

Decision Notice



Decision 017/2013 Global Alliance Against Industrial Aquaculture and the
Scottish Ministers

Sea lice data

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www.itspublicknowledge.info

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Summary

The Global Alliance Against Industrial Aquaculture (GAAIA) asked the Scottish Ministers (the Ministers) for sea lice data for all salmon farms in Scotland since 2000. Some information was provided to GAAIA. The Ministers withheld the remaining information under the Environmental Information (Scotland) Regulations 2004, as they considered disclosure would prejudice substantially the interests of the providers of the information. The Commissioner agreed with this approach.

Relevant statutory provisions

The Environmental Information (Scotland) Regulations 2004 (the EIRs) regulations 2(1)(a) and (c) (Interpretation); 5(1) and (2)(b) (Duty to make available environmental information on request); 10(1), (2) and (5)(f) (Exceptions from duty to make environmental information available)

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

Background

1. On 3 April 2012, GAAIA wrote to the Ministers requesting sea lice data since 2000 for all salmon farms in Scotland, naming the company and site as well as any other specific sea lice information.
2. The Ministers responded on 3 May 2012. They explained that fish farmers were required to maintain records of sea lice counts in association with both *A Code of Good Practice for Scottish Finfish Aquaculture* and *The Fish Farming Businesses (Record Keeping) (Scotland) Order 2008*, and while the Marine Scotland Science Fish Health Inspectorate inspected these records during routine and enhanced inspections, the information was not routinely collected, collated or held in a database.
3. The Ministers went on to explain that inspections relating to sea lice levels and the measures in place to prevent, control and reduce sea lice had been carried out (under the *Aquaculture and Fisheries (Scotland) Act 2007* (the 2007 Act)) since November 2008. The results of these and other routine sea lice inspections had been provided to GAAIA in response to an earlier request for information: that response would have contained any data the Ministers held in relation to sea lice counts or sea lice levels.

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4. The Ministers also provided a link to the website of the Scottish Salmon Producers Organisation and advised that this organisation collected information on sea lice, including counts across Scotland, and published aggregated data on its website. They also referred to a previous request for information held in relation to the Area Management Agreement (a collaboration between the fish farming industry and local wild fisheries to encourage the exchange of information) process, providing data withheld earlier but explaining that they no longer received data through this process.
5. Finally, the Ministers also drew GAAIA's attention to a consultation being undertaken into the potential future regulation of Scotland's aquaculture industry, and provided a weblink to enable GAAIA to access further information about this.
6. On 14 May 2012, GAAIA wrote to the Ministers requesting a review of their decision. GAAIA considered the information provided be inadequate, failing to address the request fully.
7. The Ministers notified GAAIA of the outcome of their review on 13 June 2012. They advised that they were upholding their original decision without modification. Nevertheless, they also advised GAAIA that, in carrying out the review, they had identified some further information which fell within the scope of the request. They concluded that this additional information should be withheld under regulation 10(5)(f) of the EIRs, as they considered that disclosure would, or would be likely to, prejudice substantially the interests of the person who provided the information (the other conditions for the application of the exception also being present).
8. The Ministers went on to explain that, under the 2007 Act, they had powers to inspect and take copies of certain records (including sea lice counts), but the data being withheld preceded the date when the 2007 Act came into force. The Ministers acknowledged GAAIA's concern that the information disclosed was inadequate, but confirmed their conclusion that all relevant information held (with the exception of the information now withheld under regulation 10(5)(f)) had been provided in response to the GAAIA's request.
9. On 18 June 2012, GAAIA wrote to the Commissioner, stating that it was dissatisfied with the outcome of the Ministers' review and applying to the Commissioner 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 certain specified modifications.
10. The application was validated by establishing that GAAIA had made a request for information to a Scottish public authority and had applied to the Commissioner for a decision only after asking the authority to review its response to that request.



Investigation

11. On 22 June 2012, the Ministers were notified in writing that an application had been received from GAAIA and were asked to provide the Commissioner with any information withheld. The Ministers responded with the information requested and the case was then allocated to an investigating officer.
12. The investigating officer subsequently contacted the Ministers, giving them an opportunity to provide comments on the application (as required by section 49(3)(a) of FOISA) and asking them to respond to specific questions. In particular, the Ministers were asked to justify why they considered the exception in regulation 10(5)(f) of the EIRs applied to the withheld information. The Ministers were also asked to explain the steps taken to identify and locate any relevant information they held, noting GAAIA's belief that more information should be held.
13. Submissions were received from the Ministers during the investigation in relation to these points. Comments were also obtained from GAAIA as to why it believed the public interest favoured disclosure of the withheld information.
14. The relevant submissions received from both the Ministers and the GAAIA will be considered fully in the Commissioner's analysis and findings below.

