this exception.
21. 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)).
22. 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 the decision-making process for the purpose of which the information or document has been prepared. It states that the mere status of something as draft alone does not automatically bring it within the exception. It also states that the words "in the course of completion" suggest that the term refers to individual documents that are being actively worked on by the public authority, and which will have more work done on them within some reasonable timeframe. Once those documents are no longer "in the course of completion" they may be released, even if they are still unfinished and even if the decision to which they pertain has not yet been resolved.

Submissions from the Applicant

23. The Applicant refers to the Aarhus Convention in its submissions, to argue that regulation 10(4)(d) cannot apply to agreed minutes of meetings as these are patently not unfinished documents that are still being worked upon.
24. The Applicant further considers that the minutes are part of the "decision making process for the purpose of which the information or document has been prepared".

Submission from the Board

25. In its review response, the Board sought to apply this exception to EMPs under negotiation, and discussed the problems it considered disclosure of these would lead to.
26. In its submissions the Board relied upon arguments provided on its behalf by Fisheries Management Scotland (FMS)², its representative body.
27. These submissions argued that the material the Board considered to be "in the course of completion" was material pertaining to the consultation process between the fish farmers and the Board, up until the point the EMP was accepted by the Planning Authority under the relevant planning condition. It considered that this interpretation clearly falls within *The Aarhus Convention: An Implementation Guide 2*, because it was material relating to the preparation phase of a document.

The Commissioner's view

28. The Commissioner considers the Board was incorrect in its application of the exception in regulation 10(4)(d). He accepts that the proposed EMP(s) are still under discussion, and as

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

² [About – Fisheries Management Scotland \(fms.scot\)](#)

a document(s) may be in the preparation phase and not finalised. However, the 2018 meeting minute (as an individual document) was complete and was not (at the time of the request or the requirement for review) actively being worked upon.

29. For these reasons, the Commissioner does not accept that the exception in regulation 10(4)(d) has been engaged in this case.
30. As the Commissioner has found that the exception contained in regulation 10(4)(d) does not apply, he is not required to consider the public interest test in regulation 10(1)(b) of the EIRs.

Regulation 13(d) of the EIRs – Refusal to make information available

31. Regulation 13(d) of the EIRs provides (subject to regulations 10(8) and 11(6)) that if a request to make environmental information available is refused by a Scottish public authority in accordance with regulation 10, the refusal shall, if the exception in regulation 10(4)(d) is relied upon, state the time by which the authority considers the information will be finished or completed (regulation 13(d)).
32. In its submissions, the Board confirmed that it had not provided the Applicant with a specific time when the material would be completed but rather believed, when it stated that *“the EMPs under negotiation are unfinished documents”*, that the Applicant would understand from this that the exception would cease when negotiations were finished and upon submission of the EMP to the Planning Authority.
33. The Commissioner does not consider this to be enough to satisfy the requirement of regulation 13(d), as it provides the Applicant with no real indication of the timescale, or a suggestion that there is an anticipated timescale, let alone that it is reasonable.
34. As the Board did not provide the Applicant in its review outcome with the expected date by which the information would be completed or finished, the Commissioner finds that the Board failed to comply with the requirements of regulation 13(d) of the EIRs.
35. Given that the Commissioner has determined that the Board was wrong to rely upon regulation 10(4)(d), it does not require it to take any action in relation to this failure.

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

36. Regulation 10(5)(e) provides that a Scottish public authority may refuse to make environmental information available to the extent that its disclosure would, or would be likely to, prejudice substantially the confidentiality of commercial or industrial information where such confidentiality is provided for by law to protect a legitimate economic interest.
37. *The Aarhus Convention: An Implementation Guide*¹ notes (at page 88) that the first test for considering this exception is whether national law expressly protects the confidentiality of the withheld information. The law must explicitly protect the type of information in question as commercial or industrial secrets. Secondly, the confidentiality must protect a “legitimate economic interest”: this term is not defined in the Convention, but its meaning is further considered below.
38. Having taken this guidance into consideration, the Commissioner’s view is that, before regulation 10(5)(e) can be engaged, authorities must consider the following matters:
 - (i) Is the information publicly available?
 - (ii) Is the information industrial or commercial in nature?

