

Decision Notice

Decision 043/2018: Salmon and Trout Conservation Scotland and the Scottish Environment Protection Agency

Information relating to the use of sea lice medicine

Reference No: 201701369

Decision Date: 26 March 2018



Scottish Information
Commissioner

Summary

SEPA was asked for information relating to an article on sustainable fish farming.

The Commissioner found that SEPA failed to provide S&TCS with adequate advice and assistance. He did not require SEPA to take any action.

Relevant statutory provisions

The Environmental Information (Scotland) Regulations 2004 (the EIRs) regulations 5(1) (Duty to make available environmental information on request); 9(1) and (3) (Duty to provide advice and assistance)

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. 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. On 23 March 2017, S&TCS made a request for information to the Scottish Environment Protection Agency (SEPA). The request concerned a draft SEPA article on sustainable fish farming. Within the draft article, reference was made to consideration regarding the permitted use of a specified sea louse treatment. S&TCS requested the information upon which SEPA's consideration, and proposed changes, had been based.
3. S&TCS also requested other information which is not the subject of this decision.
4. On 24 April 2017, SEPA wrote to S&TCS apologising for its failure to respond to S&TCS's request timeously. SEPA stated that it was finalising its response, which would be issued once it had considered all matters.
5. SEPA responded on 28 April 2017. It disclosed a section from a report to its Agency Management Team (AMT) in February 2016. This comprised the recommendations contained within the report. SEPA informed S&TCS that other information in the report, which did not fall within the scope of S&TCS's request, had been redacted.
6. On 12 May 2017, S&TCS wrote to SEPA requesting a review of its decision. S&TCS informed SEPA that, in response to a separate information request, SEPA had disclosed to S&TCS the entire unredacted AMT report of February 2016. Having considered this report in its entirety, S&TCS was of the view that all of it fell within the scope of S&TCS's request of 23 March 2017. In S&TCS's view, SEPA had not been entitled to conclude that the majority of the report fell outwith the scope of its request.
7. SEPA notified S&TCS of the outcome of its review on 9 June 2017. SEPA stated that it had concluded when handling the request originally that the information sought by S&TCS was contained within the section of the AMT report disclosed on 28 April 2017. SEPA stated also that, in response to the later request for the full, unredacted copy of the AMT report, it had determined that the full content of the document could be disclosed.

8. On 7 August 2017, S&TCS wrote to the Commissioner. It applied to the Commissioner for a decision in terms of section 47(1) of the Freedom of Information (Scotland) Act 2002 (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 SEPA's review because it did not believe SEPA had explained why it initially deemed the majority of the AMT report to be outwith the scope of the request. S&TCS suggested also that SEPA ought to have considered proactively disseminating the AMT report under the duty in regulation 4 of the EIRs.

Investigation

9. 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 its response to that request before applying to him for a decision.
10. On 15 August 2017, SEPA was notified in writing that S&TCS had made a valid application. The case was allocated to an investigating officer.
11. Section 49(3)(a) of FOISA requires the Commissioner to give public authorities an opportunity to provide comments on an application. SEPA was invited to comment on this application and answer specific questions, focussing on the points raised by S&TCS in its application.
12. SEPA responded on 3 November 2017.

Commissioner's analysis and findings

13. In coming to a decision on this matter, the Commissioner considered all of the relevant submissions, or parts of submissions, made to him by both S&TCS and SEPA. He is satisfied that no matter of relevance has been overlooked.

Whether SEPA provided adequate reasoning in its review response

14. In its application to the Commissioner, S&TCS expressed dissatisfaction with SEPA's failure to explain adequately the manner in which it had initially handled S&TCS's request.
15. As noted above, SEPA initially disclosed only the recommendations contained in an internal AMT report. The full document was later disclosed to S&TCS in response to a separate information request.
16. S&TCS submitted that, in its review response, SEPA had failed to explain why it had initially considered only a limited part of the report to fall within the scope of the request. In S&TCS's view, the entire document clearly fell within the scope of the request and ought to have been disclosed in response to the request. In S&TCS's view, the content of the AMT document had been redacted in order to avoid embarrassment to SEPA at a time when there was considerable media interest in the subject matter of the AMT report.
17. In its submissions to the Commissioner, SEPA accepted that its review response was less detailed than some earlier formal review responses issued to S&TCS. SEPA stated that this was, in part, due to the fact that the full AMT paper had been disclosed in full before it received the formal review request in this case. SEPA stated that the brevity of the formal

review response in this case was not an indicator of the importance it accorded to the points raised by S&TCS.