Commissioner's analysis and findings

15. In coming to a decision on this matter, the Commissioner has considered all of the withheld information and the submissions made to her by both GAAIA and the Ministers, and is satisfied that no matter of relevance has been overlooked.

FOISA or EIRs?

16. The Ministers dealt with GAAIA on the basis that the information requested was environmental information, as defined in regulation 2(1) of the EIRs. The information in question comprises (or would comprise, if held) sea lice data for all salmon farms in Scotland and the Commissioner is satisfied that this falls within either paragraph (a) or paragraph (c) of the definition of environmental information contained in regulation 2(1) of the EIRs, being information on the state of elements of the environment or on measures and activities affecting or likely to affect those elements (the full paragraphs are to be found in the Appendix).



Matters to be considered

17. In their application, GAAIA expressed dissatisfaction with the information disclosed by the Ministers, as they believed the Ministers had access to more sea lice data than they claimed to hold and had made available so far and with the Ministers' decision to withhold information. GAAIA also raised wider concerns such as why (if that was the case) the information in question was not routinely collected by the Ministers, why any information collected was not routinely published, and that information had been inappropriately deleted.
18. The Commissioner has a remit under legislation to only consider whether the Ministers correctly identified and located, and either disclosed or appropriately withheld, information held by them and falling within the terms of GAAIA's request of 3 April 2012.
19. As regards the specific concern about deletion of information, this would only fall within the Commissioner's remit if the information had been held by a public authority and there was an allegation that it had been deleted after a request had been made for it, contrary to the provisions of regulation 19 of the EIRs. This was not the nature of the concern raised by GAAIA.
20. Whilst the Commissioner understands the nature of GAAIA's wider concerns and their strength of feeling about them, she has no remit to consider them, and has confined her deliberations to those issues where she does have a remit.

Did the Ministers identify all relevant recorded information covered by the GAAIA's request?

21. 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. It is important to bear in mind that this obligation relates to information actually held by an authority when it receives the request, as opposed to information an applicant believes the authority should (but which it does not in fact) hold.
22. In response to GAAIA's request, the Ministers provided them with sea lice data held as a consequence of their involvement with the Area Management Agreement process. In their request for review, GAAIA advised that they considered the information provided to be wholly inadequate and queried whether this really was the sum of all the sea lice data held by the Ministers.
23. In its application, GAAIA referred to a Parliamentary Reply made by the Minister for Environment and Climate Change on 10 May 2012, stating that sea lice data were "collected and published in aggregate"¹. If sea lice data were collected and published, GAAIA asked, where were they made available to the public and why they were not made available via the FOI process.

¹ <http://www.scottish.parliament.uk/parliamentarybusiness/28862.aspx?r=7430&mode=pdf> (column 8854)



24. This point was raised with the Ministers, who explained that the Minister for Environment and Climate Change had been referring to data collected and published by the Scottish Salmon Producers Organisation (SSPO), an industry trade body, not by the Scottish Government. A link to enable GAAIA to access this data was, the Ministers submitted, provided in response to GAAIA's request (the Commissioner acknowledges that this was done, although it may not have been immediately evident from the terms of this part of the Ministers' response that it was intended to refer to the same data as the earlier Ministerial statement).
25. As noted above, in seeking to establish whether the Ministers had identified all relevant information they held which would address GAAIA's request, they were asked to explain the searches they had undertaken. In response, the Ministers provided details of the searches undertaken (both initially and at review stage), the nature of the records searched, how and where these records were held and the staff consulted (with reasons why each individual was considered relevant).
26. The Ministers advised that initially they had missed the sea lice data withheld at review stage, because not all relevant colleagues were identified. They explained the context in which this information had been obtained, and also the remedial measures put in place as a result of the oversight.
27. Having considered these submissions, the Commissioner is satisfied that the searches carried out by the Ministers, by the conclusion of the review process, were adequate and would have identified any relevant, recorded information held by the Ministers and falling within scope of GAAIA's request. The Commissioner has taken into account the legislative context, under which fish farming businesses are required to compile and retain certain records (including records in relation to the prevention, control and reduction of parasites), which government inspectors may inspect and copy, but there is no requirement that the data in these records be provided to the Ministers routinely. In all the circumstances, she is satisfied that the information identified during the review process is the only information additional to that disclosed in response to GAAIA's request which is held by the Ministers and falls within the scope of GAAIA's request.
28. The Commissioner will now go on to consider whether the sea lice data withheld from GAAIA are excepted from disclosure in line with regulation 10(5)(f) of the EIRs.

