

Decision Notice 023/2022

Changes to assumed half-life of chemical used in computer modelling to predict the dispersion of pesticides discharged by fish farms – failure to respond

Applicant: The Applicant

Public authority: Scottish Environment Protection Agency

Case Ref: 202200099



Scottish Information
Commissioner

Summary

The Applicant asked the Scottish Environment Protection Agency (SEPA) about any changes to the assumed half-life of a specific chemical (the rate at which it breaks down in seawater), used in computer modelling to predict the dispersion of pesticides discharged by fish farms and the breakdown of the chemical in seawater.

The Applicant also wanted to know what the half-life of this chemical was at typical Scottish sea temperatures in winter and summer, in terms of SEPA's previous and revised modelling criteria.

This decision finds that SEPA failed to respond to the request and requirement for review within the timescales allowed by the Freedom of Information (Scotland) Act 2002 (FOISA) and the Environmental Information (Scotland) Regulations 2004 (the EIRs).

Background

1. The Applicant made an information request to SEPA on 5 November 2021.
2. SEPA did not respond to the information request.
3. On 8 December 2021, the Applicant wrote to SEPA requiring a review of its decision in respect of its failure to respond.
4. Although the Applicant received an acknowledgement on 15 December 2021 and an update on 13 January 2022, he did not receive a response to his requirement for review.
5. The Applicant wrote to the Commissioner on 23 January 2022, stating that he was dissatisfied with SEPA's failures to respond and applying to the Commissioner for a decision in terms of section 47(1) of FOISA. The enforcement provisions of FOISA apply to the enforcement of the EIRs, subject to specified modifications – see regulation 17.
6. On 25 January 2022, SEPA was notified in writing that an application had been received from the Applicant and was invited to comment on the application.
7. The Commissioner received submissions from SEPA on 22 February 2022. These submissions are considered below.

Commissioner's analysis and findings

8. It is apparent from the terms of the request that the information will be environmental information as defined by regulation 2(1) of the EIRs. *In Decision 218/2007 Professor A D Hawkins and Transport Scotland*¹, the Commissioner confirmed, at paragraph 51, that where environmental information is concerned, there are two separate statutory frameworks for access to that information and, in terms of the legislation, an authority is required to consider the request under both FOISA and EIRs.
9. SEPA acknowledged that it had not responded to the Applicant's information request and requirement for review on time.

¹ <http://www.itspublicknowledge.info/ApplicationsandDecisions/Decisions/2007/200600654.aspx>

10. It explained that a variety of factors had significantly contributed to this, in particular the service disruptions and continued office closure due to COVID-19, and the impact of the criminal cyber-attack against SEPA on 24 December 2020.
11. SEPA acknowledged that, although the information request was made after the cyber-attack, it sought information that was created, in part, prior to the attack and, in part, afterwards. It accepted, however, that the request should have been responded to within the statutory timescales.
12. SEPA noted that internal and external communication issues had also contributed to the delays in responding timeously, including its failure to keep the Applicant up to date on the status of the request.
13. Section 10(1) of FOISA gives Scottish public authorities a maximum of 20 working days following the date of receipt of the request to comply with a request for information. This is subject to qualifications which are not relevant in this case. The same timescale is laid down by regulation 5(2)(a) of the EIRs.
14. It is a matter of fact that SEPA did not provide a response to the Applicant's request for information within 20 working days, so the Commissioner finds that it failed to comply with section 10(1) of FOISA and regulation 5(2)(a) of the EIRs.
15. Section 21(1) of FOISA gives Scottish public authorities a maximum of 20 working days following the date of receipt of the requirement to comply with a requirement for review. Again, this is subject to qualifications which are not relevant in this case. The same timescale is laid down by regulation 16(4) of the EIRs.
16. It is a matter of fact that SEPA did not provide a response to the Applicant's requirement for review within 20 working days, so the Commissioner finds that it failed to comply with section 21(1) of FOISA and regulation 16(4) of the EIRs.
17. As SEPA responded to the Applicant's requirement for review on 8 February 2022, the Commissioner does not require it to take any further action in relation to the Applicant's application. In relation to the systematic issues arising out of the 24 December 2020 cyber-attack, the Commissioner is working with SEPA (as noted in *Decision 165/2021*) to assist in rebuilding its Freedom of Information capacity, by way of a Level 2 Intervention under his Intervention Procedures.
18. Notwithstanding that intervention and his willingness to be supportive in this challenging time, the Commissioner must reiterate what he said in *Decisions 069/2021, 165/2021* (the Applicant's previous decision), *181/2021, 006/2022* and *007/2022* with regard to meeting the required timescales: where they are not met, he has no option but to find that there has been a breach of the above provisions.
19. The Commissioner notes that SEPA has apologised to the Applicant for its failure to comply.

Decision

The Commissioner finds that the Scottish Environment Protection Agency (SEPA) failed to comply with Part 1 of the Freedom of Information (Scotland) Act 2002 (FOISA) and with the Environmental Information (Scotland) Regulations 2004 (the EIRs) in dealing with the information request made by the Applicant. In particular, SEPA failed to respond to the Applicant's request for information and requirement for review within the timescales laid down by sections 10(1) and 21(1) of FOISA and regulations 5(2) and 16(4) of the EIRs.

The Commissioner does not require SEPA to take any action in respect of these failures in response to the Applicant's application, given that a response has now been issued.

Appeal

Should either the Applicant or SEPA 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.

Wendy Snedden
Freedom of Information Officer

28 February 2022

Scottish Information Commissioner

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