

Decision Notice

Decision 102/2015: Global Alliance Against Industrial Aquaculture and the Scottish Ministers

Numbers of seals shot and related correspondence

Reference No: 201402308

Decision Date: 7 July 2015



Scottish Information
Commissioner

Summary

On 24 July 2014, Global Alliance Against Industrial Aquaculture (GAAIA) asked the Scottish Ministers (the Ministers) for information about seal killings at salmon farms during 2014 and for correspondence on the provision of seal killing statistics.

The Ministers withheld the number of seals shot at each farm and stated that they did not hold any relevant correspondence.

Following an investigation, the Commissioner accepted that the Ministers did not hold the correspondence GAAIA had asked for, but found that the information about the number of seals shot at each farm should be disclosed.

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) (Interpretation) (definitions (a) and (c) of "environmental information"); 5(1) and (2)(b) (Duty to make environmental information available on request); 10(1), (2), (4)(a), (5)(a) (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

Decision 193/2012

1. To understand this current decision fully, it is necessary to be familiar with certain aspects of the investigation and enforcement of *Decision 193/2012 Global Alliance Against Industrial Aquaculture and the Scottish Ministers*¹. Reference is made to *Decision 193/2012* throughout this decision.
2. In 2012, GAAIA asked the Ministers for the number of seals killed by salmon farmers at each site during 2011 and 2012. This request was the subject of *Decision 193/2012*. In the decision, issued on 26 November 2012, the Commissioner ordered the Ministers to disclose the number of seals killed by each company at each site by 10 January 2013.
3. The Commissioner was subsequently contacted by representatives of the Salmon Net Fishing Association of Scotland and by other individuals, setting out their concerns about the information she had ordered the Ministers to disclose. In response to this, the Commissioner delayed enforcement of her decision to allow consideration about whether and how it should be enforced.
4. Before deciding whether to enforce *Decision 193/2012*, the Commissioner wrote to the Ministers and to the people who had raised concerns, setting out a number of questions and

¹ <http://www.itspublicknowledge.info/uploadedFiles/Decision193-2012.pdf>

issues with the aim of establishing what evidence was available to support the argument that harm would occur which in turn would inform what enforcement action she would take. She invited them to provide evidence including:

- (i) Copies of actual threats received or transcriptions/notes of any telephone calls that would show action was threatened because of an organisation's record on seal shooting.
 - (ii) Evidence of what action the organisation took in response to such threats, for example:
 - (a) Reviews of and changes to security arrangements
 - (b) Additional training for staff
 - (c) Issuing of guidance for staff
 - (iii) Information provided from and to the police; crime numbers, what action the police took, whether any prosecutions resulted, statements from the police about the likelihood of action and so on.
 - (iv) Evidence from other salmon fishing companies (or similar types of operation) outside Scotland of direct action that resulted from the shooting of seals (as opposed to general action in relation to animal rights).
 - (v) If there was a real likelihood of damage to property, how this damage would result in a threat to public safety or have demonstrable impact on the environment.
5. She advised the organisations concerned that submissions about enforcement must be made by the Ministers. This meant that any representations about why the decision should not be enforced should be made directly to the Ministers, who, in turn, could consider whether to make submissions to the Commissioner.
 6. The Ministers subsequently made submissions to the Commissioner and she gave careful consideration about whether to enforce *Decision 193/2012*. On 23 April 2013, the Commissioner issued the findings of her deliberations, and the actions she had taken in reaching her conclusions.
 7. Her conclusions were that, although she recognised the risks, these risks existed regardless of the information under consideration and that insufficient evidence had been provided that gave a compelling argument that threats were more likely to occur or be acted on *because* of the information being disclosed. The Commissioner concluded that the arguments provided by the Ministers, even in addition to the arguments she originally considered in relation to disclosure, did not demonstrate that disclosure of the information would, or would be likely to, prejudice substantially public safety in terms of regulation 10(5)(a) of the EIRs.
 8. She decided that *Decision 193/2012* should be enforced and the information in question disclosed by 7 May 2013, publishing her reasons on her website².

