

# Decision Notice

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## **Decision 119/2019: Salmon & Trout Conservation Scotland and the Scottish Ministers**

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### **Sea lice infestation: River Blackwater on Lewis**

Reference No: 201802100

Decision Date: 14 August 2019



## Summary

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The Ministers were asked for information on reported sea lice infestation of wild salmon at the River Blackwater on Lewis.

The Commissioner investigated and decided the Ministers were wrong to withhold the information at the time of asking.

## Relevant statutory provisions

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The Environmental Information (Scotland) Regulations 2004 (the EIRs) regulations 2(1) (Interpretation) (paragraphs (a), (c) and (f) of definition of “environmental information”); 5(1), (2)(a) and (2)(b) (Duty to make environmental information available on request); 10(1), (2) and (4)(e) (Exceptions from duty to make environmental information available)

The full text of each of the statutory provisions cited above is reproduced in Appendix 1 to this decision. The Appendix forms part of this decision.

## Background

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1. On 20 August 2018, via their solicitor, Salmon and Trout Conservation Scotland (S&TCS) made a request for information to the Scottish Ministers (the Ministers). The information requested was:  
*All information held by Scottish Ministers (to include the Fish Health inspectorate, Marine Scotland and Marine Scotland Science) concerning:*
  - a) *The 2018 incident reported to Scottish Ministers concerning sea lice infestation of wild salmon at the River Blackwater on Lewis; and*
  - b) *The salmon farms run by the Scottish Salmon Company on Loch Roag, to include all correspondence from any party concerning those farms, any inspections carried out by any person and any other information held, covering the period 1 January 2018 to date.*
2. On 19 September 2019, S&TCS wrote to the Ministers, requesting a review of the apparent failure to respond within statutory timescales.
3. The Ministers notified S&TCS of the outcome of their review on 27 November 2018, apologising for not providing a response within 20 working days. The Ministers explained that some information was available online and provided details. Information was disclosed to S&TCS, but the Ministers also confirmed they were withholding some information under regulations 10(4)(e) (internal communications) and 11(2) (personal data) of the EIRs, with their reasons.
4. On 4 December 2018, S&TCS wrote to the Commissioner. S&TCS applied to the Commissioner for a decision in terms of section 47(1) of the Freedom of Information (Scotland) Act 2002 (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. S&TCS stated it was dissatisfied with the outcome of the Ministers’ review because it believed regulation 10(4)(e) was misapplied to some information considered to be

internal communications: the public interest arguments here did not appear strong enough to withhold the information sought. It did not object to the redaction of personal data under regulation 11(2).

## **Investigation**

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5. The application was accepted as valid. The Commissioner confirmed that S&TCS made a request for information to a Scottish public authority and asked the authority to review its response to that request before applying to him for a decision.
6. On 14 January 2019, the Ministers were notified in writing that S&TCS had made a valid application. The Ministers were asked to send the Commissioner the information withheld from S&TCS and did so. The case was allocated to an investigating officer.
7. Section 49(3)(a) of FOISA requires the Commissioner to give public authorities an opportunity to provide comments on an application. The Ministers were invited to comment on this application and to answer specific questions on their handling of this request.
8. During the investigation, the Ministers reconsidered the information withheld under regulation 10(4)(e), concluding that their initial assessment had been incorrect. The Ministers changed their position and disclosed the information to S&TCS on 24 May 2019. A copy of this further release was forwarded to the Commissioner on 28 May 2019.

## **Commissioner's analysis and findings**

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9. In coming to a decision on this matter, the Commissioner considered all of the withheld information and the relevant submissions, or parts of submissions, made to him by both S&TCS and the Ministers. He is satisfied that no matter of relevance has been overlooked.

### **Regulation 10(4)(e) of the EIRs (internal communications)**

10. Under regulation 10(4)(e) of the EIRs, a Scottish public authority may refuse to make environmental information available to the extent that it involves making available internal communications. In order for information to fall within the scope of this exception, it need only be established that the information is an internal communication. If the Commissioner finds that a document is an internal communication, he will be required to go on to consider the public interest test in regulation 10(1)(b).
11. The Ministers stated that the information withheld under this exception was part of a ministerial briefing containing the opinion of a Scottish Government official, which it considered to have been given freely and frankly. On this basis, the paragraph was considered to be excepted under regulation 10(4)(e) of the EIRs.
12. As indicated above, the Ministers revisited their decision during the investigation and disclosed the information: they concluded that the opinion in question was not sufficiently sensitive or candid for the public interest to favour upholding the exception. They conceded that they had not been entitled to withhold the information at the time of the request or the requirement for review.
13. In the light of the above, the Commissioner finds that the Ministers misapplied regulation 10(4)(e) to this information, which they should have disclosed at the time of asking. In doing so, they failed to deal with the request in accordance with regulation 5(1) of the EIRs.

## Handling of the request

14. In its application, S&TCS expressed dissatisfaction with delays in responding and with the method of redaction, which it submitted was misleading.
15. The Ministers acknowledged the initial failure to respond (which was a failure to comply with regulation 5(2)(a) of the EIRs) in their review outcome and provided an apology, with an explanation of what had caused the delay. In this regard, the review fulfilled its purpose and the Commissioner does not find it necessary to revisit the matter, although the Commissioner's compliance database, which informs his intervention work, has been updated for this case.
16. The Commissioner also notes S&CTS's dissatisfaction with the redaction work which involved deleting the text electronically and substituting a single word "redacted" in square brackets, without giving any sense of how much information was actually being withheld.
17. The Ministers commented during the investigation that it would be reasonably straight forward for the S&TCS to assess that it was a small amount of information which was redacted, but did not explain why in any detail.
18. The Commissioner understands why it can be both convenient and efficient to redact electronically, but normally software for this purpose allows the text to be blacked out so that it is visually apparent exactly how much information has been redacted. While recognising that alternative approaches may be appropriate for entire pages, the Commissioner can see the value to applicants in knowing how much information has been redacted at any given point and would encourage an approach that can facilitate this.

## Decision

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The Commissioner finds that the Scottish Ministers (the Ministers) failed to comply with the Environmental Information (Scotland) Regulations 2004 in responding to the information request made by Salmon & Trout Conservation Scotland.

The Commissioner finds that the Ministers misapplied regulation 10(4)(e) to information which they subsequently disclosed during this investigation, and thereby failed to deal with the request in accordance with regulation 5(1).

## Appeal

Should either S&TCS or the Ministers 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.

**Margaret Keyse**  
**Head of Enforcement**

**14 August 2019**

## Appendix 1: Relevant statutory provisions

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### The Environmental Information (Scotland) Regulations 2004

#### 2 Interpretation

- (1) In these Regulations—

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“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;

...

- (f) the state of human health and safety, including the contamination of the food chain, where relevant, conditions of human life, cultural sites and built structures inasmuch as they are or may be affected by the state of the elements of the environment referred to in paragraph (a) or, through those elements, by any of the matters referred to in paragraphs (b) and (c);

...

#### 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)-
- (a) shall be complied with as soon as possible and in any event no later than 20 working days after the date of receipt of the request; and
- (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.

...

- (4) A Scottish public authority may refuse to make environmental information available to the extent that

...

- (e) the request involves making available internal communications.

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