

Decision Notice



Decision 080/2013 Global Alliance Against Industrial Aquaculture and the
Scottish Ministers

Anti-predator nets

Reference No: 201201744
Decision Date: 6 May 2013

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Summary

On 12 July 2012, the Global Alliance Against Industrial Aquaculture (GAAIA) asked the Scottish Ministers (the Ministers) for information about anti-predator nets. The Ministers disclosed some information, but withheld other information.

During the investigation, the Ministers disclosed the remaining information and advised that no further information was held. The Commissioner found that the Ministers had disclosed all relevant information. However, by initially withholding some information, the Ministers had failed to comply with regulation 5(1) of the EIRs. The Commissioner did not require the Ministers to take any further action.

Relevant statutory provisions

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) and (6) (General entitlement); 2(1)(b) (Effect of exemptions); 39(2) (Health, safety and the environment)

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

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 12 July 2012, GAAIA asked the Ministers for information on predator nets, specifically:
 - a. The number and percentage of Scottish salmon farms with predator nets (current figures and any other data collected via surveys or any other means since 1st January 2010).
 - b. Correspondence, briefings and any dealings with the Scottish salmon farming industry on predator nets (since 1st January 2010).

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2. The Ministers responded on 9 August 2012. They provided some information, but withheld some information relating to part a. of the request under regulations 10(5)(a) and (g) of the EIRs.
3. On 10 August 2012, GAAIA requested a review of the Ministers' decision.
4. The Ministers notified GAAIA of the outcome of their review on 10 September 2012. The Ministers disclosed the number of farms with anti-predator nets and also provided a summary of the anti-predator net survey data with a copy of the survey question asked in relation to the use of anti-predator nets from a 2011/12 survey of applicants requesting seal licences. The Ministers explained that the Scottish Government had not had any contact with the industry specifically on anti-predator nets. Information identifying the location of the farms with anti-predator nets was withheld under regulations 10(5)(a) and (g) of the EIRs.
5. On 13 September 2012, GAAIA emailed 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.
6. 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

7. On 18 September 2012, the Ministers were notified in writing that an application had been received from GAAIA and were asked to provide the Commissioner with the information withheld from GAAIA. The Ministers provided the information and the case was then allocated to an investigating officer.
8. 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. The Ministers were asked to justify their reliance on any provisions of the EIRs they considered applicable to the information requested.
9. The Ministers provided their submissions as to why regulations 10(5)(a) and (g) of the EIRs applied to the withheld information.
10. Following further correspondence, on 21 February 2012, the Ministers provided GAAIA with an explanation as to why they did not hold any correspondence specifically about anti-predator nets. The Ministers also disclosed to GAAIA the data they had previously withheld about sites where anti-predator nets were in use or available to use.



11. GAAIA considered that further correspondence about anti-predator nets was likely to be held by the Ministers; the issue had been contentious and they believed that the subject had been discussed between external organisations and the Ministers. GAAIA provided examples from press reports and a Scottish Government paper¹ to support its view.
12. Additional questions (including reference to the examples provided by GAAIA) were raised with the Ministers to clarify whether further information was held. The Ministers responded to each question and confirmed that no information was held.

Commissioner's analysis and findings

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

FOISA or EIRs?

14. The Ministers' review response was issued on the basis that the information requested is environmental information, as defined in regulation 2(1) of the EIRs. The information in question concerns anti-predator nets, and the Commissioner is satisfied that it falls within paragraph (c) of the definition of environmental information contained in regulation 2(1) of the EIRs, being information on measures and activities affecting or likely to affect the state of those elements of the environment referred to in paragraph (a) of the definition.

Section 39(2) of FOISA – environmental information

15. The exemption in section 39(2) of FOISA provides, in effect, that environmental information (as defined by regulation 2(1)) is exempt from disclosure under FOISA, thereby allowing any such information to be considered solely in terms of the EIRs. In this case, the Commissioner accepts that the Ministers were entitled to apply the exemption to the withheld information, given her conclusion that it is properly classified as environmental information.
16. As there is a separate statutory right of access to environmental information available to GAAIA in this case, the Commissioner accepts, in this case, that the public interest in maintaining this exemption and in dealing with the request in line with the requirements of the EIRs outweighs any public interest in disclosing the information under FOISA.

¹ Quick, N.J., Middlemas, S.J. & Armstrong, J.D. (2002). The use of Anti-Predator Controls at Scottish Marine Salmon Farms. Scottish Fisheries Research Report Number 03/02.



