

Decision Notice

Decision 261/2014: Royal Society for the Protection of Birds and the Scottish Ministers

Impact of wind farm developments on bird populations

Reference No: 201402165

Decision Date: 18 December 2014



Scottish Information
Commissioner

Summary

On 13 February 2014, the Royal Society for the Protection of Birds (the RSPB) asked the Scottish Ministers (the Ministers) for specified information relating to bird populations.

The Ministers sought clarification of this request and the RSPB confirmed that it was seeking information relating to the impact of named east coast wind farm projects on bird populations. The Ministers initially failed to provide the RSPB with a response to this clarified request. Following a review, the Ministers claimed the information was excepted from disclosure under regulation 10(4)(c) of the EIRs (as a request formulated in too general a manner).

The Commissioner investigated and found that the Ministers had failed to respond to the RSPB's request for information in accordance with the EIRs. This was because it had wrongly applied the exception contained in regulation 10(4)(c) of the EIRs and had failed to comply fully with its related duty to provide advice and assistance under regulation 9(2) of the EIRs. She required the Ministers to provide the RSPB with a review outcome that did not rely upon the exception in regulation 10(4)(c).

Relevant statutory provisions

The Environmental Information (Scotland) Regulations 2004 (the EIRs) regulations 2(1) (paragraphs (a) and (c) of definition of "environmental information") (Interpretation); 5(1) and (2)(b) (Duty to make available environmental information on request); 9(1), (2) and (4) (Duty to provide advice and assistance); 10(1), (2), and (4)(c) (Exceptions from duty to make environmental 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 13 February 2014, the RSPB made a request for information to the Ministers. The information requested was all material concerning:
 - Acceptable Biological Change
 - Potential Biological Removal
 - Band Collision Risk Model; and
 - Review of conservation objectives for Special Protection Areas with Seabird qualifying interestsince June 2012, to include minutes, notes, memos, correspondence (including emails) or other unpublished information (including in electronic formats) held by the Scottish Government.
2. The Ministers contacted the RSPB on 21 February 2014, seeking clarification of the request.

3. On 26 February 2014, the RSPB wrote to the Ministers and clarified that it was only seeking information relevant to east coast wind farm projects, and that the information should be limited to birds but should include all birds recorded, including those in flight or on water.
4. The Ministers contacted the RSPB on 25 March 2014, noting that the request had generated a large volume of information and indicating that it would take longer than the permitted 20 working days for them to be able to identify, collate and review information captured by the request. The RSPB confirmed, on 26 March 2014, that it would be acceptable to extend the time for response by an additional 20 working days.
5. On 31 March 2014, the Ministers contacted the RSPB again, asking it to confirm that its request was restricted to specific named east coast wind farms.
6. The RSPB wrote to the Ministers on 15 April 2014 and confirmed that it was only seeking information regarding the following east coast wind farm projects:
 - Beatrice Offshore Windfarm Limited
 - Moray Offshore Renewables Limited
 - Inch Cape
 - Neart na Gaoithe
 - Seagreen.

The RSPB stated that it was not interested in any other plans or projects and it further clarified that it did not wish to see purely administrative information, personal information, repetitive information or information already in the public domain. The RSPB also noted that it would prefer the information to be provided in an electronic format.

7. Although further correspondence was exchanged between the parties, the Ministers did not respond to the RSPB's request.
8. On 4 June 2014, the RSPB wrote to the Ministers, requesting a review of their decision on the basis that they had failed to provide the information requested.
9. The Ministers notified the RSPB of the outcome of their review on 28 July 2014. The Ministers refused the request on the basis that it was formulated in too general a manner, with the result that the information was excepted from disclosure in terms of regulation 10(4)(c) of the EIRs.
10. On 1 September 2014, the RSPB wrote to the Commissioner. It 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 RSPB stated it was dissatisfied with the outcome of the Ministers' review because, in the light of the clarification it had given the Ministers, it did not accept that the RSPB did not accept that the request was formulated in too general a manner. Noting that the Ministers had previously confirmed that all of the information within the scope of the request had been collated, it believed the presumption in favour of disclosure should apply.

