



Scottish Information
Commissioner
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Decision Notice 233/2024

Farmed salmon and salmon farm mortalities

Authority: Calmac Ferries Limited

Case Ref: 202201414

Summary

The Applicant asked the Authority for information relating to farmed salmon and salmon farming mortalities. The Authority stated that complying with the request would exceed the £600 cost limit, so it was not obliged to comply. The Commissioner investigated and found that the Authority had considered the request under the wrong legislation. The requested information was environmental information, and the Authority should have considered the request under the EIRs. The Commissioner required the Authority to respond to the request under the EIRs.

Relevant statutory provisions

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1), (2) and (6) (General entitlement); 2(1)(b) (Effect of exemptions); 12(1) (Excessive cost of compliance); 39(2) (Health, safety and the environment); 47(1) and (2) (Application for decision by Commissioner)

The Environmental Information (Scotland) Regulations 2004 (the EIRs) regulations 2(1) (definition of “the Act”, “applicant” and “the Commissioner” and (paragraphs (a), (b) and (c) of the definition of “environmental information”) (Interpretation); 5(1) (Duty to make environmental information available on request); 16 (Review by Scottish public authority); 17(1), (2)(a),(b) and (f) (Enforcement and appeal provisions)

The Freedom of Information (Fees for Required Disclosure) (Scotland) Regulations 2004 (the Fees Regulations) regulations 3 (Projected costs) and 5 (Excessive cost – prescribed amount)

Background

1. On 4 October 2022, the Applicant made a request for information to the Authority. The Applicant asked for:
 - (i) information on farmed salmon and salmon farming mortalities since 1 January 2020
 - (ii) any photos, videos, letters, emails and any other documents relating to farmed salmon and salmon farming
 - (iii) testing results, discussions and any other information relating to waste effluents from trucks and tankers transporting farmed salmon
 - (iv) any correspondence with SEPA, Marine Scotland, Salmon Scotland, Mowi, D R MacLeod, Billy Bowie, Ferguson Transport, Gogar Transport and any other haulage/transport companies in relation to farmed salmon and salmon farming mortalities.
2. The Authority responded on 7 November 2022. The Authority explained that whole gutted fresh salmon is normally transported by the Authority on overnight haulage carryings, except in very exceptional circumstances. The Authority added that the shipment of fish farm mortalities was handled by the fish farms, with transportation done by service vessels or sealed road tankers. If traveling on a crossing of the Authority, these shipments would be designated as a dangerous good and be shipped as such, in line with the handling of any other hazardous material. The Authority confirmed that it held no record of such material being transported between 1 January 2020 and 31 October 2022.
3. On the same day, the Applicant wrote to the Authority requesting a review of its decision. The Applicant stated that he was dissatisfied with the decision because he considered that it did hold information relevant to his request.
4. The Authority notified the Applicant of the outcome of its review on 8 December 2022. The Authority accepted that it had not considered the Applicant's request in full and apologised for this. Having considered the Applicant's request in full, the Authority refused the request, in terms of section 12(1) of FOISA, as it considered the cost of complying would exceed the specified limit of £600.
5. On 8 December 2024, the Applicant wrote to the Commissioner, applying for a decision in terms of section 47(1) of FOISA. The Applicant stated that he was dissatisfied with the outcome of the Authority's review because he did not agree that it would cost the Authority more than £600 to comply with his request.

Investigation

6. The Commissioner determined that the application complied with section 47(2) of FOISA and that he had the power to carry out an investigation.
7. On 12 December 2022, and in line with section 49(3)(a) of FOISA, the Commissioner gave the Authority notice in writing of the application and invited its comments and submissions.
8. The Authority provided its submissions, and the case was subsequently allocated to an investigating officer.

Commissioner's analysis and findings

9. The Commissioner has considered the submissions made by the Applicant and the Authority.

FOISA or the EIRs?

