



Decision Notice 177/2024

Welfare of sheep on St Kilda

Authority: Scottish Ministers

Case Ref: 202200344

Summary

The Applicant asked the Authority for correspondence pertaining to the welfare of sheep on the St Kilda archipelago. The Authority disclosed some information but withheld other information under regulation 10(4)(e) of the EIRs because it was internal communications. The Commissioner investigated and found that the Authority was entitled to apply regulation 10(4)(e) of the EIRs to most of the withheld information, but some information had been wrongly withheld under this exception and he required its disclosure.

Relevant statutory provisions

Freedom of Information (Scotland) Act 2002 (FOISA) sections 47(1) and (2) (Application for decision by Commissioner)

The Environmental Information (Scotland) Regulations 2004 (the EIRs) regulations 2(1) (definitions of "the Act", "applicant" and "Commissioner" and paragraphs (a), (b), and (c) of definition of "environmental information") (Interpretation); 5(1) (Duty to make environmental information available on request); 10(1), (2) and (4)(e) (Exceptions from duty to make environmental information available), 17(1), (2)(a) and (b) (Enforcement and appeal provisions)

Background

1. On 30 August 2021, the Applicant made a request for information to the Authority. He asked for correspondence, internal and external, pertaining to the welfare of, specifically, the sheep on the St Kilda archipelago – including their considered legal welfare status – from the time

of preliminary discussions around the Animal Health and Welfare (Scotland) Act 2006 ('the 2006 Act') to the present day.

2. The Authority responded on 27 September 2021. It disclosed some information, but withheld other information under regulation 10(4)(e) of the EIRs because that information was "internal communications between officials of public organisations working for the same public function about the welfare of sheep on the St Kilda archipelago". The Authority also withheld some information under the exception in regulation 11(2) of the EIRs as personal data of third parties (i.e. staff names, phone numbers, etc).
3. On 5 November 2021, the Applicant wrote to the Authority requesting a review of its decision. The Applicant stated that he was dissatisfied with the Authority's decision to apply the exception under regulation 10(4)(e) of EIRs to the information. He argued that disclosure of the withheld information was in the public interest and would:
 - contribute to ensuring that any public authority with regulatory responsibilities was adequately discharging its functions;
 - enable the correction of misleading claims;
 - enhance scrutiny of decision-making processes (or lack of them) and thereby improve accountability and participation; and
 - "contribute to a debate on a matter of significant public interest, viz. animal welfare".
4. The Authority notified the Applicant of the outcome of its review on 6 December 2021. The Authority disclosed some information that it had previously withheld under regulation 10(4)(e) of the EIRs, with personal data redactions made under regulation 11(2) of the EIRs. The Authority also notified the Applicant that it was continuing to withhold some information under regulation 10(4)(e) of the EIRs, because disclosure would breach legal professional privilege.
5. On 10 December 2021, the Applicant asked the Authority if the dates of the remaining correspondence could be disclosed (with all other information redacted). He argued that this would protect the right of confidentiality of these communications, yet would still allow him to assess whether pertinent discussion took place (or not) at specific times of interest.
6. The Authority responded on 21 January 2022, and explained that it was not able to disclose the dates of the correspondence.
7. On 22 March 2022, 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 that he was dissatisfied with the outcome of the Authority's review because it had failed to address his concerns. He said that "without more information on what has been going on, or more pressingly what has not been going on within government, then [his] ability to seek remedy through calling on [his] parliamentary representatives to bring their scrutiny of government to bear will be hampered".

Investigation

8. The Commissioner determined that the application complied with section 47(2) of FOISA and that he had the power to carry out an investigation.

9. On 4 May 2022, the Authority was notified in writing that the Applicant had made a valid application. The Authority was asked to send the Commissioner the information withheld from the Applicant. The Authority provided the information and the case was allocated to an investigating officer.
10. The investigating officer asked the Applicant to confirm whether his dissatisfaction extended to the withholding of personal information under regulation 11(2) of the EIRs. The Applicant confirmed that he did not wish to challenge the Authority's use of this exception. Accordingly, the Commissioner will only consider the information that is being withheld under regulation 10(4)(e) of the EIRs.
11. Section 49(3)(a) of FOISA requires the Commissioner to give public authorities an opportunity to provide comments on an application. The Authority was invited to comment on this application and to answer specific questions. These related to how it identified information it held and its reasons for withholding information under regulation 10(4)(e) of the EIRs. The Applicant also provided comments to the Commissioner to assist his case.

