

# Decision Notice

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## **Decision 108/2017: Global Alliance Against Industrial Aquaculture and the Scottish Ministers**

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### **Implications of a US import ban**

Reference No: 201700211  
Decision Date: 11 July 2017



## Summary

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The Ministers were asked for information in relation to the killing of seals and the implications of a US import ban. The Ministers disclosed some information and withheld the remainder.

After investigating, the Commissioner found that some of the withheld information had been incorrectly withheld under regulation 10(4)(e) of the EIRs (internal communications). She accepted that the remaining withheld information was correctly withheld under this exception.

## Relevant statutory provisions

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The Environmental Information (Scotland) Regulations 2004 (the EIRs) regulations 2(1) (definition (a), (b) and (c) of “environmental information”); 5(1) and (2)(b) (Duty to make available environmental information on request); 10(1), (2), (4)(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.

All references in this decision to "the Commissioner" are to Margaret Keyse, who has been appointed by the Scottish Parliamentary Corporate Body to discharge the functions of the Commissioner under section 42(8) of the Freedom of Information (Scotland) Act 2002 (FOISA).

## Background

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1. On 10 November 2016, the Global Alliance Against Industrial Aquaculture (GAAIA) made a request for information to the Scottish Ministers (the Ministers). The information requested was:
  - information in relation to the killing of seals and the implications of a US import ban via the Fish and Fish Product Import Provisions of the Marine Mammal Protection Act<sup>1</sup> [“the US rule”] since 1 August 2016.
  - any correspondence on the issue, including correspondence with the US Government and salmon farming companies, NGOs [non-governmental organisations] and lobby groups.
  - internal correspondence and discussions on the issue, including advice and briefings to Ministers and background information pertaining to Parliamentary Questions and Answers.
  - any media lines, press briefings and responses to media coverage of this issue.
2. The Ministers responded on 9 December 2016. They disclosed some information and withheld the remainder under the exception in regulation 10(4)(e) of the EIRs. The Ministers stated that the information was internal communications and was also internal legal advice,

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<sup>1</sup> <https://www.federalregister.gov/documents/2016/08/15/2016-19158/fish-and-fish-product-import-provisions-of-the-marine-mammal-protection-act>

disclosure of which would breach legal professional privilege. The Ministers also withheld some personal data under regulation 11(2) of the EIRs.

3. On 9 December 2016, GAAIA emailed the Ministers requesting a review of their decision. GAAIA believed that more information should be held. GAAIA disagreed that the withheld information was subject to legal professional privilege. It also challenged the decision to withhold the names of civil servants from the information which had been disclosed.
4. The Ministers notified GAAIA of the outcome of their review on 12 January 2017. They disclosed some additional information, and apologised for their failure to identify and consider this information when responding to GAAIA's request. They upheld their reliance on regulation 10(4)(e) of the EIRs to withhold the remaining information, and provided further explanation why the information was being withheld. They also upheld the decision to withhold names of civil servants under regulation 11(2).
5. On 1 February 2017, GAAIA 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. GAAIA accepted that there is a "right to confidentiality of communications between legal advisers and clients" and that "Ministers and officials must be able to receive legal advice in confidence" (as stated in the Ministers' review response). However, GAAIA argued that "there should not be blanket confidentiality on all quasi-legal and non-professional legal advice provided (for example, by Scottish Government civil servants i.e. not trained lawyers)".

## Investigation

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6. The application was accepted as valid. The Commissioner confirmed that GAAIA made a request for information to a Scottish public authority and asked the authority to review its response to that request before applying to her for a decision.
7. On 24 February 2017, the Ministers were notified in writing that GAAIA had made a valid application. The Ministers were asked to send the Commissioner the information withheld from GAAIA. The Ministers provided the information and the case was allocated to an investigating officer.
8. In correspondence with the investigating officer, GAAIA agreed that the Commissioner's investigation and decision should focus on the information withheld under regulation 10(4)(e) of the EIRs. Accordingly, the Commissioner has not considered whether the Ministers were correct to withhold personal information under regulation 11(2).
9. Section 49(3)(a) of FOISA requires the Commissioner to give public authorities an opportunity to provide comments on an application. The Ministers were invited to comment on GAAIA's application and answer specific questions. These questions focused on the searches the Ministers had carried out to identify information covered by the request, and their reasons for withholding information under the exception in regulation 10(4)(e) of the EIRs. The Ministers responded on 4 May 2017.
10. GAAIA was invited to provide reasons why disclosure of the withheld information would be in the public interest.

## Commissioner's analysis and findings

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11. 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 her by both GAAIA and the Ministers. She is satisfied that no matter of relevance has been overlooked.

