

Decision Notice

Decision 038/2017: Salmon & Trout Conservation Scotland and the Scottish Ministers

Whether a request was complied with as soon as possible

Reference No: 201602286

Decision Date: 17 March 2017



Summary

The Scottish Ministers (the Ministers) were asked for information relating to salmon conservation.

The Ministers responded and disclosed the information following a review. The Commissioner was asked for a decision as to whether the Ministers had responded to the request "as soon as possible", as required by the EIRs. Having considered the full circumstances of the response, the Commissioner was not satisfied that they had done so.

Relevant statutory provisions

The Environmental Information (Scotland) Regulations 2004 (the EIRs) regulations 2(1) (Interpretation) (paragraphs (a) and (c) of definition of "environmental information"); 13(a) (Refusal to make information available)

The full text of each of the statutory provisions cited above is reproduced in Appendix 1 to this decision. The Appendix forms part of this decision.

Background

1. On 14 October 2016, a solicitor acting on behalf of Salmon & Trout Conservation Scotland (S&TCS) emailed a request for information to the Scottish Ministers (the Ministers). Any references below to submissions from S&TCS are to be read as submissions made on its behalf by its solicitor.

The information request read:

- 1) *Page 2 of the Marine Scotland Science document entitled "Salmon Conservation Regulations September 2016" (published by Scottish Government in August 2016)*
<http://www.gov.scot/Resource/0050/00505047.pdf> refers to:

"Estimating number of salmon; A method of estimating the number of salmon entering rivers in each month was developed using data from counters run by Marine Scotland, Scottish Power and Scottish and Southern Electricity".

Pursuant to the Environmental Information (Scotland) Regulations 2004, please supply all the data used in this exercise from the above-mentioned fish counters.

I would be grateful if the data could be supplied in Excel or similar format, rather than in printed hard-copy form, to enable ease of processing.

- 2) *Please also supply all correspondence, emails, notes of phone conversations and meeting notes and agendas, as between MS/MSS and (i) SEPA and (ii) SNH, relating to the proposed salmon conservation regulations for 2017, including the assessment of conservation status and/or categorisation of rivers, as may have been held prior to the publication of the document above."*

2. On 11 November 2016, S&TCS emailed the Ministers, asking for an update on their request: on the same day, the Ministers emailed S&TCS, confirming that the response had been posted out earlier that week and should be received shortly.

3. The Ministers' response, dated 9 November 2016, withheld the requested information under regulation 10(4)(d) of the EIRs, as material in the course of completion.
4. On 15 November 2016, S&TCS emailed the Ministers requesting a review of their decision, arguing that regulation 10(4)(d) of the EIRs did not apply in this case. They also asked the Ministers to review the time taken to respond to the request, stating that regulation 13 of the EIRs requires that a refusal "be given in writing as soon as possible and in any event no later than 20 working days after the date of receipt of the request for information".
5. The Ministers notified S&TCS of the outcome of their review by email on 8 December 2016. They provided S&TCS with the information requested and confirmed they were satisfied that the response had been provided as soon as possible, given the resources available and the pressures of other work.
6. On 13 December 2016, 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 they were dissatisfied with the outcome of the Ministers' review because they did not accept that the Ministers had responded to the initial request as soon as possible.

Investigation

7. The application was accepted as valid. The Commissioner confirmed that S&TCS made a request for information to a Scottish public authority and asked the authority to review their response to that request before applying to her for a decision.
8. On 17 January 2017 the Ministers were notified in writing that S&TCS had made a valid application and the case was allocated to an investigating officer.
9. Section 49(3)(a) of FOISA requires the Commissioner to give public authorities an opportunity to provide comments on an application. The Ministers were invited to comment on this application and answer questions about their handling of the request, focusing on the time taken to respond.
10. Both the Ministers and S&TCS provided submissions to the investigating officer.

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

Application of the EIRs

12. It is evident from the subject matter (salmon conservation data) that any information falling within the scope of S&TCS's request would be environmental information, as defined in regulation 2(1) of the EIRs (paragraphs (a) and (c) of the definition are set out in Appendix 1). S&TCS have not disputed the Ministers' handling of the request under the EIRs: in fact, the sole issue raised in their application relates to the interpretation of a phrase in the EIRs. The Commissioner will therefore consider the Ministers' handling of the request solely in terms of the EIRs.

