

Decision Notice 176/2021

Applications for licences to disturb or injure marine European protected species

Applicant: The Applicant

Public authority: Scottish Ministers

Case Ref: 202100301



Scottish Information
Commissioner

Summary

The Ministers were asked for information about applications from aquaculture operators, received by Marine Scotland Licensing Operations Team, for licences to disturb or injure marine European protected species.

Except for some information which was already publicly available, the Ministers withheld the requested information on the basis that it was material still in the course of completion, and so was exempted from disclosure under regulation 10(4)(d) of the EIRs.

The Commissioner investigated and found that the Ministers were not entitled to withhold the information.

Relevant statutory provisions

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) and (6) (General entitlement); 2(1)(b) (Effect of exemptions); 39(2) (Health, safety and the environment)

The Environmental Information (Scotland) Regulations 2004 (the EIRs) regulations 2(1) (paragraphs (a), (b) and (c) of definition of “environmental information”) (Interpretation); 5(1) and (2)(b) (Duty to make available environmental information on request); 10(1), (2) and (4)(d) (Exceptions from duty to make environmental information available); 13(d) (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 17 January 2021, the Applicant made a request for information to the Scottish Ministers (the Ministers). The information requested was as follows:

The guidance document “Information Note and Frequently Asked Questions for the Operators of Finfish Farms on the use of Acoustic Deterrent Devices [ADDs] and the Requirement for a European Protected Species [EPS] Licence”¹ requires the operators of marine fish farms to apply for EPS licences if they wish to use ADDs to deter seals.

Please assist me by identifying and supplying electronic copies of all the EPS licence applications received by MS-LOT [Marine Scotland Licensing Operations Team] from aquaculture operators, for licences to disturb or injure marine European protected species.

2. The Ministers responded under the EIRs on 9 February 2021, having applied section 39(2) of FOISA. For some of the information requested (namely three applications they had previously disclosed to the Applicant, in response to an earlier information request), the Ministers informed the Applicant that regulation 6(1)(b) (Form and format of information) of the EIRs applied to this information as it was already available to him, having been published on the Scottish Government website². The Ministers highlighted that, in response to that

¹ <http://marine.gov.scot/data/use-acoustic-deterrent-devices-add-and-requirement-european-protected-species-licence-eps>

² [Licence applications for the use of Aquatic Deterrent Devices on marine fish farms: EIR release - gov.scot \(www.gov.scot\)](http://www.gov.scot)

earlier request, they had made clear that (at that stage) the applications received were incomplete and further information was required from applicants prior to processing by Marine Scotland, and that this remained the case. The Ministers also stated that it had become clear, as a result of the request under consideration here, that the published applications should not have been disclosed, as they were in the course of completion and were not finished documents.

3. The Ministers withheld the remaining applications they held under regulation 10(4)(d) of the EIRs, on the basis that they comprised material still in the course of completion. The Ministers considered the public interest in disclosure, as part of open, transparent and accountable government, was outweighed by ensuring unfinished or incomplete information, which was still being worked on or was under active consideration, was not disclosed, as this might misinform the public or give a misleading impression of the Scottish Government's view or position on the matter to which it related.
4. On 9 February 2021, the Applicant wrote to the Ministers, requesting a review of their decision to withhold the licence applications received. He argued that all applications for EPS licences were usually displayed on MS-LOT's website and asked why these fish farm applications were being treated differently, given that the public interest test was satisfied by publishing other applications.
5. The Applicant referred to the Marine Scotland document cited in his original request which states:

The cumulative impact assessment and updated application forms must be submitted to MS-LOT by 15th January 2021. We recognise that the dates above are challenging for both government and industry but these deadlines need to be met in order to conclude the licensing process by 1st March 2021 and enable the Government to comply fully with its statutory duty to report to Parliament.

As his information request had been sent after 15 January 2021, and the cumulative impact assessment was the last stage of the application process (as described in the FAQ document), he asked in what sense the applications received by the Ministers before their own deadline could be incomplete.

6. Later that same date, the Applicant again emailed the Ministers, asking when the incomplete information would be finished or completed by, as required by regulation 13(d) of the EIRs.
7. The Ministers notified the Applicant of the outcome of their review on 5 March 2021, upholding their original decision in full. The Ministers explained the applications were not regarded as being complete until they had undergone the policy review process and the applicant had had the opportunity to redraft the application, if necessary.
8. On 5 March 2021, the Applicant wrote to the Commissioner, applying 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. The Applicant stated he was dissatisfied with the outcome of the Ministers' review because he disagreed with their decision to withhold the information under regulation 10(4)(d) of the EIRs, and he believed the public interest favoured disclosure of the information.

