

Decision Notice

Decision 191/2017: Salmon and Trout Conservation Scotland and the Scottish Ministers

Report on the environmental impact of sea lice medicine

Reference No: 201701293

Decision Date: 20 November 2017



Scottish Information
Commissioner

Summary

The Ministers were asked for information concerning the peer review of a report on the environmental impact of sea lice medicine.

The Commissioner found that the Ministers were not entitled to withhold the information under the exception in regulation 10(5)(f) of the EIRs. He found that the information related to emissions, with the result that the exception could not apply.

The Commissioner required the Ministers to disclose the information.

Relevant statutory provisions

The Environmental Information (Scotland) Regulations 2004 (the EIRs) regulations 5(1) and (2)(b) (Duty to make available environmental information on request); 10(1), (2), 5(f) and (6) (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

1. In this decision, all references to Salmon and Trout Conservation Scotland (S&TCS) should be read as including S&TCS's solicitors, acting on its behalf.
2. On 2 May 2017, S&TCS made a request for information to the Scottish Ministers (the Ministers). The request concerned a report¹ by the Scottish Aquaculture Research Forum (SARF) concerning the environmental impact of sea lice medicine. The request referenced concerns and recommendations made by SARF directors, independent referees and the authors of a previous report. The information requested was:
 - All information held concerning the peer review by Wilding TA and Black KD
 - Full information as to which SARF directors raised concerns and what the concerns raised by each named SARF director were
 - If the SARF project was funded by Marine Scotland, directly or indirectly, full information on the process by which the project came about, and how the decision was made (and by whom) to subject the PAMP2 report to peer review and to commission Professor Edwards to write his report.
 - The degree to which any Scottish public authorities or the Crown Estate or any other party had any editorial control over either report.
3. The Ministers responded on 31 May 2017. The Ministers disclosed information to S&TCS. Some information was redacted in terms of regulation 11(2) of the EIRs, on the basis that it

¹ <http://www.sarf.org.uk/cms-assets/documents/251503-644637.sarf098---whole-document-aug2016.pdf>

comprised personal data the disclosure of which was not permitted under the Data Protection Act 1998.

4. On 5 June 2017, S&TCS wrote to the Ministers requesting a review of their decision. S&TCS expressed surprise that more information had not been disclosed and asked the Ministers to review whether all relevant information had been identified. S&TCS also disputed the Ministers' decision to withhold information under regulation 11(2) of the EIRs.
5. The Ministers notified S&TCS of the outcome of their review on 3 July 2017. The Ministers withdrew their reliance on regulation 11(2) of the EIRs, substituting the exception in regulation 10(5)(f) in its place. The Ministers confirmed that they did not hold any additional information falling within the scope of S&TCS's request.
6. On 24 July 2017, S&TCS wrote to the Commissioner. S&TCS applied 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 specified modifications. S&TCS stated it was dissatisfied with the outcome of the Ministers' review because:
 - (i) it disagreed with the Ministers' application of the exception in regulation 10(5)(f) of the EIRs;
 - (ii) the information withheld under regulation 10(5)(f) of the EIRs comprised emissions for the purposes of regulation 10(6) and, therefore, could not be withheld under this exception; and
 - (iii) it considered it was inconceivable that the Ministers held so little information falling within the scope of the request.

Investigation

7. 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.
8. On 6 September 2017, 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. The Ministers provided the information and the case was allocated to an investigating officer.
9. 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 answer specific questions, focusing on the points raised in S&TCS's application.
10. The Ministers responded with comments on 20 October 2017.
11. During the investigation, the Ministers provided additional information concerning the searches they had undertaken to identify and locate information falling within the scope of the request.

Commissioner's analysis and findings

12. 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.

Has all relevant information been identified?