Submissions from S&TCS

13. S&TCS contended that the Ministers' failure to provide the requested information until the twentieth working day was unacceptable. They cited regulation 13(a) of the EIRs, which states that if a request is being refused, that refusal shall be in writing and shall be given "as soon as possible" and in any event no later than 20 working days after the date of receipt of the request. S&TCS argued that it would not be compliant with the EIRs for an authority to respond to a request 20 working days after the date of receipt of the request, unless that response was also "as soon as possible".
14. The primary responsibility, S&TCS argued, was to respond as soon as possible. At the latest (the phrase used by both the Aarhus Convention and Directive 2003/4/EC, which the EIRs are intended to implement), the request must be responded to within 20 working days. A request responded to within 20 working days might not, therefore, meet the requirement to respond as soon as possible.
15. S&TCS made reference to the Commissioner's *Decision 120/2016 Residents Against Turbines Scotland and the Scottish Ministers*¹ (the *RATS* decision) and the Upper Tribunal's findings in *John v Information Commissioner and Ofsted [2014] UKUT 444 (AAC)*². It believed the circumstances of the *RATS* case could easily be distinguished from those present here.
16. In the *RATS* case, S&TCS noted, information had been disclosed in response to the initial information request. In the present case, no information had been disclosed and all the requested information had been the subject of what S&TCS described as a "blanket exemption". The blanket application of a single exception would, in S&TCS's view, not take as long as the provision of some information.
17. S&TCS noted that the Upper Tribunal (in the *John* case) identified three factors controlling the time a public authority needs to respond:

First, there are the resources available to deal with requests. This requires a balance between FOIA applications and the core business of the authority. Second, it may take time to discover whether the authority holds the information requested and, if it does, to extract it and present it in the appropriate form. Third, it may take time to be sure that the information gathered is complete.
18. As there had been a blanket refusal to provide any information, S&TCS submitted, the second and third factor considered by the Upper Tribunal did not apply in this case. Only the first fell to be considered.
19. S&TCS also provided extensive submissions on why it considered the phrase "as soon as possible" to import a more onerous requirement (in terms of responding quickly) than the word "promptly" (used in the equivalent provisions of the Freedom of Information Act 2000 (FOIA), and therefore considered by the Upper Tribunal in *John*, and also in those of the Freedom of Information (Scotland) Act 2002 (FOISA)). In this context, it provided arguments as to why rights to environmental information should be considered stronger than other information rights, one reason considered compelling being the fact that there are other

¹ <http://www.itspublicknowledge.info/ApplicationsandDecisions/Decisions/2016/201600555.aspx>

² <http://www.bailii.org/uk/cases/UKUT/AAC/2014/444.html>

pillars to the Aarhus Convention, including the right to participate in environmental decision-making.

20. S&TCS noted that the Aarhus Implementation Guide³, at page 83, highlighted (as relevant to the effective administration of timescales) the potential effect of a delay in providing information on the ability of members of the public to participate in decision-making. In this case, S&TCS argued, the information requested related to a statutory public consultation process. By the time the information was disclosed, the secondary legislation which was the subject of the consultation process had been approved: delay had impacted negatively on participation in decision-making processes.
21. Bearing this in mind, S&TCS believed the balance between compliance with the EIRs and the other core business of the authority had to take into account the need to respond more rapidly under the EIRs (compared to FOISA, or FOIA). As Scottish public authorities had a legal duty to comply with the EIRs, they must provide adequate resources to comply, to ensure responses as soon as possible. S&TCS noted that the Ministers' Code of Practice on the discharge of functions by Scottish public authorities under FOISA and the EIRs (the Section 60 Code)⁴ underlined the need for these authorities to have robust arrangements in place to allow compliance within statutory timescales.
22. In addition, S&TCS highlighted (as avoidable) the additional time taken by the Ministers responding to the request by post. In this connection, it noted that all other communication in this case had been by email. In this case, S&TCS did not believe the Ministers had explained adequately why they had not responded earlier, or why they had used ordinary post rather than email for their initial response.

Submissions from the Ministers

23. The Ministers submitted that a response to the original request was issued on the 18th working day, i.e. 2 working days ahead of the deadline. They submitted that this differed from the *RATS* case, where the response had been issued on day 20. Bearing in mind these response dates, they considered they had responded "as soon as possible".
24. The Ministers stated that they had offered the following explanation in the review outcome as to why they considered that the response was issued "as soon as possible", stating that "taking account of the resources available and the pressures of other work ... a response was provided as soon as possible and within the 20 working date statutory deadline as required under regulation 13 of the EIRs." They considered this to be consistent with the approaches taken in the *RATS* and *John* cases.
25. The Ministers noted that the request from S&TCS was received on 14 October and responded to on 9 November 2016. During this period, the Ministers stated that the small team responsible for the assessment of conservation status and development of the accompanying legislation (1.5 FTE science staff and 1.75 FTE policy staff) was:
 - analysing the 80+ responses received during the consultation period;
 - considering further data received from stakeholders to determine whether a re-categorisation was necessary before finalising the assessment of conservation status;

