

# Decision Notice

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## **Decision 010/2018: Salmon and Trout Conservation Scotland and the Scottish Environment Protection Agency**

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### **Report on the environmental impact of sea lice medicine**

Reference No: 201701417

Decision Date: 29 January 2018



Scottish Information  
Commissioner

## Summary

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SEPA was asked about a report on the environmental impact of sea lice medicine.

At review, SEPA informed S&TCS that it had disclosed all of the relevant information it held. However, during the investigation, SEPA identified additional information falling within the scope of the request and disclosed this information to S&TCS.

The Commissioner found that SEPA failed to comply with regulation 5(1) of the EIRs, by initially failing to identify and disclose all of the relevant information it held.

## Relevant statutory provisions

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The Environmental Information (Scotland) Regulations 2004 (the EIRs) regulation 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

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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 Environment Protection Agency (SEPA). The request concerned a report (SARF098)<sup>1</sup> by the Scottish Aquaculture Research Forum (SARF) concerning the environmental impact of sea lice medicine. 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 SEPA, 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. SEPA responded on 24 May 2017. It applied the exemption in section 39(2) of the Freedom of Information (Scotland) Act 2002 (FOISA), on the basis that S&TCS was seeking environmental information. SEPA informed S&TCS that it no longer held information relating to the SARF report and the information requested was, therefore, excepted from disclosure under regulation 10(4)(a) of the EIRs. SEPA stated also that it did not directly fund the SARF project.

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

4. On 24 May 2017, S&TCS wrote to SEPA requesting a review of its decision. S&TCS expressed surprise that no information was held. S&TCS asked SEPA to confirm that it did not hold any information regarding the peer review by Professor Edwards. S&TCS also asked SEPA to explain why it had stated that it no longer held such information, as this suggested the information was held at some stage.
5. SEPA notified S&TCS of the outcome of its review on 9 June 2017. SEPA informed S&TCS that it had now located one relevant email – with attachment – and disclosed these to S&TCS. SEPA stated that this was the only information it held and which fell within the scope of S&TCS's request.
6. On 7 August 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 was dissatisfied with the outcome of SEPA's review as, in its view, it was not credible that SEPA held no relevant information. S&TCS was also dissatisfied that SEPA had provided no explanation as to why it no longer held information.

## Investigation

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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 15 August 2017, SEPA was notified in writing that S&TCS had made a valid application. 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. SEPA was invited to comment on this application and answer specific questions, focusing on the steps taken to identify and locate any relevant information held.
10. SEPA provided submissions on 3 November 2017 and 15 November 2017.
11. In addition, during the investigation, the investigating officer met with SEPA to gain a fuller understanding of the searches and enquiries it had undertaken in order identify and locate any information falling within the scope of S&TCS's request.
12. Also during the investigation, SEPA carried out additional searches and rechecked all of its relevant records. These identified additional information falling within the scope of S&TCS's request. SEPA disclosed this information to S&TCS.

## Commissioner's analysis and findings

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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 S&TCS and SEPA. He is satisfied that no matter of relevance has been overlooked.

## **Has all relevant information been identified?**

14. As noted above, in its application to the Commissioner, S&TCS did not consider it credible that, at the time it received the request, SEPA held no information falling within the scope of the request.
15. S&TCS explained that it had submitted an identical request for information to the Crown Estate. In response, it had received a number of documents, comprising emails into which SEPA was copied, or of which SEPA itself was the author. In S&TCS's view, it was likely that SEPA – as the licensing body for the sea lice medicine – would have held considerably more relevant information than the Crown Estate.
16. SEPA explained that it had conducted searches within the relevant part of the organisation – in this case, the Aquaculture central team.
17. SEPA stated also that, during the handling of its review in this case, it became aware that the Crown Estate had disclosed information in response to a similar request. SEPA obtained a copy of the disclosed information and carried out a further search for interlinked information, but no additional information was located.
18. SEPA stated that a specific folder for SARF098 existed as part of records relating to SARF. SEPA stated that this folder was the location for records relating to SARF098 when they were retained as SEPA records. SEPA stated that these records had not been retained following the completion of its involvement in responding to the draft SARF098 report, which was published in August 2016.
19. During the investigation, SEPA carried out additional searches and rechecked all of the relevant records, including relevant email folders. As noted above, additional information was identified which was subsequently disclosed to S&TCS. Details of these searches were confirmed at the meeting with SEPA.
20. In relation to S&TCS's query as to why the relevant information was no longer held, SEPA stated that it had reviewed the list of emails provided to S&TCS by the Crown Estate and had conducted searches for this information. Aside from the additional information disclosed to S&TCS during this investigation, SEPA established that it did not hold any of the documents disclosed by the Crown Estate, or any other information falling within the scope of the request. SEPA stated that it did not hold any formal record of destruction for the deletion of this information, as it was not subject to any formal records disposition processes.

### *The Commissioner's view*

21. The Commissioner has considered S&TCS's representations and SEPA's explanation of the searches and enquiries undertaken, and why those searches and enquiries should have been considered likely to identify and locate any information still held which fell within the scope of S&TCS's request.
22. The Commissioner accepts that, by the end of the investigation, SEPA had undertaken reasonable, proportionate searches and enquiries in the circumstances, with a view to identifying, locating and retrieving any information held and falling within the scope of S&TCS's request. In the circumstances, he is satisfied that any relevant information would have been identified using the searches and enquiries described by S&TCS. The Commissioner is satisfied also with SEPA's explanation of why any such information which may have been held previously, is no longer held.

23. However, by failing initially to identify and disclose all the information it held and which fell within the scope of S&TCS's request, the Commissioner finds that SEPA failed to comply with regulation 5(1) of the EIRs when responding to S&TCS's request and requirement for review.
24. The Commissioner is disappointed that it took until well into his investigation for SEPA to carry out adequate searches for relevant information. This failing has been noted and may be taken into account in future action under his Enforcement Policy and Intervention Procedures.
25. As stated in many previous decisions, the Commissioner's remit extends only to consideration of whether a Scottish public authority actually holds the requested information and whether it has complied with regulation 5(1) of the EIRs. The Commissioner cannot comment on whether SEPA ought to hold more recorded information, in particular the additional information S&TCS expected it to hold.

## Decision

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The Commissioner finds that the Scottish Environment Protection Agency (SEPA) 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).

By failing initially to disclose all the relevant information it held, the Commissioner finds that SEPA failed to comply with regulation 5(1) of the EIRs in responding to S&TCS's request and requirement for review. Given that SEPA disclosed additional information to S&TCS during the investigation, and the Commissioner is satisfied that no further relevant information is held, the Commissioner does not require SEPA to take any action in respect of this failure, in response to S&TCS's application.

## Appeal

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Should either Salmon and Trout Conservation Scotland or the Scottish Environment Protection Agency 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**

**29 January 2018**

### 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.

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