Investigation

9. The application was accepted as valid. The Commissioner confirmed that the Applicant had made a request for information to a Scottish public authority and had asked the authority to review its response to that request before applying to him for a decision.
10. On 11 March 2021, the Ministers were notified in writing that the Applicant had made a valid application and were asked to send the Commissioner the information withheld from the Applicant.
11. On 9 April 2021, the Ministers informed the Commissioner that, following further consideration of the information requested, all of the information previously withheld under regulation 10(4)(d) had now been disclosed to the Applicant, with a limited amount of personal data redacted under regulation 11(2) (Personal data) of the EIRs. The information was disclosed to the Applicant (with personal data redacted) that day, with a link being provided again to the information disclosed previously.
12. Later that day, the Applicant confirmed he wished to continue with his application for a decision by the Commissioner, in order to understand why the Ministers did not disclose the information earlier. In his view, their reason for doing so at that time (i.e. that sufficient time had passed) seemed much less relevant than the licence applications being complete, in his view, when he asked for them. The Applicant raised no dissatisfaction with the Ministers' decision to redact some personal data under regulation 11(2) of the EIRs.
13. The Ministers provided the Commissioner with copies of the withheld information on 19-20 April 2021 and the case was allocated to an investigating officer.
14. 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 to answer specific questions. These focused on the Ministers' justification for withholding information under the exception in regulation 10(4)(d) of the EIRs.
15. The Ministers provided submissions to the Commissioner.
16. The Applicant was also asked for any further comment on the public interest in disclosing the information requested, but provided no further submissions.

Commissioner's analysis and findings

17. In coming to a decision on this matter, the Commissioner has considered all of the withheld information and the relevant submissions, or parts of submissions, made to him by both the Applicant and the Ministers. He is satisfied that no matter of relevance has been overlooked.

Handling in terms of the EIRs

18. The Ministers considered the Applicant's request under the EIRs, having concluded that the information requested was environmental information as defined in regulation 2(1) of the EIRs.
19. Where information falls within the scope of this definition, a person has a right to access it (and the public authority has a corresponding obligation to respond) under the EIRs, subject to the various restrictions and exceptions contained in the EIRs.

20. The Ministers submitted that the information requested by the Applicant would fall within the definition of environmental information as it related to marine areas, biological diversity and noise. As such, they were satisfied that it would fall to be considered in terms of the EIRs.
21. The Commissioner accepts this as a reasonable description and, in the circumstances, is satisfied that the information requested by the Applicant falls within the definition of environmental information set out in regulation 2(1), in particular paragraphs (a), (b) and (c) of that definition.

Section 39(2) of FOISA – Environmental information

22. The exemption in section 39(2) of FOISA provides, in effect, that environmental information (as defined by regulation 2(1) of the EIRs) is exempt from disclosure under FOISA, thereby allowing any such information to be considered solely in terms of the EIRs. In this case, the Commissioner accepts that the Ministers were entitled to apply this exemption to the information withheld under FOISA, given his conclusion that it is properly classified as environmental information.
23. As there is a statutory right of access to environmental information available to the Applicant in this case, the Commissioner accepts, in all the circumstances, that the public interest in maintaining this exemption (and responding to the request under the EIRs) outweighs any public interest in disclosing the information under FOISA. Both regimes are intended to promote public access to information and there would appear to be no reason why (in this particular case) disclosure of the information should be more likely under FOISA than under the EIRs.
24. The Commissioner therefore concludes that the Ministers were correct to apply section 39(2) of FOISA and consider the Applicant's information request under the EIRs.

Regulation 5(1) and (2)(b) of the EIRs – Duty to make available environmental information on request

25. 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. This obligation relates to information that is held by the authority when it receives a request.
26. On receipt of a request for environmental information, therefore, the authority must ascertain what information it holds falling within the scope of the request. Having done so, regulation 5(1) requires the authority to provide that information to the requester, unless a qualification in regulations 6 to 12 applies (regulation 5(2)(b)).
27. Under the EIRs, a public authority may refuse to make environmental information available if one or more of the exceptions in regulation 10 applies.

Regulation 10(4)(d) of the EIRs – Material still in the course of completion, unfinished documents or incomplete data

28. The Ministers withheld information under this exception in response to the Applicant's request and requirement for review. The Applicant disagreed with the application of this exception.

29. Regulation 10(4)(d) of the EIRs provides an exception from the duty to make environmental information available, where the request relates to material which is still in the course of completion, to unfinished documents or to incomplete data. Where a Scottish public authority refuses to make information available on this basis, it must state the time by which the information will be finished or completed (regulation 13(d)).
30. The *Aarhus Convention: An Implementation Guide*³ provides guidance (at page 85) as to the type of material this exception is intended to cover. It describes the expression "in the course of completion" as relating to the process of preparation of the information or document and not to any decision-making process for the purpose of which the information or document has been prepared. It states that the mere status of something as a draft alone does not automatically bring it within the exception. It also states that the words "in the course of completion" suggest that the term refers to individual documents that are actively being worked on by the public authority, and which will have more work done on them within some reasonable timeframe. Once those documents are no longer "in the course of completion" they may be released, even if they are still unfinished and even if the decision to which they pertain has not yet been resolved.

