

Decision Notice

Decision 020/2019: Company B and Highlands and Islands Enterprise

Integrated Aquaculture Rapid Mortality Recovery System

Reference No: 201800977

Decision Date: 13 February 2019



Scottish Information
Commissioner

Summary

HIE was asked about an “Integrated Aquaculture Rapid Mortality Recovery System”. HIE provided some information, stating other information was excepted from disclosure under the EIRs as internal communications or commercially confidential.

Following investigation, the Commissioner accepted that some of the information was excepted from disclosure: it comprised internal communications and commercially confidential information and the public interest favoured maintaining the exceptions.

He found that HIE was not entitled to withhold other information, as the requirements of the exceptions were not met. The relevant information was disclosed during the investigation.

Relevant statutory provisions

The Environmental Information (Scotland) Regulations 2004 (the EIRs) regulations 2(1) (paragraphs (a), (b) and (c) of definition of “environmental information”) (Interpretation); 5(1) and (2)(b) (Duty to make environmental information available on request); 10(1), (2), (4)(e) and (5)(e) (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. On 6 March 2018, Company B, made a request for information to Highlands and Islands Enterprise (HIE). It noted that recent HIE “approvals” included £362,000 for an Integrated Aquaculture Rapid Mortality Recovery System (the system). He asked for:
“...any correspondence on this matter, briefings, reports, emails, letters, budgets, proposals, photos, graphics and any other information relating to [the system].”
2. HIE responded on 27 March 2018. It advised Company B that it was dealing with the request under the EIRs. It stated that, due to the volume and complexity of the information he was seeking, it was impractical to provide it within 20 working days and so it intended to extend the period to 40 working days under regulation 7 of the EIRs.
3. On 2 May 2018, HIE responded to Company B’s request. It provided some information, explaining that it had redacted personal data under regulation 11(2) of the EIRs. It also advised that it was withholding other information as it was excepted from disclosure under regulations 10(4)(e) (Internal communications) and 10(5)(e) (Confidentiality of commercial or industrial information).
4. On 2 May 2018, Company B wrote to HIE, requesting a review of its decision on the basis that it did not accept that all of the information requested had been provided. It explained what further information it believed should be held.

5. On 3 May 2018, HIE responded, advising that it was treating the correspondence of 2 May 2018 as a supplementary question. It provided Company B with an earlier press release about the subject matter.
6. On 3 and 4 May 2018, Company B wrote to HIE and stated that it wished a review for its original request. It commented that it wished to be provided with the information originally requested as HIE had (in its view) failed to provide basic information. It also commented that, while it was appreciated that some information could be classed as commercially confidential, it believed a blanket approach had been taken in relation to the application of 10(5)(e) of the EIRs.
7. HIE notified Company B of the outcome of its review on 31 May 2018. HIE provided further information, while confirming that some information remained withheld as it was subject to the exemptions in regulation 10(4)(e) and 10(5)(e) of the EIRs.
8. On 6 June 2018, Company B wrote to the Commissioner. Company B applied to the Commissioner for a decision in terms of section 47(1) of the Freedom of Information (Scotland) Act 2002 (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. Company B stated it was dissatisfied with the outcome of HIE's review because it failed to provide all of the information requested: in particular, it disputed the application of regulation 10(4)(e) and 10(5)(e) of the EIRs.

Investigation

9. The application was accepted as valid. The Commissioner confirmed that Company B made a request for information to a Scottish public authority and asked the authority to review its response to that request requests before applying to him for a decision.
10. On 3 August 2018, HIE was notified in writing that Company B had made a valid application. HIE was asked to send the Commissioner the information withheld from Company B. HIE provided the information and the case was allocated to an investigating officer.
11. Section 49(3)(a) of FOISA requires the Commissioner to give public authorities an opportunity to provide comments on an application. HIE was invited to comment on this application and to answer specific questions. It was asked about the steps taken to establish what information it held, and also about the requirements of the two exceptions claimed in its earlier correspondence with Company B.
12. During the investigation, HIE changed its position and provided some of the information previously withheld under regulation 10(4)(e) and 10(5)(e). It maintained, however, that some of the information was excepted from disclosure.
13. During the investigation, Company B also confirmed that it did not wish the Commissioner to consider the redaction of personal data under regulation 11(2). As such, this will not form part of the Commissioner's investigation.
14. Company B confirmed receipt of the information disclosed during the investigation but remained dissatisfied with HIE's response.

