

Decision Notice



Decision 085/2011 Thomas Clark and Solway Shellfish Management Association

Income and expenditure

Reference No: 201001847
Decision Date: 12 May 2011

www.itspublicknowledge.info

Kevin Dunion
Scottish Information Commissioner

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Summary

Mr Clark asked the Solway Shellfish Management Association (the SSMA) to provide information about its funding and expenditure. The SSMA initially refused to comply with the request on the grounds that it was not a Scottish public authority covered by the Freedom of Information (Scotland) Act 2002 (FOISA). Mr Clark requested a review of this decision, but received no reply. After correspondence between the Commissioner and the SSMA, during which the SSMA acknowledged that it was covered by the Environmental Information (Scotland) Regulations 2004 (the EIRs) but not by FOISA, the SSMA issued a review response which advised Mr Clark that the information he had requested was not environmental information as defined by the EIRs. Mr Clark remained dissatisfied and applied to the Commissioner for a decision.

After investigation, the Commissioner found that at least some of the information withheld was environmental information in terms of regulation 2(1) of the EIRs, and required the SSMA to deal with Mr Clark's request under the EIRs.

Relevant statutory provisions and other sources

The Environmental Information (Scotland) Regulations 2004 (the EIRs) regulations 2(1) (Interpretation) (definitions of "Environmental information" and "Scottish public authority"); 5(1) and (2)(b) (Duty to make available environmental information on request) and 16(1) and (4) (Review by Scottish public authority)

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 21 June 2010, Mr Clark wrote to the SSMA asking it to provide "full accurate details on all public funding received by the SSMA from 2004 to date, and full accurate accounts on how the public money was spent including in detail all expenses paid to employees or members of the SSMA Board or Committee".
2. On 8 July 2010, the SSMA wrote to advise Mr Clark that it was not a public authority as defined in FOISA, and consequently the terms of that Act did not apply to it. It pointed out that its accounts were available for inspection through the Register of Companies.



3. On 17 August 2010, Mr Clark (through his legal representatives) requested a review of the SSMA's response. He took the view that the SSMA was a Scottish public authority as defined by regulation 2(1) of the EIRs.
4. Mr Clark received no response to his request for review, and on 27 September 2010 his legal representatives, acting on his behalf, made an application to the Commissioner for a decision on the matter.
5. After investigation, the Commissioner reached the view that the SSMA was a Scottish public authority as defined by the EIRs (and specifically paragraph (d) of that definition), although it was not a Scottish public authority covered by FOISA. The SSMA was invited to comment on his findings.
6. On 10 January 2011, the SSMA wrote to the Commissioner, accepting that it was a Scottish public authority in terms of the EIRs, while advising that it still required to consider whether the requested information was environmental information as defined in regulation 2(1) of the EIRs.
7. On 10 February 2011, the SSMA provided Mr Clark with a response to his request for review. It concluded that the information he had requested was not environmental information, as defined in regulation 2(1) the EIRs.
8. On 15 February 2011, a new application for a decision from the Commissioner was made on behalf of Mr Clark, in relation to his request of 21 June 2010 and his request for review of 17 August 2010.
9. The application was validated by establishing that Mr Clark had made a request for information to a Scottish public authority and had applied to the Commissioner for a decision only after asking the authority to review its response to that request.

Investigation

10. On 21 February 2011, the SSMA was notified in writing that an application had been received from Mr Clark and was invited to provide full reasons for considering that the information covered by Mr Clark's request of 21 June 2010 was not wholly or partially environmental information, as defined in regulation 2(1) of the EIRs.
11. On 21 March 2010, the SSMA advised that, following legal advice and internal discussions, it remained of the opinion that the information requested by Mr Clark was not environmental in nature and therefore fell outside the ambit of the EIRs. The SSMA's response is considered in detail in the next part of this decision notice.



Commissioner's analysis and findings

12. In coming to a decision on this matter, the Commissioner has considered all of the submissions made to him by both Mr Clark and the SSMA and is satisfied that no matter of relevance has been overlooked.