Regulation 5(1) of the EIRs

17. Regulation 5(1) of the EIRs (subject to the various qualifications contained in regulations 6 to 12) 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.
18. Under the EIRs, a public authority may refuse to make environmental information available if one or more of the exceptions in regulation 10 apply and, in all the circumstances of the case, the public interest in maintaining the exception or exceptions outweighs the public interest in making the information available.

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

The use of anti-predator nets – background information

19. The Ministers explained that they held only a small amount of information on anti-predator nets. They had provided background information on anti-predator nets to GAAIA in their responses, and during the investigation they had disclosed data on the location of sites with anti-predator nets on 21 February 2013. They stated that they did not hold any more information relevant to GAAIA's request.
20. The Ministers explained that all fish farms which have submitted applications for a seal shooting licence already employ at least one, and many cases a range, of non-lethal measures. The non-lethal measure generally considered to be the most effective against seals is tensioned nets, which, although actually designed to keep fish contained, also help to keep seals out. The Ministers went on to explain that almost all fish farms seeking a seal licence have tensioned nets installed, while almost two-thirds use acoustic deterrents and seal blinds, and a fifth use anti-predator nets.
21. The Ministers stated that the issue with anti-predator nets is that they are indiscriminate and they have a tendency not simply to exclude but to entangle and drown a range of predators including seabirds, otters, seals, porpoises and dolphins. The Ministers commented that they do not insist on the use of anti-predator nets at all fish farms.



Part a. – all data collected

22. The Ministers explained that they held only a small amount of data on anti-predator nets, which had been obtained from responses to one or two questions in an online survey completed by fish farm companies requesting licences to shoot seals to protect the health and welfare of farmed fish in Scotland. In 2010 and 2011, fish farms were asked to complete online surveys through an independent website² hosted by a private company and commissioned by Marine Scotland. The Ministers explained that the private company used the information to compile a summary report and the individual responses by fish farms were never passed on directly to the Ministers. The only information which the Ministers held was in the form of a condensed summary table from the 2011 survey. The information from that table which fell within the scope of the request had now been disclosed to GAAIA.
23. During the investigation, GAAIA provided examples of surveys conducted in 2001 and 2009, but as these pre-dated the time period of GAAIA's request (1 January 2010 to 12 July 2012), the data from these surveys falls outwith the scope of the request.
24. The Commissioner accepts that questions about anti-predator nets form only a small part of the online survey completed by fish farms, in line with the Ministers' comments that anti-predator nets are only one of range of measures available to fish farms and are the least preferred measure to prevent predation. The Commissioner is satisfied that the small amount of information on anti-predator nets which was gathered though this survey has been disclosed to GAAIA.

Part b. – correspondence

25. As noted above, the Ministers explained that anti-predator nets are only one of a range of predation measures adopted by fish farms and have not been the focus of correspondence with the fish farm industry. The Ministers summarised the situation by explaining that, because anti-predator nets cause harm to wildlife and are not considered particularly effective, there has been no reason to correspond with the industry on this issue outwith the surveys undertaken.
26. The Ministers explained that, besides the information generated by the survey described above, the only specific information they held on anti-predator nets was a single comment in an email from the Scottish Salmon Producers Organisation (the SSPO), which had been provided to GAAIA in the initial response to its request. Marine Scotland had asked the SSPO to provide a number of definitions, including a definition of anti-predator nets. The relevant extract from the SSPO reply was disclosed to GAAIA. The original request issued to SSPO requesting these definitions was not retained.
27. The Ministers also stated that enquiries to officials within Marine Scotland had confirmed that the Ministers held no other correspondence about anti-predator nets.

