

Decision Notice

Decision 051/2019: Salmon and Trout Scotland and the Scottish Ministers (Marine Scotland)

Correspondence: Scadabay Fish Health Inspection reports

Reference No: 201801349

Decision Date: 3 April 2019



Scottish Information
Commissioner

Summary

The Ministers were asked for information believed to be held by the Fish Health Inspectorate at Marine Scotland in connection with two 2016 Scadabay inspection reports.

The Commissioner investigated whether all information had been identified at the time of asking and required further searches by the Ministers, after which he was satisfied that there was no further information capable of addressing the request.

Relevant statutory provisions

The Environmental Information (Scotland) Regulations 2004 (the EIRs) regulations 2(1) (definitions (a) and (c) of environmental information) (Interpretation); 5(1) and (2)(b) (Duty to make available environmental information on request)

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 11 May 2018, via their solicitor, Salmon and Trout Conservation Scotland (S&TCS) made a request for information to the Fish Health Inspectorate at Marine Scotland, a Directorate of the Scottish Ministers (the Ministers). S&TCS asked the Ministers for all correspondence, emails and other communications Marine Scotland may have had with any other party concerning two Scadabay [Fish Farm] inspection reports from 2016, which at the time, remained unpublished. It may be helpful to note that those two reports have subsequently been disclosed to S&TCS.
2. References in this decision to S&TCS should be read as including communications by and to their solicitor on their behalf.
3. The Ministers responded on 14 June 2018, under the EIRs. They disclosed some information but withheld some under regulation 11(2), on the grounds that it was personal data disclosure of which would contravene the data protection principles.
4. On 19 June 2018, S&TCS wrote to the Ministers, requesting a review of their decision as they were not satisfied that all relevant information has been identified and disclosed.
5. The Ministers replied on 27 June 2018, explaining what they considered to be the correct process for seeking a review: they asked S&TCS to submit the request again to another person in Marine Scotland.
6. S&TCS applied to the Commissioner on 6 July 2018 on procedural grounds, resulting in the issue of *Decision 120/2018 Salmon and Trout Conservation Scotland and the Scottish Ministers*¹. In this Decision, the Ministers were required to comply with the requirement for review.

¹ <http://www.itspublicknowledge.info/ApplicationsandDecisions/Decisions/2018/201801191.aspx>

7. The Ministers notified S&TCS of the outcome of their review on 7 August 2018, with an apology for not properly identifying and responding to the requirement for review when they should have done. The Ministers confirmed the original response without modification, on the basis that searches conducted by staff were adequate. Having searched again, they also confirmed that they had not identified any more information capable of addressing the request.
8. On 9 August 2018, S&TCS wrote to the Commissioner's Office. S&TCS 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 they were dissatisfied with the outcome of the Ministers' review, referring to other communications they believed to be of potential relevance.

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 11 September 2018, the Ministers were 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. The Ministers were invited to comment on this application and to answer specific questions about the adequacy of their searches. During the investigation, they were asked to comment on points raised by S&TCS.

Commissioner's analysis and findings

12. 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 the Ministers. He is satisfied that no matter of relevance has been overlooked.

Application of the EIRs

13. It is clear from the Ministers' correspondence with both S&TCS and the Commissioner that the information sought by S&TCS is properly considered to be environmental information, as defined in regulation 2(1) of the EIRs. It relates to the escape of living organisms (fish) into the marine environment and action taken in response, and so the Commissioner is satisfied that any information covered by the request would fall within paragraphs (a) or (c) of the definition in regulation 2(1) (the text of each paragraph is reproduced in Appendix 1). S&TCS has not disputed this and the Commissioner will consider the information in what follows solely in terms of the EIRs.
14. 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. While this duty is subject to certain qualifications, none of them appear to be relevant in this case. It is important to bear in mind that this obligation relates to information actually held by an authority when it receives the request, as opposed to information an applicant believes the authority should hold (but which is not in fact held at that time).

Information held by the Ministers

15. In this case, the Ministers submitted that all the information they held, and which was capable of addressing the terms of this request, had been identified and provided to S&TCS.
16. S&TCS contended that this was unlikely to be the case, expressing surprise (given the scale of the escape) that the disclosed information did not appear to include any correspondence with the operator of the farm concerned. They referred to specific correspondence which they believed suggested further information was held.
17. The Commissioner will now consider whether the Ministers identified and located all the relevant information they held.

Searches

18. The Ministers submitted that their searches were adequate at the time of asking. They explained there were two places where the information would be held:
 - (1) "AQUADAT". This is a dedicated case management database, which is a repository for all case reports. Keywords used during searches included the site name "Scadabay", the unique identifier for this site and the two case numbers unique to the site visits;
 - (2) The eDRM system called "Objective". This is the electronic records management system used within the Scottish Government and holds correspondence/letters of note. Search terms included "Scadabay", "Scadabay" and "Escape", "Scadabay" and "Escape" and "Fish Farm" and "Scadabay" and "Fish Farm".
19. In addition to searching these two systems, the Ministers confirmed that relevant staff also searched their email inboxes. These were the individuals responsible for aquaculture and fish health and who, for this reason, would be aware of any information within scope.
20. Following further queries from the investigating officer, the Ministers confirmed that further searches had been conducted using the terms "Scottish Salmon Company" and "TSSC". Screenshots of the results were forwarded to the investigating officer, with an explanation that none of the items identified related to this request. The Commissioner is satisfied that the items listed in the screen shots do not fall within the scope of this request.

Conclusions

21. Having considered all relevant submissions and the terms of S&TCS's request, the Commissioner accepts that – by the end of this investigation – the Ministers had taken adequate and proportionate steps to establish what information falling within the scope of S&TCS's request was held. He is not, however, satisfied that they did so at the time of the request and requirement for review: in this regard, the Commissioner finds that the Ministers' failed to conduct proper searches (and therefore failed to comply fully with regulation 5(1) of the EIRs). The Ministers may wish to give due consideration to this point when contemplating how to construct keyword searches in future.
22. As mentioned above, the Commissioner can only consider whether information is actually held by the Ministers, not what information an applicant believes ought to exist or be held.
23. In all the circumstances, therefore, the Commissioner is satisfied that the Ministers have provided S&CTS with all the information they held and which fell within the terms of this request.

Decision

The Commissioner finds that the Scottish Ministers, by failing to conduct adequate searches at the time of the request and requirement for review, failed to comply fully with regulation 5(1) of the Environmental Information (Scotland) Regulations 2004 in responding to the information request made by Scottish and Trout Conservation Scotland.

Given the actions taken during this investigation, he does not require further steps to be taken on this occasion.

Appeal

Should either S&TCS 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

3 April 2019

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

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(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;

...

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.

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