² <http://www.itspublicknowledge.info/nmsruntime/saveasdialog.aspx?IID=6255&sID=6805>

Current application

9. Salmon farms and fisheries can apply to Marine Scotland for a licence authorising “shooting of a limited number of seals within an area specified and for a period specified in the licence”³. The number of seals which can be shot is based on a number of factors. The Scottish Government publishes⁴ a summary of the total seal licences granted per area annually.
10. On 24 July 2014, GAAIA asked the Ministers for the following information:
 - (a) a list of salmon farms killing seals during 2014 (including the name of the site, data, company, species of seal and number of seals killed)
 - (b) all correspondence from the Scottish Salmon Producers’ Organisation (the SSPO), Marine Harvest and any other salmon farming companies about threats to refuse to provide information about the number of seals killed in 2013 and 2014 (as clarified by GAAIA on 11 September 2014)
11. The Ministers responded on 21 August 2014. In relation to part (a) of the request, they told GAAIA that the seal licensing year runs from 1 February to 31 January and that the information for January 2014 was already publicly available as part of the licence data for 2013. The Ministers withheld the information for February to December 2014 under regulation 10(5)(a) (substantial prejudice to public safety). The Ministers told GAAIA that they considered that part (b) of the request was manifestly unreasonable (regulation 10(4)(b) of the EIRs).
12. On 21 August 2014, GAAIA asked the Ministers to conduct a review of their response (regulation 16 of the EIRs). In relation to part (a) of the request, GAAIA referred to *Decision 193/2012*, which had required the Ministers to disclose similar information. GAAIA considered that the Ministers’ reasons for refusing to provide the correspondence sought in part (b) of the request were baseless.
13. On 11 September 2014, the Ministers asked GAAIA to clarify the scope of part (b) of its request, as it was considered very broad. GAAIA stated that it was specifically seeking any threats to refuse to provide information or disclose data as well as the disclosure of data and seal killing returns and photos (the request, as clarified, is set out in paragraph 10 above).
14. The Ministers notified GAAIA of the outcome of their review on 15 September 2014. They upheld their response with respect to part (a). They revised their response to part (b) and told GAAIA that they did not hold any such correspondence. Under regulation 10(4)(a) of the EIRs, a public authority is entitled to refuse to disclose any information it does not hold when a request is received.
15. On 26 September 2014, GAAIA emailed the Commissioner stating that it was dissatisfied with the outcome of the Ministers’ review and applying 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. GAAIA considered that the seal killing data in part (a) should be disclosed and that the Ministers were wrong to say they did not hold the correspondence referred to in part (b) of the request.

³ <http://www.gov.scot/Topics/marine/Licensing/SealLicensing/applications>

⁴ <http://www.gov.scot/Topics/marine/Licensing/SealLicensing>

Investigation

16. The current application was accepted as valid. The Commissioner confirmed that GAAIA made a request for information to a Scottish public authority and asked the authority to review its response to that request before applying to her for a decision.
17. On 13 October 2014, the Ministers were notified in writing that GAAIA had made a valid application. The Ministers were given an opportunity to provide comments on the application (as required by section 49(3)(a) of FOISA) and to respond to specific questions. The Ministers were also asked to provide the Commissioner with the information which had been withheld from GAAIA.
18. The Ministers responded to the investigating officer's questions on 5 November 2014.
19. On 14 November 2014, the Ministers were asked additional questions regarding the searches they had conducted for the correspondence contained in part (b) of GAAIA's request. The Ministers answered those questions and also provided further submissions relating to the information covered by part (a) of the request. The Ministers were also reminded about giving due consideration to consulting salmon farming companies, reflecting back on the enforcement of *Decision 193/2012*.
20. GAAIA was invited to provide its views as to why the withheld information should be disclosed, and did so.
21. On 5 February 2015, representatives from the Commissioner's office met with Marine Scotland and the Ministers to discuss whether:
 - (i) data relating specifically to salmon farms (not salmon fisheries) could be disclosed to GAAIA, and
 - (ii) comments had been received directly from salmon farming companies about the effect on them if the seal shooting data were disclosed.
22. Following this meeting, the Ministers provided the Commissioner with a copy of the information covered by part (a) of the request, identifying the data that related specifically to salmon farms. The Ministers also provided further submissions as to why they considered that the exception in regulation 10(5)(a) of the EIRs applied specifically to the salmon farm data. Representations were also received directly from two salmon fishing companies, predicting the effect on their businesses if the seal shooting data were disclosed. No submissions were received from salmon farming companies.

Commissioner's analysis and findings

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

Application of the EIRs

24. It is clear that any information falling within part (a) or (b) of GAAIA's request would be environmental information, as defined in regulation 2(1) of the EIRs. The information relates to the shooting of seals; as such, the Commissioner is satisfied that it would fall within paragraph (c) of the definition of environmental information in regulation 2(1) of the EIRs, read in relation to paragraph (a) (both paragraphs are reproduced in Appendix 1). GAAIA

has not disputed that the EIRs apply in this case and the Commissioner will consider the request solely in terms of that regime.

