

Decision Notice

Decision 142/2017: Salmon and Trout Conservation Scotland and the Scottish Ministers

Control and reduction of sea lice on fish farms

Reference No: 201700453 and 201700777

Decision Date: 4 September 2017



Summary

Two requests were made to the Ministers for information provided to Marine Scotland by fish farms regarding sea lice levels, notifications, escalation plans, monitoring plans and interventions carried out.

The Commissioner found that the information had been incorrectly withheld under the exceptions in regulation 10(4)(d) and 10(5)(f) of the EIRs. She required the Ministers to disclose the information.

Additionally, the Commissioner found that the Ministers failed to meet the required timescale for responding to the requirements for review.

Relevant statutory provisions

The Environmental Information (Scotland) Regulations 2004 (the EIRs) regulations 5(1) and (2) (Duty to make available environmental information on request); 10(1), (2), (4)(d), (5)(f) and (6) (Exceptions from duty to make environmental information available); 13(d) (Refusal to make information available); 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.

All references to “the Commissioner” in this decision 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

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. This decision concerns two separate applications for decision made by S&TCS concerning the Scottish Ministers’ (the Ministers) responses to two similar requests for information. These are described as S&TCS’s first and second information requests in what follows.
3. The background to this case concerns information reported by fish farms to Marine Scotland on the average numbers of sea lice present on fish. The information forms part of a monitoring scheme to identify the presence of sea lice within specified limits. Where there is an average of three adult female sea lice per fish on any fish farm, this is reported to Marine Scotland. Where this limit is reached, increased monitoring is implemented. This continues until either the average count is reduced to below three, or the intervention limit of an average of eight adult female sea lice per fish is reached. Once the figure of eight is exceeded, an enforcement notice would be served by the Ministers.

S&TCS’s first information request

4. On 2 December 2016, S&TCS made its first information request to the Ministers. The request referenced an announcement made by the Scottish Government to the North Atlantic Salmon

Conservation Organisation (NASCO) concerning the new monitoring measures described above. The information requested was as follows:

- (i) Full details of any notification made to Marine Scotland or the Fish Health Inspectorate by any farms exceeding the trigger levels of 3 or 8 respectively, since the announcement to NASCO to today's date (2 December 2016);
- (ii) Copies of all site specific escalation plans so far submitted to Marine Scotland or the Fish Health Inspectorate since the announcement to NASCO; and
- (iii) Any increased monitoring plans and data produced, with full details of any intervention carried out, at any farms.

5. The Ministers responded on 5 January 2017. In relation to parts (ii) and (iii) of the request, the Ministers stated that the information was excepted from disclosure in terms of regulation 10(4)(a) of the EIRs: in other words, they did not hold the information requested. The Ministers also stated that some information they held was incomplete.
6. Additionally, the Ministers stated that some of the information requested was excepted from disclosure in terms of regulation 10(5)(b) (substantial prejudice to the course of justice) and 10(5)(f) (substantial prejudice to the interests of the person providing the information) of the EIRs.
7. On 10 January 2017, S&TCS wrote to the Ministers requesting a review of their decision. S&TCS pointed out that the Ministers had stated that they did not hold any information falling within the scope of parts (ii) and (ii) of the request, yet had apparently gone on to state that this information was incomplete. S&TCS also disagreed with the Ministers' view that the exceptions in regulation 10(5)(b) and 10(5)(f) were engaged.
8. The Ministers notified S&TCS of the outcome of their review on 1 March 2017. The Ministers confirmed that, in relation to parts (ii) and (iii) of the request, they did not hold the information requested. The Minister stated that the reference (in their initial response) to incomplete information concerned part (i) of the request. At this stage, the Ministers stated that they had received five notifications since the new reporting policy had been implemented, four by telephone and one by email.
9. The Ministers stated that the telephone notifications had been entered onto a live spreadsheet and no separate record existed beyond the information entered on the spreadsheet. The Ministers disclosed an email exchange between Fish Health Inspectors but withheld the personal data of junior civil servants and information which identified aquaculture sites. The Ministers stated that the names of the sites in question had been withheld under the exception in regulation 10(5)(f) of the EIRs.
10. At this stage, the Ministers also withdrew their reliance on regulation 10(5)(b) of the EIRs. The Ministers now applied the exception in regulation 10(5)(f) of the EIRs to the information which they had collected on notifications at the time they received S&TCS's request.
11. On 8 March 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 the Ministers review because:
 - (i) it disagreed with the Ministers' application of regulation 10(5)(f) of the EIRs;