Whether the EIRs apply to the information requested

13. Mr Clark made a wide-ranging request for full details of all public funding received by the SSMA from 2004 to date, and full details of how the public money was spent. During the investigation, the SSMA was asked to provide samples of information which would fall within the scope of this request. The SSMA provided copies of three staff expense claim forms, and topline figures for its annual income and annual staff expense claim expenditure. The Commissioner considers it likely that the SSMA holds other information which would be covered by the terms of Mr Clark's request, but has (for various reasons which he does not consider it necessary to expand upon here) based his determination in this decision upon the sample information provided by the SSMA.
14. The Commissioner and the SSMA agree that the SSMA is a Scottish public authority in terms of regulation 2(1) of the EIRs, but not in terms of FOISA. The Commissioner must therefore decide whether information withheld from Mr Clark is environmental information, as defined in regulation 2(1), in order to ascertain whether he is required to make a decision on this case. If the information is not covered by the EIRs, the Commissioner cannot make a decision, as the SSMA is not a Scottish public authority in terms of FOISA.
15. The Commissioner's published guidance on the EIRs states:

"No types of information are excluded from the potential ambit of environmental information. Environmental information may be used or found in or extend beyond what is not specifically an environmental topic. Court cases have confirmed that environmental information, and the scope of the Directive, should be interpreted broadly¹. In the case of any conflict, Directive 2003/4/EC prevails or takes precedence over the EIRs."

¹ For example, *Mecklenburg v Kreis Pinneburg*, ECJ C321/96 [1998] ECR 3809; *Glawischnig v Bundeskanzler* C316/01; [2003] ECR I-5995, 12 June 2003 [these decisions concerned Dir 90/313/EEC and not Dir 2003/4/EC]; *The Office of Communications v The Information Commissioner* [2009] EWCA Civ 90; *BERR v Information Commissioner and Friends of the Earth Information Tribunal*, 2008, EA/2007/0072; *Network Rail Ltd v Information Commissioner and Others*; *Information Tribunal*, 2007, EA/2006/0061/0062; *Port of London Authority v Information Commissioner and Another*, 2007; *Information Tribunal*; EA/2006/0083



16. In *Decision 056/2008 Mr Rob Edwards and the Scottish Ministers*², the Commissioner acknowledged that it is not always a simple matter to establish what is or is not environmental information, as defined in regulation 2(1) of the EIRs. He found that information which in isolation may not be regarded as environmental, can and should be regarded as having that quality when read in context; as an example he cited a document which simply says “Approval is given”, which wording has no explicit environmental content. However, if it is then understood that the approval is to permit the construction of a power station or the disposal of wastes, then the environmental import is clear and the information can be regarded as environmental.
17. Regulation 2(1) of the EIRs provides interpretation of the term “environmental information”. Regulation 2(1)(c) states that the term applies to:
- “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”.
- (A full copy of the definition of environmental information in regulation 2(1) can be found in the Appendix to this decision.)
18. In this case, the information requested is financial information, which, taken out of context, may appear to have no environmental content. However, the financial information relates to the regulation of activities affecting shellfish stocks in the Scottish Solway Firth. The SSMA’s purpose is to regulate “dredging, fishing for and taking of cockles” in the fishery³, and in providing such regulation the SSMA directly affects the state of the environment in the Solway Firth.
19. The Commissioner takes the view that because the SSMA’s sole purpose is the regulation of a particular environment, it is likely that information relating to the SSMA’s activities will be environmental information because these activities affect or are likely to affect the state of the elements of the environment concerned, such as “coastal and marine areas” and “biological diversity”, both referred to in part (a) of the definition of environmental information in regulation 2(1) of the EIRs. In his view, information relating to expenditure on these activities will be information relating to these activities.
20. As noted previously, the Commissioner has not yet had access to the full range of requested information held by the SSMA. However, he is satisfied that the information he has seen includes information falling within the ambit of the EIRs, in being directly related to the cost of a particular regulatory activity (coastal patrols). The Commissioner therefore does not accept the SSMA’s submission that none of the information covered by Mr Clark’s request is environmental information. As indicated above, given the nature of the SSMA’s activities, he considers it reasonable to expect that it will hold further environmental information falling within the scope of Mr Clark’s request.

