

# Decision Notice



Decision 001/2010 Argyll District Salmon Fishery Board and Loch Awe Improvement Association and the Scottish Ministers

Investigation of escape of rainbow trout

Reference No: 200901276

Decision Date: 14 January 2010

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**Kevin Dunion**

Scottish Information Commissioner

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## Summary

Argyll District Salmon Fishery Board and Loch Awe Improvement Association (the applicants) requested from the Fisheries Research Service (the Ministers) information relating to the investigation of an escape of farmed rainbow trout in Loch Awe and Loch Etive. The Ministers responded by providing certain information whilst withholding the remainder as excepted information under regulation 10(5)(b) of the Environmental Information (Scotland) Regulations 2004 (the EIRs) in that its release would substantially prejudice the course of justice and the ability of a person to receive a fair trial. Following a review, the applicants remained dissatisfied and applied to the Commissioner for a decision.

Following an investigation, during which the Ministers released the information previously withheld under regulation 10(5)(b), the Commissioner found that the Ministers had dealt with the applicants' request for information in accordance with Part 1 of FOISA by applying section 39(2), the information requested being environmental information and therefore subject to the EIRs. He also found, however, that he could not uphold the Ministers' application of regulation 10(5)(b) of the EIRs in withholding the information. Since the Ministers provided the information during the investigation, the Commissioner did not require the Ministers to take any action.

## Relevant statutory provisions and other sources

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

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

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

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1. On 3 March 2009 Fish Legal, on behalf of the applicants, wrote to the Ministers' Fisheries Research Service (which has since become part of Marine Scotland, a directorate of the Ministers, and is referred to for the purposes of this decision as "the Ministers") requesting the following information in respect of recent escapes of farmed rainbow trout in Loch Awe and Loch Etive:
  - (i) Full details of any investigation carried out by the Ministers into the recent escapes together with details of what, if any, enforcement action the Ministers intended to take against the operator of the farm concerned; and
  - (ii) Copies of all correspondence between the Ministers and any other party including the owner/operator of the farm concerned relating to the recent escape from Loch Etive, including all letters, emails, faxes and records of telephone conversations.
2. The Ministers responded on 1 April 2009 and provided the information covered by request (ii) above, subject to the redaction of certain personal data. In relation to request (i), the Ministers provided an outline of the action it had taken while arguing that further details were excepted under regulation 10(5)(b) of the EIRs, on the basis that disclosure of the information would, or would likely to, prejudice substantially the course of justice, the ability of a person to receive a fair trial or the ability of any public authority to conduct an inquiry of a criminal or disciplinary nature.
3. On 11 May 2009, Fish Legal wrote to the Ministers on behalf of the applicants, requesting a review of their decision to apply regulation 10(5)(b) in relation to request (i). In particular, Fish Legal stated that in the applicants' view the exception under 10(5)(b) was not applicable, contending that there was no immediate prospect of legal action and that the public interest favoured release.
4. The Ministers notified the applicants (through Fish Legal) of the outcome of their review on 22 June 2009. The applicants were directed to further information available on the Scottish Government website and informed that the review upheld the decision to withhold a Fish Health Inspectorate (FHI) containment audit report and recommendations under regulation 10(5)(b) of the EIRs. They were advised that this decision would be reconsidered when the case had reached a conclusion.
5. On 14 July 2009, Fish Legal wrote to the Commissioner on behalf of the applicants, stating that the applicants were dissatisfied with the outcome of the Ministers' review and applying to the Commissioner on their behalf for a decision in terms of section 47(1) of FOISA. The application related to the Ministers' application of regulation 10(5)(b) of the EIRs to the information in the containment audit report and recommendations. 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 the applicants 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

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7. On 21 July 2009, the Ministers were notified in writing that an application had been received from the applicants and asked to provide the Commissioner with any information withheld. The Ministers responded with the information requested 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. In particular, the Ministers were asked to justify their reliance on any provisions of the EIRs they considered applicable to the information requested.
9. The Ministers responded, setting out the background to the statutory regulatory and enforcement procedure concerned. They also provided arguments in relation to the application to the withheld information of regulation 10(5)(b) and section 39(2) of FOISA.
10. During the investigation the Ministers provided the applicants with the information that had been previously withheld, subject to the redaction of personal data under regulation 11(2) of the EIRs. Whilst the applicants accepted the redactions of personal data, they wished a decision from the Commissioner as to whether the information to which regulation 10(5)(b) had been applied was correctly withheld under the EIRs at the time the Ministers dealt with their request for information.
11. The Ministers submissions will be considered more fully in the Commissioner's analysis and findings below.

## Commissioner's analysis and findings

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12. In coming to a decision on this matter, the Commissioner has considered all of the withheld information and the submissions made to him by both the applicants and the Ministers and is satisfied that no matter of relevance has been overlooked.



