

# Decision Notice

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## **Decision 013/2018: Salmon and Trout Conservation Scotland and the Scottish Environment Protection Agency**

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### **Correspondence with Marine Scotland**

Reference No: 201701418

Decision Date: 31 January 2018



## Summary

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SEPA was asked for correspondence between it and Marine Scotland concerning a report on the environmental impact of sea lice medicine.

SEPA initially informed S&TCS that no such correspondence had taken place. On review, it directed S&TCS to information published on its website which it considered fell within the scope of S&TCS's request. During the investigation, SEPA identified additional information 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.

The Commissioner found also that SEPA had failed to meet the required timescale for responding to S&TCS's requirement for review.

## Relevant statutory provisions

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The Environmental Information (Scotland) Regulations 2004 (the EIRs) regulations 5(1) (Duty to make available environmental information on request); 16(3), (4) and (5) (Review by Scottish public authority)

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 4 May 2017, S&TCS made a request for information to the Scottish Environment Protection Agency (SEPA). The request related to a report<sup>1</sup> on the environmental impact of sea lice medicine. The information requested was:

*All correspondence between SEPA and Marine Scotland concerning Slice and/or SARF098 and/or the proposed withdrawal of permission, covering 2015 to the present day.*

S&TCS also requested other information which is not the subject of this Decision Notice.

3. SEPA responded on 30 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 stated that there had been no correspondence between it and Marine Scotland falling within the scope of S&TCS's request; therefore, the information was excepted from disclosure under regulation 10(4)(a) of the EIRs.
4. On 30 May 2017, S&TCS wrote to SEPA requesting a review of its decision, on the basis that S&TCS expected such correspondence would exist.

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

5. SEPA notified S&TCS of the outcome of its review on 28 June 2017. SEPA informed S&TCS that its original response was inaccurate and there had in fact been correspondence between it and Marine Scotland. SEPA provided a link to information it had published on its website in response to a separate information request, informing S&TCS that relevant correspondence, falling within the scope of S&TCS's request, was contained within that link.
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 stated it was dissatisfied with the outcome of SEPA's review because:
  - (i) The information on SEPA's website to which SEPA had provided a link did not relate to a request which mirrored the terms of S&TCS's request. In S&TCS's view, its own request was considerable broader than the terms of the request (and published correspondence) to which SEPA had referred;
  - (ii) SEPA's initial response – that there had been no correspondence between it and Marine Scotland – was so far off the mark that it warranted the Commissioner's attention; and
  - (iii) SEPA failed to respond to its requirement for review within the timescale required by regulation 16(4) of the EIRs.

## **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. S&TCS 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 to 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 on 13 December 2017.

## **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 accept that the information on SEPA's website (to which it had been referred by SEPA) necessarily encompassed all of the information falling within the scope of its request.
15. SEPA explained that it had received a large number of requests for information around this general topic and it had proved challenging to carry out searches each time a new request was received.
16. As noted above, during the investigation, SEPA carried out further searches and rechecked all of its relevant records. This identified additional information falling within the scope of S&TCS's request. Also as noted above, this was disclosed to S&TCS on 13 December 2017.
17. SEPA confirmed that it had carried out a search across its electronic records systems. Details of these searches were confirmed at the meeting with SEPA.

### *The Commissioner's view*

18. The Commissioner has considered S&TCS's representations, with SEPA's explanation of the searches undertaken, and why those searches should have been considered likely to identify and locate any information which fell within the scope of S&TCS's request.
19. The Commissioner accepts that, by the end of the investigation, SEPA had undertaken reasonable, proportionate searches in the circumstances, with a view to identifying 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 conducted by S&TCS.
20. 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.
21. It is clear that SEPA's initial position – that there had been no correspondence between it and Marine Scotland – was completely inaccurate.
22. 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.

## **Regulation 16 of the EIRs**

23. S&TCS complained that SEPA had failed to respond to its requirement for review within the timescale laid down in regulation 16(4) of the EIRs.
24. Regulation 16 of the EIRs states that, on receipt of representations seeking a review, the public authority shall review the matter and decide whether it has complied with the EIRs, no later than 20 working days after the date of receipt of the representations (regulation 16(3) and (4)). It also states that where an authority has not complied with its duty under the EIRs, it shall immediately take steps to remedy the breach of duty (regulation 16(5)).
25. In this case, S&TCS submitted its requirement for review by email on 30 May 2017. SEPA responded to that requirement on 28 June 2017.

26. The first working day after the date of receipt of S&TCS's requirement for review was 31 May 2017. Therefore, the 20<sup>th</sup> working day (and the final date for complying with the requirements of regulation 16(4)) was 27 June 2017.
27. SEPA did not respond until 28 June 2017. Therefore, it is a matter of fact that SEPA did not respond to S&TCS's requirement for review within 20 working days. Consequently, the Commissioner finds that it failed to comply with regulation 16(4) of the EIRs.
28. This failure to respond to S&TCS's requirement for review timeously has been noted. This may be taken into account in future by the Commissioner in determining whether further action is required under his Enforcement Policy and Intervention Procedures.

## 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 of 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, he does not require SEPA to take any action in respect of this failure, in response to S&TCS's application.

The Commissioner finds also that SEPA failed to respond to S&TCS's requirement for review within the timescale laid down in regulation 16(4) of the EIRs. On this occasion, he does not require SEPA to take any action in respect of this failure.

## 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**

**31 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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#### **16 Review by Scottish public authority**

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- (3) The Scottish public authority shall on receipt of such representations-
  - (a) consider them and any supporting evidence produced by the applicant; and
  - (b) review the matter and decide whether it has complied with these Regulations.
- (4) The Scottish public authority shall as soon as possible and no later than 20 working days after the date of receipt of the representations notify the applicant of its decision.
- (5) Where the Scottish public authority decides that it has not complied with its duty under these Regulations, it shall immediately take steps to remedy the breach of duty.

**Scottish Information Commissioner**

Kinburn Castle  
Doubledykes Road  
St Andrews, Fife  
KY16 9DS

t 01334 464610

f 01334 464611

[enquiries@itspublicknowledge.info](mailto:enquiries@itspublicknowledge.info)

**[www.itspublicknowledge.info](http://www.itspublicknowledge.info)**