



Scottish Information  
Commissioner  
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# Decision Notice 254/2024

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## Toxicology qualifications of staff

Authority: Scottish Environment Protection Agency  
Case Ref: 202400691

### Summary

The Applicant asked the Authority for information relating to toxicology qualifications held by its employees who provided advice on specified matters. The Authority informed the Applicant that it did not hold the information requested. The Commissioner investigated and found that the Authority had not accurately interpreted part of the request. He required the Authority to reconsider part of the Applicant's request and issue a revised review outcome.

### Relevant statutory provisions

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1), (2) and (6) (General entitlement); 2(1)(b) (Effect of exemptions); 39(2) (Health, safety and the environment); 47(1) and (2) (Application for decision by Commissioner)

The Environmental Information (Scotland) Regulations 2004 (the EIRs) regulations 2(1) (definition of "the Act", "applicant" and "the Commissioner") (Interpretation); 5(1) and (2)(b) (Duty to make environmental information available on request); 10(1) and (4)(a); (Exceptions from duty to make environmental information available); 17(1), (2)(a), (b) and (f) (Enforcement and appeal provisions)

### Background

1. On 19 January 2024, the Applicant made a request for information to the Authority. Among other things, he asked:

"Having previously been informed that [the Authority] does not employ a suitably qualified toxicologist...What toxicology qualification(s) is held by any [the Authority] official(s) who has advised on the emissions from open cage salmon farms and CAR/L/1168182."

2. For context, CAR/L/1168182 is the unique identifier for the water use licence for the operation of the North Kilbrannan marine pen fish farm in Kilbrannan Sound.
3. The Authority responded on 16 February 2024. The Authority responded to other questions asked by the Applicant, but it failed to respond to the question set out in paragraph 1.
4. On 3 March 2024, the Applicant wrote to the Authority requesting a review of its decision. The Applicant stated that he was dissatisfied with the decision because the Authority had failed to answer the question set out in paragraph 1.
5. The Authority notified the Applicant of the outcome of its review on 12 April 2024. The Authority advised that it did employ staff with toxicological expertise. However, the Authority explained that the toxicological and ecotoxicological expertise applied to the setting of the Environmental Standards, not in case-by-case authorisation of fish farms. The Authority stated that its officials did not “advise in the way described in the request”. The Authority confirmed that WCA, a chemical risk assessment and environmental consultancy firm, provided toxicological advice relating to CAR/L/1168182.
6. On 16 May 2024, the Applicant wrote to the Commissioner, applying 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. The Applicant stated that he was dissatisfied with the outcome of the Authority’s review because he did not consider it had fully responded to the question set out in paragraph 1.

## **Investigation**

7. The Commissioner determined that the application complied with section 47(2) of FOISA and that he had the power to carry out an investigation.
8. On 12 June 2024, the Authority was notified in writing that the Applicant had made a valid application. The case was then 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. On 16 July 2024, the Authority was invited to comment on this application and to answer specific questions. These primarily related to the Authority’s interpretation of the request.
10. The Applicant was also invited to make further comments, which he did.

## **Commissioner’s analysis and findings**

11. The Commissioner has considered all of the submissions made to him by the Applicant and the Authority.

### ***EIRs or FOISA?***

12. The Authority considered the Applicant's request under the EIRs, having concluded that the information requested was environmental information as defined in regulation 2(1) of the EIRs.
13. The information requested appears to fall clearly within the scope of the definition of environmental information contained in regulation 2(1) of the EIRs.
14. The Applicant has not disputed the Authority's decision to handle his request under the EIRs and the Commissioner is satisfied, in the circumstances, that the information requested falls within the definition of environmental information set out in regulation 2(1).

#### ***Section 39(2) - Environmental information***

15. The exemption in section 39(2) of FOISA provides, in effect, that environmental information (as defined by regulation 2(1) of the EIRs) is exempt from disclosure under FOISA, thereby allowing any such information to be considered solely in terms of the EIRs.
16. In this case, therefore, the Commissioner accepts that the Authority was entitled to apply the exemption in section 39(2) of FOISA, given his conclusion that the information requested is properly considered to be environmental information.
17. As there is a statutory right of access to environmental information available to the Applicant in this case, the Commissioner accepts, in all the circumstances, that the public interest in maintaining this exemption (and responding to the request under the EIRs) outweighs any public interest in disclosing the information under FOISA.
18. Both regimes are intended to promote public access to information and there would appear to be no reason why (in this particular case) disclosure of the information should be more likely under FOISA than under the EIRs.
19. The Commissioner therefore concludes that the Authority was correct to apply section 39(2) of FOISA and to consider the Applicant's information request under the EIRs.