Part (a) Seal shooting data: regulation 10(5)(a) (public safety, etc.)

25. Under regulation 10(5)(a) of the EIRs, a Scottish public authority may refuse to make information available to the extent that its disclosure would, or would be likely to, prejudice substantially international relations, defence, national security or public safety. This exception must be interpreted in a restrictive way (regulation 10(2)(a)) and the public authority must apply a presumption in favour of disclosure (regulation 10(2)(b)). An authority applying this exception must be able to demonstrate that there is a real risk or likelihood that actual harm would follow disclosure (**of the specific information under consideration**) at some time in the near (certainly foreseeable) future, not simply that the harm is a remote or hypothetical possibility.
26. The Ministers considered that disclosing the seal shooting data would be likely to prejudice substantially public safety by leading to harassment and threats to salmon farm staff and their families.

The Ministers' submissions

27. The Ministers referred to *Decision 193/2012*. The Ministers told the Commissioner that a campaign of direct action against the shooting of seals had developed on the basis of this newly available information, as highlighted on the campaigners' Facebook pages. The Ministers told the Commissioner that this direct action commenced in April 2014 at Gardenstown in the Moray Firth, extended to the Montrose area in May, then to the north coast in August, with the main focus on one company, a salmon fishery.
28. The Ministers told the Commissioner that a campaign of direct action and aggressive confrontation was being pursued by campaigners and by a number of hunt saboteur groups, which carried with it a serious potential risk to public safety. The Ministers said there had been a number of confrontations, each of which had the potential to get out of hand and result in a risk to public safety. A number involved masked campaigners confronting marksmen who were in the possession of firearms, with the stated intention of standing in front of their guns. The Ministers considered that it was hugely fortunate that, for the moment, great restraint had been shown by those confronted in this way and that such potentially explosive incidents had not resulted in more serious consequences.
29. The Ministers provided other specific examples of what they considered as the main confrontations that gave cause for concern. These included masked campaigners following fishery staff, leading to a confrontation; pictures of masked individuals being taken outside a private residence (the occupants felt this to be intimidation); and campaigners following fishery staff, leading to a confrontation and the blocking of a road.
30. The Ministers stated that, in addition to the actual occurrence of such potentially explosive incidents, the repeated threats from campaigning organisations and others to place themselves between any marksmen and their targets carries a high risk to public safety. Firearms are dangerous and any suggestion of such inappropriate behaviour in relation to the use of firearms is highly dangerous.
31. The Ministers commented that, in addition to the incidents they had listed, campaigners had been regularly watching individuals involved in shooting seals under licence, often waiting outside their residences, and then following them as they go about their daily business. The

Ministers warned that this kind of harassment activity would almost inevitably lead to frequent confrontations along the lines of those described above, with their attendant risks.

32. The Ministers provided correspondence from a salmon fishery expressing extreme concern about the actions of one campaign group. The Ministers considered that the concerns raised by this company were likely to apply to all other companies identified in the withheld information.
33. The Ministers referred the Commissioner to the website of one campaigning organisation, which reported that it was preparing to expand its campaign during 2015, noting that “we know from records...that seals are at times shot by fish farm operators”. The website statement also indicated that the campaign would continue “and expand from the Western Isles up to Shetland and down the east coast next year and indeed will continue every year...”
34. The Ministers concluded that the intention to extend the campaign across Scotland meant that any fishery or fish farm company might be targeted in a similar fashion in future. As a result of increases in the number of confrontations and the number of individuals involved in these confrontations, the risks to public safety could increase exponentially.
35. The Ministers considered that, while the protesters would be able to identify some of the companies shooting seals from information already published for previous years or from their own surveillance work, releasing the withheld information for 2014 would:
 - (i) provide the confirmation necessary to help the protesters justify continuing their campaign of direct action in locations they have already targeted; and
 - (ii) allow them to identify and target additional companies for direct action, putting more people at a wider range of locations at significant risk.
36. The Ministers submitted that disclosing the data for (February to December) 2014 would be likely to substantially prejudice public safety by significantly increasing the risk, at a wider range of sites, of accidents or deliberate harm affecting fisheries or fish farm staff, their families, protesters themselves or members of the public.
37. The Ministers commented that, although many of the protesters may have peaceful intentions, there is clear evidence that some involved are willing to go to extremes to prevent seals being killed. They considered that, in addition to the significantly increased risk of actual physical injury, there would also be increased deliberate intimidation by masked protesters, particularly those watching family homes. The Ministers commented that, while the masked protesters may not actually do anything to physically harm these families, their actions substantially prejudice public safety by making people feel unsafe in their homes and scared to go out while the protesters are there.
38. These submissions focussed on salmon fisheries. During the investigation, the Ministers were asked how the disclosure of the data would affect salmon farms (as opposed to salmon fisheries) as this is what GAAIA’s request had been for. The Ministers responded that, while their submissions focused on incidents at salmon fisheries, this did not mean that there was no significant risk to public safety at salmon farms: simply because protesters have so far focused on salmon fisheries does not mean that they would not take a similar approach to protesting at salmon farms. The Ministers considered that, if the protesters secured more information about which salmon farms are shooting seals, it was very likely that this would be used as evidence to justify protests and harassment of staff and the families of staff at those sites.

