

Decision Notice 160/2019

Import of Salmon ova

Applicant: The Applicant

Public authority: The Scottish Ministers

Case Ref: 201900504



Scottish Information
Commissioner

Summary

The Ministers were asked about salmon ova imports since 1 January 2017. The Ministers provided the majority of the information to the Applicant, but withheld some information as commercially confidential. The Commissioner investigated and did not accept that the information was commercially confidential. He required the Ministers to disclose the withheld information to the Applicant. He also found that information disclosed during the investigation had been wrongly withheld earlier.

Relevant statutory provisions

The 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) (Interpretation) (paragraphs (a) and (c) of the definition of "environmental information"); 5(1) and (2)(b) (Duty to make environmental information available on request); 10(1), (2), and (5)(e) (Exceptions from duty to make environmental information available 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 4 June 2018, the Applicant made a request for information to the Scottish Ministers (the Ministers). The Applicant requested information on salmon ova imports since 1 January 2017, including details of egg import licence documents, any tests for disease and health certificates.
2. The Applicant also asked for information on “the Norwegian Government’s decision to ban import of salmon eggs from Scotland – including details of meetings with Hendrix Genetics, Landcatch, the Norwegian Government or any other parties ... since 29 March 2018”, and for “any reaction by the Scottish Government – including press briefings, Cabinet Briefings and other email alerts” in relation to May 2018 media coverage on Scottish salmon.
3. The Applicant asked for the data on salmon ova imports to be in Excel format, similar to that supplied in 2017 in response to a similar request.
4. The Ministers responded on 2 July 2018. Processing the request under the EIRs (having applied section 39(2) of FOISA), they supplied some of the information requested but withheld other information under regulations 10(4)(e) (internal communications) and 10(5)(e) (confidentiality of commercial or industrial information) of the EIRs. The Ministers also explained that Marine Scotland’s Fish Health Inspectorate (FHI) does not conduct routine testing on ova introduced or imported: testing is undertaken at the source site by the competent national authority, with FHI being notified of incidences of listed diseases. The Ministers assisted by supplying the Applicant with sample copies of health certificates by the competent authority in the country of origin. The Ministers disclosed an Excel spreadsheet

with details of ova imports, but withheld some information under the above exceptions: some numbers of salmon ova imported and some information on respective operator, site of destination, source country and source company. The Ministers said that disclosure of this information would cause substantial harm to the commercial interests of Scottish Sea Farms Ltd. (SSF) and would give their competitors an advantage by revealing company or industrial commercial strategy for production of salmon in freshwater. They also provided reasons for concluding that the public interest in making the information available was outweighed by that in maintaining each exception.

5. On 27 July 2018, the Applicant wrote to the Ministers, requesting a review of their decision. The Applicant did not accept that the information withheld was commercially confidential, noting that similar information for other commercial organisations had been disclosed by the Ministers. The Applicant submitted that there was no reason to redact the data relating to numbers of salmon ova. The Applicant also questioned the Ministers' withholding of internal communications, under regulation 10(4)(e), submitting that there was a public interest in transparency.
6. The Ministers notified the Applicant of the outcome of their review on 19 September 2018. They upheld their original decision, but with modifications. They disclosed the previously redacted numbers of ova, but continued to withhold the remaining information under regulation 10(5)(e), again stating that disclosure would substantially prejudice the commercial interests of SSF.
7. On 13 March 2019, the Applicant 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. The Applicant was dissatisfied with the outcome of the Ministers' review because it disagreed that disclosure would, or would be likely to, prejudice substantially the confidentiality of commercial information provided by SSF.

Investigation

8. The application was accepted as valid. The Commissioner confirmed that the Applicant 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.
9. On 2 May 2019, the Ministers were notified in writing that the Applicant had made a valid application. The Ministers were asked to send the Commissioner the information withheld from the Applicant. The Ministers provided the information and the case was allocated to an investigating officer.
10. 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.
11. On 17 May 2019, the Ministers wrote again to the Applicant and stated that they were of the view, due to the passage of time, that the Ministerial Briefing previously withheld under regulation 10(4)(e) of the EIRs could now be disclosed. The Ministers supplied a copy of this document to the Applicant, subject to a small amount of information being withheld as personal data under regulation 11(2). The Ministers also explained that some information redacted in their initial response was withheld under regulation 11(2).

12. The Applicant did not challenge the Ministers' decision to withhold personal data from the disclosed information. The Commissioner will not, therefore, consider this further.

Commissioner's analysis and findings

13. In coming to a decision on this matter, the Commissioner considered all the withheld information (that remains withheld) 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.

