

Decision Notice



Decision 064/2013 Global Alliance Against Industrial Aquaculture and the
Scottish Ministers

Seal killings under licence between 2000 and 2010

Reference No: 201202198
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Rosemary Agnew
Scottish Information Commissioner

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Summary

On 12 July 2012, Global Alliance Against Industrial Aquaculture (GAAIA) asked the Scottish Ministers (the Ministers) for information about seals killed by salmon farms between 2000 and 2010. The Ministers informed GAAIA that their request was manifestly unreasonable and a response would not be provided.

During the investigation, the Ministers stated that, after reviewing the request, they now considered that they held no information falling in scope of the request. The Commissioner accepted that the Ministers did not hold the information GAAIA had asked for.

Relevant statutory provisions

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

The Environmental Information (Scotland) Regulations 2004 (the EIRs) regulations 2(1) (definitions (a) and (c) of "environmental information"); 5(1) and (2)(b) (Duty to make available environmental information on request); 10(1), (2), and (4)(a) (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. The request under consideration in this decision was made on 21 August 2012. It was a narrowed version of a previous request made on 12 July 2012. In the earlier request, GAAIA asked the Ministers for an annual breakdown of seal killings by salmon farms between 2000 and 2010 – including details of the company, site, species and any other data. The Ministers stated that there had been no statutory requirement to report such data during the period specified, but believed it possible that there could be a few sporadic references to individual instances of seal killing amongst the papers on file from that decade. However, the Ministers considered that the time required to locate this information made the request “manifestly unreasonable”.



2. On 21 August 2012, GAAIA emailed the Ministers with a narrowed request, seeking correspondence (in relation to seal shootings 2000 – 2010) with the Scottish Salmon Producers' Organisation (SSPO), Scottish Quality Salmon (SQS) and salmon farming companies. GAAIA also asked for any photos (relating to seal shootings during this period) to be provided.
3. The Ministers responded on 19 September 2012. They considered the new request to be virtually similar to the earlier request and argued that it would be unreasonable to spend a disproportionate amount of time looking through a significant number of paper and electronic files covering a 10 year period for what, if it existed at all, might amount to only a few individual pieces of correspondence or photos. The Ministers found the request to be manifestly unreasonable, in line with regulation 10(4)(b) of the EIRs.
4. On 20 September 2012, GAAIA requested a review of the Ministers' decision. It considered that if they held only a few pieces of information, then the request was not voluminous.
5. The Ministers notified GAAIA of the outcome of their review on 12 October 2012, upholding their previous decision without amendment.
6. On 25 October 2012, GAAIA emailed 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.
7. The application was validated by establishing that 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.

Investigation

8. The investigating officer confirmed with GAAIA the scope of its application, and asked it about the search terms that would be pertinent in establishing whether the Ministers held information falling in scope.
9. On 13 December 2012, the Ministers were notified in writing that an application had been received from GAAIA and were asked to provide comments to support their position that the request was manifestly unreasonable. The Ministers were also asked to conduct targeted searches of the Scottish Government's electronic systems, and to provide details of the information they held in paper format, to show the volume of information that might have to be examined in order to provide all information covered by the request.



10. The Ministers provided details of the results of the targeted searches and a description of the information they held in paper and electronic form. The Ministers now took the view that they did not hold any relevant information falling in scope of the request and cited regulation 10(4)(a) of the EIRs. They no longer considered the request manifestly unreasonable (in line with regulation 10(4)(b) of the EIRs).

Commissioner's analysis and findings

11. 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.

FOISA or EIRs?

12. The Ministers' review response was issued on the basis that the information requested was environmental information, as defined in regulation 2(1) of the EIRs. The information in question concerns the killing of seals, and the Commissioner is satisfied that it falls within paragraph (c) of the definition of environmental information contained in regulation 2(1) of the EIRs, being information on measures and activities affecting or likely to affect the state of those elements of the environment referred to in paragraph (a) of the definition.

