

Decision Notice



Decision 043/2013 Global Alliance Against Industrial Aquaculture and the
Scottish Ministers

Sea lice data

Reference No: 201201459
Decision Date: 14 March 2013

www.itspublicknowledge.info

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Summary

On 14 May 2012, the Global Alliance Against Industrial Aquaculture (GAAIA) asked the Scottish Ministers (the Ministers) for information they held about the deletion of sea lice data. The Ministers notified GAAIA that they did not hold this information.

Following a review, the Ministers acknowledged that some relevant information might be held, but that the burden of responding to the request under the EIRs would be manifestly unreasonable. Following an investigation, the Commissioner found that the Ministers' initial response (i.e. that they did not hold the information) had been the correct one and that the Ministers had therefore been wrong to inform GAAIA that complying with its request would be manifestly unreasonable. While the Ministers had some information which inferred that certain data had been deleted, this did not mean that they "held" the information for the purposes of the EIRs.

Given that the Ministers did not hold the information, the Commissioner did not require them to take any action in relation to the breach of the EIRs.

Relevant statutory provisions

The Environmental Information (Scotland) Regulations 2004 (the EIRs) regulations 2(1) (Interpretation) (definitions (a) and (b) of "environmental information"); 5(1) and (2)(b) (Duty to make available environmental information on request); 10(1), (2) and (4)(a) and (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

1. On 14 May 2012, GAAIA wrote to the Ministers requesting information relating to the deletion of sea lice data, dating from 2007. It asked the Ministers for details of any sea lice data, files, emails, correspondence etc. being erased, deleted, edited or hidden.
2. The Ministers responded on 15 June 2012, notifying GAAIA that they held no information relevant to the deletion of sea lice data. The Ministers explained the process for managing sea lice data in case files.



3. On 18 June 2012, GAAIA wrote to the Ministers requesting a review of their decision. GAAIA asked what safeguards and checks were in place to ensure that sea lice data were not deliberately deleted, and how the Ministers knew that sea lice data had not been deleted.
4. The Ministers notified GAAIA of the outcome of their review on 16 July 2012. They upheld their original decision without modification. Nonetheless, they acknowledged that it was possible they might hold some information about the deletion of sea lice data, but that it would be manifestly unreasonable to carry out an analysis of all site visit records and of the data they had collected. The Ministers therefore sought to rely on the exception in regulation 10(4)(b) of the EIRs for refusing to do so.
5. On 31 July 2012, GAAIA wrote to the Commissioner, stating that it was dissatisfied with the outcome of the Ministers' review and applying 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 certain specified modifications.
6. The application was validated by establishing that the GAAIA 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. The case was then allocated to an investigating officer.

Investigation

7. On 16 August 2012, the Ministers were notified in writing that an application had been received from GAAIA and were invited to provide comments on the application (as required by section 49(3)(a) of FOISA).
8. During the investigation, further submissions were received from both parties. It also became apparent that the Ministers did not consider they held information about the deletion of sea lice data.

Commissioner's analysis and findings

9. In coming to a decision on this matter, the Commissioner has considered all of the submissions made to her by both GAAIA and the Ministers and is satisfied that no matter of relevance has been overlooked.



Regulation 5(1) of the EIRs

10. Regulation 5(1) of the EIRs (subject to 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.
11. Under the EIRs, a Scottish 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.

Regulation 10(4)(a) (information not held)