13. As noted above, S&TCS did not consider the Ministers had identified and disclosed all of the relevant information that they held. S&TCS stated that, following a similar request to the Crown Estate, it had received more information from the Crown Estate than was disclosed by the Ministers. S&TCS stated that some of the information disclosed by the Crown Estate indicated that officials in Marine Scotland (a Directorate of the Scottish Government) had been copied into many emails not disclosed by the Ministers. In S&TCS's view, it was inconceivable that the Ministers no longer held such documents.
14. In S&TCS's view, the effect of the Ministers' stated position was that highly relevant information concerning an active and controversial policy discussion, in which multiple public authorities and the Cabinet Secretary had become involved, were no longer held, presumably destroyed. S&TCS noted that this had happened before the active policy discussion had concluded and between receipt (of the documents) and S&TCS's request for information.
15. The Ministers explained that they had undertaken searches of their electronic Records and Document Management System (eRDM). The Ministers also explained that staff who would have worked on this subject matter were asked to check their personal Objective folders and inboxes to identify any relevant information.
16. The Ministers identified the search terms used in searches of the eRDM system. These did not produce any results falling within the scope of the request.
17. The Ministers also required key staff within relevant Divisions of the Scottish Government to check whether they held any relevant information. This did not result in any additional information being identified which fell within the scope of the request. The Ministers produced copies of the responses to all of these enquiries.
18. The Ministers submitted that, if the information was held, it would have been located by the searches undertaken. Given that the information had not been located, they assumed that it had not been retained as part of the public record. The Ministers noted S&TCS's assertion that the information had been held previously by Marine Scotland, but pointed out, correctly, that they are only required to consider information held at the time a request is received.
19. The Commissioner has considered the Ministers' explanation of the searches and enquiries undertaken and why those searches and enquiries would have been likely to identify and locate any information falling within the scope of S&TCS's request.
20. The Commissioner accepts that the Ministers undertook reasonable, proportionate searches and enquiries in the circumstances, with a view to locating and identifying any information falling within the scope of S&TCS's request. He accepts that any relevant information would have been identified using the searches and enquiries described by the Ministers.
21. The Commissioner is therefore satisfied that the Ministers identified all of the relevant information they held when responding to S&TCS's request.

Regulation 10(6) of the EIRs

22. Regulation 10(6) of the EIRs states that a Scottish public authority is not entitled to refuse to make information available under a number of exceptions (including that in regulation 10(5)(f)) to the extent that it relates to information on emissions.
23. S&TCS argued that the information requested related to a report looking into the environmental impact of sea lice medicines released from salmon farms. S&TCS submitted that the report was on the impact of actual emissions. In its view, therefore, the information was patently covered by regulation 10(6).
24. The Ministers did not accept that the terms “emissions” applied to living organisms occurring naturally in the environment, such as sea lice. In their view, that organism already existed in the environment and therefore could not be an emission.

The Commissioner’s view

25. The term “emissions” is not explicitly defined in the EIRs or in the European Directive on public access to environmental information (Directive 2003/4/EC²) which the EIRs are intended to implement. The Aarhus Convention: An Implementation Guide (Second Edition 2014)³ notes (at page 88) that the term “emission” has been defined in the Industrial Emissions Directive⁴ as a:

“direct or indirect release of substances, vibrations, heat or noise from individual or diffuse sources ... into air, water or land”.
26. When considering the definition of emissions, the Commissioner has taken account of the ruling of the Court of Justice of the European Union (CJEU) in *Bayer CropScience SA-NV, Stichting De Bijenstichting v College voor de toelating van gewasbeschermingsmiddelen en biociden*⁵.
27. In that ruling, the Court set out the objective elements which must prevail in an assessment of whether information falls within the scope of “information relating to emissions into the environment” within the meaning of Article 4(2) of Directive 2003/4/EC.
28. The Court noted that, since the Directive neither defined “emissions into the environment” nor “information relating to emissions into the environment”, the interpretation of those concepts must take into account the context of the second sub-paragraph of Article 4(2) of the Directive and its objective.
29. The Court further noted that, as expressly provided in the Aarhus Convention and recital 16 and Article 4(2) of Directive 2003/4 EC, the disclosure of information must be the general rule and the grounds for refusal must be interpreted in a restrictive way. In the Court’s view, it was not necessary to apply a restrictive interpretation of “emissions into the environment” and “information on emissions into the environment” within the meaning of Article 4(2).