Commissioner's analysis and findings

12. The Commissioner has considered all the submissions made to him by the Applicant and the Authority.

Is the requested information environmental information?

13. The Commissioner is satisfied that the information covered by this request (information related to the welfare of sheep on the St Kilda archipelago) is environmental information, as defined in regulation 2(1) of the EIRs. In reaching this conclusion, the Commissioner has considered the information in question, along with paragraphs (a), (b) and (c) of the definition of environmental information in regulation 2(1) of the EIRs and he agrees with the Authority in categorising the information as environmental. He notes that the Applicant has not disputed the Authority's decision to handle his request under the EIRs.

Regulation 5(1) of the EIRs

14. Regulation 5(1) of the EIRs requires a Scottish public authority which 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.
15. 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 regulations 6 to 12 applies (regulation 5(2)(b)).

Information held

16. In order to ascertain whether all relevant information had been identified, the Authority was asked to explain the steps it took to establish what information it held that fell within the terms of the Applicant's information request. The Authority explained that the team involved in the type of work covered by the request was very small and, consequently, a limited number of individuals would have been likely to hold relevant information. It said that the case handler on the initial request was the primary person responsible for this matter. The Authority confirmed that the original searches were carried out on the case handler's own email folders and those of the Wildlife Management Natural Resources team.

17. During the investigation, the Authority carried out additional searches of its electronic document records management system (eRDM) using search terms such as "St Kilda sheep", "Animal Welfare Act", "Kilda", and the name of the original case handler. These searches identified additional information, which included information that had already been provided to the Applicant or was otherwise in the public domain. The Authority reviewed the remaining additional information and disclosed information that was within scope of the request, subject to redactions made under regulation 11(2) of the EIRs, in relation to personal data. Some of the additional information was not within scope of the request because it was not held at the time the request was made.
18. Given the timeframe of the request (i.e. from the time of preliminary discussions around the 2006 Act to the date of the request), the Authority was asked whether any searches had been carried out which sought correspondence between staff members preceding the original case handler. The Authority confirmed that any such correspondence would be saved to the eRDM. The Authority subsequently conducted searches using the names of previous staff members from the time when 2006 Act was being developed. The Authority provided screenshots which showed that these searches returned no relevant results.
19. The Authority also explained that staff who were in the Animal Welfare team prior to 2006 did not recall St Kilda sheep being raised as part of discussions around the development of the 2006 Act.
20. It later confirmed that it did not hold copies of paper files on this subject, and neither was such information held in area offices. The Authority was asked questions about particular correspondence and documents referenced in the disclosed information, and which the Applicant considered should be held by the Authority. The Authority confirmed, in relation to each query, that its searches would have identified information if it was held.
21. 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.
22. Having considered all the relevant submissions and the terms of the request, the Commissioner is satisfied that the information held by the Authority and falling within the scope of the Applicant's request was capable of being identified by the searches carried out. The request itself was clear and without ambiguity and the Authority interpreted it reasonably. Furthermore, the Authority explained why it did not hold certain recorded information – for example, that the duty was on another public authority or that the Authority's searches would have identified the specific type of document referred to or mentioned elsewhere in the disclosed information. The Commissioner recognises that the Authority identified a relatively small amount of information, given the timeframe specified in the Applicant's request, but, he is satisfied that, by the end of the investigation, the Authority had taken adequate, proportionate steps to establish the extent of information held that was relevant to the request.

23. However, the Commissioner considers that the information referred to in paragraph 17 should clearly have been identified as falling within scope by the close of the Authority's review, at the latest. In failing to identify this information, the Authority failed to deal with the request fully in accordance with regulation 5(1) of the EIRs.