- (ii) the information in question comprised “emissions” for the purposes of regulation 10(6) of the EIRs and, therefore, could not be withheld under regulation 10(5)(f);
- (iii) no information from the live spreadsheet had been disclosed in relation to telephone notifications; and
- (iv) the Ministers failed to respond to its requirement for review within the timescale required by regulation 16(4) of the EIRs.

S&TCS stated that it had no objection to the withholding of names of junior civil servants.

S&TCS’s second information request

12. On 17 February 2017, S&TCS requested the same information from the Ministers, covering the period from 2 December 2016 to 17 February 2017.
13. The Ministers responded on 17 March 2017. The Ministers withheld information on treatment plans under the exception in regulation 10(4)(d) of the EIRs, on the basis that it comprised material still in the course of completion. The Ministers withheld the remainder of the withheld information under regulation 10(5)(f) of the EIRs, on the basis that its disclosure would cause substantial prejudice to the interests of the aquaculture companies which had provided that information.
14. On 21 March 2017, S&TCS wrote to the Ministers requesting a review of their decision. S&TCS expressed dissatisfaction that the Ministers had not responded “as soon as possible” as required by regulation 5(2) of the EIRs. S&TCS also disagreed with the Ministers’ application of the exceptions in regulation 10(4)(d) and 10(5)(f) to the information withheld. S&TCS submitted that the Ministers’ decision ignored the impact of regulation 10(6) of the EIRs (relating to “emissions”) on the application of regulation 10(5)(f).
15. The Ministers notified S&TCS of the outcome of their review on 21 April 2017. The Ministers were satisfied that they had responded to the request within the required timescale and that their response had been issued as soon as possible. The Ministers upheld their previous decision on regulation 10(4)(d) and 10(5)(f), without modification.
16. On 28 April 2017, S&TCS wrote to the Commissioner. S&TCS applied to the Commissioner for a decision in terms of section 47(1) of FOISA. As noted above, 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 the Ministers’ review because:
 - (i) it disagreed with the Ministers’ application of the exceptions in regulations 10(4)(d) and 10(5)(f) of the EIRs;
 - (ii) the information withheld under regulation 10(5)(f) of the EIRs comprised “emissions” for the purposes of regulation 10(6) and, therefore, could not be withheld under this exception; and
 - (iii) the Ministers failed to respond to its requirement for review within the timescale required by regulation 16(4) of the EIRs.

Investigation

17. The applications were accepted as valid. The Commissioner confirmed that S&TCS made requests for information to a Scottish public authority and asked the authority to review its responses to those requests before applying to her for a decision.
18. Given that the subject matter and submissions received in these cases overlap considerably, the two have been conjoined for the purposes of this decision.
19. On 31 March and 18 May 2017 respectively, the Ministers were notified in writing that S&TCS had made valid applications in these cases. The Ministers were asked to send the Commissioner the information withheld from S&TCS. The Ministers provided the information and the cases were allocated to an investigating officer.
20. 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 these two applications and answer specific questions, with particular reference to the matters raised by S&TCS in the applications.
21. The Ministers responded with submissions on 31 May and 24 July 2017 respectively.
22. During the investigation, the Ministers provided further explanation of the method by which relevant notifications were made and recorded.

Commissioner's analysis and findings

23. 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 S&TCS and the Ministers. She is satisfied that no matter of relevance has been overlooked.

Information in scope

24. In its first application to the Commissioner, S&TCS noted that the Ministers had disclosed information contained within an email exchange between Fish Health Inspectors. However, S&TCS was dissatisfied that similar information had not been disclosed in respect of the four telephone notifications that had been made.
25. The Ministers explained that they did not keep a record of how and when notifications were made as their interest was in the information provided, the record of which was on the relevant spreadsheet. The Ministers stated that the information was usually entered directly onto the live spreadsheet whenever the telephone notification was received.
26. The Ministers pointed out that notifications were only made if lice numbers exceeded the threshold figures and were recorded directly on the spreadsheet whenever the telephone notification was received.
27. The Commissioner has considered the Ministers' explanation of how the notifications are recorded. In the circumstances, she accepts that there is no additional information held in relation to the notifications made by telephone, beyond that contained within the relevant spreadsheet. Accordingly, she is satisfied that the Ministers identified, located and retrieved all the information they held falling within the scope of S&TCS's request.