The Applicant's submissions

31. In his application to the Commissioner, the Applicant stated that the Scottish salmon industry had submitted EPS licence applications, as requested by Marine Scotland, but then withdrew them all at the same time during February 2021.
32. The Applicant argued that his information request was submitted after the closing date published by Marine Scotland for the receipt of completed EPS licence applications, so the applications submitted could not have been incomplete. Also, he had asked for the licence applications Marine Scotland had received, and not modified applications which might or might not be resubmitted, and so did not consider this to be a reasonable basis for non-disclosure.
33. The Applicant stated that applications for all other EPS licences were published on MS-LOT's webpage⁴. Noting that the webpage stated "*The table below lists all marine licence and Section 36 consent applications processed by Marine Scotland*", he argued this was incorrect as EPS licence applications to use acoustic deterrent devices (ADDs) on fish farms received the exceptional treatment of being considered in secrecy.
34. The Applicant submitted that the use of ADDs without an EPS licence would break Scots law which, in his view, prevents the disturbance of any cetacean: these (most often porpoises) are, he submitted, present in all areas where fish farms operate. To be eligible for an EPS licence, the Applicant explained, a fish farm must show that there is no viable alternative to using ADDs. In this regard, he believed there was a strong public interest in disclosure of the information requested.

The Ministers' submissions

35. In their submissions to the Commissioner, the Ministers explained that the EPS licence applications were received as part of a new two-stage licence application process, where initial applications included information on the first two tests under the EPS licensing process (licensable purpose and satisfactory alternatives), in addition to technical information on the

³ [The Aarhus Convention: An Implementation Guide \(second edition\) | UNECE](#)

⁴ [All applications | Marine Scotland Information](#)

use of ADDs at individual sites (e.g. source level, frequency, duty cycle). At this stage, the applications were being worked on and the information was being reviewed by MS-LOT to determine whether applicants had provided appropriate information. The technical information on the devices was also being consolidated into a spreadsheet for use in the cumulative assessment (stage 2), but none of the applications proceeded to the second stage as they were withdrawn before this information was submitted.

36. At the date of receipt of the Applicant's request, the Ministers explained, all applications held by MS-LOT were only in the preliminary stages of completion, with an expectation, at that time, that more work would be done on them by the applicants within a reasonable timeframe. The Ministers therefore considered these to be at a draft stage, and still in the course of completion.
37. The Ministers submitted that, during the Commissioner's investigation, in an effort to be helpful, they disclosed the applications originally withheld under regulation 10(4)(d), given that all of the applications had subsequently been withdrawn and were no longer considered to be in the course of completion. While the Applicant appeared to believe the disclosure was due to sufficient time passing, it was actually due to the withdrawal of the incomplete applications, which signified a material change in their status. They were no longer considered to be in the course of completion and so regulation 10(4)(d) no longer applied. The Ministers apologised for not making this clear to the Applicant.
38. The Ministers maintained that the exception in regulation 10(4)(d) applied at both initial response and review stages. On receipt of the Applicant's request, all of the applications received were current and in progress, and Marine Scotland expected more work would be undertaken on each application within a reasonable timeframe. As such, the Ministers considered they were still in the course of completion at that stage.
39. The Ministers argued that the applications were still being worked on up until they were withdrawn on various dates in February 2021. While the applications withheld under regulation 10(4)(d) had been withdrawn by the date of the Ministers' response to the original request (issued 9 February 2021), their response was based on the position as at the date of receipt of the request (17 January 2021).
40. The Ministers explained that, when the initial applications were received, Marine Scotland reviewed them and emailed comments back to the applicants, seeking further information or clarification (which differed for each application) to allow the applications to be processed. On receipt of this further information/clarification, Marine Scotland would have then determined whether there was adequate information to process the application to determination, and it was at this stage the application would have been deemed complete.

The Commissioner's conclusions

41. The Commissioner considers that the Ministers were incorrect in their application of the exception in regulation 10(4)(d). Although he accepts that the application process may have been subject to further development, and may therefore not have been finalised at the date by which the initial applications were to have been submitted, the applications (as individual documents) were complete in themselves at that stage, and were not (at the time the Ministers dealt with the Applicant's request and requirement for review) actively being worked on.