#### ***Regulation 5(1) – Duty to make environmental information available***

20. Regulation 5(1) of the EIRs requires a Scottish public authority which holds the information to make it available when requested to do so by any applicant. This obligation relates to information that is held by the authority when it receives a request.
21. On receipt of a request for environmental information, the authority must ascertain what information it holds falling within the scope of the request. Having done so, regulation 5(1) requires the authority to make the information available, unless a qualification in regulation 6 to 12 applies (regulation 5(2)(b)).
22. Under the EIRs, a Scottish public authority may refuse to make environmental information available if one or more of the exceptions in regulation 10 applies

#### ***Regulation 10(4)(a) – Information not held***

23. Regulation 10(4)(a) of the EIRs states that a Scottish public authority may refuse to make information available to the extent that it does not hold the information when it received the request.
24. The standard of proof to determine whether a Scottish public authority holds the information is the civil standard of the balance of probabilities. In determining where the balance of

probabilities lies, the Commissioner considers the scope, quality, thoroughness and results of the searches carried out by the public authority.

25. The Commissioner also considers, where appropriate, any reasons offered by the public authority to explain why it does not hold the information. While it may be relevant as part of this exercise to explore expectations about what information the authority should hold, ultimately the Commissioner's role is to determine what relevant information is (or was, at the time the request was received) held by the public authority.

#### *The Applicant's submissions*

26. The Applicant stated that he had asked the Authority on several occasions about the toxicology qualifications of its staff but had not received a satisfactory response. The Applicant explained that he had been informed by a third party that the Authority had previously admitted it had a problem with toxicology because it did not have employees with relevant qualifications.
27. The Applicant submitted that this was a serious problem, because a large part of the Authority's duties related to the regulation of the use of toxic chemicals and other authorities relied on the Authority's expert advice as statutory consultees.
28. The Applicant believed that the qualifications of the Authority's employees must be recorded, given that they must be suitably qualified and experienced personnel, particularly where safety issues were involved.
29. The Applicant submitted that he had asked a simple question about qualifications, which the Authority had failed to answer. The Applicant explained that the Authority had rejected expert evidence he had provided from two eminent academics, which he speculated was because the Authority did not employ suitably qualified toxicologists.

#### *The Authority's submissions*

30. The Authority provided detailed submissions, which the Commissioner will not reproduce in full. However, he has summarised below what he considers to be the key points of the Authority's submissions.
31. The Authority explained that it had interpreted the Applicant's request as meaning that it should only provide the toxicology qualifications of its officials if they had advised on the emissions from open cage salmon farms and CAR/L/1168182.
32. The Authority further explained how it had interpreted specific elements of the request:
- "advised" to mean "specialist toxicological advice" provided by a "qualified [Authority] toxicologist" on the emissions relating to individual fish farms and any risk to human health
  - "emissions" to mean fish medicine
  - "open cage fish farms" to mean sea farms that use pens made from nets with an open mesh to contain farmed fish
  - "CAR/L/1168182" to mean the unique identifier for the water use licence for the operation of the North Kilbrannan marine pen fish farm in Kilbrannan Sound.
33. The Authority reiterated that ecotoxicological expertise was not required (i.e. on a case-by-case basis) for determining applications involving discharges of substances for which

suitable environmental standards had already been established, which included the application for the proposed fish farm in Kilbrannan Sound.