Regulation 10(5)(f) of the EIRs

28. The Ministers withheld information on sea lice numbers (including information identifying the relative companies and sites) in response to both of S&TCS's information requests.
29. Under regulation 10(5)(f) of the EIRs, 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 interests of the person who provided the information, where that person:
 - (i) was not under, and could not have been put under, any legal obligation to supply the information
 - (ii) did not supply it in circumstances such that it could, apart from the EIRs, be made available; and
 - (iii) has not consented to its disclosure.

Does regulation 10(5)(f) apply in this case?

30. There are a number of factors that should be addressed in considering whether this exception applies. These include:
 - (i) Was the information provided by a third party?
 - (ii) Was the provider, or could the provider be, required by law to provide it?
 - (iii) Is the information otherwise publicly available?
 - (iv) Has the provider consented to disclosure?
 - (v) Would disclosure of the information cause, or be likely to cause, substantial harm to the interests of the provider?

The Ministers' submissions

31. In the Ministers' view, disclosure of the information would prejudice substantially the interests of the aquaculture companies who provided the information to the Scottish Government.
32. The Ministers stated that the information was provided on a voluntary basis to allow for details to be available for inspections. They explained that this would allow inspectors to check and assess records of high incidences and monitor what was being done to remedy issues and lower the incidence of sea lice.
33. The Ministers stated that the companies providing this information had significant concerns relating to operational sensitivities and commercial confidentiality regarding sea lice numbers. In particular, they feared information on the performance of individual sites could be used to influence contract values through undue media pressure, or to call for local authorities and other regulators to revoke consent for sites reporting higher sea lice levels. They argued that this would lead to the loss of production and, therefore, revenue.
34. The Ministers noted that public pressure has previously been put on supermarkets not to stock salmon from farms with above average sea lice counts, referring to a campaign by

S&TCS¹. In the Ministers' view, any perception of lice problems, however incomplete the picture provided, had the potential to impact seriously on the company concerned.

35. The Ministers considered the publication of this data at the end of the production cycle would still allow for concerns to be raised in the public domain, if specific sites were shown to be repeatedly poor and not improving following intervention. However, they believed disclosure at the end of the cycle would show where improvement had been made and provide a full picture, rather than a "snapshot in time" which would not show what had been done to fix issues.
36. In the Ministers' view, disclosure in "snapshots of time", with no consideration of what was being, had been or would be done to remedy the issue, would substantially prejudice the ability of aquaculture companies to compete in an ever changing global market. They considered also that it would put undue pressure on companies and their viability.
37. The Ministers also argued that disclosure of the information would cause substantial prejudice to an established, co-operative and mutually beneficial relationship between the Scottish Government and the aquaculture industry. In their view, if the aquaculture industry refused to provide the information on a voluntary basis, they would be required to instruct and bring into force legislation compelling them to do so. The Ministers submitted that going down this route did not support such a co-operative relationship.
38. The Ministers submitted that there was nothing in the Aquaculture and Fisheries (Scotland) Act 2007² (the 2007 Act) or related legislation which compelled aquaculture companies to submit sea lice data to any part of the Scottish Government. The Ministers argued that this lack of statutory compulsion was a matter raised regularly by those seeking to obtain sea lice figures from the Scottish Government, but it did not alter the fact that there was no legal obligation.
39. The Ministers reiterated their view that the information was provided on a voluntary basis, in the absence of any legal obligation. The Ministers referred to an agreement which was reached between the Scottish Government and the salmon farming industry, by which sea lice levels above certain limits would be reported to Marine Scotland.
40. The Ministers stated that the sea lice information was collated for the purposes of providing evidence for inspections and to identify arising issues and the success or otherwise of measures to respond to those concerns. While they did not require this information to be provided, it was used to establish whether or not there was significant cause for concern and whether enforcement action was required.
41. The Ministers considered it vital that they could maintain this voluntary arrangement with the industry, to ensure there was compliance with inspections and so they could be kept informed of arising issues and ensure the industry was applying best practice and appropriate fish health measures.
42. In relation to the issue of consent (to disclosure of the information requested), the Ministers confirmed that there had been no specific communications with the providers of the data regarding S&TCS's requests. They argued that there was a clear expectation when the