Regulation 10(4)(e) - Internal communications

24. Regulation 10(4)(e) allows authorities to refuse to disclose internal communications. This is a class-based exception, meaning that there is no need to consider whether disclosure of the communication would cause harm before applying the exception.
25. For information to fall within the scope of the exception in regulation 10(4)(e) it need only be established that the information is an internal communication.
26. The Authority withheld the information contained in six items of correspondence (documents 16, 16A, 17, 18, 19 and 20) under regulation 10(4)(e), which, it argued, were internal communications.
27. The Authority submitted that the exception was applied to some of the information in document 16 (some of the emails included in the email thread in document 16 were disclosed to the Applicant during the investigation and so are not being withheld under 10(4)(e)), and to documents 16A and 17 in their entirety. It explained that the exception applied to the information in documents 16 and 17 because these were internal email exchanges between officials. For document 16A, the Authority argued that the exception applied because it was a draft letter which was attached to emails contained within document 16, and which has only been shared internally as part of the email exchanges. The Authority confirmed during the investigation that it did not hold any final version of the draft document, 16A.
28. In its submissions, the Authority explained that it withheld documents 18, 19 and 20 under regulation 10(4)(e) of the EIRs, because they contained legal advice and requests for legal advice from internal legal advisers. The Authority argued that legal advice privilege applied to these documents and that a claim to confidentiality could be maintained in legal proceedings because the correspondence in question has only been shared between its officials and internal legal advisers.
29. The Authority commented that there could be other exceptions available under the EIRs that may be applicable when legal advice was under consideration, but it did not identify any such exceptions.
30. Having considered all of the information withheld from the Applicant under regulation 10(4)(e), the Commissioner is satisfied that documents 16A, 17, 18, 19 and 20 are internal communications and the cited exception is relevant. The Commissioner is also satisfied that the information redacted from document 16 comprises internal email communications, and therefore falls under this exception.
31. The Commissioner must, therefore, go on to consider whether, in all of the circumstances of this case, the public interest in disclosing the information is outweighed by the public interest in maintaining the exception.

The Authority's comments on the public interest

32. In considering documents 16, 16A and 17, the Authority acknowledged that there was a public interest in disclosing the information to promote openness and transparency. It also acknowledged the strong presumption in favour of disclosure under the EIRs.

33. However, the Authority submitted that there was a greater public interest in allowing officials a private space within which issues, policy positions and responses to correspondence could be explored and refined until such time as sound, and effective, decisions could be made. The Authority added that disclosure of the information would undermine the full and frank discussion of issues between officials, and that would, in turn, undermine the quality of the decision-making process. It argued that this would not be in the public interest, and therefore it considered that the public interest favoured withholding documents 16, 16A and 17.
34. For documents 18, 19 and 20, the Authority again recognised the public interest in disclosure in order to promote openness and transparency. However, it argued that it was important, in all cases, that lawyers were able to provide free and frank legal advice, without fear that it will be disclosed and potentially taken out of context. The Authority argued that legal advisers need to be able to present the full picture to their clients, and to set out possible arguments for and against a particular view. The Authority submitted that there was a strong public interest in protecting the confidentiality of the information in order to ensure that decisions can be made in a fully informed legal context.
35. The Authority made clear that it believed the information was confidential at the time the Authority responded to the Applicant's request and requirement for review (and it still remained so – and legal professional privilege has not been waived). The Authority argued that in this instance, the public interest in maintaining the exception outweighed that of disclosure because of the overriding public interest in maintaining the confidentiality of communication between lawyers and clients.

The Applicant' comments on the public interest

36. In his application to the Commissioner, the Applicant explained that the subject of his appeal was the "annual winter starvation" of a significant number of sheep on three islands of the St Kilda archipelago, a World Heritage Site. He argued that disclosure of the information would contribute to a debate on this, which he considers to be a matter of considerable public interest.
37. The Applicant submitted that establishing which regulatory regime applied to the sheep (i.e. the 2006 act or the Wildlife and Countryside Act 1981) was critical to determining whether their welfare was being satisfactorily managed, and to ensure that no breaches or offences (of whichever provisions were applicable) have occurred with respect to the sheep. The Applicant argued that the current cycle of rapid population growth and subsequent crash through starvation and nutritional disease causes suffering to the animals. He submitted that full disclosure of the information would enhance scrutiny of the decision-making processes and thereby improve accountability and participation.
38. The Applicant also submitted that the matter of whether the sheep were considered to be "wild" or "feral" was important in identifying which regulatory regime applied. He noted that his request sought information from the Authority to examine how it determined whether the sheep were wild or feral, and to confirm if the Authority had properly considered which regulatory regime was applicable.
39. The Applicant argued that the Authority's position regarding the welfare status of the St Kilda sheep appeared confused, particularly in relation to the gathering of the sheep for research purposes which, he argued, would have constituted a breach or offence of the 2006 Act) or if not, a breach or offence of the Wildlife and Countryside Act 1981.

The Applicant submitted that even the *possibility* of the Authority and/or another public authority determining policy on the basis that an offence under the Wildlife and Countryside Act would be viewed as a lesser offence than one under the Animal Health and Welfare Act should be a matter of significant public interest.