10. The relationship between FOISA and the EIRs was considered at length in [Decision 218/2007](#)¹. In the light of that decision, the Commissioner's general position is as follows:
- (i) The definition of what constitutes environmental information should not be viewed narrowly
 - (ii) There are two separate statutory frameworks for access to environmental information. A public authority is required to consider any request for environmental information under both FOISA and the EIRs
 - (iii) Any request for environmental information therefore must be handled under the EIRs
 - (iv) In responding to a request for environmental information under FOISA, an authority may claim the exemption in section 39(2)
 - (v) If the authority does not choose to claim the section 39(2) exemption, it must respond to the request fully under FOISA: by providing the information; withholding it under another exemption in Part 2; or claiming that it is not obliged to comply with the request by virtue of another provision in Part 1 (or a combination of these)
 - (vi) Where the Commissioner considers a request for environmental information has not been handled under the EIRs, he is entitled (and indeed obliged) to consider how it should have been handled under that regime.
11. The information in question concerns farmed salmon and salmon farming mortalities and waste effluent from trucks and tankers transporting farmed salmon.
12. Given the subject matter of this request, it is clear to the Commissioner that information falling within the scope of the request would be environmental information, as defined in regulation 2(1) of the EIRs (particularly paragraphs (a), (b) and (c)).
13. Given that the information requested is environmental information, the Authority had a duty to consider it in terms of regulation 5(1) of the EIRs. In failing to do so, it failed to comply with regulation 5(1).

Section 39(2) of FOISA - environmental information

14. The exemption in section 39(2) of FOISA provides, in effect, that environmental information (as defined by regulation 2(1) of the EIRs) is exempt from disclosure under FOISA, thereby allowing any such information to be considered solely in terms of the EIRs.
15. In this case, the Authority responded to the request solely under FOISA despite the Applicant asking that his request be considered under FOISA and the EIRs. The Authority provided the Commissioner with no submissions why it did not consider the information requested could be environmental information (as defined by regulation 2(1) of the EIRs).
16. In the absence of any such submissions in this respect, the Commissioner finds that the Authority would have been entitled to apply the exemption in section 39(2) of FOISA to the

¹ <https://www.foi.scot/decision-2182007>

request, given his conclusion that the information requested was properly classified as environmental information.

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

Regulation 16 of the EIRs

18. Regulation 16 of the EIRs states that, on receipt of a requirement to conduct a review, the authority shall review the matter and decide whether it has complied with the EIRs, within 20 working days (regulations 16(3) and (4)). It also states that, where an authority has not complied with its duty under the EIRs, it shall immediately take steps to remedy the breach of duty (regulation 16(5)).
19. Although the Authority responded to the Applicant's requirement for review on 8 December 2022, this was a result of the Authority considering the request solely in terms of FOISA and not under the EIRs.
20. It is apparent that the Authority failed to respond to the Applicant's request of 4 October 2022 in terms of the EIRs, and therefore failed to comply with regulation 5(1) of the EIRs. It is also apparent that the Authority failed to carry out a review meeting the requirements of regulation 16 of the EIRs.
21. The Commissioner therefore requires the Authority to provide a response to the Applicant's requirement for review of 7 November 2022, in terms of regulation 16 of the EIRs.
22. The Commissioner would expect the Authority, when carrying out a fresh review (in terms of the EIRs), to:
 - ensure that it fully addresses each element of the request
 - undertake adequate and proportionate searches with specific reference to the terms of the request. (In this case, the Commissioner notes that one of the search keywords used was "salmon" which, unsurprisingly, returned an extremely high number of results.)
 - provide the Applicant with advice and assistance on how he might refine his request in order to make it more manageable if it appears, on the basis of adequate and proportionate searches, that processing it would be likely to impose a significant burden on the Authority.
23. The Commissioner's decision below states a compliance date of 9 December 2024, in line with the timescales he is required to follow. This is the latest day on which the Authority must issue a response: the deadline does not prevent the Authority from issuing one sooner.

Decision

The Commissioner finds that the Authority failed to comply with the requirements of regulations 5(1) and 16 of the Environmental Information (Scotland) Regulations 2004 (the EIRs) in responding to the Applicant's information request and requirement for review.

The Commissioner requires the Authority to provide a response to the Applicant's requirement for review, in terms of regulation 16 of the EIRs, by **9 December 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.

Cal Richardson
Deputy Head of Enforcement

24 October 2024