13. The Ministers dealt with the applicants' request on the basis that the information requested was environmental information as defined in regulation 2(1) of the EIRs, which is reproduced in the Appendix below. The information withheld in this context concerns the release of farmed fish into the wider environment and as such relates to biological diversity. Consequently, the Commissioner is satisfied that it falls within the definition of environmental information set out in regulation 2(1), in particular part (c) of that definition, which refers to information on measures and activities affecting or likely to affect the elements of the environment (which, in terms of part (a) of the definition, include biological diversity and its components).

### **Section 39(2) of FOISA – environmental information**

14. 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, with a view to any such information being considered solely in terms of the EIRs. In this case the Commissioner accepts that the Ministers were correct to apply the exemption to the withheld information, given his conclusion that it is environmental information as defined by regulation 2(1).
15. This exemption is subject to the public interest test in section 2(1)(b) of FOISA. As there is a separate statutory right of access to environmental information available to the applicant in this case, the Commissioner accepts that the public interest in maintaining this exemption and dealing with the request in line with the requirements of the EIRs outweighs any public interest in disclosure of the information under FOISA. The Commissioner has consequently proceeded to consider this case in what follows solely in terms of the EIRs.

### **Regulation 10(5)(b) of the EIRs**

16. Regulation 10(5)(b) of the EIRs states 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 course of justice, the ability of a person to receive a fair trial or the ability of any public authority to conduct an inquiry of a criminal or disciplinary nature.
17. In determining whether the withheld information would fall within the scope of this exception, the Commissioner has been mindful of the explanation given in *The Aarhus Convention: An Implementation Guide* (<http://www.unece.org/env/pp/acig.pdf>), where the principles behind the Convention provision on which the exemption is based are set out in the following way (page 59):

"The course of justice refers to active proceedings within the courts. The term 'in the course of' implies that an active judicial procedure capable of being prejudiced must be under way. This exception does not apply to material simply because at one time it was part of a court case. Public authorities can also refuse to release information if it would adversely affect the ability of a person to receive a fair trial. This provision should be interpreted in the context of the law pertaining to the rights of the accused."



The *Guide* goes on to refer to that part of the exception relating to investigations, pointing out that it applies only to investigations of a criminal or disciplinary nature and therefore does not necessarily cover information about a civil or administrative investigation.

18. Although there is no definition within the EIRs of what would constitute substantial prejudice, it is the Commissioner's view that in order for a public authority to be able to rely on this exception it would have to show that the risk of damage being caused by disclosing the information was real or very likely, not simply hypothetical. The harm caused would have to be significant, not marginal, and it would have to occur in the near (certainly the foreseeable) future and not in some distant time.
19. In this case, the Ministers submitted that the FHI operated under powers available in the Aquaculture and Fisheries (Scotland) Act 2007 (the 2007 Act) in relation to inspections regarding parasites and containment. Further to these powers, a programme of audits and inspections had been introduced to ensure compliance with the Fish Farming Businesses (Record Keeping) (Scotland) Order 2008, made under the 2007 Act, in order to facilitate the provision of information to the Scottish Ministers and assess whether the measures being taken were satisfactory with reference to best practice.
20. In this case, the FHI had carried out an audit of the fish farm as a result of an escape of fish, resulting in the operators being requested to take certain action within an agreed time frame. This was described by the Ministers as the audit stage, with the recommendations being contained in the fish health report. The Ministers stated that a follow-up inspection might be conducted to assess compliance with the recommendations.
21. In circumstances where improvements were not implemented to a satisfactory level, the Ministers advised that enforcement action might be taken, by serving an enforcement notice in terms of section 6(1) of the 2007 Act. This would instruct action to be taken within a specified period of time, failure to comply being an offence under the 2007 Act. The Ministers expected that in such circumstances a report would be submitted to the Procurator Fiscal for consideration.
22. The Ministers referred to the Commissioner's guidance on the application of regulation 10(5)(b), which they noted referred to the exception applying to functions undertaken by public authorities in relation to their regulatory activities. They regarded this as relevant to this particular case and in particular saw direct parallels to the Commissioner's conclusions as set out in *Decision 125/2007 Robert Hogg and City of Edinburgh Council* (<http://www.itspublicknowledge.info/applicationsanddecisions/Decisions/2007/200601096.asp>)
23. The Ministers contended that as the statutory regulatory process of assessment and compliance (which could ultimately lead to criminal proceedings) was ongoing at the time they dealt with the applicants' request and request for review, the audit and report should remain withheld. They believed disclosure would (as in the case of *Decision 125/2007*) undermine the investigatory process. They did not know at that stage if an enforcement notice would be served or, if it was, whether it would be adhered to. Consequently, they did not know whether a case would be submitted to the procurator fiscal.