40. The Applicant cited paragraph 8 of the guidance to the 2006 Act ¹ which states that;

...Protected animals' include the kinds of animals whose collective behaviour, life cycle, or physiology has been altered as a result of their breeding and living conditions being under human control for multiple generations. Livestock, poultry, horses, cats and dogs are all protected animals whether they are in captivity or living wild as "feral" animals. Thus feral cats, sheep, goats or ponies are "protected animals" for the purpose of the Act....

The Applicant explained that he sought the information in order to establish the Authority's scientific justification for disregarding this guidance. He submitted that his attempts to correspond with the Authority on this issue have not been satisfactorily answered and without disclosure of the withheld information he does not know whether there has been a failure of due process.

41. The Applicant submitted that, in his correspondence with the Authority [in which he attempted to highlight his concerns regarding the continuing starvation of sheep on St Kilda], he noticed examples of what he interpreted as obfuscation and dissemblance. He argued that there were enough examples to reasonably question the Authority's fiduciary duty and trustworthiness. The Applicant provided the Commissioner with these examples for his consideration. The Applicant submitted that only release of all communications would confirm or refute any failure of the Authority's fiduciary duty.
42. The Applicant argued that having the dates of the withheld information disclosed (without the content) would allow scrutiny of whether the Authority had ever properly considered the welfare of the St Kilda sheep, particularly with respect to compulsory vaccination programmes and in terms of decision making under regulatory regimes related to animal welfare. In his view, he argued that such a "date only" disclosure would not compromise legal confidentiality of advice and as such, this information should be released.

The Commissioner's view on the public interest

43. Regulation 10(2)(b) of the EIRs builds in an explicit presumption in favour of disclosure, which makes it clear that where arguments are evenly balanced for withholding and disclosing the information, the information must be disclosed.
44. The starting position is, therefore, that there is a public interest in disclosure of environmental information (as expressed in the EIRs and associated EU Directive) and that only if there is a stronger competing public interest in withholding the information should exceptions be applied.
45. The Commissioner has carefully considered the submissions made by the Authority and the Applicant.

¹ <https://www.gov.scot/binaries/content/documents/govscot/publications/advice-and-guidance/2018/11/animal-health-and-welfare-scotland-act-2006-guidance/documents/animal-health-and-welfare-scotland-act-2006-guidance/animal-health-and-welfare-scotland-act-2006-guidance/govscot%3Adocument/Animal%2BHealth%2Band%2BWelfare%2B%2528Scotland%2529%2BAct%2B2006%2B-%2BGuidance%2B.pdf>

46. The Commissioner accepts that there is a public interest in ensuring that officials of the Authority have a private space in which they can discuss and consider issues and make informed decisions. As in many previous decisions, he recognises the importance of such a private space for good decision-making.
47. On the other hand, the Applicant has clearly explained to the Commissioner that his interest in pursuing this appeal is to determine whether the Authority has properly considered the welfare status of the St Kilda. The Commissioner agrees that there is strong public interest in the welfare of the sheep on the St Kilda archipelago, and also in ensuring that the Authority has made properly considered decisions relating to that. He considers that the Applicant has presented a detailed and well-argued case.
48. The Commissioner acknowledges that disclosure of the information would allow scrutiny of the decisions that have been taken, and improve accountability and transparency. He recognises that there is a significant public interest in ensuring that the Authority has properly considered the welfare status of the St Kilda sheep and properly considered the consequences of such decisions within the legal framework applying to animal welfare.
49. The Commissioner has reviewed the information that the Authority has disclosed to the Applicant. He notes that document 16A is a draft letter to an external party and the Authority has no record of this letter being finalised or sent. The Commissioner also notes that documents 16 and 17 comprise internal emails which provide comments on the draft contained in document 16A. The Commissioner considers that there is a public interest in permitting authorities a private space in which to draft, edit and refine communications, in order to ensure that any finalised versions have been fully considered and accurately reflect the views of the Authority. In cases where documents are drafted but are never finalised, the Commissioner generally takes the view that such documents do not represent the finalised views of the Authority, and disclosure of such information would not be in the public interest.
50. The Commissioner finds, in relation to documents 16, 16A and 17 that the public interest favours allowing an Authority a private space in which to consider how best to communicate its views to an external party and he finds that most of the information in these documents has been correctly withheld under 10(4)(e) of the EIRs.
51. Regarding those documents that the Authority identifies as being subject to legal advice privilege (documents 18, 19 and 20), the Commissioner notes, as he did in previous decisions involving both FOISA and the EIRs, that the courts have long recognised the strong public interest in maintaining the right to confidentiality of communications between legal adviser and client on administration of justice grounds. Many of the arguments in favour of maintaining confidentiality of communications were discussed in a House of Lords case, *Three Rivers District Council and others v Governor and Company of the Bank of England (2004) UKHL 48*² and in the *Department for Business, Enterprise and Regulatory Reform v Information Commissioner and O'Brien [2009] EWHC 164 (QB)*³. The Commissioner will apply the same reasoning to communications attracting legal professional privilege generally. More generally, he considers there to be a strong public interest, also recognised by the courts, in the maintenance of confidences.

