

Decision Notice



Decision 225/2013 River Creran Improvement Association and the Scottish Ministers

Loch Creran fish farms

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www.itspublicknowledge.info

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Summary

On 22 December 2012, the River Creran Improvement Association (RCIA) asked the Scottish Ministers (the Ministers) for information relating to the review of fish-farms in Loch Creran under their audit and review process. The Ministers withheld information, as they considered disclosure would prejudice substantially the interests of the providers of the information in terms of regulation 10(5)(f) of the EIRs.

Following an investigation, the Commissioner found that the Ministers failed to deal with RCIA's request for information in accordance with the EIRs, by incorrectly applying regulation 10(5)(f) to the information they withheld. She also found that the Ministers failed to respond to RCIA's request within the required timescale.

Relevant statutory provisions

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

The full text of each of the statutory provisions cited above is reproduced in the Appendix to this decision. The Appendix forms part of this decision.

Background

1. On 22 December 2012, a solicitor on behalf of RCIA (referred to in the remainder of the decision as "RCIA") wrote to the Ministers requesting, under the terms of the EIRs, the following information:
"... all correspondence, including the application and screening forms submitted by the operators of the Creran fish-farms, received from or sent to any third party, including the fish farm operators and any statutory and other public bodies, in relation to the current review process being applied to the Creran fish-farms."



2. The Ministers responded on 29 January 2013. They informed RCIA that the information in the review application and associated documents was excepted from disclosure under regulation 10(5)(f) and provided some further explanation as to why the exception applied and why the public interest favoured maintaining it. The Ministers also supplied RCIA with copies of email exchanges, subject to redaction on the basis that regulation 10(5)(f) applied.
3. On 1 February 2013, RCIA wrote to the Ministers requesting a review of their decision. RCIA argued that the Ministers had not taken account of regulation 10(6), which disapplies regulation 10(5)(f) to the extent that the information in question relates to information on emissions. RCIA did not accept that regulation 10(5)(f) applied to the information in question, arguing that it was a requirement on the operators of the fish farms to submit the information to the audit and review process.
4. The Ministers notified RCIA of the outcome of their review on 6 March 2013. The Ministers maintained their reliance on regulation 10(5)(f), but provided RCIA with supplementary documentation to explain why certain types of information, which RCIA considered to be information on emissions, was not collected by the Ministers as part of the audit and review process.
5. On 21 March 2013, RCIA wrote to the Commissioner, stating that they were dissatisfied with the outcome of the Ministers' review and applying to the Commissioner for a decision in terms of section 47(1) of FOISA. By virtue of regulation 17 of the EIRs, Part 4 of FOISA applies to the enforcement of the EIRs as it applies to the enforcement of FOISA, subject to certain specified modifications.
6. The application was validated by establishing that RCIA made a request for information to a Scottish public authority and applied to the Commissioner for a decision only after asking the authority to review its response to that request.

Investigation

7. On 9 April 2013, the Ministers were notified in writing that an application had been received from RCIA and were asked to provide the Commissioner with any information withheld from them. The Ministers responded with the information requested and the case was then allocated to an investigating officer.
8. The investigating officer subsequently contacted the Ministers, giving them an opportunity to provide comments on the application (as required by section 49(3)(a) of FOISA) and asking them to respond to specific questions. In particular, the Ministers were asked to justify their reliance on any provisions of the EIRs they considered applicable to the information requested, with particular reference to the provisions of regulation 10(5)(f) and 10(6). The Ministers were also asked specific questions about their handling of this request, raised by RCIA in their application.



9. During the investigation, further information was disclosed to RCIA by the Ministers. This was all the information they considered to fall within the definition of “emissions” which was captured by this request. The Ministers accepted that all of this information should have been released to RCIA pursuant to regulation 10(6) of the EIRs.
10. RCIA did not accept that the information disclosed during the investigation encompassed all the information held by the Ministers and covered by what they considered to be the definition of “emissions”: they believed there should be more such information held which had not been provided to them. They also asked the Commissioner to consider whether the Ministers applied regulation 10(6) correctly in carrying out their review.

Commissioner’s analysis and findings

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 RCIA and the Ministers. She is satisfied that no matter of relevance has been overlooked.