² http://www.itspublicknowledge.info/applicationsanddecisions/Decisions/2008/200501950_Part1.asp

³ http://www.ssma.org.uk/ssma/contents/category_0.html



21. That being so, the Commissioner is required to make a decision in relation to Mr Clark's application. He finds that the SSMA did not comply with the duty to make available environmental information on request laid down in regulation 5 of the EIRs, in responding to Mr Clark's request, in that the SSMA did not provide the environmental information requested by Mr Clark or refuse to do so in accordance with any of the applicable provisions referred to in regulation 5(2)(b).
22. The Commissioner now requires the SSMA to respond to Mr Clark's request in accordance with the EIRs, and to provide Mr Clark with the information he requested and which he is entitled to receive under the terms of the EIRs (insofar as the information relates to the regulatory activities of the SSMA and not to purely administrative activities), unless it considers it is entitled to refuse to do so under any applicable provision referred to in regulation 5(2)(b) (in which case the requisite notice should be given to Mr Clark). As noted above, the Commissioner expects the SSMA to consider all information covered by the terms of Mr Clark's wide-ranging request, not just the information it has previously provided to the Commissioner.

Failure to comply with statutory timescales

23. Under regulation 16(4) of the EIRs, a Scottish public authority must respond as soon as possible and no later than 20 working days after receiving a request for a review of its response to a request for information.
24. On 17 August 2010, Mr Clark requested a review of the SSMA's response to his request of 21 June 2010. He did not receive any response to his request for review within the statutory timescale. The Commissioner therefore finds that the SSMA failed to comply with regulation 16(4) in dealing with Mr Clark's request for review.
25. The Commissioner notes this failure to comply with the statutory timescale but does not require any further action in relation to this breach.



DECISION

The Commissioner finds that the Solway Shellfish Management Association (the SSMA) failed to comply with the Environmental Information (Scotland) Regulations 2004 (the EIRs) in responding to the information request made by Mr Clark.

The Commissioner finds that the SSMA wrongly determined that none of the information requested by Mr Clark was environmental information as defined in the EIRs, and thereby failed to comply with regulation 5(1) of the EIRs in dealing with his request. He also finds that the SSMA failed to comply with the statutory timescale for responding to a request for review (regulation 16(4)).

The Commissioner now requires the SSMA to respond to Mr Clark's request in accordance with regulation 5(1) of the EIRs by 27 June 2011.

Appeal

Should either Mr Clark or the Solway Shellfish Management Association wish to appeal against this decision, there is an appeal to the Court of Session on a point of law only. Any such appeal must be made within 42 days after the date of intimation of this decision notice.

Kevin Dunion
Scottish Information Commissioner
12 May 2011



Appendix

Relevant statutory provisions

Environmental Information (Scotland) Regulations 2004

2 Interpretation

(1) In these Regulations:-

...

"environmental information" has the same meaning as in Article 2(1) of the Directive, namely any information in written, visual, aural, electronic or any other material form on -

- (a) the state of the elements of the environment, such as air and atmosphere, water, soil, land, landscape and natural sites including wetlands, coastal and marine areas, biological diversity and its components, including genetically modified organisms, and the interaction among these elements;
- (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;
- (d) reports on the implementation of environmental legislation;
- (e) costs benefits and other economic analyses and assumptions used within the framework of the measures and activities referred to in paragraph (c); and
- (f) the state of human health and safety, including the contamination of the food chain, where relevant, conditions of human life, cultural sites and built structures inasmuch as they are or may be affected by the state of the elements referred to in paragraph (a), or, through those elements, by any of the matters referred to in paragraphs (b) and (c);

"Scottish public authority" means –

- (a) any body which, any other person who, or the holder of any office which is-
 - (i) listed in schedule 1 to the Act (but subject to any qualification in that schedule),
or



- (ii) designated by order under section 5(1) of the Act;
- (b) a publicly-owned company as defined by section 6 of the Act;
- (c) any other Scottish public authority with mixed functions or no reserved functions (within the meaning of the Scotland Act 1998); and
- (d) any other person who is neither a public body nor the holder of a public office and who is under the control of a person or body falling within paragraphs (a), (b) or (c) of this definition and-
 - (i) has public responsibilities relating to the environment;
 - (ii) exercises functions of a public nature relating to the environment; or
 - (iii) provides public services relating to the environment; and

...

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.

...

16 Review by Scottish public authority

- (1) Subject to paragraph (2), an applicant may make representations to a Scottish public authority if it appears to the applicant that the authority has not complied with any requirement of these Regulations in relation to the applicant's request.
 - ...
- (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.

...

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