39. The Ministers also took the view that the protesters are focused on stopping the shooting of seals and would not distinguish between salmon farms or salmon fisheries in selecting their target. Therefore, there would be a similar risk to public safety at both salmon farms and fisheries if the information on seal killings at each site were disclosed.

GAAIA's submissions

40. GAAIA, on the other hand, did not believe that disclosing the information would be likely to prejudice substantially public safety. It argued that the data requested is historical in nature. It said that GAAIA was not intent on “directly stopping” (i.e. through direct action and physical means) the killing of seals by salmon farmers in Scotland. It told the Commissioner that its “Salmon Farming Kills” campaign targets consumers, not salmon farmers or their marksmen, and asks that consumers boycott farmed salmon from salmon farms killing seals. GAAIA considered that this practice was in line with the campaign in the US in which the public was asked to boycott Scottish salmon and in which the US Government was asked to ban imports of farmed salmon from “seal-unfriendly” farms (in 2010, US retailer Target announced that it would no longer sell farmed salmon from its stores). GAAIA noted that the US Marine Mammal Protection Act⁵ prohibits the intentional killing of marine mammals in commercial fishing operations, including fish farms⁶. Consequently, GAAIA argued that its UK campaign could hardly be considered controversial or dangerous.
41. GAAIA said that there is no evidence relating to direct threats against salmon farmers or the marksmen they employ to shoot seals. It stated that, since information about the number of seals shot was published in May 2013 (following *Decision 193/2012*), no direct action, intimidation or “dangerous” activity against salmon farmers or their marksmen had occurred, contrary to the suggestion of the Scottish Government. Confrontations early in 2014 involving animal rights activists related to the killing of seals on the east coast of Scotland (at a salmon fishery) and did not relate to salmon farms.
42. GAAIA considered it was “fallacious” to suggest that disclosure of the data for 2014 would open the floodgates to direct and dangerous action by animal rights activists, as information is “already out there”.

The Commissioner's view

43. The Commissioner has carefully considered the arguments made by GAAIA and the Ministers. At the heart of her decision lies the question, would disclosure of the **specific seal shooting data under consideration** prejudice substantially, or be likely to prejudice substantially, public safety for the reasons given by the Ministers?
44. GAAIA commented that it was not seeking to be informed of any forthcoming seal shootings and was seeking only retrospective information. GAAIA made the argument that the disclosure of historical statistics is less likely to cause substantial prejudice than the disclosure of current statistics. The Commissioner does not accept the argument that the retrospective nature of the information would prevent its use by protestors, who might protest about the shootings having taken place, once details were released. The fact that the figures are retrospective does not guarantee that the shootings will take place in a different location in following years: it is possible that the shootings will take place in the same location. In other words, the Commissioner does not accept that the retrospective nature of the data is

⁵ http://www.mmc.gov/legislation/pdf/mmpa_2007.pdf

⁶ <http://www.gaaia.org/killing-farms>

enough to rule out the possibility that the seal shooting figures could be used by protestors planning future action.