² <http://www.bailii.org/uk/cases/UKHL/2004/48.html>

³ <https://www.bailii.org/ew/cases/EWHC/QB/2009/164.html>

52. While the information in documents 18, 19 and 20 is not legal advice, the Commissioner accepts that it is still subject to legal professional privilege given the expectation of confidentiality of communications between legal adviser and client.
53. The Commissioner finds the Applicant's public interest arguments compelling and he agrees that there is significant public interest in examining whether the Authority's decision-making is based in law. He finds this to be a case where the public interest is finely balanced.
54. However, having considered the competing public interest arguments, the Commissioner considers the balance of the public interest lies in maintaining confidentiality of communications within the Authority. It is important that an authority has a private space to discuss key matters in confidence. The Directive recognises this and the EIRs incorporate an exception permitting access to internal documents to be refused by an authority so as to meet the need (of public authorities) to have a protected space in order to engage in reflection and to pursue internal discussions. The Commissioner would note that this private space is particularly important when legal matters are being discussed and information is subject to legal professional privilege, as in this case.
55. Scottish public authorities to which a request for access to environmental information contained in an internal communication has been made should take into account the time that has passed since that communication and the information that it contains were drawn up. In this case, the Commissioner has also considered this factor. For the information involved, at the time of the request (or at the latest the Authority's review), he does not think that it can be said that, on account of its age, the information has become historical and that it is accordingly no longer sensitive, where some time has passed since it was drawn up.
56. The Commissioner finds that the Authority complied with the EIRs in withholding most of the information contained in documents 18, 19, and 20, and which it categorised as internal communications.

Dates of internal communications

57. However, there is some information contained in documents 16, 16A, 17, 18, 19 and 20, which the Commissioner does not regard as correctly withheld under this exception.
58. The Applicant specifically asked the Authority (on 10 December 2021) if the dates of the remaining correspondence could be disclosed, with all other information redacted. He argued that this would protect the right of confidentiality of these communications, yet would still allow him to assess whether pertinent discussion took place (or not) at specific times of interest. The Authority responded, on 21 January 2022, that it was not able to disclose the dates of the correspondence.
59. As noted above, in his application to the Commissioner, the Applicant also specifically raised this point: i.e. he submitted that "date only" disclosure "does not compromise legal confidentiality of advice and ask that this information be released".
60. In this instance, the Commissioner cannot see that such disclosure would have a harmful effect in respect of preserving a private space for internal communications. Such a disclosure would simply indicate the dates of the internal communication that the Authority holds and that falls within the terms of the Applicant's requests.
61. The Commissioner is clear that the Applicant has a clear interest in transparency and understanding the actions of the Authority in respect of the legal status of the sheep on St Kilda and any concomitant rights and duties that arise (for public authorities or other

organisations) in respect of those sheep. Disclosure of the dates of the recorded information would allow the Applicant to understand the timeline of the Authority's actions as shown by the recorded information held. The Commissioner notes that the Authority has not redacted any other dates from any other communications that it has already disclosed and he cannot see the difference in terms of the public interest in respect of dates involved in the withheld information. He believes there is a public interest in showing the extent of the Authority's withheld information.

Information to disclose

62. The Commissioner requires the Authority to provide the Applicant with the dates of documents 16, 16A, 17, 18, 19 and 20.

Decision

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

He finds that the Authority correctly withheld some information under regulation 10(4)(e) of the EIRs, and so complied with the EIRs in that respect.

However, he also finds that the Authority wrongly withheld some information under regulation 10(4)(e) of the EIRs, and so failed to comply with regulation 5(1) of the EIRs in that respect.

The Commissioner therefore requires the Authority to provide the Applicant with the dates of documents 16, 16A, 17, 18, 19 and 20 that it wrongly withheld under 10(4)(e) of the EIRs, by 14 October 2024.

Appeal

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

David Hamilton
Scottish Information Commissioner

28 August 2024