Application of regulation 10(5)(f)

29. In terms of regulation 10(5)(f) of the EIRs, 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 interests of the person who provided the information where that person
 - (i) was not under, and could not have been put under, any legal obligation to supply the information;
 - (ii) did not supply it in circumstances such that it could, apart from the EIRs, be made available; and
 - (iii) has not consented to its disclosure.



30. Regulation 10(2) of the EIRs provides that this exception must be interpreted in a restrictive way and that the public authority shall apply a presumption in favour of disclosure. The exception is also subject to the public interest test in regulation 10(1)(b).
31. In the Commissioner's guidance on regulation 10(5)(f)², she states that certain points should be addressed in considering whether this exception applies. These include:
- Was the information provided by a third party?
 - Was the provider, or could the provider be, required by law to provide it?
 - Has the provider consented to disclosure?
 - Would release of the information cause, or be likely to cause, substantial harm to the interests of the provider?
 - Is the information otherwise publicly available?

Does regulation 10(5)(f) apply in this case?

32. In their submissions, the Ministers explained that the withheld sea lice data had been provided to them on a voluntary basis by a single fish farming company, which had not given consent for the information to be disclosed.
33. The Ministers explained that they had powers under the 2007 Act to inspect and take copies of certain records (including sea lice counts). There were no equivalent powers prior to the enactment of the 2007 Act, from when the withheld information dated. (The relevant parts of the 2007 Act came into effect on 1 August 2007; the 2008 Order, which sets out the records which fish farming businesses are required to collect, did not come into force until 10 November 2008.) The Ministers explained that records might have been kept by farmers prior to the enactment of the 2007 Act (this is presumably a reference to the coming into force of the 2008 Order), but there was no statutory requirement for them to do so, nor were there any statutory powers of collection or inspection. If any sea lice data had been received by them from fish farmers at this time, they would have been provided on a purely voluntary basis and not for the purpose of monitoring.
34. Having considered the submissions from the Ministers, the Commissioner is satisfied that all of the information withheld under regulation 10(5)(f) was provided to them by a third party. The Commissioner is also satisfied that the withheld sea lice data predate the 2007 Act.
35. The Commissioner is aware that the sea lice data held by the Ministers is also held by another body, and that other body has carried out analysis of this data and has used the product of this analysis in various papers and publications. Although the product of this analysis is publicly available, the Commissioner understands that the withheld information itself is not, and was not, publicly available at the time of the Ministers' review of their handling of GAAIA's information request (or, indeed at the date on which the Ministers received GAAIA's request).

² <http://www.itspublicknowledge.info/Law/FOISA-EIRsGuidance/section33/Section33.asp>



36. Given that the Ministers had no powers to require fish farming companies to record and provide them with sea lice data prior to the 2007 Act, the Commissioner accepts that the company providing the withheld information was not (and could not be put) under any legal obligation to supply the data to them. She is therefore satisfied that regulation (10)(5)(f)(i) is met in this case.
37. Regulation 10(5)(f)(ii) states that the exception can only apply to information which was not supplied in circumstances such that it could, apart from under the EIRs, be made available. The Commissioner cannot identify any other legal obligation, apart from those under the EIRs, which would require the disclosure of the withheld information, and therefore accepts that regulation 10(5)(f)(ii) is met in this case.
38. The Commissioner also notes that the third party supplying this information has not consented to its disclosure. Consequently, the Commissioner concludes that regulation 10(5)(f)(iii) applies to the withheld information.
39. Since the tests in regulation 10(5)(f)(i), (ii) and (iii) have been satisfied, the Commissioner must go on to consider whether disclosure of the information would, or would be likely to, prejudice substantially the interests of the person who provided the information.
40. In this case, the information was provided by one specific fish farming company, so it is the interests of that company which must be considered in relation to the disclosure of the information.
41. In arguing that substantial prejudice would be likely, the Ministers noted that the data had not been updated for some time and did not provide a meaningful picture of sea lice levels on fish farms across Scotland. The data related to one company only and could be used, out of context, to provide a misleading or damaging picture of that company in isolation, leading to substantial commercial harm to the company concerned.
42. The Ministers also considered that release of the withheld sea lice data might lead to perceptions in relation to the occurrence of sea lice on the farms of the company concerned, as opposed to those of other companies (whose data were not in the public domain, or held by the Ministers). This, the Ministers submitted, put the company providing the data at a commercial disadvantage in comparison to aquaculture companies whose sea lice levels were not published.
43. The information of which the withheld sea lice data formed part was, the Ministers explained, used to develop research of benefit to the provider, the Scottish Government and the industry as a whole. They provided examples of its use in addressing fish disease and mortality. These outputs, the Ministers submitted, informed the provider, other industry bodies and the Scottish Government in the development of informed disease control policies. In the Ministers' view, the cessation of this work would substantially prejudice the data provider's ability to manage disease, and thus their economic wellbeing.