45. In relation to the current application, the Ministers were asked to consider:
 - (i) the evidence sought by the Commissioner during the investigation which led to *Decision 193/2012*
 - (ii) the evidence obtained after the decision was issued, but before the Commissioner decided to enforce the decision and
 - (iii) with reference to the questions in paragraph 4, any new evidence they had received after disclosing information in line with the decision.
46. The Ministers provided extensive submissions to support their position. The majority of this evidence consisted of links to webpages from organisations campaigning against the shooting of seals. The Ministers also provided copies of correspondence regarding specific threats to one salmon fishery where seals had been shot. Having considered the webpages referred to by the Ministers, specifically the Sea Shepherd Facebook page, it is noted that the Sea Shepherd campaign appears to be solely focussed on one salmon fishery, as opposed to the salmon farming industry as a whole.
47. As there was a notable lack of any evidence relating to salmon farms, the Commissioner asked the Ministers to contact salmon farm companies directly, to encourage these companies to provide submissions regarding any threats they had received in relation to the shooting of seals, inviting them to make it clear that on this occasion she would be willing to receive their comments directly. The Ministers asked the salmon farm companies to send such correspondence to the Commissioner. Correspondence was received from two salmon fisheries and from two representatives from the Salmon Net Fishing Association of Scotland, but not from salmon farm companies.
48. The Ministers were asked again to obtain comments directly from salmon farm companies, as the Commissioner sought to ensure that her decision was based on the fullest information possible, given the nature of the claimed impact of disclosure. No comments were provided.
49. The Commissioner has studied in detail the submissions and associated attachments provided by the Ministers. She has taken into account the comments published by the campaigners and their supporters on their websites, particularly those indicating an expansion to the planned campaign of protest in 2015. She has also taken into account the detailed comments provided by a salmon fishery about the threats it has received and the confrontations with campaigners which have taken place at its premises.
50. The Commissioner is aware that the shooting of seals is an emotive subject. With the advent of social media, it is possible to orchestrate campaigns which more people can either support (for example, by “liking” or commenting on a Facebook page) than would previously have been the case. The Commissioner considers that, individuals posting candid comments on social media or stating that they will physically join a campaign, does not necessarily mean that they will follow through with their stated action.
51. In this case, the Commissioner must decide whether disclosure of the withheld information would, or would be likely to, prejudice substantially public safety, as the Ministers have argued. In making this decision, the Commissioner must consider the evidence she has obtained during the investigation of the case. The question for the Commissioner is not whether campaigners are likely to protest at salmon farms and fisheries, but whether

disclosure of the seal shooting data would, in itself, directly result in protests as claimed, which would cause (or be likely to cause) substantial prejudice to public safety.

52. The Ministers have not provided any specific examples or evidence to support the view that there would be an increased threat to public safety if information about seal shootings carried out under licence is made known. Although invited to do so, the Ministers did not provide any evidence relating to threats or action affecting salmon farms, or fears of such action at salmon farms following disclosure of the seal shooting figures.
53. While the Commissioner accepts that protestors may campaign at both salmon fisheries and salmon farms (and she is only aware of protests against salmon fisheries), the information requested in this case relates only to salmon farms. The Ministers did not provide any specific arguments about why it is likely that information about salmon fisheries would provoke action at salmon farms, beyond saying that in their view it would.
54. The Commissioner notes the stated intention of campaigners to expand their area of protest in 2015. Given that this statement has already been published, she does not consider that disclosure of the withheld data will raise awareness of issues that would make such action more likely to take place.
55. Having given the issue careful thought, the Commissioner is not satisfied that the Ministers have demonstrated that disclosure of the information in itself would, or would be likely to, prejudice substantially public safety, despite being asked to explain in detail the nature of the harm they anticipated would follow disclosure of the seal shooting figures.
56. On the strength of the evidence provided to her, the Commissioner is unable to accept that disclosure of the information would, or would be likely to, prejudice substantially public safety. Consequently, she has concluded that regulation 10(5)(a) of the EIRs does not apply to the withheld information, and that the information should be disclosed.
57. Having found that the exception in regulation 10(5)(a) has not been shown to apply in the circumstances of this case, the Commissioner is not required to go on to consider the public interest test in regulation 10(1)(b) in relation to the withheld information.

Part (b) – correspondence about providing data – is any information held?

58. Part (b) of the request covers correspondence from the SSPO, Marine Harvest and other salmon farming companies about threats to refuse to provide information about the number of seals killed in 2013 and 2014 (see paragraph 10). The Ministers told GAAIA that they did not hold any information covered by part (b) of the request, and applied the exception in regulation 10(4)(a) of the EIRs.
59. Under regulation 10(4)(a) of the EIRs, a Scottish public authority may refuse to make environmental information available to the extent that it does not hold that information when an applicant's request is received.
60. The standard of proof to determine whether a Scottish public authority holds information is the civil standard of the balance of probabilities. In determining this, the Commissioner will consider the scope, quality, thoroughness and results of the searches carried out by the public authority. She will also consider, where appropriate, any reason offered by the public authority to explain why it does not hold the information.