18. SEPA stated that it had looked again at the full content of the AMT paper in relation to the wording of S&TCS's original request. With hindsight, it accepted that the request was possibly interpreted too narrowly and that the full paper could have been disclosed in response.
19. In the Commissioner's view, it would have been reasonable for SEPA to address this matter under the duty to provide advice and assistance under regulation 9(1) of the EIRs. This provides that a Scottish public authority shall provide advice and assistance, so far as it would be reasonable to expect it to do so, to applicants and prospective applicants. Regulation 9(3) states that a Scottish public authority shall be taken to have complied with this duty if it conforms to the guidance contained in the Scottish Ministers' Code of Practice on the Discharge of Functions by Scottish Public Authorities under the Freedom of Information (Scotland) Act 2002 and the EIRs¹ (the Section 60 Code of Practice).
20. This matter under consideration in this case is not addressed expressly in the Section 60 Code of Practice or in the EIRs themselves. However, in the Commissioner's view, it would still have been reasonable to expect SEPA to have addressed this matter under the duty to provide advice and assistance.
21. Paragraph 5.1.1 of the Section 60 Code of Practice (at page 19) states that authorities have a duty to provide advice and assistance *at all stages* of a request. It goes on to state that this can be provided while the authority is handling the request, or after it has responded.
22. In the Commissioner's view, it would have been good practice to provide S&TCS with a proper explanation for the manner in which it handled the request, including the reason(s) for concluding that only a small part of the AMT report fell within the scope of the initial request. It is important that, wherever possible, the applicant understands why the public authority has handled a request in a particular way. By failing to provide any adequate explanation, the Commissioner finds that SEPA failed to comply with regulation 9(1) of the EIRs. The Commissioner would suggest that SEPA reflect on this point, with a view to avoiding its recurrence: he notes from the review response in this case that it intends in future to record reasons where parts of a document are to be withheld as out of scope.

Regulation 4 of the EIRs

23. Regulation 4(1) of the EIRs provides that Scottish public authorities shall take reasonable steps to organise and keep up to date the environmental information, relevant to its functions, which it holds, with a view to the active and systematic dissemination of that information to the public.
24. In its application to the Commissioner, S&TCS argued that SEPA ought to have considered proactively publishing the AMT paper in 2016, in compliance with regulation 4 of the EIRs.
25. The Commissioner notes that S&TCS did not raise this point in its review request to S&TCS on 12 May 2017. Even if S&TCS had raised this point in its review request, compliance with regulation 4 is not a matter which the Commissioner has the power to consider when determining whether a public authority has made environmental information available in response to a request made under regulation 5(1) of the EIRs.

¹ <http://www.gov.scot/Resource/0051/00510851.pdf>

Decision

The Commissioner finds that the Scottish Environment Protection Agency (SEPA) failed to comply with the Environmental Information (Scotland) Regulations 2004 (the EIRs) in responding to the information request made by Salmon and Trout Conservation Scotland (S&TCS).

The Commissioner finds that SEPA failed to provide adequate advice and assistance to S&TCS in its review outcome, under regulation 9 of the EIRs.

The Commissioner does not require SEPA to take any action in respect of this failure, in response to S&TCS's application.

Appeal

Should either Salmon and Trout Conservation Scotland or the Scottish Environment Protection Agency 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

26 March 2018

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.

...

9 Duty to provide advice and assistance

- (1) A Scottish public authority shall provide advice and assistance, so far as it would be reasonable to expect the authority to do so, to applicants and prospective applicants.

...

- (3) To the extent that a Scottish public authority conforms to a code of practice under regulation 18 in relation to the provision of advice and assistance in a particular case, it shall be taken to have complied with the duty imposed by paragraph (1) in relation to that case.

...

Scottish Information Commissioner

Kinburn Castle
Doubledykes Road
St Andrews, Fife
KY16 9DS

t 01334 464610

f 01334 464611

enquiries@itspublicknowledge.info

www.itspublicknowledge.info