Commissioner's analysis and findings

15. 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 Company B and HIE. He is satisfied that no matter of relevance has been overlooked.

Application of the EIRs

16. The Commissioner is satisfied that the information covered by this request (information relating to the recovery and disposal of dead fish) is environmental information, as defined in regulation 2(1) of the EIRs. In reaching this conclusion, the Commissioner has considered the information in question, along with paragraphs (a), (c) and (f) of the definition of environmental information (reproduced in Appendix 1). Company B has not disputed HIE's decision to handle the request under the EIRs and the Commissioner will consider the information in what follows solely in terms of the EIRs.

Regulation 5(1) of the EIRs

17. Regulation 5(1) of the EIRs (subject to the various qualifications contained in regulations 6 to 12) requires a Scottish public authority which holds environmental information to make it available when requested to do so by any applicant.
18. Under the EIRs, a public authority may refuse to make environmental information available if one or more of the exceptions in regulation 10 apply and, in all the circumstances of the case, the public interest in maintaining the exception or exceptions outweighs the public interest in making the information available. In its response to Company B's requirement for review, and in providing the withheld information to the Commissioner, HIE advised that it considered certain information to be excepted from disclosure in terms of regulation 10(4)(e) and 10(5)(e) of the EIRs.

Was all relevant information identified and located by HIE?

19. Company B queried whether all of the relevant information had been identified and located by HIE.
20. The standard of proof to determine whether a Scottish public authority holds 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.
21. HIE confirmed the searches and enquiries it undertook to ascertain what information it held falling within the scope of Company B's request, detailing the searches undertaken. These included searches of relevant electronic and paper records, and consultation with all relevant business units to ensure a review of all relevant records. HIE provided supporting evidence confirming the outcomes of its searches.
22. HIE explained that the conclusion of the searches and enquiries was that no information was held, beyond that considered (and either disclosed or withheld) in responding to Company B.
23. Having considered all relevant submissions and the terms of the request, the Commissioner accepts that HIE interpreted Company B's request reasonably and took adequate, proportionate steps with a view to identifying and locating the information requested by

Company B. Consequently, in this regard, the Commissioner is satisfied on balance that HIE identified all of the information held and falling within the scope of Company B's request.

24. During the investigation, HIE confirmed that it had provided Company B with some of the information that it had previously withheld under regulations 10(4)(e) and 10(5)(e) of the EIRs. HIE however maintained that certain information remained to be withheld as excepted under regulations 10(4)(e) and 10(5)(e) of the EIRs.

Regulation 10(4)(e) of the EIRs (internal communications)

25. Regulation 10(4)(e) of the EIRs provides that a Scottish public authority may refuse to make environmental information available to the extent that it involves making available internal communications. In order for information to fall within the scope of this exception, it need only be established that the information is an internal communication.
26. As with all of the exceptions contained within regulation 10, a Scottish public authority applying this exception must interpret the exception in a restrictive way (regulation 10(2)(a)) and apply a presumption in favour of disclosure (regulation 10(2)(b)). Even where the exception applies, the information must be disclosed unless, in all the circumstances, the public interest in making the information available is outweighed by that in maintaining the exception (regulation 10(1)(b)).
27. As mentioned above, during the investigation HIE withdrew its reliance on regulation 10(4)(e) of the EIRs for some of the information withheld from Company B, confirming this information had been disclosed to Company B. In the absence of submissions from HIE as to why the information was initially considered to be excepted from disclosure, the Commissioner must conclude that the information in question was not properly excepted under regulation 10(4)(e) of the EIRs and was therefore incorrectly withheld by HIE. In doing so, HIE breached regulation 5(1) of the EIRs.
28. Given that the information concerned was provided to HIE during the investigation, the Commissioner does not require HIE to take any action in respect of this failure.
29. HIE confirmed that it still wished to claim regulation 10(4)(e) to withhold information redacted from documents disclosed to Company B.
30. Having considered the information still withheld under this exception, the Commissioner is satisfied that all of this information comprises internal communications and is therefore subject to the exception in regulation 10(4)(e). He must go on to consider whether, in all of the circumstances, the public interest in making the information available is outweighed by the public interest in maintaining the exception.