Background to request

12. On 1 April 2007, the Town and Country Planning (Marine Fish Farming) (Scotland) Order 2007 came into force. This extended statutory planning controls in relation to marine fish farm development, providing for the consideration of planning applications for new fish farms by planning authorities. Operators of sites which were established prior to 1 April 2007, and did not already have planning permission, can apply through the Scottish Government’s audit and review process.
13. Sites are entitled to operate legally until either the expiry date of their existing consent/works licence or 31 March 2014. Sites which do not have permanent planning permission by the latter of these dates will be operating unlawfully.
14. RCIA’s request relates to application to the Ministers for planning permission by the operator of the Loch Creran fish farm, through the review process. The review process is for use by operators of finfish farms where an assessment of the impact on the environment has not been undertaken.
15. This process provides that, once all the required information has been obtained from the operator, the Ministers will consult with:
 - a. The Planning Authority (plus adjacent one, if appropriate)
 - b. Scottish Environment Protection Agency
 - c. Scottish Natural Heritage
 - d. Marine Scotland Science
 - e. The local District Salmon Fishery Board



f. Historic Scotland.

16. The Ministers' guidance on the review process¹ states that, as part of the consultation, consultees will be asked what assessment of the impacts of the operation of the fish farm should be undertaken. It also states that the Ministers will ask the operator to provide any additional information about its site and operations which is required to make the assessment. The guidance document states that the operator may be required to advertise the application for public comment.

Extent of information held

17. Commenting on the information provided during the investigation, RCIA submitted that there appeared to be information missing, highlighting that their request encompassed documentation from third parties and public bodies, but they only received information provided by the fish farm operator to Marine Scotland.
18. In response to this point, the Ministers explained that although they *now* held relevant documentation from third parties and public bodies, they did not do so when they received the request (22 December 2012). Then, the only information held in relation to the review was the application form and the review assessment form from the operator of the fish farm. At that time, they explained, the application was with statutory consultees (referred to in paragraph 15 above) for comment, the deadline for their comments being 14 January 2013. Consequently, no further information was held at the relevant time.
19. The Commissioner has considered the Ministers' explanation and supporting documentation, which shows that consultees were not required to provide their comments until 14 January 2013. In the circumstances, she is satisfied that the information identified by the Ministers is all the information falling within the scope of this request and held by the Ministers at the relevant time.

Regulation 10(5)(f)

20. In terms of 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.

¹ <http://www.scotland.gov.uk/Topics/marine/Fish-Shellfish/18716/fish-farm/fish-farm/AuditReviewProcess>



21. Regulation 10(2) of the EIRs provides that this exception must be interpreted in a restrictive way and that the public authority shall apply a presumption in favour of disclosure. This exception is also subject to the public interest test in regulation 10(1)(b).
22. In the Commissioner's guidance on regulation 10(5)(f), she states that certain points should be addressed in considering whether this exception applies. These include:
 - a. Was the information provided by a third party?
 - b. Was the provider, or could the provider be, required by law to provide it?
 - c. Has the provider consented to disclosure?
 - d. Is the information otherwise publicly available?
 - e. Would release of the information cause, or be likely to cause, substantial harm to the interests of the provider?
23. Although her guidance makes reference to the consent (or otherwise) of the provider of information, it is a matter for the authority to formulate and make submissions to the Commissioner supporting the withholding of information.

Was the information provided by a third party?

24. The Ministers stated that the information was provided to Marine Scotland by the operator of Loch Creran fish farm. Having considered the information withheld, the Commissioner is satisfied that it is information supplied to the Ministers by another person, i.e. the fish farm operator. However, for this exception to apply, the Aarhus Convention requires that the affected interests are those of a "third party".
25. The Aarhus Convention: An Implementation Guide² states that a "third party" is a "person not a party to a particular agreement or transaction, but a person who may have rights or interests therein". In this case, basically, the operator is seeking planning permission from the Ministers. It is clearly a party to that process: its relationship to the Ministers for this purpose is quite specific and defined, considerably more so than the general relationship of being subject to a process of statutory regulation. Bearing in mind the provisions of regulation 10(2), the Commissioner does not accept that the Convention (and therefore the EIRs) envisaged that a person in the position of the operator in this case should be considered a third party.

Was the provider, or could the provider be, required by law to provide it?

26. RCIA did not accept that the operator of the fish farm was not, and could not have been put under, any legal obligation to supply the information to the Ministers. They argued that had the operator not provided the information it would not, even under the process being operated by the Ministers, have received planning permission. In addition, RCIA argued that much of the information withheld could be obtained by the Ministers in any event, for example under the inspection powers of the Fish Health Inspectorate.