12. As noted above, although the Ministers notified GAAIA at review stage that dealing with their request would be manifestly unreasonable, during the investigation they informed the Commissioner that they did not in fact hold the information GAAIA had asked for. Under regulation 10(4)(a) of the EIRs, a Scottish public authority may refuse to make environmental information available if it does not hold that information.
13. GAAIA requested all correspondence and any information since 2007 relating to the deletion of sea lice data. In the Commissioner's view, this must be taken to refer to information relating specifically to the deletion of such data, not simply information from which an inference might be drawn that certain sea lice data were held or possibly held, but are no longer held.
14. The Ministers confirmed that this had also been their interpretation of GAAIA's request. They explained that, as GAAIA had, in its request for review, questioned the veracity of their response, they explained that they thought it would be manifestly unreasonable to go through the case sheets to find information from which it might be inferred that data are being deleted.
15. The Ministers explained that the case sheets relating to fish health inspections detailed when specific records would have been received following an inspection, because they were unavailable for inspection during the site visit. If the records were considered pertinent to the case, they would be filed with the case paper work. If not, they would be either returned to the site operator or destroyed, as appropriate.
16. The Ministers confirmed that there was no recorded detail on the case sheet which confirmed whether records received in relation to fish inspection had been destroyed or deleted, only that the records had been received. Therefore, where records had been received but were no longer held, it could only be *inferred* from their absence that the records had either been returned or destroyed.
17. The Ministers also explained that the only information held on their electronic systems would be that considered pertinent to the case in question, which would be held with the (scanned) case sheet. They did not consider there to be any way of identifying the deletion of sea lice data from within these case records.



18. In their application, GAAIA made reference to other information it had received, which suggested that the deletion of sea lice data was carried out routinely, in line with the Ministers' usual procedures. This included a written response to a Parliamentary question by Graeme Pearson MSP (S4W-08527)¹ and led GAAIA to believe that information should be held regarding the deletion of sea lice data.
19. In response to this, the Ministers re-iterated the process explained above. They explained that there was no written procedure.
20. Having considered the submissions from the Ministers, the Commissioner accepts that no specific procedure exists which sets out how and when sea lice data should be deleted.
21. The Commissioner also accepts the Ministers do not hold information which records the deletion of sea lice data. The Ministers may have information from which it may be inferred that data has been deleted, but this is not the same as holding the information GAAIA has requested. Consequently, the Commissioner is satisfied that the information requested by GAAIA is subject to the exception in regulation 10(4)(a) of the EIRs.

Public interest test

22. The exception in regulation 10(4)(a) is subject to the public interest test in regulation 10(1)(b) of the EIRs (see the Appendix).
23. The Commissioner is satisfied that the Ministers do not (and did not, at the time of receiving GAAIA's request) hold any recorded information relevant to the request. Consequently, she does not consider there to be any conceivable public interest in requiring that the information requested by GAAIA be made available. In all the circumstances of this case, therefore, the Commissioner concludes that the public interest in making the requested information available is outweighed by that in maintaining the exception in regulation 10(4)(a) of the EIRs.

Regulation 10(5)(b) (manifestly unreasonable)

24. As noted above, the Ministers advised GAAIA at review stage that it was possible that they held information about the deletion of sea lice data, but that they were not required to comply with the request on the basis that it was manifestly unreasonable, in terms of regulation 10(4)(b) of the EIRs.
25. The Commissioner acknowledges that the Ministers told GAAIA that it was possible that they held information, presumably in an attempt to be helpful to them. However, given that she is satisfied that the Ministers do not hold the information, she must conclude that the Ministers breached the EIRs by advising GAAIA that dealing with its request would be manifestly unreasonable.

¹ http://www.scottish.parliament.uk/S4_ChamberDesk/WA20120719.pdf



DECISION

The Commissioner finds that the Scottish Ministers (the Ministers) failed to comply with the Environmental Information (Scotland) Regulations 2004 (the EIRs) in responding to the information request made by the Global Alliance Against Industrial Aquaculture (GAAIA).

Having found that the Ministers did not hold the information, the Commissioner concludes that the Ministers breached the EIRs in advising GAAIA that dealing with the request would be manifestly unreasonable under regulation 10(5)(b) of the EIRs.

Given that the Ministers do not hold the information GAAIA requested, the Commissioner does not require the Scottish Ministers to take any action in relation to this breach.

Appeal

Should either the Global Alliance Against Industrial Aquaculture 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.

Rosemary Agnew
Scottish Information Commissioner
14 March 2013



Appendix

Relevant statutory provisions

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) 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
 - (a) it does not hold that information when an applicant's request is received;
 - (b) the request for information is manifestly unreasonable;...