Public Interest Test

31. In common with all the other exceptions in the EIRs, regulation 10(4)(e) is subject to the public interest test set out in regulation 10(1)(b). Consequently, information can be withheld under this exception only where, in all the circumstances, the public interest in making the information available is outweighed by that in maintaining the exception.
32. In its submissions, HIE recognised that public transparency of the application and review process favoured disclosure of the information.
33. HIE also submitted, however, that it was in the public interest to maintain the exception, to allow employees to have free and frank discussions about the decision-making process: disclosure would adversely affect that process. HIE made further submissions as to why it

was in the public interest to maintain the exception, but the Commissioner cannot go into the detail of these without referencing the information that has been withheld.

34. In discussion with the investigating officer, Company B commented that as the information related to expenditure from the public purse, the public interest favoured disclosure.

The Commissioner's view

35. The Commissioner has considered carefully the public interest in disclosure of the information, bearing in mind the general public interest in transparency and accountability in the decision-making processes of public authorities, and in understanding how particular decisions are reached. He acknowledges that disclosure of the information would assist such accountability and understanding, and has considered whether the passage of time should have a bearing on where the public interest lies.
36. However, the Commissioner also accepts that there is a considerable public interest – bearing in mind the information under consideration – in maintaining confidentiality of internal communications and allowing staff to have free and frank exchanges of views when deliberating on such information.
37. In the particular circumstances of this case, having considered the information that has been withheld and all the circumstances, the Commissioner concludes, on balance, that the public interest in making this information available is outweighed by that in maintaining the exception in regulation 10(4)(e) of the EIRs. Therefore, he finds HIE to have been justified in withholding the remaining information to which it is applying that exception.

Regulation 10(5)(e) of the EIRs (Confidentiality of commercial or industrial information)

38. HIE submitted that the other information withheld, and which fell within the scope of Company B's request, was excepted from disclosure by virtue of regulation 10(5)(e) of the EIRs.
39. As mentioned above, during the investigation HIE withdrew its reliance on regulation 10(5)(e) for some of the information withheld from Company B, confirming this information had been disclosed to Company B. In the absence of submissions from HIE as to why the information was initially considered excepted from disclosure, the Commissioner must conclude that the information in question was not properly excepted under regulation 10(5)(e) of the EIRs and was therefore incorrectly withheld by HIE. In doing so, HIE breached regulation 5(1) of the EIRs.
40. Given that the information concerned was provided to Company B during the investigation, the Commissioner does not require HIE to take any action in respect of this failure.
41. HIE confirmed that it still wished to claim regulation 10(5)(e) to withhold some information, which it considered to be commercially sensitive.
42. Regulation 10(5)(e) provides 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 confidentiality of commercial or industrial information where such confidentiality is provided for by law to protect a legitimate economic interest.
43. As mentioned above, this exception is subject to the public interest test in regulation 10(1)(b) of the EIRs.