Application of the EIRs

14. The Ministers responded to the Applicant's request under the EIRs rather than in terms of FOISA. The Applicant did not challenge this in its application to the Commissioner.
15. The Applicant requested details of the import of salmon ova, withholding information as described above.
16. The import of salmon ova is regulated. EU Commission Regulation 1251/2008 provides conditions and certification requirements for the placing on the market and import of aquaculture animals. An importer or consignee (of salmon ova) must notify the Scottish Ministers, i.e. the FHI, in writing, of an intended introduction from the EU or EFTA, at least 24 hours prior to arrival. Commission Regulation 1251/2008 provides the format of the health certificate. Notification can be made using an import notification form. The information provided to the Applicant – and the information withheld – was extracted from the notifications covering the timescale of the request.
17. It is clear from the Ministers' correspondence with the Applicant and with the Commissioner, and from the information itself, that the information sought by the Applicant is properly considered to be environmental information, as defined in regulation 2(1) of the EIRs. The information relates to measures (the regulations and requirements applying to those involved in aquaculture and, in particular, in the import of salmon ova) affecting or likely to affect the state of elements of the environment (in particular coastal and marine areas and biological diversity) referred to in paragraph (a) of the definition of environmental information in regulation 2(1). The Commissioner is satisfied that this information therefore falls within either paragraph (a) or paragraph (c) of the definition of environmental information contained in regulation 2(1) of the EIRs (these definitions are reproduced in the Appendix).
18. Section 39(2) of FOISA provides, in effect, that environmental information is exempt from disclosure under FOISA, thereby allowing any such information to be considered solely in terms of the EIRs. The Ministers referred to this in their initial response of 2 July 2018. The Commissioner accepts that the public interest in maintaining the exemption in section 39(2) of FOISA and dealing with the request in line with the EIRs outweighs the public interest in disclosure under FOISA. Therefore, the Commissioner will consider the information in what follows solely in terms of the EIRs.

Regulation 5(1) of the EIRs

19. Regulation 5(1) of the EIRs (subject to the various qualifications contained in regulations 6 to 12) 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 held by the authority when it receives a request. 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)).

20. Under the EIRs, a public authority may refuse to make environmental information available if one or more of the exceptions in regulation 10 apply and, in all the circumstances of the case, the public interest in maintaining the exception or exceptions outweighs the public interest in making the information available. The Ministers submitted that the information was excepted from disclosure in terms of regulation 10(5)(e) of the EIRs.
21. The Ministers initially withheld a Ministerial Briefing, but disclosed it to the Applicant during the investigation. Only one exception was applied to this information (that in regulation 10(4)(e) of the EIRs) and the Ministers did not uphold the application of this exception when they carried out their review. In the absence of any reasons for not disclosing the Briefing at the time of the review, the Commissioner must find that that the Ministers failed to comply with regulation 5(1) of the EIRs in withholding the information.

Regulation 10(5)(e) - Confidentiality of commercial or industrial information

22. Regulation 10(5)(e) of the EIRs provides that a Scottish public authority may refuse to make environmental information available to the extent that its disclosure would, or would be likely to, prejudice substantially the confidentiality of commercial or industrial information, where such confidentiality is provided for by law to protect a legitimate economic interest.
23. A Scottish public authority applying an exception must interpret it in a restrictive way and apply a presumption in favour of disclosure (regulation 10(2)). Even where the exception applies, the information must be disclosed unless, in all the circumstances, the public interest in making the information available is outweighed by that in maintaining the exception (regulation 10(1)(b)).
24. *The Aarhus Convention: an Implementation Guide*¹, which offers guidance on the interpretation of the convention from which the EIRs are derived, notes (at page 88) that the first test for considering the exception in regulation 10(5)(e) is whether national law expressly protects the confidentiality of the withheld information. The law must explicitly protect the type of information in question as commercial or industrial secrets. Secondly, the confidentiality must protect a "legitimate economic interest": this term is not defined in the Convention, but its meaning is considered further below.

Submissions from the Ministers

25. The Ministers submitted that there was "a clear commercial nature to this information as it contains details of third party operators and source companies that have imported salmon ova into Scotland." The Ministers explained that SSF had entered into a mutual confidentiality agreement with Aqua Gen AS, and Landcatch Natural Selection Limited, which showed that the information (which was covered by the agreement) was commercially confidential in nature.
26. The Ministers' submission explained that, when dealing with the initial request, they contacted all companies that had imported ova into Scotland since 1 January 2017, asking for their views on whether the information the Ministers held relating to them should be disclosed. In response, SSF provided their reasons for not disclosing specific information,

¹ https://www.unece.org/fileadmin/DAM/env/pp/Publications/Aarhus_Implementation_Guide_interactive_eng.pdf
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which they considered was excepted under regulation 10(5)(e). In support of this, SSF provided extracts of relevant confidentiality clauses within contractual agreements.

27. The Ministers said that to disclose this information would breach the terms of the confidentiality agreement in place, and would cause substantial harm to the interests of SSF. If the information were released, it would disclose company or commercial strategy in the production of salmon in freshwater, which would substantially prejudice future production strategies.
28. The Ministers acknowledged that similar information relating to other companies had been released, but commented that but these other companies did not object to disclosure of that information in reliance on a confidentiality agreement.

Submissions from the Applicant

29. In its application to the Commissioner, the Applicant disagreed that "disclosure ... would, or would be likely to, prejudice substantially the confidentiality of commercial information provided by SSF and thus cause substantial harm to their commercial interests". The Applicant said that-

"... no other salmon farming company have objected to the disclosure of the same information and it is difficult to argue that SSF has a unique reason which demands non-disclosure. Why should SSF be afforded exclusivity in terms of privacy and anonymity?"