¹ <http://www.salmon-trout.org/consumers-asked-to-challenge-supermarkets-on-the-source-of-scottish-farmed-salmon/news/434>

² <http://www.legislation.gov.uk/asp/2007/12/contents>

agreement was made to supply the data that it would not be disclosed if at all possible. The Ministers stated that consent for disclosure had not been given.

43. The Ministers stated that they had, on many occasions, discussed with the aquaculture industry the issues and concerns that they had with regard to the disclosure of incomplete data. The Ministers stated that they did not believe it was necessary or appropriate to go out to the industry to ask for consent every time a request of this nature was received. They stated they were only too well aware of the concerns of the industry and the potential implications of disclosure of the information. Therefore, the Ministers were content that the industry would not consent to the disclosure of the information.

S&TCS's submissions

44. S&TCS submitted that the Ministers had provided no evidence or argument of any substantial prejudice that would ensue from disclosure of the information.
45. S&TCS referred to the Ministers' view that information on the performance of individual fish farms might be used to call for local authorities or other regulators to remove sites reporting high numbers of sea lice, thereby leading to a loss of production. S&TCS submitted that those authorities and regulators were quite capable of applying their statutory duties in a lawful manner. In its view, those bodies would be perfectly capable of considering whether or not any information provided to them by S&TCS as a result of disclosure should influence how they exercised those functions, including action leading to the removal of sites reporting high lice levels. S&TCS submitted that, only if those sites should be removed, would local authorities or other regulators make the decisions to require removal: that was their decision to make.
46. S&TCS noted that it had no statutory powers to remove sites, but it believed it did have a legitimate role as a Scottish charity to argue for what it saw as being required to protect wild fish. In S&TCS's view, the Ministers' logic appeared to be that the information on lice problems should not, in fact, be disclosed to local authorities or other regulators, despite their statutory functions in relation to the regulation of fish farms, just in case they then sought to remove fish farms.
47. S&TCS submitted that there was no evidence that prejudice has been caused by the publication of a vast amount of information about the performance of fish farms on the Scotland's aquaculture database³. S&TCS noted the very great level of detail provided on that website about the operation of particular farms, for example information on fish escapes. S&TCS argued that the Ministers' position appears to be that the disclosure of additional information showing particular farms in a bad light should not be published, precisely because it showed these farms in a bad light. In S&TCS's view, this was contrary to the EIRs.
48. S&TCS also argued that it did not anticipate there would be anything in the data provided to Marine Scotland that should not be recorded by fish farms under their obligations contained in the Fish Farming Businesses (Record Keeping) (Scotland) Order 2008⁴ (the 2008 Order). S&TCS noted also that section 3(3) of the 2007 Act empowered inspectors to examine and take copies of documents or records. S&TCS stated that this power was not limited to records covered by the 2008 Order and would cover all of the information it had requested.

³ <http://aquaculture.scotland.gov.uk/>

⁴ <http://www.legislation.gov.uk/ssi/2008/326/contents/sld/made>

49. In relation to the issue of consent to disclosure by the providers of the information, S&TCS referred to *the Aarhus Convention: An Implementation Guide*⁵, which offers guidance on the interpretation of the convention from which the EIRs are derived. S&TCS noted that the guide (at page 89) states: “not only must the information in question qualify as voluntarily supplied information, the person that provided it must have denied consent to have it released”. S&TCS referred to *Decision 101/2008 Mr Alistair Johnson and East Renfrewshire Council*⁶, where the Commissioner determined that regulation 10(5)(f) was not engaged as the public authority in that case had not demonstrated that the persons providing the information had denied consent for disclosure.

