

Decision Notice 125/2020

West Coast Salmon Smolt Tracking Project

Applicant: The Applicant

Public authority: Scottish Ministers

Case Ref: 202000217



Scottish Information
Commissioner

Summary

The Ministers were asked for correspondence received by Marine Scotland for the West Coast Salmon Smolt Tracking Project. Some information was disclosed at the time of asking and some withheld until its disclosure during this investigation.

Following investigation, the Commissioner decided that more information should have been disclosed at the time of asking.

Relevant statutory provisions

The Environmental Information (Scotland) Regulations 2004 (the EIRs) regulations 2(1) (paragraphs (a) and (c) of definition of "environmental information") (Interpretation); 5(1) (Duty to make available environmental information on request)

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

1. On 27 October 2019, the Applicant made a request for information to the Scottish Ministers (the Ministers). The information requested was:
 - (a) Any and all correspondence, no matter how related, email (or any other electronic means), telephone records and letters sent and received by Marine Scotland in relation to a project titled "West Coast Salmon Smolt Tracking Project" being undertaken by the Atlantic Salmon Trust.
 - (b) All correspondence (as previously defined) between Marine Scotland and the Atlantic Salmon Trust in 2019, to date.
2. The Ministers emailed the Applicant on 25 November 2019, notifying him that they were dealing with the request under the EIRs and stating that, as they considered the request complex and voluminous, they were extending the timescale for responding to 40 working days under regulation 7 of the EIRs.
3. On 26 November 2019, the Applicant emailed the Ministers, requesting a review as he did not consider the Ministers had complied with regulation 7 in their response.
4. The Ministers notified the Applicant of the outcome of their review on 24 December 2019. They confirmed that they were dealing with the request under the EIRs and supplied information in response. Some information was withheld under the exceptions in regulations 10(4)(d) (as information they considered unfinished or incomplete) and 10(4)(e) (as internal communications). In addition, some third party personal data was withheld under regulation 11(2).
5. The Ministers disclosed further information to the Applicant after its review.
6. On 11 February 2020, the Applicant wrote to the Commissioner, applying 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. The Applicant was dissatisfied with the Ministers' application of the exceptions in regulations 10(4)(d) and (e) of the EIRs to the withheld information. He also submitted that he did not believe the response to be complete.

7. As the Applicant did not comment in their Application on the Ministers' application of regulation 11(2) to third party personal data, the Commissioner will not consider that information here.

Investigation

8. The application was accepted as valid. The Commissioner confirmed that the Applicant 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.
9. On 24 February 2020 the Ministers were notified in writing that the Applicant had made a valid application. The Ministers were asked to send the Commissioner the information withheld from the Applicant. The Ministers provided the information and the case was allocated to an investigating officer.
10. 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. These related to issues including the exceptions applied to the withheld information.
11. During the investigation, the Ministers disclosed information to the Applicant (on 4 September 2020).
12. The Applicant confirmed to the investigating officer (on 23 September 2020) that there was no need to pursue the issue of whether more information was missing in this decision notice.

Commissioner's analysis and findings

13. In coming to a decision on this matter, the Commissioner considered all of the relevant submissions, or parts of submissions, made to him by both the Applicant and the Scottish public authority. He is satisfied that no matter of relevance has been overlooked.

Handling in terms of the EIRs

14. In its correspondence with the Applicant, the Ministers identified all of the information requested as being environmental information, as defined in regulation 2(1) of the EIRs.
15. The Commissioner is satisfied that the withheld information, relating to tracking salmon in their natural environment, falls within the definition of environmental information in regulation 2(1) of the EIRs, particularly paragraphs (a) and (c) (see Appendix 1 to this decision).
16. The Applicant has not disputed the Ministers' decision to deal with the request under the EIRs and, in what follows; the Commissioner will consider this case solely in terms of the EIRs.

Information identified and disclosed

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. This obligation relates to information held by the authority when it receives a request.
18. The Commissioner notes the Ministers issued some attachments to emails on 10 and 15 January 2020, which it appears were omitted in error from the review outcome of 24 December.
19. During this investigation, on 7 September 2020, the Ministers disclosed the remaining information to the Applicant, subject to redaction of personal data.
20. The Ministers have offered no reasons for applying exemptions to any of this information earlier. Therefore, the Commissioner must find that the Ministers breached regulation 5(1) of the EIRs, by not supplying this information in full at the time it communicated its review outcome.

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 the Applicant.

The Commissioner finds that, by disclosing some information, the Ministers partially complied with the EIRs. However, he also finds that the Ministers failed to comply with regulation 5(1) of the EIRs, by omitting to provide the remainder of the requested information (subject to redaction of personal data, which the Applicant is not concerned about) until after they had carried out their review.

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

Appeal

Should either the Applicant or the Scottish 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

6 October 2020

Appendix 1: Relevant statutory provisions

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.

...

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