² <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2003:041:0026:0032:EN:PDF>

³

http://www.unece.org/fileadmin/DAM/env/pp/Publications/Aarhus_Implementation_Guide_interactive_eng.pdf

⁴ <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2010:334:0017:0119:en:PDF>

⁵

<http://curia.europa.eu/juris/document/document.jsf?jsessionid=9ea7d0f130d693a5a5349680406cb44ab3723191c962.e34KaxiLc3eQc40LaxqMbN4Pah4Qe0?text=&docid=185542&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=652085>

30. In this case, the Commissioner disagrees with the Ministers' position that the "emissions" under consideration are living organisms, i.e. sea lice. The information comprises communications concerning a report on the environmental impact of sea lice medicine, not the sea lice themselves.
31. In the Commissioner's view, the information withheld by the Ministers quite clearly relates to information on emissions. The withheld information comprises (generally) the identities of the reviewers of the report and others involved in the process.
32. The introduction to the original SARF report which was the subject of peer review stated that the use of anti-parasitic medicinal compounds inevitably leads to their partial release to the sea. The title of the report: "Towards Understanding of the Environmental Impact of a Sea Lice Medicine – the PAMP suite" indicates clearly that the purpose of the report is to investigate the consequential effects of releasing such substances into the marine environment. In the Commissioner's view, this discharge of chemical substances, through salmon nets into the marine environment, falls within the definition of emissions contained in the Aarhus Convention Implementation Guide referenced above.
33. Consequently, the Commissioner considers that information concerning the identities of the peer reviewers comprises information relating to information on emissions. Therefore, it falls within the definition contained in regulation 10(6) of the EIRs.
34. Having taken into account the view of the CJEU, the Commissioner does not consider a restrictive interpretation on the meaning of regulation 10(6) should apply in this case. Consequently, he is satisfied that the information withheld by the Ministers under regulation 10(5)(f) of the EIRs comprises information of the type envisaged by regulation 10(6), on the basis that it relates to information on emissions.
35. Having concluded that the information under consideration falls within the ambit of regulation 10(6), the Commissioner cannot accept that the Ministers were entitled to refuse to make the information available under the exception in regulation 10(5)(f).
36. The Commissioner now requires the Ministers to disclose the information to S&TCS.
37. Although there is no requirement to do so, the Commissioner wishes to comment on the Ministers' application of the exception in regulation 10(5)(f) of the EIRs.

Regulation 10(5)(f) of the EIRs

38. Under 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.
39. The Commissioner specifically addressed the issue of consent in relation to regulation 10(5)(f) in *Decision 142/2017: Salmon and Trout Conservation Scotland and the Scottish*

*Ministers*⁶. In that decision, the Commissioner noted that consent must have been sought, and denied specifically, before that limb of the exception can be said to be met.

40. In this case, the Ministers stated that they did not request consent from any party to disclose the information, but informed all parties concerned – as a courtesy – that the information was being disclosed.
41. Since no specific consent to disclosure (or denial thereof) has been sought, or received, in this case, the Commissioner does not agree (notwithstanding his finding on regulation 10(6) above) that the exception applies to the information under consideration. The “courtesy” communication can hardly be considered to have been seeking consent for the purposes of regulation 10(5)(f), bearing in mind that it does not even appear to have mentioned the withholding of the information to which that exception has been applied. The Commissioner reiterates his view that that it is essential, if this exception is to apply, for specific consent to be sought and specific denial of that consent obtained.
42. Accordingly, the Commissioner does not accept that the information withheld in this case would have been excepted from disclosure in terms of regulation 10(5)(f) of the EIRs.

Decision

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

The Commissioner finds that the information related to information on emissions, so the Ministers were not entitled to refuse to make the information available under regulation 10(5)(f). The Commissioner requires the Ministers to disclose this information to S&TCS by **4 January 2018**.

Appeal

Should either Salmon and Trout Conservation Scotland 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.

⁶ <http://www.itspublicknowledge.info/ApplicationsandDecisions/Decisions/2017/201700453.aspx>

Enforcement

If the Scottish Ministers (the Ministers) fail to comply with this decision, the Commissioner has the right to certify to the Court of Session that the Ministers have failed to comply. The Court has the right to inquire into the matter and may deal with the Ministers as if they had committed a contempt of court.

Margaret Keyse
Head of Enforcement

20 November 2017

The Environmental Information (Scotland) Regulations 2004

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...
- (6) To the extent that the environmental information to be made available relates to information on emissions, a Scottish public authority shall not be entitled to refuse to make it available under an exception referred to in paragraph (5)(d) to (g).
...

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