### Background

12. The US rule aims to prohibit seafood imports from countries where fisheries kill more marine mammals such as whales and dolphins than U.S. standards allow. The new rule took effect on 1 January 2017 and will be fully implemented by 2022. Exporting nations will be required to track and monitor fisheries and whale, dolphin and other marine mammal populations, modify fishing gear where necessary, and even restrict fishing in some areas in order to limit entanglement risk.

### Application of the EIRs

13. The Commissioner is satisfied that the information covered by this request is environmental information, as defined in regulation 2(1) of the EIRs (paragraphs (a) to (c) of the definition of "environmental information"). GAAIA's request was for information about the implications of the US rule for the Scottish farmed fish industry, which is a measure of the type described in paragraph (c), affecting or likely to affect the elements and factors referred to in paragraphs (a) and (b) of the definition.
14. GAAIA has not disputed the Ministers' decision to handle the request under the EIRs and so the Commissioner will consider the information solely in terms of the EIRs in what follows.

### Regulation 5(1) – information falling within scope of the request

15. Regulation 5(1) of the EIRs requires a Scottish public authority which holds environmental information to make it available when requested to do so. It is important to bear in mind that this obligation relates to information actually held by an authority when it receives the request, as opposed to information which a requester believes the authority should hold.
16. On receipt of a request for environmental information, the authority must establish what information it holds falling within the scope of the request. Having done so, regulation 5(1) requires the authority to provide that information to the requester, unless a qualification in regulations 6 to 12 applies (see regulation 5(2)(b)).
17. The Ministers provided details of the searches they had conducted for information covered by GAAIA's request. A search had been carried out using their electronic Record and Document Management system (eRDMS). Searches were also undertaken of the email inboxes of relevant (named) staff.
18. The Ministers explained that the issue was a recent one arising from publication of the US rule on 15 August 2016; consequently, it had had a fairly limited circulation amongst a few key individuals within the Directorate for Marine Scotland and to the identified legal adviser. The searches were undertaken by these individuals, who were aware of the issue and what information was held. The Ministers confirmed that the searches had covered the period 1 August 2016 to 10 November 2016, as specified in the request. They were satisfied that all information falling within scope of the request had been identified.

19. Having considered the Ministers' submissions, the Commissioner accepts that the Ministers carried out adequate searches, with a view to identifying and locating the information requested by GAAIA.

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

20. The Ministers withheld information from four documents under regulation 10(4)(e) of the EIRs. Two documents were withheld in full, and two were partially withheld.
21. Under regulation 10(4)(e) of the EIRs, a 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. As with all exceptions under the EIRs, however, regulation 10(4)(e) is subject to the public interest test.

#### *The Ministers' submissions*

22. The Ministers submitted that the withheld information was internal communications which were intended to secure legal advice to support future important international negotiations and to provide background briefing in support of responding to Parliamentary Questions (PQ). The Ministers explained that the sections of the PQ background notes which have been withheld provide summary information to Ministers on aspects of this legal advice, to keep them informed of the legal issues involved.
23. The Ministers considered that "it is necessary for the Scottish Government to be able to seek legal advice and to be able to provide summaries of that information to inform Ministers and to allow for the gathering of evidence with regard to the potential impacts of this piece of US legislation".
24. The Ministers submitted that all of the withheld information contained legal advice, explaining that:
  - Document 1 is the initial request from the policy official for legal advice, setting out questions to be considered
  - Document 2 is the legal advice itself, provided by a solicitor
  - The withheld sections of documents 3 and 4 summarise parts of the legal advice, provided as background information for the Minister in relation to the preparation of Parliamentary Question responses.
25. The Ministers were asked if the withheld information was still confidential, as they had disclosed information in response to a similar request which had post-dated the request from GAAIA under consideration.
26. The Ministers argued that the information maintains its status as legal advice and is subject to legal professional privilege. They stated that information does not require to be written out by a lawyer directly for it to retain legal professional privilege, but also applies to information which reports what a lawyer has advised as long as that information has not been published or shared outwith the necessary internal officials.
27. The Ministers confirmed that the information was still excepted from disclosure under regulation 10(4)(e), being legal advice in respect of matters that remain to be resolved. They argued that any premature publication of the advice might hinder future important international negotiations.

### *GAAIA's submissions*

28. GAAIA submitted that, to a large extent, the "legal advice" to which the Scottish Government referred and which it refused to disclose could not be properly described as professional legal advice. GAAIA considered it was obvious that the new US rules apply to countries and not companies, contrary to the indication given in an answer to a PQ (S5W-02362) where the Cabinet Secretary for Rural Economy and Connectivity stated: "it is a matter for individual companies wishing to export fish or fish products to the US to seek their own legal advice on compliance with the US regulations".
29. GAAIA surmised that the professional legal advice which had been withheld would have contradicted this position, finding that the ban applies to countries and not companies. It argued that the legal advice was so flawed that legal professional privilege did not apply.