Investigation

11. The application was accepted as valid. The Commissioner confirmed that the RSPB made a request for information to a Scottish public authority and asked the authority to review their response to that request before applying to her for a decision.
12. On 8 September 2014, the Ministers were notified in writing that the RSPB had made a valid application and the case was allocated to an investigating officer.
13. 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 answer specific questions. These focused on the Ministers' application of regulation 10(4)(c) of FOISA.

Commissioner's analysis and findings

14. In coming to a decision on this matter, the Commissioner considered the relevant submissions, or parts of submissions, made to her by both the RSPB and the Ministers. She is satisfied that no matter of relevance has been overlooked.
15. The information requested appears to fall clearly within the scope of the definition of environmental information contained in regulation 2(1) of the EIRs. The RSPB made no comment on the Ministers' application of the EIRs in this case and the Commissioner will consider the request in what follows solely in terms of the EIRs.

Regulation 10(4)(c)

16. Regulation 10(4)(c) of the EIRs states that a Scottish public authority may refuse to make environmental information available to the extent that the request for information is formulated in too general a manner and the authority has complied with its duty under regulation 9. Regulation 9 of the EIRs requires Scottish public authorities to provide advice and assistance to applicants and prospective applicants: where the authority believes the request is formulated in too general a manner, there is a specific duty (regulation 9(2)) to ask the applicant for more particulars in relation to the request and assist the applicant in providing those particulars (see below).
17. Neither the Aarhus Convention nor the EIRs specify what is meant by "formulated in too general a manner". The Commissioner's expectation is that there must be implications for an authority's ability to identify the information requested, or to comply with the request in some other respect. Even if a request is general in terms, but the authority is able to identify the information requested and respond within an extended 40 working day timeframe (applying regulation 7), it is unlikely to be "too general" for the purpose of the EIRs.
18. In the Commissioner's view, this exception is not designed to permit authorities to simply delay responding to a request for 40 working days in order to claim that the request is "too general". An authority must provide evidence demonstrating that it was either a) unable to identify all relevant information or b) unable to respond within the extended timescale. Regulation 10(4)(c) cannot be used to cover up an authority's own failings in dealing timeously with a request.

Submissions from the Ministers

19. In their submissions, the Ministers acknowledged that the request could have been handled better. They referred to an email sent to the RSPB on 13 June 2014, which stated they had *“finished with the request on 5 June having checked it over and satisfied ourselves we had provided everything we hold within scope.”* The email went on to explain that all identified information would now be passed to the Special Advisors (for review). The Ministers contended that this email should not have been sent: it referred to internal procedures and did not contain accurate information to clarify to the RSPB what stage of the process had been reached at that point. The Ministers noted that while the email was sent to the RSPB in an effort to be helpful and transparent, and to provide information on the status of the request, the actual content of the email was misleading and for this they expressed their apologies.
20. The Ministers explained that at the time the email was sent, the information had not been properly scrutinised or filtered. They argued that the request was so broad and technically complex that the searches caught a huge amount of information that was potentially of relevance but not necessarily within scope. The Ministers noted that when they sent the email on 13 June 2014, they had not satisfied themselves as to what information was entirely relevant or within the scope of the request.
21. The Ministers explained that eleven people were involved in carrying out the initial searches for the information and that common key words (which they listed) were used in all searches. The Ministers submitted that following these searches, the information was converted to pdfs (and at that point amounted to 11,905 pages). This pool of information was then reviewed by six members of staff, who were not experts in the field but managed to remove information that was clearly outwith scope. As a result of this review, the pool of information was reduced to 10,564 pages. At this point, specialist staff carried out a further review in order to identify information which could be potentially sensitive and which would require further clearance if it was to be released. This information, sent to the Special Advisors, consisted of 10,564 pages (with electronic “sticky notes” attached where information was considered to be potentially sensitive).
22. The Ministers explained that the reason for such a large amount of information being assessed was due to uncertainty over what was potentially relevant, because of the general nature of the request and the complex technical substance it encompassed. If there was any doubt, the Ministers explained, the information was included.
23. The Ministers acknowledged that there was so much time required to complete the above stages that the initial deadline was missed. Then, when the Special Advisors received the information, it became apparent that they (and Ministers) would not be able review this very large volume of information without further advice and detailed explanations of what the information was and the issues to be considered. At this point, it was decided that the information would have to be reviewed again, with a view to removing everything outwith scope and completing a detailed schedule of all remaining documents. The Ministers conceded that this should have been done in the first instance.
24. At this point, the Ministers concluded the request was too broad. There was too much information to review and it would not be feasible to consider all of it and identify if anything needed to be withheld.
25. The Ministers noted that they had sought clarification from the RSBP on two occasions, to narrow the scope of the request and obtain specific detail on what information was being