24. The Ministers considered that the release of the containment audit report and the fish health report would, in the circumstances, amount to the release of evidence or information which was likely to be crucial to support an enforcement notice, and ultimately a prosecution, under the 2007 Act. They believed it could, if released into the public arena prior to the commencement of criminal proceedings, be presented and publicised in such a manner as to substantially prejudice a fair trial.
25. The applicants contended that there was no real prospect of criminal proceedings in this case. They further contended that if every audit, inspection or “sub-prosecution” enforcement action by any government regulator across the whole range of environmental regulatory systems, which could *conceivably* at some stage in the future lead to formal legal proceedings, were to be subject to non-disclosure under regulation 10(5)(b), then all such regulatory systems could be kept as confidential as the regulator deemed necessary or expedient. They did not believe this to be the purpose of, or to be compliant with, either the relevant EC Directive or the Aarhus Convention.
26. The Commissioner notes the conclusions of *Decision 125/2007*, which was cited by the Ministers in their submissions. In that case, the Commissioner found that the relevant planning enforcement process was “live” and had the potential to lead to criminal prosecution. If prosecution were to take place, the planning enforcement file would form the basis of that prosecution. The investigation forming part of the enforcement process might properly be considered a civil or administrative matter at the time the authority dealt with the request for information, but that investigation would in turn lead to and inform any subsequent decision on prosecution made by the Procurator Fiscal. In the circumstances, the Commissioner was satisfied that disclosure while the matter was ongoing would undermine the investigation process. He was also satisfied that disclosure at that time would undermine the site operator’s ability to prepare their case and receive a fair hearing should criminal proceedings ultimately ensue. On the other hand, while taking account of these conclusions where relevant, the Commissioner must acknowledge that each application has to be considered on its own merits, with any information withheld being considered in context.
27. In this case, no court proceedings had commenced at the time the Ministers dealt with either the applicants’ information request or their request for review. The Ministers’ investigations could not at that time be construed as “active proceedings within the courts”. Accordingly, the Commissioner does not consider that release of the information in response to the applicants’ request or request for review would have prejudiced, or would have been likely to prejudice, substantially the course of justice for the purposes of Regulation 10(5)(b). However, he must still consider the other limbs of regulation 10(5)(b).
28. Section 6(1) of the 2007 Act states that the Scottish Ministers may serve an enforcement notice on a person who carries on a business of fish farming, but only where they are satisfied that person does not have satisfactory measures in place for any of the purposes mentioned in subsection (2). These are:
  - (a) the prevention, control and reduction of parasites,
  - (b) the containment of fish,



- (c) the prevention of escape of fish,
  - (d) the recovery of escaped fish.
29. It is only if a person contravenes an enforcement notice without reasonable excuse that an offence is committed under section 6(9) of the 2007 Act. Such a contravention could lead to the Ministers carrying out an inquiry of a criminal nature, and ultimately to prosecution of the person on whom the notice has been served. The Commissioner must consider whether, in the light of these provisions, disclosure of the withheld information in response to the applicants' request or request for review would have prejudiced substantially, or would have been likely to prejudice substantially, either the authorities' ability to conduct a criminal inquiry or the ability of any person prosecuted as a consequence to receive a fair trial.
30. The Commissioner has considered the withheld information carefully. Given the nature of the recommendations in this case, he cannot accept that any enforcement action which might follow from them would carry with it any reasonable prospect of an inquiry of a criminal nature or subsequent criminal proceedings. Consequently he is not satisfied that disclosure would, or would be likely to, prejudice the ability of a person to receive a fair trial or the ability of any public authority to conduct an inquiry of a criminal nature. As should be clear from the nature of the test of substantial prejudice, he does not accept that the mere theoretical possibility of criminal prosecution which is always present in such cases is sufficient to sustain the exception. Consequently, he cannot agree with the Ministers' application of regulation 10(5)(b) in this case.
31. Having found that the exception in regulation 10(5)(b) did not apply in the circumstances of this case, the Commissioner is not required to go onto consider the public interest test in section 10(1) in relation to the withheld information.

## DECISION

The Commissioner finds that the Scottish Ministers (the Ministers) complied with Part 1 of the Freedom of Information (Scotland) Act 2002 (FOISA) in responding to the information request made by Argyll District Salmon Fishery Board and Loch Awe Improvement Association (the applicants), in particular by applying section 39(2) of FOISA on the basis that the information requested was environmental information and therefore subject to the EIRs.

He also finds that the Scottish Ministers failed to comply with the Environmental Information (Scotland) Regulations 2004 (the EIRs) in responding to the information request made by the applicants. In particular, the Commissioner finds that the Scottish Ministers wrongly applied the exception contained in regulation 10(5)(b) of the EIRs to the withheld information and thereby failed to deal with the request in accordance with regulation 5(1) of the EIRs.

Given that during the investigation the Ministers released the information previously withheld, he does not require the Ministers to take any action.





## **Appeal**

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Should either the applicants 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.

**Kevin Dunion**  
**Scottish Information Commissioner**  
**14 January 2010**



## Appendix

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### 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;
- (b) factors, such as substances, energy, noise, radiation or waste, including radioactive waste, emissions, discharges and other releases into the environment, affecting or likely to affect the elements of the environment referred to in paragraph (a);
- (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;
- (d) reports on the implementation of environmental legislation;
- (e) costs benefit and other economic analyses and assumptions used within the framework of the measures and activities referred to in paragraph (c); and
- (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)-

...

- (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-
  - .....
  - (b) the course of justice, the ability of a person to receive a fair trial or the ability of any public authority to conduct an inquiry of a criminal or disciplinary nature;
- ...