44. The Aarhus Convention: an Implementation Guide¹ (which offers guidance on the interpretation of the Aarhus Convention, from which the EIRs are derived) notes (page 88) that the first test for considering this exception is whether national law expressly protects the confidentiality of the withheld information. The law must explicitly protect that type of information as commercial or industrial secrets. Secondly, the confidentiality must protect a "legitimate economic interest": this term is not defined in the Convention, but its meaning is considered further below.
45. Having taken this guidance into consideration, the Commissioner's view is that before regulation 10(5)(e) can be engaged, authorities must consider the following matters:
- Is the information commercial or industrial in nature?
 - Does a legally binding duty of confidence exist in relation to the information?
 - Is the information publicly available?
 - Would disclosure of the information cause, or be likely to cause, substantial harm to a legitimate economic interest?

Is the information commercial or industrial in nature?

46. HIE submitted that the information in question relates to either financial information or the innovative design of a new product in what it described as a very small and competitive market place.
47. Having considered the relevant submissions, together with the information that remains withheld under this exception, the Commissioner is satisfied that the information is commercial in nature.

Does a legally binding duty of confidence exist in relation to the information?

48. In the Commissioner's view, confidentiality "provided for by law" will include confidentiality imposed on any person under the common law of confidence, under a contractual obligation or by statute.
49. In its submissions to the Commissioner, HIE stated that the information in question was provided by HIE's client. It commented that third parties providing information to HIE were aware that the information may be subject to a request under FOISA or the EIRs, but that they were also aware that both FOISA and the EIRs protected their most sensitive information, which (if disclosed) would have a detrimental effect on them.
50. It explained the information was provided for the purposes of discussing potential support and provided to HIE during a grant application and consideration thereof. It stated that, in the circumstances, there was a legally binding obligation on its part not to release the information in question as it had been provided on the understanding that confidentiality would be maintained to protect the provider's business interests. In effect, HIE argued that there was an implied duty of confidence and an expectation of confidentiality would be normal in the circumstances.
51. The Commissioner has considered the withheld information in the context of the request, along with HIE's submissions. While there is nothing which evidences an explicit obligation

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

of confidentiality, the Commissioner is satisfied, in the circumstances, that the information was exchanged under an implied obligation to maintain confidentiality. He acknowledges that such an expectation would be normal practice in correspondence of this nature, where a third party is providing an authority with financial and other costing or design details in advance of an award of funding being made. Accordingly, the Commissioner is satisfied that an implied duty of confidence existed and applied to the withheld information, at the time HIE responded to Company B's request and their requirement for review (and indeed now).

Is the information publicly available?

52. HIE submitted that the information was not currently in the public domain and that it had not been published.
53. The Commissioner accepts that the withheld information was not publicly available when HIE dealt with Company B's request or its requirement for review (nor, indeed, is it so available now).

Would disclosure of the information cause, or be likely to cause, substantial harm to a legitimate economic interest?

54. The term "legitimate economic interest" is not defined within the EIRs. In the Commissioner's view, the interest in question must be financial, commercial or otherwise "economic" in nature, and the prejudice to that interest must be substantial. In order to apply this exception, an authority must, in the Commissioner's view, be able to demonstrate that the harm to the economic interest in question would be real, actual and of significant substance.
55. In its submissions to the Commissioner, HIE explained the relationship between HIE and the third party and the circumstances under which the information was provided. It advised that disclosure would harm the economic interests of the third party as it would provide the third party's competitors with an unfair advantage in terms of knowledge of its business. If disclosed, competitors would be aware of the detail of the product design in question and the various costing and financial information being withheld, to the detriment of the third party. Such disclosure, HIE argued, would give competitors an unfair advantage if they knew the details of the product, which they could use to develop something similar without investing the same time in development.
56. HIE made further submissions as to how disclosure of the information withheld or redacted from each document would cause substantial harm: the Commissioner cannot go into the detail of those submissions, as to do so would involve referencing the information that has been withheld.
57. Where the authority considers disclosure of information would cause harm to the economic interests of a third party, it must make this clear: generally, while the final decision on disclosure will always be one for the authority, it will assist matters if the third party has been consulted on the elements referred to above.
58. In its submissions to the Commissioner, HIE submitted – and provided evidence to the effect – that it had consulted with the third party which had provided it with the information. The third party affirmed that disclosure would substantially prejudice their legitimate commercial interests, as claimed by HIE.
59. Having taken HIE's submissions into account, together with the information actually withheld, and the comments provided by the third party in question, the Commissioner is satisfied that disclosure of the information would have caused, or would have been likely to cause,

substantial prejudice to the confidentiality of the information and the ongoing legitimate economic interests of the third party. Consequently, the Commissioner is satisfied that HIE was entitled to apply regulation 10(5)(e) of the EIRs to the information withheld under that exception.