The Commissioner’s view

50. The Commissioner has considered carefully the submissions made by both parties in relation to this exception. She notes the differing views on whether the bodies in question supplied the information voluntarily, and on whether they could, in the circumstances, have been required to provide it.
51. As noted above, S&TCS referred to the content of the *Aarhus Convention: An Implementation Guide*, which states that the provider of information must have denied consent for its disclosure. Also as noted above, the Commissioner addressed this point in *Decision 101/2008* (and, indeed, in other decisions). It will be apparent from that decision that the Commissioner expects consent to have been sought and denied specifically before this limb of the exception can be said to have been met.
52. Since the Ministers have confirmed that they have not obtained any specific denial of consent to disclosure (or, for that matter, sought such consent), the Commissioner cannot agree that the exception applies to the information on sea lice counts withheld by the Ministers. While the Ministers may believe it was not necessary or appropriate to seek consent (or otherwise) from the providers of the information, the Commissioner would reiterate her view that is essential, if the exception is to apply, for specific consent to be sought and specific denial of that consent obtained.
53. Accordingly, the Commissioner cannot accept in this case that the information on sea lice counts is excepted from disclosure in terms of regulation 10(5)(f) of the EIRs. In the absence of the requisite denial of consent, an essential element of the exception is missing and it is not strictly necessary to go on to consider the remaining elements. However, the Commissioner will go on to consider the conflicting arguments put forward as to whether the aquaculture companies were, or could have been, required by law to provide the information.
54. The Ministers contend that there is no legislative provision for requiring the provision of data of this kind. S&TCS, on the other hand, has referred to the provisions in section 3(3) of the 2007 Act, which empowers the Ministers’ inspectors to examine and take copies of documents or records. In S&TCS’s view, this power would cover all of the information requested in this case.
55. The Commissioner considered this point in *Decision 071/2009 Fish Legal and the Scottish Ministers*⁷ (see paragraphs 37 and 38). There, the Commissioner noted that the information

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

⁶

<http://www.itspublicknowledge.info/ApplicationsandDecisions/Decisions/2008/200700609.aspx>

⁷

<http://www.itspublicknowledge.info/ApplicationsandDecisions/Decisions/2009/200801520.aspx>

being withheld could be legally acquired by the Ministers under existing legislation. The Commissioner referred specifically to the powers under the 2007 Act to enforce a robust inspection regime, whether or not the fish farm concerned provided the information voluntarily. The Commissioner acknowledged that that the circumstances in which the information under consideration had been provided may have fallen outwith that formal process, but does not appear to have considered that relevant.

56. In the Commissioner's view, the position taken in *Decision 071/2009* was correct. The Ministers (or their inspectors) have the power, under section 3 of the 2007 Act, to carry out inspections of fish farms and shellfish farms, to ascertain the levels of parasites (if any) there, and to assess the measures in place for the prevention, control and reduction of parasites. As S&TCS has suggested, these purposes appear to embrace the whole subject matter of the request under consideration here.
57. Such an inspection may include examining and taking copies of documents or records. The records referred to must, in the Commissioner's view, include the records the farm operator maintains under Schedule 1 to the 2008 Regulations, together with any other records maintained by the operator and containing information falling within the scope of this request. In other words, while the operators may have provided this particular information voluntarily, they can be required to provide it as part of the process of inspection. That it may be more effective to obtain it voluntarily for all fish farms, ensuring that inspections and other interventions can then be targeted appropriately, is not the point: the power of compulsion exists and that is enough to disapply the regulation 10(5)(f) exception.
58. In all the circumstances, therefore, the Commissioner finds that the Ministers were wrong to apply the exception in regulation 10(5)(f) to the information on sea lice counts (including the relative information on companies and sites). As she has found that the exception contained in regulation 10(5)(f) does not apply, she is not required to consider the public interest test in regulation 10(1)(b) of the EIRs.
59. The Commissioner therefore requires the Ministers to disclose this information to S&TCS.

