

Decision Notice 064/2021

Suspension of navigation rights – failure to respond

Applicant: The Applicant

Public authority: Scottish Environment Protection Agency

Case Ref: 202100164



Scottish Information
Commissioner

Summary

The Applicant asked the Scottish Environment Protection Agency (SEPA) for information about Kilbrannan Fish Farm and the discharging of hazardous chemicals into the sea. The Applicant wanted to know how the operator may legally suspend the right of navigation in tidal waters (relating to the safety of swimmers and other waterborn activities in and around Cour Bay) if an exclusion zone is imposed.

This decision finds that SEPA failed to respond to the request within the timescale allowed by the Environmental Information (Scotland) Regulations 2004 (the EIRs). The decision also finds that SEPA failed to comply with the Applicant's requirement for review within the timescale set down by the EIRs.

The Commissioner has ordered SEPA to comply with the requirement for review.

Background

1. The Applicant made a four part information request to SEPA on 25 October 2020.
2. On 14 December 2020, the Applicant asked for a review on the basis SEPA failed to respond to the information request.
3. SEPA responded to requests one and three of the information request on 17 December 2020.
4. On 21 December 2020, the Applicant wrote to SEPA requiring a review on the basis that it did not respond to requests two and four.
5. The Applicant did not receive a response to its representations for review.
6. The Applicant wrote to the Commissioner on 8 February 2021, stating that it was dissatisfied with SEPA's failure to respond and applying to the Commissioner for a decision in terms of section 47(1) 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.
7. The application was accepted as valid. The Commissioner confirmed the Applicant made a valid information request to a Scottish public authority and asked the authority to review its response to that request before applying to him for a decision.
8. The Commissioner received submissions from SEPA on 11 March 2021. These submissions are considered below.

Commissioner's analysis and findings

9. It is apparent from the terms of this request that the information caught by it will be environmental information as defined by regulation 2(1) of the EIRs. The Commissioner accepts that the request should be considered in terms of the EIRs.
10. Regulation 5(1) of the EIRs requires a Scottish public authority which holds environmental information to make it available when requested to do so by any applicant, although this duty is subject to certain qualifications. "Information" is defined in regulation 2(1) of the EIRs as "information in written, visual, aural, electronic or other material form". Information therefore

has to be in a recorded format and must be held by the public authority when the request is received for the authority to be under a duty to make it available.

11. However, it is not always straightforward to determine, particularly when requests are posed as questions, whether the question is a request for environmental information (which is subject to the EIRs) or a request for advice or opinion (which is not subject to the EIRs).
12. In this case, SEPA interpreted requests two and four as requests for advice and opinion, rather than requests for information.
13. The Commissioner accepts that request two was a request for an opinion and not a request for recorded information. It reads as follows:

If there is no guidance on swimming in the immediate vicinity of a salmon cage or well-boat releasing azamethiphos, deltamethrin, cypermethrin, hydrogen peroxide or sodium hypochlorite, would you agree that it is presumed to be unsafe and should not take place?
14. Here, the Applicant has put a hypothetical situation to SEPA and has asked SEPA whether it agrees with its view. The Commissioner considers, on balance, that this is a request for an opinion rather than a request for environmental information.
15. However, the Commissioner is satisfied that request four is a request for environmental information in terms of regulation 5(1) of the EIRs. The request reads as follows:

It seems likely that the operator will endanger public safety when they discharge hazardous chemicals into the sea, unless they impose an exclusion zone, so please explain how they may legally suspend the public right of navigation in tidal waters to exclude other users from the area?
16. Although asking for an explanation, the request can be read without this term and can be reasonably interpreted as a request for recorded information (in the form of published guidance or legislation, for example) on how the operator may legally suspend the right of navigation.
17. Furthermore, the Commissioner is satisfied that the intention that this be treated as a request for information was clear from the Applicant's representations for review, which specifically referenced SEPA's responsibilities under regulation 15(1) of the Water Environment (Controlled Activities) (Scotland) Regulations 2011. Regulation 15 could reasonably have led the Applicant to believe that there may be information held.
18. Unlike section 8(1)(c) of FOISA, the EIRs do not specifically require that a request describes the information in order for the request to be valid – although an authority can refuse to make environmental information available if the request is formulated in too general a manner. The Commissioner is satisfied that this not the case here: the information requested is easily identifiable from the request.
19. The Commissioner is therefore satisfied, on balance, that request four is a request for environmental information under the EIRs.
20. Regulation 5(2) gives Scottish public authorities a maximum of 20 working days following the date of receipt of the request to comply with a request for information.
21. It is a matter of fact that SEPA did not provide a response to request four of the Applicant's request for information within 20 working days, so the Commissioner finds that it failed to comply with regulation 5(2)(a) of the EIRs.
22. Regulation 16(4) gives Scottish public authorities a maximum of 20 working days following the date of receipt of the representations to comply with a requirement for review.

23. It is a matter of fact that SEPA did not provide a response to the Applicant's representations for review within 20 working days, so the Commissioner finds that it failed to comply with regulation 16(4) of the EIRs.
24. The remainder of regulation 16 sets out the requirements to be followed by a Scottish public authority in carrying out a review. As no review has been carried out in this case, the Commissioner finds that SEPA failed to discharge these requirements: he now requires a review, with respect to request four, to be carried out in accordance with regulation 16.
25. The Commissioner recommends that the SEPA considers whether it would be appropriate to apologise to the Applicant for its failure to comply.

Decision

The Commissioner finds that the Scottish Environment Protection Agency (SEPA) failed to comply with the Environmental Information (Scotland) Regulations (the EIRs) in dealing with the information request made by the Applicant. In particular, SEPA failed to identify and respond to request four of the Applicant's request for information and representations for review within the timescales laid down by regulations 5(2) and 16(4) of the EIRs.

The Commissioner requires SEPA to respond to the representations for review with respect to request four, by **Thursday 17 June 2021**.

Appeal

Should either the Applicant or SEPA 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.

Enforcement

If SEPA fails to comply with this decision, the Commissioner has the right to certify to the Court of Session that SEPA has failed to comply. The Court has the right to inquire into the matter and may deal with SEPA as if it had committed a contempt of court.

Claire Stephen
Deputy Head of Enforcement

3 May 2021

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