34. The Authority explained the difference between environmental standards and case-by-case authorisation of fish farm as follows:
- An environmental standard represents the concentration of a substance (such as a medicine used to treat farmed fish) in the water environment that can be accommodated without a likelihood of adverse effects on plant or animal life. These standards are based on information from scientific studies on the toxicity of the substances to aquatic organisms.
  - The resulting concentrations of a substance in the water environment depend on the quantities of the substance proposed to be discharged, how the substance disperses in the water environment and, if relevant, current concentrations of the substance in the environment. These dependencies are all site specific. Consequently, the concentrations in the water environment resulting from proposed discharge are assessed on a case-by-case basis.
35. The Authority explained that it therefore determined that, as ecotoxicological expertise or advice by the Authority was not required, it did not have any information to provide. However, the Authority reiterated that it had named the organisation (WCA) that provided toxicological advice.
36. During the investigation, the Authority was specifically asked if it was “engaged in providing advice (or anything that could reasonably be characterised as advice” on emissions from open cage salmon farms and CAR/L/1168182. The Authority confirmed that it was.
37. Specifically, the Authority explained that all marine fish farms require an authorisation from the Authority and planning permission from the relevant local authority. The Authority is a statutory consultee under the land use planning system and provides advice on marine fish farm developments when consulted by the relevant local authority. The Authority was consulted by Argyll and Bute Council on an application for planning permission for the development of a fish farm in Kilbrannan Sound. The Authority confirmed that it provided advice to the Council.

#### *The Commissioner’s view*

38. The Commissioner has fully considered the submissions provided by the Applicant and the Authority. He has also carefully considered the specific terms of the request:
- “Having previously been informed that [the Authority] does not employ a suitably qualified toxicologist...[W]hat toxicology qualification(s) is held by any [the Authority] official(s) who has advised on the emissions from open cage salmon farms and CAR/L/1168182.”
39. The Authority confirmed that it had been engaged in providing advice (or something which could reasonably be characterised as advice) on emissions from open cage salmon farms and CAR/L/1168182.
40. However, the Authority also explained that it had, given the context of the request, interpreted the word “advised” to mean “specialist toxicological advice” provided by “a qualified [Authority] toxicologist” on the emissions relating to individual fish farms and any risk to human health.

41. Having fully considered the Authority's submissions, the Commissioner is not satisfied that the Authority's interpretation of the request was accurate.
42. The Commissioner does not accept that the request, given its reference to "any [Authority] officials", was limited to advice provided by a "qualified [Authority] toxicologist". Given the Applicant's reference in his request to the Authority not employing a suitably qualified toxicologist, the Commissioner considers that the request not only sought information on whether advice was provided by a qualified toxicologist, but information on whether advice was provided by someone without toxicology qualifications.
43. The Commissioner also does not accept that the advice the Authority confirmed it had been engaged in providing on emissions from open cage salmon farms and CAR/L/1168182 fell outwith the scope of the request.
44. In other words, the Commissioner considers that the Authority should have, as per the terms of the request, provided a response to the Applicant on the toxicology qualifications held by *any officials* of the Authority who advised on emissions from open cage salmon farms *and* CAR/L/1168182.
45. Consequently, the Commissioner considers that the Authority has failed to accurately interpret and respond to the Applicant's request. He therefore finds that the Authority failed to comply with regulation 5(1) of the EIRS and, in doing so, provided an incomplete response to the Applicant.
46. The Commissioner requires the Authority to reconsider the Applicant's request and to provide him with a fresh review response in relation to it. The Authority can, of course, choose to provide a commentary which places its revised review response (or any information disclosed) in context.
47. The Commissioner cannot stress enough the importance of ensuring that the terms of any information request received by a Scottish public authority are clear before proceeding to respond. He would urge the Authority, and indeed all Scottish public authorities, to take steps to clarify with applicants any matter which is open to interpretation, prior to proceeding with a request (as provided for by regulation 9 of the EIRs).

## Decision

The Commissioner finds that the Authority failed to comply with the Environmental Information (Scotland) Regulations 2004 (the EIRs) in responding to the information request made by the Applicant.

Specifically, the Commissioner finds that, in failing to accurately interpret the Applicant's request and provide a response to this, the Authority failed to comply with regulation 5(1) of the EIRs.

The Commissioner therefore requires the Authority to reconsider the Applicant's request and to issue a fresh review outcome to him, in accordance with regulation 16 of the EIRs, **by 26 December 2024.**

## **Appeal**

Should either the Applicant or the Authority 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.

## **Enforcement**

If the Authority fails to comply with this decision, the Commissioner has the right to certify to the Court of Session that the Authority has failed to comply. The Court has the right to inquire into the matter and may deal with the Authority as if it had committed a contempt of court.

**Euan McCulloch**  
**Head of Enforcement**

**11 November 2024**