Regulation 10(6) of the EIRs

60. Regulation 10(6) of the EIRs states that a Scottish public authority is not entitled to refuse to make information available under a number of exceptions (including that in regulation 10(5)(f)) to the extent that it relates to information on emissions.
61. S&TCS argued that the information under consideration comprised "emissions" for the purposes of regulation 10(6). In its view, the release of many millions of juvenile sea lice from a fish farm into a sea loch must be an emission for the purposes of regulation 10(6).
62. By contrast, the Ministers did not accept that the term "emissions" could apply to a living organism occurring naturally in the environment, such as sea lice. In their view, that organism already existed in the environment and therefore could not be an emission.
63. The Commissioner acknowledges that the question of what constitutes an "emission" for the purposes of regulation 10(6) is not clearly or easily defined and is open to interpretation. However, she has not considered this further in this case since she has found the exception in regulation 10(5)(f) of the EIRs would not apply in the circumstances, irrespective of any decision on the applicability or otherwise of regulation 10(6). Accordingly, she does not consider it necessary to go on to consider the impact of regulation 10(6) on the Ministers' right to apply the exception.

Regulation 10(4)(d) of the EIRs

64. The Ministers withheld information which they described as “treatment plans” under this exception in response to S&TCS’s second information request (part (ii)). This information is contained within the same spreadsheet used to record sea lice figures above the relevant thresholds, referred to above.
65. Regulation 10(4)(d) of the EIRs provides an exception from the duty to make environmental information available, where the request relates to material which is still in the course of completion, to unfinished documents or to incomplete data. Where a Scottish public authority refuses to make information available on this basis, it must state the time by which the information will be finished or completed (regulation 13(d)).
66. The *Aarhus Convention: An Implementation Guide* provides guidance (at page 85) as to the type of material this exception is intended to cover. It describes the expression “in the course of completion” as relating to the process of preparation of the information or document and not to any decision-making process for the purpose of which the information or document has been prepared. It also states that the words “in the course of completion” suggest that the term refers to individual documents that are actively being worked on by the public authority, and which will have more work done on them within some reasonable timeframe.

The Ministers’ submissions

67. The Ministers stated that information on treatment plans is only collected if lice numbers exceed the reporting threshold figures; it is within this context that information is collected on treatment plans.
68. The Ministers submitted that the information was not a plan – it was collected before any intervention had taken place. They stated that it may be that the plan would not be followed and the treatment as planned would not be carried out. The Ministers noted that Marine Scotland did not check whether what was planned was completed – their primary interest was that the measures put in place were satisfactory, measured by the lice number outcomes thereafter.
69. The Ministers stated that a treatment plan might be carried out over a number of weeks and the outcome of the plan (which might be updated over time) would only be apparent when a specific treatment or series of treatments was completed. They noted that this might be close to the end of the production cycle. They argued that this information was incomplete until that point, as it was constantly evolving and showed nothing meaningful until that point.
70. The Ministers submitted that the information would be complete at the end of the production cycle or at the conclusion of any enforcement action, whichever was sooner. They stated that a full production cycle was normally expected to last for 16-18 months. The Ministers indicated that production cycles for different sites ended at different times, so they were not suggesting that all information would be incomplete for 16-18 months from the time of writing. However, they did argue that this information was incomplete for each site until the production cycle had ended on that site (or at the conclusion of any enforcement action, whichever was the sooner).
71. The Ministers also stated that they intended publishing the information as it became complete, at the end of the production cycle.

S&TCS's submissions

72. S&TCS did not accept the Ministers' position on this point. In S&TCS's view, this was not logical as those plans were put into effect during the production cycle and not at its end. In its view, it would be nonsensical to complete a plan after farmed fish had been removed from the water and harvested. S&TCS submitted that it must be the case that the plan was put into action while fish were still growing in the farm and therefore well before the end of the production cycle.
73. In S&TCS's view, changing plans in accordance with changing facts on the ground was patently not the same as the plans being unfinished or incomplete on their initial or subsequent submission to Marine Scotland, even if they were later amended to cope with a developing sea lice issue.
74. Nor therefore, in S&TCS's view, could it be correct to say that the plans were only complete at the end of a production cycle. S&TCS referred to the Commissioner's guidance⁸ on exceptions in the EIRs, stating (at paragraph 16) that "data which is part of routine monitoring should not be regarded as part of an ongoing unfinished set, but should normally be disclosed as soon as practicable after collection". In S&TCS's view, by analogy, a plan – even if subject to change or additions at a later date – should be disclosed when requested.