44. The Commissioner has considered a sample of the withheld sea lice data, together with the Ministers' submissions. She is not satisfied from the submissions she has received that disclosure would necessarily lead (or be likely to lead) to the termination of the valuable work referred to in the preceding paragraph. Equally, public authorities disclosing information can always explain the context in which it is held. Nevertheless, the Commissioner accepts the potential for this information (once in the public domain, which would be the effect of disclosure under the EIRs) being used to the commercial disadvantage of a single fish farming company, which would be likely to prejudice that company's interests substantially.
45. The Commissioner has therefore found that the Ministers correctly applied the exception in regulation 10(5)(f) to the information under consideration. She will now go on to consider the balance of the public interest in relation to this information.

Public interest in relation to regulation 10(5)(f)

46. The exception in regulation 10(5)(f) is subject to the public interest test in regulation 10(1)(b) of the EIRs. Even if an exception has been judged to apply, a Scottish public authority may only refuse a request to make environmental information available if, in all the circumstances, the public interest in making the information available is outweighed by that in maintaining the exception (that is, withholding the information).
47. In their submissions, the Ministers advised that they considered there to be a greater public interest in allowing research into fish disease to continue and be published for the benefit of all, than in releasing the information with the risk of losing further research opportunities.
48. In seeking to justify this conclusion, the Ministers contended that release of the withheld sea lice data in question could lead to a breakdown in trust between them and the data provider. If data supplied voluntarily for research purposes were released in this instance, the future voluntary supply of data about non-notifiable diseases and Bacterial Kidney Disease might well stop.
49. The Ministers submitted that the information provided voluntarily was their only source of information for assessing mortality attributed to non-notifiable diseases over a long period and over a large number of sites. The Ministers therefore considered this information critical for assessing trends in various diseases. It was also, the Ministers submitted, critical for assessing the economic impact of diseases, a major Scottish Government aim. The Ministers advised that they had no powers to obtain these data and would lose the ability to make any sort of statement as to the seriousness of, or changes in, the impact of these diseases if the data.
50. Even in relation to Bacterial Kidney Disease, a notifiable disease, the Ministers submitted that information obtained voluntarily was documented to a higher resolution than could be obtained under legislation, which was of value in assessing economic impact.