² <http://secure.soi.ltd.uk/forms/>



28. As noted above, additional questions were raised with the Ministers during the investigation to establish whether any more information was held than that already disclosed. The Ministers were asked about GAAIA's examples of press coverage and published papers where the subject of anti-predator nets had been publicly discussed and might have been expected to give rise to correspondence. These included a private company's survey of anti-predator nets in 2009; published guidelines from the SSPO on good practice with regard to predation measures³; and media coverage of action taken by a fish farm company in Canada to install anti-predator nets.
29. The Ministers responded to all the questions raised, confirming that they held no further information and reiterating their comments as to why they did not hold any correspondence specifically about anti-predator nets. The Ministers stated that they were aware of the 2009 survey, but had not discussed this with the aquaculture industry; neither had they had any input or discussions about the SSPO's good practice guidelines or the use of anti-predator nets in Canada.
30. The Commissioner notes GAAIA's view that the Ministers are likely to hold further correspondence about anti-predator nets, given that the nets are a topic of substantial interest and concern which would be expected to have been debated in detail. The Commissioner acknowledges GAAIA's concerns, but, after making enquiries on this point, she has found no evidence that the Ministers hold any additional information. Taking into account the reasons given by the Ministers to explain why no correspondence on the subject of anti-predator nets exists, she has concluded that the Ministers have carried out proportionate searches and enquiries which were sufficient to establish what limited information is held.
31. Consequently, the Commissioner accepts that the Ministers do not hold any more information on anti-predator nets beyond that already provided to GAAIA.

Regulations 10(5)(a) and 10(5)(g) of the EIRs

32. In their response to GAAIA's request for review, the Ministers advised GAAIA that they were withholding information in relation to part a. of its request under regulations 10(5)(a) and 10(5)(g) of the EIRs.
33. Regulation 10(5)(a) of the EIRs provides that a Scottish public authority may refuse to make information available to the extent that its disclosure would, or would be likely to, prejudice substantially international relations, defence, national security or public safety. The Ministers stated that disclosure would prejudice public safety, given the likelihood that some Non-Governmental Organisations would take direct action against specific farm sites and against individuals employed at sites where anti-predator nets were not in place and where seals have been shot.

³ A Code of Good Practice for Scottish Finfish Aquaculture.
<http://www.thecodeofgoodpractice.co.uk/cogp/5-fish-welfare-and-care/5-2-systems-and-management/5-2-9-predator-control>

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34. Regulation 10(5)(g) of the EIRs 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 protection of the environment to which the information relates. The Ministers stated that the direct action by activists resulting from disclosure of information about sites lacking anti-predator nets (and hence the possibility that seals might be shot at those sites) might cause harm to the environment both directly and indirectly.
35. In their public interest submissions, the Ministers considered that the release of information on the lack of anti-predator nets and numbers of seals shot at site level would not help the public to decide whether or not to purchase salmon from particular companies. On the other hand, disclosure carried a real risk of direct action against specific sites and individuals associated with those sites.
36. As indicated above, during the investigation, the Ministers decided to disclose the information they had previously withheld under regulations 10(5)(a) and 10(5)(g) of the EIRs.
37. At no stage during the investigation did the Ministers explain to the Commissioner why the information was no longer covered by the exceptions in regulations 10(5)(a) and 10(5)(g): i.e. whether a change in circumstances meant that the exception(s) no longer applied; whether a change in circumstances had tipped the balance of public interest towards disclosure; or whether the Ministers had decided that the exception(s) had been wrongly applied in the first place. In the circumstances, the Commissioner can only conclude that the Ministers were not entitled to withhold the information under regulations 10(5)(a) and 10(5)(g) and, in doing so, failed to comply with regulation 5(1) of FOISA.

DECISION

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

The Commissioner finds that the Ministers do not hold any additional information in relation to part b. of GAAIA's request to that disclosed and that their response therefore complied with regulation 5(1) of the EIRs.

However, by wrongly applying the exceptions in regulation 10(5)(a) and 10(5)(g) of the EIRs to part a. of GAAIA's request, the Ministers failed to comply with regulation 5(1) of the EIRs.

Given that the Ministers have now disclosed the withheld information, the Commissioner does not require the Ministers to take any action in respect of this failure.

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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
6 May 2013



Appendix

Relevant statutory provisions

Freedom of Information (Scotland) Act 2002

1 General entitlement

- (1) A person who requests information from a Scottish public authority which holds it is entitled to be given it by the authority.

...

- (6) This section is subject to sections 2, 9, 12 and 14.

2 Effect of exemptions

- (1) To information which is exempt information by virtue of any provision of Part 2, section 1 applies only to the extent that –

...

- (b) in all the circumstances of the case, the public interest in disclosing the information is not outweighed by that in maintaining the exemption.

...

39 Health, safety and the environment

...

- (2) Information is exempt information if a Scottish public authority-
- (a) is obliged by regulations under section 62 to make it available to the public in accordance with the regulations; or
- (b) would be so obliged but for any exemption contained in the regulations.

...



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 –

(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-
 - (a) international relations, defence, national security or public safety;
 - ...
 - (g) the protection of the environment to which the information relates.