³https://www.unece.org/fileadmin/DAM/env/pp/Publications/Aarhus_Implementation_Guide_interactive_eng.pdf

⁴<http://www.gov.scot/Resource/0046/00465757.pdf>

- continuing to engage with stakeholders to answer enquiries on the assessment of individual rivers and the development of local voluntary conservation measures;
 - responding to items of ministerial correspondence;
 - considering another Environmental Information Request (which was responded to on 8 November);
 - drafting the necessary explanatory science documentation for the Marine Scotland website;
 - finalising the geographical descriptions for the areas assessed;
 - drafting the accompanying policy note for the legislation;
 - finalising the Business and Regulatory Impact Assessment; and
 - finalising the Habitats Regulations Assessment in line with EU requirements.
26. The Ministers submitted that every effort had been made to meet the statutory deadline for S&TCS's request, at their busiest time of the team's year.
27. The Ministers noted that the secondary legislation which was the subject of the consultation was laid in the Scottish Parliament at the end of November 2016, to ensure that fishery proprietors were aware of their final conservation status to enable them to market their fishing for the 2017 season in time for the run-up to the busy Christmas booking period. This was in line with the timetable Scottish Ministers had advised the Scottish Parliament and stakeholders they were working towards.
28. The Ministers considered it unreasonable for S&TCS to suggest that the review outcome should have explained the decision to send the original response by post instead of e-mail, because S&TCS did not raise that particular point in their review request. The Ministers acknowledged that, as the original request was made by e-mail, the response should also have been sent by e-mail in line with normal practice. The Ministers were unsure why this practice was not adhered to on this occasion, but, as the response was issued within the necessary timescales, they did not consider it had had any effect on the provision of a response in this case.
29. Furthermore, the Ministers disagreed with S&TCS's view that this case could easily be distinguished from the *RATS* case because a blanket exception was applied here instead of some information being released. They submitted that this view was based on a misunderstanding of what an authority is required to do to respond to an EIRs request. Specifically, the Ministers submitted that an authority could not apply an exception, in a blanket fashion or otherwise, without having first found and reviewed all of the requested information. Therefore, in their view, the amount of work involved in responding to this request and the time required was much the same as if some information had been released. The Ministers considered that most of the second factor referred to in the *John* case decision did apply in the case, i.e. "... it may take time to discover whether the authority holds the information and, if it does, to extract it ..."
30. To sum up, the Ministers stated that they had responded to the request and the requirement for review within the allowable timescales stipulated in regulation 5(2)(a) of the EIRs, and so did not consider they had breached any part of the EIRs. They believed they had responded to the request as soon as possible, within the constraints of ongoing day to day work and

work pressures caused by the tight timescales they had to adhere to for the purposes of the industry.

The Commissioner's findings

31. In reaching a conclusion in this case, the Commissioner has taken account of the findings in the *RATS* decision and also the Upper Tribunal's findings in the *John* case. She is not bound by the Upper Tribunal's findings, but is of the view that its interpretation of the equivalent FOIA phrasing can be taken as a reasonable guide in this case.
32. Regulation 13(a) of the EIRs requires a Scottish public authority refusing a request for environmental information to do so in writing, as soon as possible and in any event no later than 20 working days after the date of receipt of the request. The question here, as in the cases referred to above, is what is meant by "as soon as possible". In that regard, the Commissioner must consider new arguments, advanced by S&TCS here and not addressed in these earlier decisions.
33. The Commissioner is not persuaded by S&TCS that the respective terms used in the EIRs and FOIA/FOISA require a significantly different interpretation. In both sets of legislation, clearly, the stipulated period of 20 working days is a "long stop" – in both cases, the legislators expect requests to be responded to more quickly, where possible. In each case, too, the Commissioner would interpret the underlying purpose of the phrasing used as being the same – to prevent unnecessary delay in responding.
34. The Commissioner acknowledges that it may be relevant, when considering the appropriate time for responding to a request for environmental information, to take account of factors additional to those identified by the Upper Tribunal in the *John* decision. In particular, she acknowledges the importance (highlighted by S&TCS) of ensuring – wherever possible – that public participation in environmental decision-making processes is not inhibited by delay in the provision of environmental information by public authorities. What is relevant in any individual case will, of course, depend on the circumstances of that case.
35. On the other hand, having read the whole of the section of the Aarhus Implementation Guide on "Timing for providing information" (pages 82 and 83 – quoted in part by S&TCS in relation to delay and the consequences for participation in decision-making), the Commissioner is satisfied that the drafters of the Convention did not intend an absolute obligation to prevent all delay, regardless of the consequences for the effective administration of the authority. This section appears to recognise that responding to information requests will go on within the organisational realities experienced by any public authority, including the need to balance responding with the competing priorities of other core functions of the authority. Broadly, that is a similar position to that reached by the Upper Tribunal in the *John* case, subject to consideration of any factors peculiar to the environmental information regime which happen to be relevant in any given case.
36. In this case, as in the *RATS* decision, the Commissioner has taken account of the factors identified by the Upper Tribunal in the *John* decision. In *RATS*, the Commissioner focused on the Upper Tribunal's first factor – the available resources. In that case, the Ministers' submissions to the Commissioner focused on that factor. Here, the Ministers also commented on the second factor, pointing out that it was required to find and review all the requested information before it could apply an exception to it, whether in a blanket fashion or otherwise.