Section 39(2) of FOISA – environmental information

13. The exemption in section 39(2) of FOISA provides, in effect, that environmental information (as defined by regulation 2(1)) is exempt from disclosure under FOISA, thereby allowing any such information to be considered solely in terms of the EIRs. In this case, the Commissioner accepts that the Ministers were entitled to apply the exemption to the withheld information, given her conclusion that it is properly classified as environmental information.
14. As there is a separate statutory right of access to environmental information available to GAAIA in this case, the Commissioner also accepts that, in this case, the public interest in maintaining this exemption and in dealing with the request in line with the requirements of the EIRs outweighs any public interest in disclosing the information under FOISA.

Regulation 5(1) of the EIRs

15. 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. It is important to bear in mind that this obligation relates to information actually held by an authority when it receives the request.
16. 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.



Regulation 10(4)(a) of the EIRs

17. Regulation 10(4)(a) of the EIRs provides that a Scottish public authority may refuse to make environmental information available to the extent that it does not hold that information when an applicant's request is received. The exception in regulation 10(4)(a) is subject to the public interest test in regulation 10(1)(b) of the EIRs and can only apply if, 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.
18. In their submissions the Ministers explained that the repealed Conservation of Seals Act 1970 (the 1970 Act¹), which applied in Scotland prior to 31 January 2011, permitted seals to be killed by fisheries and fish farms without a licence, provided this was done outwith the respective close seasons for each species. In addition, the 1970 Act allowed seals to be shot even during the close seasons under the so-called "netmen's defence" clause. There was no requirement to report such seal shootings under the 1970 Act and the Scottish Government had no power to request this information.
19. The Ministers stated that, on 31 January 2011, the Marine (Scotland) Act 2010² was introduced to ensure that all future seal management was undertaken under licence and appropriately monitored.
20. The Ministers went on to explain that, in relation to seal licences issued under the 1970 Act during the respective close seasons, none were issued to fish farms during the years 2000 to 2010. The Ministers commented that the figures which GAAIA had quoted (for seals shot under licence during the three years prior to the introduction of seal licensing under the Marine (Scotland) Act 2010), relate to seals shot during the close seasons by fisheries only. The Ministers confirmed that they held information on the numbers of seals shot under licence by fisheries during the close seasons between 2000 and 2010 and had already offered this information to GAAIA.
21. The Ministers explained that they held some 51 paper files relating to seals policy, and believed it possible that 27 of these files might contain one or two documents mentioning seal killings in passing. However, these documents were likely to be press articles or communications from NGOs which were already in the public domain, and not the information which GAAIA had asked for. The official working on this case had been in post since November 1999 and was fully familiar with the majority of the contents of both the paper and the electronic files. The Ministers commented that, to their knowledge, there were few reports of seal killings during the 10 year period in question.

¹ <http://www.legislation.gov.uk/ukpga/1970/30>

² <http://www.legislation.gov.uk/asp/2010/5/contents>

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22. The Ministers stated that they were not aware of any information amongst the paper or electronic files that might fit into the specific categories identified by GAAIA (correspondence with the SSPO, SQS and salmon farming companies, and photographs). They reiterated that it had not been illegal to kill seals (outwith the close seasons) during the period 2000 to 2010 under the, now repealed, 1970 Act and there had been no requirement, at that time, for the Scottish Government to obtain or hold information on seal killings.
23. During the investigation, the Ministers also conducted targeted keyword searches of the information held in the Scottish Government's electronic systems; these searches identified no information falling within the scope of the request.
24. GAAIA was given the opportunity to comment why it considered that the Ministers were likely to hold information falling within scope of the request, but did not provide any further comments.
25. On the basis of the Ministers' submissions and searches, described above, the Commissioner is satisfied, on balance of probabilities, that the Ministers do not hold the requested information.

Public interest test

26. The exception in regulation 10(4)(a) is subject to the public interest test in regulation 10(1)(b) of the EIRs.
27. The Commissioner is satisfied that the Ministers do not (and did not, at the time of receiving GAAIA's request) hold any recorded information covered by 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. She therefore concludes that, in all the circumstances of this case, 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.
28. The Commissioner is satisfied, therefore, that the Ministers were entitled to refuse GAAIA's request under regulation 10(4)(a) of the EIRs.

DECISION

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

The Commissioner finds that the Ministers were correct to conclude that they do not hold the requested information in line with regulation 10(4)(a) of the EIRs.

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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.

Margaret Keyse
Head of Enforcement
9 April 2013



Appendix

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.

...



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;

...

(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.

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- (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;

...