

Decision Notice

Decision 215/2018: Mr K and the Scottish Ministers

Sea lice infestation: failure to respond within statutory timescales

Reference No: 201801743

Decision Date: 21 December 2018



Scottish Information
Commissioner

Summary

The Ministers were asked about sea lice infestation of wild salmon and the inspection of specific farms.

This decision finds that, in the respects specified in the application, the Scottish Ministers complied with the Environmental Information (Scotland) Regulations 2004 (the EIRs) in dealing with the information request made by Mr K

Background

Date	Action
20 August 2018	Mr K, via his solicitor, made an information request to the Scottish Ministers (the Ministers). Further references to Mr K should be read as including his solicitors, acting on his behalf.
	The Ministers did not respond to the information request.
19 September 2018	Mr K wrote to the Ministers, requiring a review in respect of their failure to respond.
	Mr K did not receive a response to his requirement for review.
10 October 2018	Mr K wrote to the Commissioner's Office, stating that he was dissatisfied with the Ministers' failure to respond to "as soon as possible" as required by regulation 16(4) of the EIRs. While acknowledging that the twenty working days from the date of the requirement for review had not passed, Mr K confirmed he was applying to the Commissioner for a decision in terms of section 47(1)(b) of the Freedom of Information (Scotland) Act 2002 (FOISA). The enforcement provisions of FOISA apply to the enforcement of the EIRs, subject to specified modifications – see regulation 17.
5 November 2018	Mr K wrote to the Commissioner's Office, stating that the Ministers had still not responded to the requirement for review.
5 November 2018	The Ministers were notified in writing that an application had been received from Mr K and were invited to comment on the application. In particular the Ministers were asked to comment on whether they considered that by not responding to the review by 10 October 2018, they had failed to respond "as soon as possible" as required by regulation 16(4) of the EIRs.
16 November 2018	The Commissioner received submissions from the Ministers. These submissions are considered below.

Commissioner's analysis and findings

1. It is clear from Mr K's correspondence with the Ministers and the Commissioner that the information sought by Mr K is properly considered to be environmental information, as defined in regulation 2(1) of the EIRs. The information relates to sea lice infestation of wild salmon and the inspections carried out at the farms in question. This engages paragraphs (a), (b), (c) and (f) of the definition of environmental information.
2. Mr K's application to the Commissioner is specific to his claim that the Ministers failed to respond "as soon as possible", as required by regulation 16(4) of the EIRs, and the Commissioner will consider the application in what follows solely in terms of the EIRs.
3. The Commissioner considers this application valid under section 47(1)(b) of FOISA, which states that a person who is dissatisfied with the failure of a Scottish public authority to which a requirement for review was made to give such a notice, may make application to the Commissioner for a decision whether, in any respect specified in that application, the request for information to which the requirement relates has been dealt with in accordance with Part 1 of FOISA. As mentioned above the enforcement provisions of FOISA apply to the enforcement of the EIRs, and the Commissioner is satisfied that a failure to give notice for the purposes of section 47(1)(b) may include a failure to do so "as soon as possible", as required by regulation 16(4) of the EIRs.
4. The Ministers advised the Commissioner that, due to administrative errors, neither Mr K's request nor his requirement for review had been registered, as they had been overlooked. The Ministers accepted that this was not appropriate and that considerable more care required to be taken in registering requests. They advised that every effort would be made to ensure that they provided Mr K with a response to the requirement for review as soon as possible: a review outcome was sent to Mr K on 27 November 2018.
5. Regulation 16(4) of the EIRs requires that, following the date of receipt of the requirement for review a Scottish public authority shall, as soon as possible and no later than 20 working days after the date of receipt of the representations (i.e. the requirement for review), notify the applicant of its decision.
6. Mr K wrote to the Ministers on 19 September 2018, so the Ministers were obliged to respond as soon as possible and, in any event, no later than 17 October 2018.
7. Mr K's application to the Commissioner specifically asks him to come to a decision on whether the Ministers failed to comply with regulation 16(4) of the EIRs, in failing to respond to the requirement for review by 10 October 2018 (the date of his application to the Commissioner) and therefore – in Mr K's view – failing to respond as soon as possible.
8. It is a matter of fact that the Ministers did not provide a response to Mr K by 10 October 2018. It does not necessarily follow, however, that they failed to respond as soon as possible for the purposes of regulation 16(4).
9. Mr K have submitted that his representation (seeking a review) was made on a very straightforward basis, that Marine Scotland had missed the initial 20 working days allowed under regulation 5(2)(a) for responding to his information request. In those circumstances, Mr K argued, the review of the public authority's initial failure to respond should not have taken the full 20 working days. The practical effect of allowing it to do so would be to "undermine completely" the 20 working day requirement in regulation 5(2)(a) and, in effect, give the public authority an extra 20 working days to respond to the request.

10. The Commissioner notes Mr K's views on the matter, but must also note that – in terms of the timescales allowed for responding – regulation 16(4) makes no distinction between a case where the public authority has responded to the request for information and one where it has not. In either case, the public authority is required to respond as soon as possible and no later than 20 working days from receipt of the representations. In the Commissioner's view, this makes sense – he cannot endorse failures to identify, log and action information requests, but where this happens (and the request is only identified as such when a review is sought, or later) the authority will effectively be starting from scratch in carrying out a review and it is in no-one's interests for that process to be rushed.
11. Persistent failures of this kind can – and will – be addressed as questions of acceptable practice or enforcement of the legislation, through the Commissioner's Enforcement Policy and Intervention Procedures. Applicants are urged to bring such matters to the Commissioner's attention, whether or not they are seeking a formal decision in any given case.
12. In this case, the Ministers did not believe they had failed to respond as soon as possible. They noted the administrative errors which led to the request (and, initially, the requirement for review) being overlooked and submitted that there had been no deliberate attempt to delay a response.
13. On balance, in all the circumstances of this case and having considered all relevant submissions, the Commissioner is prepared to accept that the Ministers had not – as at 10 October 2018 – failed to respond to Mr K's representations as soon as possible, as required by regulation 16(4) of the EIRs. He cannot accept, therefore, that they failed to comply with the EIRs in the respect claimed by Mr K.
14. The Commissioner notes that the Ministers provided Mr K with a review outcome on 27 November 2018. While not directly the basis on which Mr K applied to the Commissioner in this case, and while acknowledging that the Ministers have apologised for the failure and confirmed that measures are being put in place to ensure that it is not repeated, the Commissioner must record that the overall delay in providing a response in this case has been wholly unacceptable. Any measures put in place to prevent its recurrence must be followed through: the matter has been recorded as a compliance issue and the Commissioner would ask the Ministers to review the effectiveness of these measures, and report to the Commissioner on the findings and outcome of that review, by 28 February 2019.
15. The Commissioner would also remind Mr K that it is now in a position to apply to the Commissioner in respect of any substantive dissatisfaction with the review outcome. A review has been carried out and no further steps can be required on the applicant's part before making an application to the Commissioner.

Decision

The Commissioner finds that, in the respects specified in the application, the Scottish Ministers complied with the Environmental Information (Scotland) Regulations 2004 (the EIRs) in dealing with the information request made by Mr K

Appeal

Should either Mr K 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.

Daren Fitzhenry
Scottish Information Commissioner

21 December 2018

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