sought. Because so many individuals held the information, the Ministers explained that they did not realise how much information was caught by the request until a very late stage (when they realised they would be unable to complete the review of the information and separate out what was relevant). As the deadline for a response had passed by then, it did not seem appropriate to the Ministers to go back to the RSPB and ask for further clarification.

Submissions from the RSPB

26. In its application, the RSBP noted that it had clarified the scope of its request on two occasions. It believed the clarification it provided on 15 April 2014 went well beyond the level of detail requested by the Ministers on 31 March 2014. The RSPB submitted that, although it exchanged correspondence with the Ministers following its email of 15 April 2014, it was given no indication that the scope of its request was “too general” until it received the outcome of the Ministers review on 28 July 2014.
27. The RSPB queried how the Ministers could argue that its request was formulated in too general a manner for them to be able to locate, retrieve and provide all of the information requested when, on 13 June 2014, the Ministers stated that they had satisfied themselves that they had located everything within the scope of the request (for review by the Special Advisors).

The Commissioner’s view

28. In order for the Commissioner to accept the application of the exception contained in regulation 10(4)(c) of the EIRs, the Commissioner must be satisfied that the RSPB’s clarified request of 15 April 2014 was formulated in too general a manner. As indicated above, the Commissioner’s view is that “too general” means a request that is unclear or non-specific, so that it does not allow the authority to identify and locate the information the requester is seeking. It is not generally enough that the request captures a large amount of information, and the issue must be with the quality of the request and not that of the authority’s record keeping or searching.
29. The Commissioner must also be satisfied that the Ministers have met the duties conferred on them by regulation 9 of the EIRs, in that they have offered advice and assistance to the RSPB to enable it to better frame its request. This is considered further below. First, the Commissioner will consider the Ministers’ submissions on the generality of the request.
30. The Ministers have submitted that the amount of information captured by the RSPB’s request, following the clarification of 15 April 2014, amounted to more than 10,000 pages. It was only after the process of considering this information described above that they concluded the request was formulated in too general a manner.
31. The Ministers submissions in support of their application of 10(4) (c) were predicated on the situation where they had already searched for and located a large volume of information. Their submissions included a detailed explanation of the search terms they used and why they were unable to electronically filter the information to reduce the volume.
32. The Ministers submissions suggest they knew what they were searching for, so by definition they must have had sufficient understanding of what was being requested in order to carry out such searches. In the circumstances, the Commissioner is satisfied that the Ministers understood the request. It was reasonably clear what information the request was seeking. She does not believe it is possible to argue that the request, in the form it had reached by 15 April 2014, was formulated in too general a manner.

33. The exception contained in regulation 10(4)(c) can only be upheld if the authority claiming the exception has complied with its duties under regulation 9 of the EIRs. As the Ministers believed this exception to be applicable when they conducted their review, the Commissioner will now go on to consider whether the Ministers fulfilled their duties under regulation 9 in responding to the RSPB's request.