42. With regard to the Ministers' change of position following the withdrawal of the applications, the Commissioner notes that the applications in question had been withdrawn by the time the Ministers issued their initial response, yet the Ministers still withheld them, at that time, under regulation 10(4)(d) of the EIRs. The Commissioner would comment that the Ministers (and indeed all Scottish public authorities) must consider the information held at the time of receipt of the request, and the relevant circumstances (for the purposes of any exception) at the time of response (or review outcome, where applicable). Had the Ministers done so in this case, this may have avoided an application being made to the Commissioner, and avoided unnecessary work for both the Commissioner's staff and the Ministers. In any case, the Commissioner considers the information (i.e. the individual applications) would appear to have been completed at the time the Applicant submitted his request, regardless of whether the applications were subsequently withdrawn or not.
43. For these reasons, the Commissioner does not accept that the exception in regulation 10(4)(d) has been engaged in this case.
44. As the Commissioner has found that the exception contained in regulation 10(4)(d) does not apply, he is not required to consider the public interest in regulation 10(1)(b) of the EIRs.
45. As noted above, since submitting his application to the Commissioner, the Ministers have made available to the Applicant all of the information withheld under regulation 10(4)(d) in this case (with the exception of some personal data which the Ministers withheld under regulation 11(2) (Personal data) of the EIRs). In light of this, the Commissioner does not require the Ministers to take any further action in this regard.

Regulation 13(d) of the EIRs – Refusal to make information available

46. Regulation 13 of the EIRs provides (subject to regulations 10(8) and 11(6)) that if a request to make environmental information available is refused by a Scottish public authority in accordance with regulation 10, the refusal shall, if the exception in regulation 10(4)(d) is relied on, state the time by which the authority considers the information will be finished or completed (regulation 13(d)).
47. In their submissions to the Commissioner, the Ministers stated that, when they responded to the Applicant's initial request (9 February 2021), Marine Scotland did not know the exact date when applications would be completed by fish farm operators, as no revised deadline had been set. Therefore, they were unable to provide a completion date and so advised the Applicant *"Marine Scotland await the submission of completed EPS applications. We do not know at this stage when the applications will be completed and submitted."*
48. At review stage, the Ministers explained, the Applicant's later email (querying the expected completion date) was saved separately in their records. Due to an administrative error, the reviewer only had sight of the earlier email requesting a review, and so did not respond specifically to the later email querying the expected date of completion. The Ministers accepted that both their initial and review responses should have stated the time by which Marine Scotland considered the information would be finished or completed, and apologised for this omission.
49. Given that the Ministers did not notify the Applicant, in either their initial response or their review outcome, of the expected date by which the information would be completed or finished, the Commissioner finds that the Ministers failed to comply with the requirements of regulation 13(d) of the EIRs.

Decision

The Commissioner finds that the Scottish Ministers (the Ministers) failed to comply with the Environmental Information (Scotland) Regulations 2004 (the EIRs) in responding to the information request made by the Applicant.

He finds that the Ministers were not entitled to withhold the information requested under regulation 10(4)(d) of the EIRs and that, in doing so, they breached regulation 5(1) of the EIRs. He also finds that the Ministers failed to comply with the requirements of regulation 13(d) of the EIRs, by failing to notify the Applicant of the expected date by which the information requested would be completed or finished.

Given that, at the start of the investigation, the Ministers disclosed to the Applicant all of the information they were originally withholding under regulation 10(4)(d) (with some personal data redacted under regulation 11(2)), the Commissioner does not require the Ministers to take any further action in respect of these failures in response to the Applicant's application.

Appeal

Should either the Applicant 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

4 November 2021

Appendix 1: Relevant statutory provisions

Freedom of Information (Scotland) Act 2002

1 General entitlement

- (1) A person who requests information from a Scottish public authority which holds it is entitled to be given it by the authority.

...

- (6) This section is subject to sections 2, 9, 12 and 14.

2 Effect of exemptions

- (1) To information which is exempt information by virtue of any provision of Part 2, section 1 applies only to the extent that –

...

- (b) in all the circumstances of the case, the public interest in disclosing the information is not outweighed by that in maintaining the exemption.

...

39 Health, safety and the environment

...

- (2) Information is exempt information if a Scottish public authority-
- (a) is obliged by regulations under section 62 to make it available to the public in accordance with the regulations; or
 - (b) would be so obliged but for any exemption contained in the regulations.

...

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;

- (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;

...

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.

...

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.

...

- (4) A Scottish public authority may refuse to make environmental information available to the extent that
 - ...
 - (d) the request relates to material which is still in the course of completion, to unfinished documents or to incomplete data; or

...

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-

...

- (d) if the exception in regulation 10(4)(d) is relied on, state the time by which the authority considers that the information will be finished or completed; and

...

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