37. The Commissioner agrees with this last point made by the Ministers. She expects authorities to identify, locate and consider any information falling within the scope of a request before determining whether or not any of it is exempted. An authority would be failing in its duties under the EIRs if it applied an exception without first going through these basic tasks inherent in responding to any information request. The Commissioner cannot, therefore, accept S&TCS's assertion that it is inherently more straightforward, and less time consuming, to withhold information (whether in whole or in part) than to provide it – if done properly, it can be the opposite.
38. As in *RATS*, the Commissioner must note that she would regard responding to information requests, whether under FOISA or the EIRs, as a core function of any Scottish public authority. It needs to be balanced against the demands of other core functions. These may be many and diverse, and authorities need to prioritise resources to meet a range of deadlines and statutory requirements. The duty to respond as soon as possible needs to be read in this context. As will be apparent from the last paragraph, it also needs to be read in a context in which the authority aims to “get the request right” (preferably first time, even if there is an opportunity to revisit its handling of the request on review) – there is no point in a quick response which is the result of incomplete searches or inadequate consideration of the information found in these searches.
39. Reflecting the Aarhus Implementation Guide, the Commissioner also recognises as important the need to ensure, wherever possible, that delays in responding to environmental information requests do not impact negatively on the public's involvement in environmental decision-making, another of the three pillars of the Aarhus Convention. This is a relevant factor to take into consideration: the Commissioner expects Scottish public authorities to take it seriously, but it will not necessarily outweigh the other factors considered above. In this case, it is not entirely clear from S&TCS's submissions why the absence of the withheld information would have such a detrimental effect on its ability to participate in the consultation exercise in question, or how any avoidable delay in responding to the initial information request (as opposed to the necessary demands of responding to the request and requirement for review as a whole) would have contributed so significantly to the situation identified by S&TCS.
40. In this case, having considered the relevant submissions of the Ministers and S&TCS fully, the Commissioner is satisfied that, up to the point of preparing a response for issue, the Ministers took all reasonable steps to respond to S&TCS's request as soon as possible. At that point, however, as the Ministers have acknowledged, it would have been normal practice for the Ministers to send the response by email – the means by which the original request was sent. This could have been done, resulting in a quicker response, and the Ministers are unable to explain why it was not. The Ministers have made the point that S&TCS did not ask them to explain their decision to post the response (rather than emailing it) when seeking a review, but that decision (or oversight) remains a factor which contributed to the response being issued less quickly than it might have been. The response could, by adhering to established practice, have been responded to more quickly than it was and, in those circumstances, the Commissioner is unable to conclude that the Ministers responded to the request as soon as possible. As indicated above, it is not enough simply to meet the 20 working day timescale and assume that will do.
41. The Commissioner therefore finds that the Ministers failed to respond to S&TCS's request for information in accordance with regulation 13(a) of the EIRs. As a matter of good practice, she would ask the Ministers to reflect on what appears to be the established practice for

responding to emailed requests, codify it where necessary and take steps to ensure that it is adhered to across the authority.

Decision

The Commissioner finds that the Scottish Ministers (the Ministers), in failing to respond to Salmon & Trout Conservation Scotland's (S&TCS's) information request as soon as possible, failed to comply with regulation 13(a) of the Environmental Information (Scotland) Regulations 2004. While she has identified points of good practice she would ask the Ministers to address, the Commissioner does not (given the Ministers' overall handling of the request and requirement for review) require the Ministers to take any action in respect of this failure, in response to S&TCS's application.

Appeal

Should either Salmon & Trout Conservation Scotland or the Ministers wish to appeal against this decision, they have the right to appeal to the Court of Session on a point of law only. Any such appeal must be made within 42 days after the date of intimation of this decision.

Margaret Keyse
Head of Enforcement

17 March 2017

The 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;

...

(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;

...

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–

(a) be given in writing as soon as possible and in any event no later than 20 working days after the date of receipt of the request for the information;

...

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