Consideration of the public interest

60. Having upheld the use of the exception contained within regulation 10(5)(e) in relation to the withheld information, the Commissioner is required to consider the public interest test set out in regulation 10(1)(b) of the EIRs.
61. In its submissions, HIE recognised that public transparency of the application and review process favoured disclosure of the information.
62. However, it also submitted that it was in the public interest to maintain the exception to ensure that HIE is provided with such information to assist in its decision-making processes in providing public funding. It explained that its due diligence would be likely to be restricted as companies would be unlikely to provide the level of confidential information required for adequate checks, should it be known that the information would be disclosed. It submitted that it was in the public interest that HIE can show that it can keep sensitive information confidential.
63. In relation to some of the detailed information withheld, HIE made further submissions as to why it was in the public interest to maintain the exception. The Commissioner has considered these submissions, but cannot go into their detail as to do so would involve referencing the information that has been withheld.
64. In discussion with the investigating officer, Company B commented that as the information related to expenditure from the public purse, the public interest favoured disclosure.

Commissioner's conclusions

65. The Commissioner accepts the general public interest in transparency and accountability, particularly where this involves the spending of public money. He also acknowledges the significant environmental considerations raised by the subject matter. The Commissioner also accepts that disclosure of the information might shed some light on the process followed and the information considered when grants or loans are applied for and those applications are considered. He has also borne in mind that those submitting information to Scottish public authorities should be aware that, at times, such information will require to be made available as a result of a request under FOISA or the EIRs.
66. The Commissioner has also taken account of the submissions made by HIE in favour of maintaining the exception. He has already acknowledged the risk of substantial commercial prejudice in this case. He accepts that this would not be in the public interest.
67. The Commissioner considers it is in the public interest for those organisations operating within a competitive market to be able to do so, with potential competitors, on a fair and equal footing. This is particularly relevant where the information relates to new products and processes, which may still be subject to further development.
68. On balance, having considered the withheld information in the context of all relevant submissions he has received, the Commissioner finds that the public interest in disclosing the remaining information withheld under this exception is outweighed by that in the maintenance of confidences and in fair competition. On balance, therefore, in all the circumstances of this case, he concludes that the public interest in making the remaining

information available is outweighed by the public interest in maintaining the exception in regulation 10(5)(e) of the EIRs.

69. The Commissioner therefore finds HIE was entitled to withhold the remaining information under the exception in regulation 10(5)(e) of the EIRs.

Decision

The Commissioner finds that Highlands and Islands Enterprise (HIE) partially complied with the Environmental Information (Scotland) Regulations 2004 (the EIRs) in responding to the information request made by Company B.

The Commissioner finds that HIE was entitled to withhold some information as excepted from disclosure under regulations 10(4)(e) and 10(5)(e) of the EIRs.

He also finds, however, that HIE was not entitled to withhold the information it disclosed during the investigation: in doing so, it breached regulation 5(1) of the EIRs.

Given the information was disclosed during the investigation, the Commissioner does not require HIE to take any action in respect of this failure.

Appeal

Should either Company B or HIE 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

13 February 2019

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

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- (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;

...

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.

...

- (4) A Scottish public authority may refuse to make environmental information available to the extent that

...

- (e) the request involves making available internal communications.

- (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-

...

- (e) the confidentiality of commercial or industrial information where such confidentiality is provided for by law to protect a legitimate economic interest;

...

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