The Ministers' submissions

61. In their submissions, the Ministers stated that they do not hold the correspondence requested in part (b) of GAAIA's request.
62. The Ministers explained that no information had been identified during searches conducted by named officials. The Ministers submitted that the named individuals are the only staff dealing with seals policy and seal licensing and, therefore, they are the only people likely to have or know of information relevant to this case.
63. The Ministers provided screen shots of the searches that had been conducted of their records management system, which used the terms taken from GAAIA's request, such as "seal killing" combined with "SSPO", "Marine Harvest" and "salmon farming". The Ministers commented that a search based on the word "seal" alone would highlight almost every single document in the files owned by the team working in this area, so it was necessary to identify the key search terms most likely to identify information within the scope of the original request.
64. The Ministers explained that, as GAAIA's request sought correspondence respecting salmon farming only, they had not searched for correspondence relating to salmon fisheries. GAAIA had previously made it clear that a request for information about salmon farms should not be extended to cover salmon fisheries too.
65. The Ministers explained that, in line with their records management policy, if any information had been held, it would have been kept for five years before review and longer if it was felt it should be kept for the official record. If not, it would have been routinely deleted. However, the Ministers did not believe any relevant information had ever been held by the Scottish Government.
66. The Ministers were asked about the legal requirements surrounding the provision of seal killing data. The Ministers explained that, under section 113 of the Marine (Scotland) Act 2010⁷ (the 2010 Act), each licensee has a statutory duty to report all seals shot under licence, including nil returns. These are submitted to Marine Scotland on a quarterly basis. This includes the date and location of each shooting, the species of seal and, if possible, information on the recovery of the carcass. Marine Scotland monitors the returns against licences and, where appropriate, investigates recovered carcasses through its funding of the Scottish Marine Animal Strandings Scheme⁸.

Commissioner's conclusion

67. The Commissioner is satisfied that the Ministers' searches were reasonable and proportionate and she accepts (on the evidence of these searches and on the balance of probabilities) that the Ministers do not hold any information falling within scope of part (b) of the request.
68. The Commissioner notes that, under section 113(4) of the 2010 Act, it is a criminal offence for a person who has been granted a seal licence not to report the number of seals shot. As such, this makes it less likely that a company with a seal licence would write to the Scottish Government to say that it was unwilling to provide the information.

⁷ http://www.legislation.gov.uk/asp/2010/5/pdfs/asp_20100005_en.pdf

⁸ <http://www.strandings.org/>

69. Before accepting that the exception in regulation 10(4)(a) of the EIRs was correctly applied, the Commissioner is required to consider the public interest test in regulation 10(1)(b) of the EIRs.

Consideration of the public interest test

70. The Commissioner is satisfied that the Ministers do not hold the information sought by GAAIA in part (b) of its request. Consequently, she does not consider there to be any conceivable public interest in requiring that the information be made available. The Commissioner therefore concludes that the public interest in making the requested information available is outweighed by that in maintaining the exception in regulation 10(4)(a) of the EIRs.

71. The Commissioner is satisfied, therefore, that the Ministers were entitled to refuse part (b) of GAAIA's request under regulation 10(4)(a) of the EIRs, on the basis that they did not hold the requested information.

Decision

The Commissioner finds that the Scottish Ministers (the Ministers) partially complied with the Environmental Information (Scotland) Regulations 2004 (the EIRs) in responding to the information request made by Global Alliance Against Industrial Aquaculture (GAAIA).

The Commissioner:

- (i) finds that the Ministers did not hold the information requested in part (b) of the request, and that the exception in regulation 10(4)(a) should be upheld.
- (ii) does not accept that disclosing the information covered by part (a) of the request would, or would be likely to, prejudice substantially public safety.

The Commissioner therefore requires the Ministers to disclose the information covered by part (a) of the request **Friday, 21 August 2015**.

Appeal

Should either GAAIA 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 they had committed a contempt of court.

Rosemary Agnew
Scottish Information Commissioner

7 July 2015

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.

...

(4) A Scottish public authority may refuse to make environmental information available to the extent that -

(a) it does not hold that information when an applicant's request is received;

...

- (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-
 - (a) international relations, defence, national security or public safety;

...

Scottish Information Commissioner

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