Regulation 9 of the EIRs

34. Regulation 9(2) of the EIRs provides that where a request has been formulated in too general a manner, the authority must ask the applicant to provide more particulars in relation to the request, and must assist the applicant in providing those particulars.
35. In this case, the Ministers sought clarification on 21 February 2014. The RSPB provided clarification on 26 February 2014. On 31 March 2014, the Ministers sought further clarification of the request (essentially asking the RSPB to confirm that it was only interested in information relating to six named east coast wind farm projects). The RSPB responded to this second request for clarification on 15 April 2014, with additional information to narrow the scope of the request. In addition to restricting the request to these specific projects, the RSPB asked the Ministers to exclude personal data from the request (along with purely administrative information, repetitive information and any information already in the public domain).
36. The Commissioner is satisfied that the Ministers gave some assistance to the RSPB in relation to the clarification of the request.
37. While the Commissioner is satisfied that the Ministers provided some assistance to the RSPB in helping them to narrow the request, she does not accept that this means they fulfilled all of their duties under regulation 9(2) of the EIRs. Specifically, she believes that given their view that 10(4)(c) was potentially applicable, and this had not been mooted to the RSPB at this point, they should have gone back to the RSPB to explain their position and offer appropriate advice and assistance. They had reasons for applying this exception, which they believed capable of being sustained and so, in line with regulation 10(4)(c), they should have attempted to assist the RSPB in addressing this perceived defect in the request. From the point at which they identified reasons why they considered the request to be too general, the Ministers do not appear to have offered such assistance.
38. The Ministers submitted that they did not seek further clarification from the RSPB after 15 April 2014 as they did not think it would be fruitful, nor did they think it would help reduce the amount of information captured by the request. The Commissioner notes that none of the reasons cited by the Ministers (for not contacting the RSPB) focused on whether additional assistance would benefit the RSPB and give it an opportunity to access any or some information. The Ministers' rationale for not offering additional advice to the RSPB appears to be that they did not believe they (the Ministers) would gain anything from it.
39. The Ministers have stated that it took them some time to realise how much information was captured by the request, and at that late point it did not seem appropriate to go back to the RSPB and ask for further clarification. The Ministers have conceded that they should have realised this earlier and provided more guidance to the RSPB to help it to reduce the scope of its request. The Commissioner agrees they should have done this: viewed reasonably, she cannot accept that this was a request which could never be refined to the point where it was capable of a response, and she cannot see why the passage of time should have made any difference to the need to provide relevant advice and assistance.

40. Taking all of the circumstances into consideration, the Commissioner finds that the Ministers have failed to justify their application of regulation 10(4)(c) of the EIRs. Even if the request was formulated in too general a manner (the Commissioner does not accept that it is), the Ministers failed to fulfil the consequent duties required by regulation 9(2) of the EIRs. As a result, the Commissioner requires the Ministers to respond to the RSPB's requirement for review, in accordance with the EIRs (but other than in terms of regulation 10(4)(c)).

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 Royal Society for the Protection of Birds (RSPB). In particular, the Commissioner finds that the Ministers failed to comply with regulations 9(2) and 10(4)(c) of the EIRs.

The Commissioner therefore requires the Ministers to provide a new response to the RSPB's requirement for review, other than in terms of regulation 10(4)(c) of the EIRs, by 2 February 2015.

Appeal

Should either the Royal Society for the Protection of Birds or the Scottish 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 Scottish Ministers fails to comply with this decision, the Commissioner has the right to certify to the Court of Session that the Scottish Ministers have failed to comply. The Court has the right to inquire into the matter and may deal with the Scottish Ministers as if they had committed a contempt of court.

Rosemary Agnew
Scottish Information Commissioner

18 December 2014

Appendix 1: Relevant statutory provisions

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.

...

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.

(2) Where a request has been formulated in too general a manner, the authority shall-

(a) ask the applicant as soon as possible, and in any event no later than 20 working days after the date of receipt of request, to provide more particulars in relation to the request; and

(b) assist the applicant in providing those particulars.

...

(4) In any case to which paragraph (2) applies, the date on which the further particulars are received by the authority shall be treated as the date of the request for the purposes of regulations 5(2)(a), 6(2)(a) and 13(a) and any period within which the authority is required to respond to that request by these Regulations shall begin on the day following that date.

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

...

 - (c) the request for information is formulated in too general a manner and the authority has complied with its duty under regulation 9;

...

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