### *The Commissioner's findings*

30. Having considered the information withheld by the Ministers, the Commissioner is satisfied that all of the withheld information comprises internal communications and is therefore subject to the exception in regulation 10(4)(e).
31. Regulation 10(4)(e) is subject to the public interest test in regulation 10(1)(b) of the EIRs. The Ministers can only rely on the exception to withhold the information if, in all the circumstances, the public interest in making the information available is outweighed by the public interest in maintaining the exception.

## **The public interest test**

### *The Ministers' submissions*

32. The Ministers recognised that there is a public interest in the disclosure of information on this topic as part of an open and transparent government and in helping to inform public debate with regard to the topic of marine mammals and aquaculture and how the US Act will affect imports or exports.
33. However, the Ministers also considered that there is a very strong public interest in maintaining legal professional privilege and ensuring the confidentiality of communications between legal advisers and clients.
34. The Ministers submitted that there is a clear public interest in withholding documents prepared solely for internal communication, especially where that communication is requesting or responding to a request for legal advice. They argued that there is a greater public interest in allowing the Scottish Government to seek and receive legal advice in order to consider and develop opinions in order to respond to legal changes such as the US rule.
35. The Ministers considered it was important in all cases that legal advisers can provide free and frank legal advice which considers and discusses all issues without fear that the advice may be disclosed. They believed it was vital that lawyers and officials have private space in which to fully consider the issues arising from the new US rule and to ensure the Scottish Government is able to receive and consider advice to enable them to reach an informed position.
36. The Ministers concluded that if there is an expectation that legal advice would be disclosed, it would inevitably lead to legal advice, such as that covered by this case, being much more circumspect and therefore less effective.

37. The Ministers recognised some public interest in the disclosure of the withheld information, but on balance they considered that it was not sufficient to outweigh the very strong public interest in maintaining the confidentiality of legal advice and internal communications in this case.

#### *GAAIA's submissions*

38. In relation to the public interest in disclosure of the withheld information, GAAIA submitted that it is in the public interest to disclose advice from civil servants on an issue which "is front and central to the thinking, workings and discussions of the Scottish Government". GAAIA argued that the Ministers' response did not begin to address "the export dimension" and considered that the legal advice should be disclosed.
39. GAAIA considered that the public have a right to know if the Scottish Government is receiving incorrect legal advice.
40. GAAIA submitted that the Scottish Government must be held publicly accountable and display transparency, which is especially pertinent in this case, when Parliamentary Questions filed by Mark Ruskell MSP<sup>2,3</sup> had specifically enquired into the legal ramifications of the US rule.
41. In relation to the public interest in disclosure, GAAIA also referred to comments by Mark Ruskell<sup>4</sup>, who said:

"The Scottish Government has irresponsibly allowed a US import ban on Scottish fisheries to be set in train that could cost over £200m a year to the farmed salmon sector alone.

The choice is clear, either the Scottish Government does the responsible thing and bins the laws that allow the killing of seals in Scotland by fish farm operators and fishermen, or it lobbies Trump's administration to weaken US environmental laws that protect marine mammals.

The killing of seals is completely unnecessary and most people find it abhorrent that this practice still occurs in the 21st century. It is perfectly possible to prevent seals from attempting to eat farmed fish through deterrents rather than the bullet."

42. GAAIA also referred to comments from Scott Landsburgh, chief executive of Scottish Salmon Producers' Organisation, who said:

"The Scottish salmon farming industry is fully aware of its responsibility to protect the welfare of the fish in its care; and of the need to work within the law when it comes to preventing damage from marine mammals which occasionally kill and damage farmed fish.

It is our ambition to develop exclusion techniques that eliminate the need to shoot seals. However, existing methods are not yet 100% effective, and the law permits the shooting of seals in situations where exclusion methods have proven ineffective."