² <http://www.unece.org/fileadmin/DAM/env/pp/acig.pdf> (the First Edition, in place at the time the Ministers dealt with this request)



27. The Ministers submitted that operators were under no obligation to apply for planning permission through the audit and review process. If they decided not to do so, they would be required to modify their site and apply separately and directly to the planning authority. The Ministers did acknowledge that, in order to apply for permission through the audit and review process, fish farms were obliged to provide the requested information.
28. The Ministers also noted that, if an operator failed to make information available to Ministers when requested to do so in the context of such an application, then that operator ran the risk that the decision would be delayed or that the application might be refused. The Ministers argued, therefore, that although there may be strong incentives on an operator to comply with a request, they did not consider there was a legal obligation to provide information as there was no legal obligation to make an application at all.
29. The Commissioner accepts these arguments in relation to a literal interpretation of whether there exists a legal requirement to provide information. However, this cannot be considered in isolation of the underlying aims and intention of the Aarhus Convention, from which the Directive and the EIRs are derived, and in particular to what extent provision of information is or is not voluntary.
30. Regulation 10(5)(f) applies in situations where the information was supplied on a voluntary basis in the expectation that it would not be disclosed to a third party and where the supplier has not consented to disclosure.
31. As noted in the Commissioner's guidance³, the purpose of this exception is to ensure the continuation of the flow of voluntary information between companies and their regulators. Making such information available to the public could possibly inhibit open and constructive discussions between environmental control authorities and industry.
32. The Aarhus Convention: An Implementation Guide states, in relation to this exception:
This exception is meant to encourage the voluntary flow of information from private persons to the government. Information provided to public authorities that the public authority has not specifically requested is not necessarily "voluntary".
33. Persons who apply to public authorities for the purposes of obtaining licences, grants, and other permissions (such as the review process under consideration in this case) will submit information as part of the process. The Commissioner acknowledges that the decision to instigate that process will be a voluntary one, but once that decision is made there will be certain information the person seeking the permission is obliged to provide in order for the application to be processed. This has the effect of removing the element of choice associated with information provided voluntarily.

³ <http://www.itspublicknowledge.info/uploadedfiles/EIRGuidance.pdf>



34. The Commissioner has considered the guidance notes accompanying the review process application form and the content of the application form itself, which states:
- “... all questions must be answered, even if your answer is n/a. Your form will be returned – potentially causing delay, if all questions are not answered ...”
35. The application form also stipulates the plans drawings and other information which “must” accompany the application. All of this appears to conform to the general scheme of Scottish planning legislation, which envisages that an application in appropriate form must be submitted to the planning authority before that authority can consider granting planning permission for the development. The withheld information is, to all intents and purposes, such an application.
36. On the basis of the above, the Commissioner does not accept the Ministers’ application of regulation 10(5)(f) in this case. The operator in question opted to take this route to obtain planning permission for its fish farm, but once that decision was taken it was obliged to provide the necessary information as part of that process.

Consent / is the information otherwise publicly available?

37. The Commissioner acknowledges that the operator has not consented to disclosure of the information (evidence of this has been provided by the Ministers) and that the information is not publicly available elsewhere.

Would release of the information cause, or be likely to cause, substantial harm to the interests of the provider?

38. The Ministers put forward reasons why they considered making the information available could be used to harm the operator’s trading activity and competitiveness. Having considered the relatively basic submissions provided to this effect (which do little more than quote relevant sections of the application and suggest that the information might be taken out of context), the Commissioner is not satisfied that the Ministers have adequately demonstrated in their submissions that there is a substantiated risk of harm, or that such harm would (or would be likely to) be substantial. In any event, she notes that the Ministers envisage that the information in the application will be made available after a decision has been made on it.
39. The timing of disclosure of particular information may be relevant in considering whether than information should be made available under the EIRs. The prejudice caused, or likely to be caused, by making the information available (or the risk of that prejudice occurring) may be greater at a particular time than it would be subsequently. Public authorities need to explain why they believe that to be the case. In this case, the Ministers’ arguments in this connection appear to be based on the expectations of the operator. There is an additional argument as to potential delay in completing the audit and review process, but there is nothing to suggest that this relates to the interests of the operator as opposed to general administrative efficiency.