51. Great difficulty had been experienced, the Ministers submitted, in gathering the relevant data from a wider range of sources (which they believed would be beneficial), because other companies were concerned that they would lose control of their data and were not confident in the Government's ability to keep information confidential. Preliminary discussions with another fish farming company suggested that, unless the Ministers could guarantee the security of the data, they were unlikely to get them. They believed they were thus undermined in their ability to identify and evaluate potential emerging problems, a problem which would be exacerbated if existing data providers ceased to provide information.
52. In their submissions, GAAIA considered there to be a huge public interest in disclosure of sea lice information, believing it clear that Scotland had a huge problem with sea lice infestation and chemical resistance. Quoting data obtained from the Scottish Environment Protection Agency, the GAAIA submitted that there had been a 12-fold increase in the use of sea lice chemicals between 2005 and 2011.
53. GAAIA noted that the salmon farming industry itself referred to sea lice data, referring by way of example to information made available by the Scottish Salmon Producers' Organisation via Regional Health Management Reports. It also referred to data obtained by the Salmon and Trout association on the incidence of sea lice, together with extracts of reports and newspaper articles to support its position that there was a public interest in disclosure of sea lice data.
54. GAAIA also explained that the governments in other countries where salmon farming was common, such as Ireland, Norway, Canada and Chile, regularly published sea lice data online. In Norway, GAAIA advised, the salmon farming industry was required to provide the government with sea lice counts on a weekly basis. Marine Harvest (Scotland's largest salmon farming operator) already published site-specific sea lice data for their farms in Canada, and had been critical of producers in Norway who did not report their sea lice counts.
55. In GAAIA's view, the Ministers' argument that disclosure of sea lice counts would be likely to prejudice substantially the interests of those persons who provided the counts served only to back up the view that the information was so damning and damaging to the salmon farming industry that it must be released to the Scottish public. If the Scottish Government and Scottish salmon farming industry is fighting so hard to prevent sea lice data from being disclosed, GAAIA argued, then the information must be shocking and therefore should be shared with the people and taxpayers of Scotland.
56. GAAIA submitted that stakeholders, including shellfish farmers, fishermen, environmentalists, community groups and wild fishing interests, deserved access to sea lice data. It questioned why the interests of Norwegian-owned companies, for example, should prevail over the interests of people living in the Highlands and Islands of Scotland.



57. Having considered the submissions received from both the Ministers and GAAIA, the Commissioner acknowledges the widespread public interest that exists in ensuring that farmed Scottish salmon are healthy and free from sea lice and other diseases. It is clear to the Commissioner, from reading the articles and reports highlighted to her by GAAIA, that the issue of sea lice infestation of Scottish farmed salmon is highly emotive. It is also clear that this public interest extends to ensuring (and being assured) that action is taken to reduce or eradicate the presence of sea lice infestation in Scottish farmed salmon, for the benefit of not only the public but also both the farmed and wild fish industries.
58. The Commissioner acknowledges that greater transparency in relation to sea lice data would be likely to serve the public interest identified in paragraph 55, but can appreciate that this is a general argument which would be most relevant to reliable, comprehensive, up-to-date data which provides an industry-wide view. In the circumstances of this case, the information is limited, dated and restricted to one company and in this context it is reasonable to argue that the public interest would not be served by its disclosure.
59. The Commissioner must balance the public interest in disclosure against that in maintaining the exception. Clearly, there is a strong public interest in the continued voluntary provision of data as described by the Ministers: the Commissioner acknowledges that fish farming companies are not, even after the coming into force of the 2007 Act and subsidiary regulations, obliged to provide the Scottish Government with all of the data required for the valuable purposes outlined by the Ministers. While the position might be different if she were being asked to consider the disclosure of recent data in respect of the whole industry, she accepts that disclosure of isolated elements of information in respect of a single operator, such as those under consideration here, would make engagement and co-operation in the voluntary provision of necessary information less likely.
60. On balance, therefore, the Commissioner has concluded that the public interest in maintaining the exception in regulation 10(5)(f) of the EIRs outweighs the public interest in disclosure of the withheld information. Therefore the Commissioner has concluded that the Ministers were entitled to withhold the sea lice data under regulation 10(5)(f) of the EIRs.

DECISION

The Commissioner finds that the Scottish Ministers complied with the Environmental Information (Scotland) Regulations 2004 in responding to the information request made by the Global Alliance Against Industrial Aquaculture.

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Appeal

Should either the Global Alliance Against Industrial Aquaculture or the Scottish Ministers wish to appeal against this decision, there is an 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 notice.

Rosemary Agnew
Scottish Information Commissioner
19 February 2013



Appendix

Relevant statutory provisions

The Environmental Information (Scotland) Regulations 2004

2 Interpretation

(1) In these Regulations –

“the Act” means the Freedom of Information (Scotland) Act 2002;

“applicant” means any person who requests that environmental information be made available;

“the Commissioner” means the Scottish Information Commissioner constituted by section 42 of the Act;

“the Directive” means Directive 2003/4/EC of the European Parliament and of the Council on public access to environmental information and repealing Council Directive 90/313/EEC;

“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 –

(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;

...

(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.
- (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-
...
 - (f) the interests of the person who provided the information where that person-
 - (i) was not under, and could not have been put under, any legal obligation to supply the information;
 - (ii) did not supply it in circumstances such that it could, apart from these Regulations, be made available; and
 - (iii) has not consented to its disclosure; or
...