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<sup>2</sup>

<http://www.parliament.scot/parliamentarybusiness/28877.aspx?SearchType=Advance&ReferenceNumbers=S5W-02631&ResultsPerPage=10>

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<http://www.parliament.scot/parliamentarybusiness/28877.aspx?SearchType=Advance&ReferenceNumbers=S5W-03168>

<sup>4</sup> <https://greens.scot/news/import-ban-on-scottish-fisheries-set-to-cost-200m-a-year>

### *The Commissioner's findings*

43. The Commissioner has carefully considered the submissions made by both the Ministers and GAAIA.
44. The Commissioner recognises the significant public interest in transparency and accountability in relation to the potential effects of the US rule upon the Scottish fish farming industry.
45. Before reaching a decision on whether the public interest in disclosure is outweighed by the public interest in withholding the information, it is relevant to consider whether the withheld information is legal advice and legally privileged.
46. As the Commissioner has noted in a number of previous decisions, the courts have long recognised the strong public interest in maintaining the right to confidentiality of communications between legal adviser and client on administration of justice grounds. Many of the arguments in favour of maintaining confidentiality of communications were discussed in a House of Lords case, *Three Rivers District Council and others v Governor and Company of the Bank of England*<sup>5</sup> (2004) UKHL 48. In her decisions, the Commissioner has affirmed the inherent public interest in maintaining the right to confidentiality of communications between legal advisers and their clients, and observed that the release of such communications is only likely to be ordered in “highly compelling cases”.
47. As stated above, the Ministers submitted that all of the documents contained legal advice.
48. The Commissioner accepts that documents 2, 3 and 4 contain legal advice from the Scottish Government Legal Directorate. The person who gave the advice is a solicitor and a member of the Law Society of Scotland. Document 1 does not contain legal advice, but is a request for legal advice (the advice provided in document 2).
49. Legal advice privilege will only apply to communications made for the purpose of seeking and giving legal advice. Documents 1 and 2 are communications between a lawyer and their client, and are covered by legal advice privilege.
50. The Commissioner notes that the legal advice withheld from document 3 has already been disclosed to GAAIA (in paragraph 1 of document 30, supplied by the Ministers at review). Consequently, she cannot accept that this information has the same sensitivity as the rest of the withheld information, or is legally privileged, and concludes that the public interest in withholding it is outweighed by the public interest in its disclosure.
51. Although document 4 did not come directly from the lawyer providing the legal advice, the Commissioner accepts that it contains a summary of part of that advice.
52. The Commissioner notes that, in its application for a decision, GAAIA accepted that there is a right to confidentiality of communications between legal advisers and clients, and that Ministers and officials must be able to receive legal advice in confidence. It also conceded that a letter from a qualified lawyer formally hired by the Scottish Government or working on a retained basis to offer professional legal advice and give a legal opinion “does indeed fall under the cloak of confidentiality”. GAAIA’s concern was that the withheld information was not properly described as “legal advice”. After investigating, the Commissioner has found that the withheld information is legal advice.

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<sup>5</sup> (2004) UKHL 48



53. In reaching a decision on the balance of public interest in this case, the Commissioner has also taken into account the currency of the information. As noted above, the US rule was published on 15 August 2016, and GAAIA submitted its request on 10 November 2016. The new rule took effect on 1 January 2017 and will be fully implemented by 2022. The Commissioner accepts the Ministers' argument that it is in the public interest for them to be allowed time to obtain advice and to formulate their position on the implications of the US rule, without concern that their correspondence will be published before they have reached a settled view and decided what action should be taken.
54. The Commissioner has considered the public interest arguments on both sides. She accepts that there might be reasons why disclosing the information would be in the public interest, in terms of increasing transparency on a matter of concern to the public. However, the Commissioner has decided that, on balance, the public interest in allowing the Ministers to request and receive confidential advice so that they can fully formulate their position on the issues relating to the US rule outweighs the public interest in disclosure.
55. The Commissioner accepts that the Ministers correctly withheld information from documents 1, 2 and 4 under the exception in regulation 10(4)(e) of the EIRs.
56. As the Ministers have already disclosed the information in the third document to GAAIA, she does not require them to disclose this information again.

## Decision

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The Commissioner finds that the Scottish Ministers (the Ministers) partially 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).

The Commissioner finds that:

- (i) the Ministers located all of the information which fell within the scope of GAAIA's request;
- (ii) the exception in regulation 10(4)(e) of the EIRs was correctly applied to most of the information withheld by the Ministers;
- (iii) in failing to disclose the information which was wrongly withheld under regulation 10(4)(e), the Ministers failed to comply with regulation 5(1) of the EIRs.

As the Ministers have already provided GAAIA with the information not excepted under regulation 10(4)(e) of the EIRs within the third document, by disclosing the same information in paragraph 1 of document 30, she does not require the Ministers to disclose this information again to GAAIA.

## **Appeal**

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Should either GAAIA or the Ministers 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**  
**Acting Scottish Information Commissioner**

**11 July 2017**

## Appendix 1: Relevant statutory provisions

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### The Environmental Information (Scotland) Regulations 2004

#### 2 Interpretation

(1) In these Regulations –

“the Act” means the Freedom of Information (Scotland) Act 2002;

...

“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.

...

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