The Commissioner's view

75. The Commissioner considers the Ministers were incorrect in their application of the exception contained in regulation 10(4)(d). Although she accepts that the matters referred to in the withheld information (i.e. the intended treatment method) may have been subject to further development as time progressed, the information is complete in itself and is not (and was not at the time of S&TCS's request) actively being worked on.
76. In the Commissioner's view, the information itself comprises a "snapshot" of what was planned at specific points in time, as records were updated following notifications from fish farms. She does not, in the circumstances, accept that the specific information relates to material which is still in the course of completion, to unfinished documents or to incomplete data.
77. For these reasons, the Commissioner does not accept that the exception in regulation 10(4)(d) has been engaged in this case.
78. As the Commissioner has found that the exception contained in regulation 10(4)(d) does not apply, she is not required to consider the public interest test in regulation 10(1)(b) of the EIRs. The Commissioner now requires the Ministers to disclose the information withheld under this exception to S&TCS.

Regulation 16 of the EIRs

79. In both applications to the Commissioner, S&TCS complained that the Ministers had failed to respond to its requirement for review within the timescale laid down in regulation 16(4) of the EIRs.
80. 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, within 20 working days (regulations 16(3) and (4)). It also states that where an authority has

⁸ <http://www.itspublicknowledge.info/Law/EIRs/EIRsExceptions.aspx>

not complied with its duty under the EIRs, it shall immediately take steps to remedy the breach of duty (regulation 16(5)).

81. It is a matter of fact that the Ministers did not respond to either of S&TCS's requirements for review within 20 working days. Therefore, the Commissioner finds that they failed to comply with regulation 16(4) of the EIRs in both cases.
82. As noted above, the Ministers responded to S&TCS's requirements for review on 1 March 2017 and 21 April 2017 respectively, so the Commissioner does not require them to take any further action in relation to these breaches. The Commissioner would, however, recommend that the Ministers reflect on the issues raised by these breaches and take steps to ensure that they are in a position to respond to requirements for review timeously in future.
83. These failures to respond to S&TCS's requirements for review timeously have been noted. They may be taken into account in future by the Commissioner in determining whether further action is required under her Enforcement Policy and Intervention Procedures.

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 requests made by Salmon and Trout Conservation Scotland (S&TCS).

The Commissioner finds that the Ministers failed to respond to S&TCS's requirements for review within the timescale laid down in regulation 16(4) of the EIRs. Given that the Ministers did respond to S&TCS's requirements for review subsequently, she does not require them to take any action in respect of these failures, in response to S&TCS's applications.

The Commissioner finds also that the Ministers were not entitled to withhold information under the exceptions in regulation 10(4)(d) and 10(5)(f) of the EIRs. In doing so, they failed to comply with regulation 5(1) of the EIRs. She requires the Ministers to disclose this information to S&TCS by **19 October 2017**.

Appeal

Should either Salmon and Trout Conservation Scotland or the Scottish 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.

Enforcement

If the Scottish Ministers (the Ministers) fail to comply with this decision, the Commissioner has the right to certify to the Court of Session that the Ministers have failed to comply. The Court has the right to inquire into the matter and may deal with the Ministers as if they had committed a contempt of court.

Margaret Keyse
Acting Scottish Information Commissioner

4 September 2017

Appendix 1: Relevant statutory provisions

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.
- (2) The duty under paragraph (1)-
 - (a) shall be complied with as soon as possible and in any event no later than 20 working days after the date of receipt of the request; and
 - (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

...

- (d) the request relates to material which is still in the course of completion, to unfinished documents or to incomplete data; or

...

- (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-

...

- (f) the interests of the person who provided the information where that person-
 - (i) was not under, and could not have been put under, any legal obligation to supply the information;
 - (ii) did not supply it in circumstances such that it could, apart from these Regulations, be made available; and
 - (iii) has not consented to its disclosure; or

...

- (6) To the extent that the environmental information to be made available relates to information on emissions, a Scottish public authority shall not be entitled to refuse to make it available under an exception referred to in paragraph (5)(d) to (g).

...

13 Refusal to make information available

Subject to regulations 10(8) and 11(6), if a request to make environmental information available is refused by a Scottish public authority in accordance with regulation 10, the refusal shall-

...

- (d) if the exception in regulation 10(4)(d) is relied on, state the time by which the authority considers that the information will be finished or completed ...

16 Review by Scottish public authority

...

- (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.

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