The Commissioner's view

30. Before regulation 10(5)(e) can be engaged, authorities must address the following matters:
 - (i) Is the information commercial or industrial in nature?
 - (ii) Does a legally binding duty of confidence exist in relation to the information?
 - (iii) Is the information publicly available?
 - (iv) Would disclosure of the information cause, or be likely to cause, substantial harm to a legitimate economic interest?
31. The Commissioner will therefore consider the above matters with respect to the withheld information.

Is the information commercial or industrial in nature?

32. The withheld information is described above and includes (for certain imports) site of destination; operator; source country and source company.
33. The Applicant did not suggest that the information was other than commercial or industrial in nature.
34. Having considered the withheld information, the Commissioner accepts that the information is commercial, for the reasons given by the Ministers. That is, the information contains details of operators and source companies involved in the import of salmon ova into Scotland as part of the production of farmed salmon.

Does a legally binding duty of confidence exist in relation to the information?

35. Confidentiality "provided for by law" will include confidentiality imposed on any person under the common law of confidence, under a contractual obligation or by statute. For a duty of confidence to be owed under the common law, it is necessary for certain criteria to be met.

36. The Ministers submitted that there was an obligation of confidentiality in relation to the withheld information: it was only shared on the basis of it being held as confidential and not for disclosure into the public domain. The Ministers evidenced this position to the Commissioner.
37. The Commissioner acknowledges that the information might be regarded as falling within the terms of the agreement, with the result that it would be the subject of a binding duty of confidence. The definition of what information is covered by the agreement is not particularly clear. Both the Ministers and SSF have simply asserted that it applies.

Is the information publicly available?

38. The Commissioner has not found the withheld information to be publicly available and has accepted, on the balance of probabilities, that the withheld information was not publicly available when the Ministers responded to the Applicant's request or requirement for review.

Would disclosure of the information cause, or be likely to cause, substantial harm to a legitimate economic interest?

39. The term "legitimate economic interest" is not defined in the EIRs. In the Commissioner's view, the interest in question should be financial, commercial or otherwise "economic" in nature. The prejudice to that interest must be substantial: in other words, it must be of real and demonstrable significance.
40. The Commissioner does not accept that he has been given sufficient evidence or reasoning to explain or show that disclosure of the specific withheld information would, or would be likely to, cause substantial harm to legitimate economic interests in the respects asserted by the Ministers.
41. First, it is not obvious that the information would be commercially sensitive, or that disclosure would, or be likely to, cause substantial harm to a legitimate economic interest. The information does relate to a commercial relationship, but the Ministers' submission does not explain the commercial sensitivity of the material or the anticipated harm. The Commissioner has not received any explanation of how this information relates so intimately to the areas of commercial strategy alluded to (in quite general terms), or how (or to what extent) that strategy – or any future strategy – would be harmed by disclosure. He has not received any explanation that links disclosure of the information with harm, other than there would be disclosure of commercial strategy.
42. Similar information, for other commercial entities, has been disclosed to the Applicant in this case, and released into the public domain in past disclosures² (also under the EIRs). The Commissioner is not aware of any harm resulting from such disclosures. He has not received any argument or evidence that a past disclosure has resulted in substantial harm to any legitimate economic interest. While disclosure of similar information is not in itself sufficient to conclude that disclosure of the present withheld information would not have the effect that the Ministers contend, in the absence of explanation of a difference between the withheld information and similarly disclosed information the Commissioner must attribute some weight to the case for discounting the required harm.
43. In all the circumstances, the Commissioner cannot accept that disclosure of the withheld information in this case would have the effect suggested by the Ministers i.e. that disclosure would, or would be likely to, prejudice substantially the confidentiality of commercial or

² <https://www.gov.scot/publications/foi-18-02912/>

industrial information where such confidentiality is provided for by law to protect a legitimate economic interest. The Commissioner therefore is not satisfied that the exception in regulation 10(5)(e) of the EIRs could legitimately be applied to the remaining withheld information.

44. As the Commissioner has determined that the Ministers were incorrect in their application of regulation 10(5)(e), there is no requirement to go on to consider the application of the public interest test to disclosure of the information.

Decision

The Commissioner finds that the Scottish Ministers (the Ministers) failed to comply fully with the Environmental Information (Scotland) Regulations 2004 (the EIRs) (and in particular with regulation 5(1)) in responding to the information request made by the Applicant.

The Commissioner does not accept that the information still withheld is excepted from disclosure under regulation 10(5)(e) of the EIRs. The Commissioner therefore requires the Ministers to provide the Applicant with the information, by 17 December 2019.

The Commissioner also finds that the Ministers had no justification for withholding the information disclosed to the applicant during the investigation.

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.

Enforcement

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

Margaret Keyse
Head of Enforcement

30 October 2019

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;

...

(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.

...

(5) A Scottish public authority may refuse to make environmental information available to the extent that its disclosure would, or would be likely to, prejudice substantially-

...

(e) the confidentiality of commercial or industrial information where such confidentiality is provided for by law to protect a legitimate economic interest;

...

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