- (iii) Does a legally binding duty of confidence exist in relation to the information – express or implied?
- (iv) Would disclosure of the information cause, or be likely to cause, substantial harm to a legitimate economic interest?

Submissions from the Applicant

- 39. In its submissions, the Applicant highlights that the Board may only engage regulation 10(5)(e) to withhold information the extent that its disclosure would cause substantial prejudice to the confidentiality of commercial or industrial information where such confidentiality was provided for by law to protect a legitimate economic interest.
- 40. The Applicant submitted that the Board had provided no explanation for how such prejudice would occur if the information were disclosed, and that it was relying upon the issue of “trust and confidence” between the parties to apply the exception.

Submissions from the Board

- 41. In its submissions (provided by FMS), the Board considered that the information related to draft EMPs, which in turn comprised various actions a fish farm might take in relation to evidence of transmission of lice from the fish farm to the local wild salmon populations. It viewed this information as commercial in nature as actions taken under the EMPs were material to both the functioning of the fish farms and the health of local wild fisheries.
- 42. The Board explained that, under a typical EMP planning condition, the fish farmer was obliged to enter into consultation with the local Board in order to draft the EMP.
- 43. The Board submitted that the material discussed in these consultations was not trivial, nor was it in the public domain. It also considered that the information was shared in circumstances where it was expected by both parties (fish farmer and Board) that confidence would be kept for the duration of the consultation period. The Board described how the confidential nature of the discussions was made explicit, for example, either verbally or by having password protected documents.
- 44. The Board believed the legitimate economic interest is the health of local salmonids, which in turn supported the local wild salmonid fisheries. It considered the confidential negotiations would result in the strongest possible EMP being agreed, as they provided circumstances in which concessions from fish farmers could be negotiated and agreed.
- 45. The Board referred to a historic low level of trust between fish farmers and the Boards, and considered it was in its best interests to build on the trust established to gain the maximum benefit to wild fisheries.
- 46. The Board submitted that disclosure would allow the intervention of parties with a different agenda, which would potentially make it harder for Boards to negotiate the best possible EMP.

The Commissioner's view

Is the information publicly available?

- 47. The Commissioner accepts the Board's position that the withheld information is not publicly available.

Is the information commercial or industrial in nature?

48. The Commissioner considers that, in as far as the 2018 meeting minute relates to activities that affect the fish farmer and the local wild salmonid fisheries, which are both commercial enterprises, the information can be considered commercial in nature.

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

49. In the Commissioner's view, confidentiality "provided by law" will include confidentiality imposed on any person under the common law of confidence, under a contractual obligation or by statute.

50. Although the Board described why it considered keeping discussions such as those contained within the withheld information confidential, it did not provide evidence that there was an expectation of confidentiality "provided by law".

51. The Commissioner has considered the withheld information, as well as the submissions, and find nothing therein that evidences an explicit obligation of confidence. Neither is there sufficient evidence either in the submissions or in the nature of the withheld information to support an implied obligation of confidence.

52. Taking all of this into consideration, along with the content of the withheld information (which does not suggest that there is any basis for regarding it as inherently confidential), the Commissioner does not accept that there is an explicit or implied duty of confidence in relation to the requested information.

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

53. The term "legitimate interest" is not defined in the EIRs. In the Commissioner's view, the interest in question should be financial, commercial or otherwise economic in nature. The prejudice to that interest must be substantial: in other words, it must be of real and of demonstrable significance.

54. As indicated above, the Board considered disclosure could affect future consultations through loss of trust, thereby reducing the effectiveness of the final EMP resulting from these ongoing discussions (like those in the 2018 meeting minute), and that this in turn would have a knock-on effect on the health of the local wild salmonids, and so on the commercial interests of the local wild salmonid fisheries.