40. Regarding the operator's expectations, the application form states that:
"... any information in the application may be made available or copied to any member of the public on request and may be published, including on the Scottish Government's website."
41. The Ministers have stated that "there has been an assumption" that the information will not be available until after a decision has been made and that "the aquaculture industry is aware of this", but nothing has been provided to substantiate this statement. On the face of it, there would appear to be a general expectation that the information may be made available, unqualified as to time. In any event, the Commissioner fails to see how the expectations of the person supplying the information alone can make the information time-sensitive, in the absence of the presentation of any other relevant factors.
42. In all the circumstances, therefore, the Commissioner is not satisfied that the exception in regulation 10(5)(f) of the EIRs applied to the withheld information in the operator's application and supporting documents.
43. As the Commissioner has determined that the Ministers were incorrect in their application of regulation 10(5)(f), there is no requirement to go on to consider (in relation to the information withheld under that exception) RCIA's concerns relating to how the Ministers defined what they considered to be information relating to "emissions". Neither is there any need to consider the application of the public interest test in regulation 10(1)(b).

Handling of request

44. RCIA raised concerns in their application relating to the manner in which the Ministers handled their request for information. RCIA believed that the delays encountered in responding to their request represented "... a deliberate tactic designed to avoid disclosure of the information during the period within which it is expected that the final decision will be made under the review process to grant permanent planning permission ...". They provided further reasons, relating to the progress of the audit and review process, why they believed this to be the case.
45. Regulation 5(2)(a) of the EIRs gives authorities a maximum of 20 working days after the date of receipt of the applicant's request to comply with the request, subject to exceptions which are not relevant in this case.
46. The Ministers submitted that this request was received on 22 December 2012 and that RCIA were informed that they should receive a response by the 20 working day deadline of 24 January 2013. On 25 January 2013, the Ministers contacted RCIA to let them know that their request would be answered in a few days, due to difficulties in obtaining some information. A response then was issued to RCIA on 29 January 2013. The Ministers submitted that there was no foundation for RCIA's suggestion that this was a delaying tactic, given that the delay was only a few days and the decision to grant planning permission was not made until 3 April 2013.

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47. As the Ministers did not provide a response to RCIA's request for information within 20 working days, the Commissioner finds that they failed to comply with the requirements of regulation 5(2)(a). From the submissions she has received, the Commissioner does not conclude that this failure was a deliberate delaying tactic by the Ministers in responding to this request.
48. RCIA also raised concerns about the adequacy of the Ministers' internal review, specifically their failure to apply regulation 10(6). Regulation 10(6) of the EIRs states that a Scottish public authority is not entitled to refuse to make information available under certain exceptions (including that in regulation 10(5)(f)) to the extent that it relates to information on emissions.
49. Within their submissions to the Commissioner, the Ministers recognised that they had failed to take regulation 10(6) into consideration in dealing with this request. The Ministers stated that where future EIRs cases requested emissions data, they would assess these while being aware of regulation 10(6).
50. The Commissioner concludes that in responding to this request and requirement for review, the Ministers failed to take account of regulation 10(6) and therefore incorrectly withheld information relating to emissions under regulation 10(5)(f). This failure was recognised during the course of the investigation, the Ministers disclosing what they considered to be the relevant information. Having considered the Ministers' submissions on this point, and the points made by RCIA on applying a broad interpretation to the definition of "emissions", the Commissioner is satisfied that the Ministers (at the time they received this request) held no further information which could fall within the scope of that definition, with the exception of that withheld under regulation 10(5)(f) and considered above. In the circumstances, she does not require any action by the Ministers in respect of this failure.

DECISION

The Commissioner finds that the Ministers failed to comply with the Environmental Information (Scotland) Regulations 2004 (the EIRs) in responding to the information request made by RCIA. The Commissioner finds that the Ministers were not entitled to apply the exception in regulation 10(5)(f) to the withheld information, and consequently that they failed to comply with regulation 5(1) in refusing to disclose this information. The Commissioner also finds that the Ministers breached regulation 5(2)(a) by failing to respond to this request in 20 working days, and failed to take into consideration the requirements of regulation 10(6) in responding to the request.

The Commissioner therefore requires the Ministers to provide RCIA with the withheld information by 22 November 2013.



Appeal

Should either the River Creran Improvement Association 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.

Rosemary Agnew
Scottish Information Commissioner
8 October 2013



Appendix

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.

...
- (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).