55. The Commissioner has considered the arguments put forward by the Board and the Applicant, as well as the withheld information itself.

56. The Commissioner is not persuaded that the Board has made a compelling enough argument that disclosure of the withheld information would be capable of the harm envisaged, in the absence of any evidence to support its position.

57. Taking account of the withheld information and the submissions provided by the Board, the Commissioner is unable to accept that disclosure would cause the substantial prejudice required by regulation 10(5)(e) of the EIRs. Consequently, he cannot accept that the Board can justify the application of regulation 10(5)(e) to the withheld information.

58. Given that the Commissioner has found that the exception in regulation 10(5)(e) was incorrectly applied to the information withheld by the Board, the Commissioner is not obliged to, and has not gone on to, consider the public interest test required by regulation 10(1)(b) of the EIRs.

59. The Commissioner finds that, by not making the information available, the Board failed to comply with regulation 5(1) of the EIRs. He requires the Board to disclose the information to the Applicant (keeping the redactions of personal data in place).

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

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

Decision

The Commissioner finds that Wester Ross Area 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 withhold the information requested under regulation 10(4)(d) of the EIRs. He also finds that the Board failed to comply with the requirements of regulation 13(d) of the EIRs, by failing to notify the Applicant of the expected date by which the information requested would be completed or finished.

The Commissioner also finds that the Board was not entitled to withhold the information under regulation 10(5)(e) of the EIRs.

The Commissioner therefore finds that the Board failed to comply with regulation 5(1) of the EIRs.

The Commissioner therefore requires the Board to provide the Applicant with the 2018 meeting minute (keeping the redactions of personal data in place), by **28 February 2022**.

Appeal

Should either the Applicant or the Board wish to appeal against this decision, they have the right to appeal to the Court of Session on a point of law only. Any such appeal must be made within 42 days after the date of intimation of this decision.

Enforcement

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

Margaret Keyse
Head of Enforcement

14 January 2022

Appendix 1: Relevant statutory provisions

The Environmental Information (Scotland) Regulations 2004

2 Interpretation

(1) In these Regulations –

...

"environmental information" has the same meaning as in Article 2(1) of the Directive, namely any information in written, visual, aural, electronic or any other material form on

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- (a) the state of the elements of the environment, such as air and atmosphere, water, soil, land, landscape and natural sites including wetlands, coastal and marine areas, biological diversity and its components, including genetically modified organisms, and the interaction among these elements;
- (b) factors, such as substances, energy, noise, radiation or waste, including radioactive waste, emissions, discharges and other releases into the environment, affecting or likely to affect the elements of the environment referred to in paragraph (a);
- (c) measures (including administrative measures), such as policies, legislation, plans, programmes, environmental agreements, and activities affecting or likely to affect the elements and factors referred to in paragraphs (a) and (b) as well as measures or activities designed to protect those elements;

...

5 Duty to make available environmental information on request

(1) Subject to paragraph (2), a Scottish public authority that holds environmental information shall make it available when requested to do so by any applicant.

(2) The duty under paragraph (1)-

...

(b) is subject to regulations 6 to 12.

...

10 Exceptions from duty to make environmental information available-

(1) A Scottish public authority may refuse a request to make environmental information available if-

- (a) there is an exception to disclosure under paragraphs (4) or (5); and
- (b) in all the circumstances, the public interest in making the information available is outweighed by that in maintaining the exception.

(2) In considering the application of the exceptions referred to in paragraphs (4) and (5), a Scottish public authority shall-

- (a) interpret those paragraphs in a restrictive way; and

(b) apply a presumption in favour of disclosure.

...

(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

(e) the request involves making available internal communications.

(5) A Scottish public authority may refuse to make environmental information available to the extent that its disclosure would, or would be likely to, prejudice substantially-

...

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

...

(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).

...

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-

...

(d) if the exception in regulation 10(4)(d) is relied on, state the time by which the authority considers that the information will be finished or completed; and

...

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