

Decision Notice

Decision 187/2016: Mr Rob Edwards and the Scottish Ministers

Discussions with energy companies on Special Area of Conservation for harbour porpoises

Reference No: 201600721

Decision Date: 30 August 2016



Scottish Information
Commissioner

Summary

On 10 March 2016, Mr Edwards asked the Scottish Ministers (the Ministers) for information relating to discussions with energy companies since 1 January 2015 about a proposed Special Area of Conservation (SAC) for harbour porpoises in the Moray Firth.

The Ministers told Mr Edwards that they did not hold the information he had requested. Following a review, Mr Edwards remained dissatisfied and applied to the Commissioner for a decision.

The Commissioner investigated and found that the Ministers had failed to respond to Mr Edwards' request for information in accordance with the EIRs. They had interpreted Mr Edwards' request too narrowly, and failed to provide him with information falling within the scope of his request, or with the advice and assistance required by their interpretation of his request. As the Ministers have since provided Mr Edwards with this information, she does not require them to take further action in relation to this failure.

Relevant statutory provisions

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 available environmental information on request); 9(1) (Duty to provide advice and assistance); 10(4)(a) (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 10 March 2016, Mr Edwards made a request for information to the Ministers. The information requested was:

"...any correspondence, emails, memos, minutes, notes or other unpublished information relating to discussions with energy companies since 1 January 2015 about a proposed Special Area of Conservation [SAC] for harbour porpoises in the Moray Firth"
2. The Ministers responded on 24 March 2016. They relied on regulation 10(4)(a) of the EIRs (Information not held), noting that they did not hold the information he had requested because *"there has never been a proposed Special Area of Conservation for harbour porpoises in the Moray Firth"*.
3. On 24 March 2016, Mr Edwards wrote to the Ministers requesting a review of their decision on the basis that the Ministers appeared to have taken an over-literal interpretation of his request. Mr Edwards noted that statutory advisory agencies had identified the Moray Firth as one of six potential SACs for harbour porpoises and he argued that this demonstrated that there was clearly a potential or proposed SAC for harbour porpoises in the Moray Firth.
4. The Ministers notified Mr Edwards of the outcome of their review on 22 April 2016. The Ministers upheld their initial response. They acknowledged that the JNCC (Joint Nature Conservation Committee) had identified six draft sites for harbour porpoise SACs and that the Moray Firth was one such site. However, the Ministers noted that after their own

scientists had reviewed the Moray Firth site, they had not approved it, so the Moray Firth did not continue to the next stage of the SAC designation process: notification as a “proposed SAC” and public consultation. The Ministers maintained that their previous response, which had explained that there was no information available about any exchanges with energy companies in this context, was correct.

5. On 25 April 2016, Mr Edwards 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. Mr Edwards stated that while he had used the word “proposed” in a plain English sense, and while he had made this clear in his request for review, the Ministers had continued to rely on a very narrow definition of the term “proposed” in order to enable them to withhold information from him.

Investigation

6. The application was accepted as valid. The Commissioner confirmed that Mr Edwards 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.
7. The case was allocated to an investigating officer.
8. 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 including justifying their reliance on any provisions of the EIRs they considered applicable to the information requested.

Commissioner’s analysis and findings

9. 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 Mr Edwards and the Ministers. She is satisfied that no matter of relevance has been overlooked.

Application of the EIRs

10. The Commissioner is satisfied that the information covered by this request is environmental information, as defined in regulation 2(1) of the EIRs (see paragraphs (a) and (c) of the definition, in particular: the text of each paragraph is reproduced in Appendix 1). The information relates to the marine environment in the Moray Firth. Mr Edwards has not disputed the Ministers’ decision to handle the request under the EIRs and the Commissioner will consider the information solely in terms of the EIRs in what follows.

Interpretation of request

11. The Ministers and Mr Edwards disagree about the scope of Mr Edwards’ request. Mr Edwards initially requested information about “*a proposed Special Area of Conservation for harbour porpoises in the Moray Firth*”. In his request for review, he referred to information on the Scottish Government website which stated that “*there are a total of six sites being considered as potential SACs for harbour porpoise*” and noted that at least one of those sites was in the Moray Firth.

12. The Ministers consider that Mr Edwards was seeking information about a specific stage in the SAC designation process (a “proposal” stage). In their review response, the Ministers clarified that “*Such a status is only placed on areas approved for public consultation by Scottish Ministers.*” The Ministers maintain that this stage has not been reached with the Moray Firth site and they were correct to state that, consequently, they did not hold any information covered by Mr Edwards’ request.
13. Mr Edwards considers that the Ministers took an overly narrow interpretation of his request, and that he used the word “proposal” in the generally accepted, plain English sense.
14. In interpreting information requests, the Commissioner believes that the words used in the request should generally be given their plain, ordinary meaning. The Ministers argued that Mr Edwards’ use of the word “proposed” confused the issue, given that a “proposal” would be a specific part of the planning process which had not yet been reached at the time of his request. The Commissioner finds Mr Edwards’ request to be clearly worded, and notes that his request for review provided additional context about the information he was seeking. It would therefore have been reasonable for the Ministers to interpret the request in a straightforward way, using the ordinary, everyday meaning of the word “proposed” as something which has been put forward for consideration.
15. During the investigation, it was established that Mr Edwards had made a second, amended request for information to the Ministers on 25 April 2016. In this second request, Mr Edwards asked for:

“Copies of any correspondence, emails, memos, minutes, notes or other unpublished information relating to discussions with energy companies since 1 January 2015 about any draft sites under consideration for Special Areas of Conservation for Harbour porpoises in the Moray Firth.”
16. The Ministers noted that they responded to this second, amended request from Mr Edwards and that he has received the information he asked for. The Ministers argued that Mr Edwards’ decision to submit an amended request “suggests that he initially at least accepted our original argument”.
17. There is nothing in Mr Edwards’ correspondence with the Ministers or with the Commissioner which suggests that his decision to submit an amended request was in any way an admission that he accepted the Ministers’ view of his request of 10 March 2016. Mr Edwards has commented that one of his aims, in seeking a decision from the Commissioner, was to obtain her opinion on whether or not the Ministers acted within the spirit and letter of the law when they refused his initial request.
18. The Commissioner has reviewed the wording in the second request submitted by Mr Edwards and she does not accept that replacing the word “*proposed*” with “*any draft sites under consideration*” renders the second request entirely different from the first. She takes the view that both requests would cover the same information.
19. The Commissioner expects requests to be interpreted in an objective and reasonable manner.
20. In the circumstances, the Commissioner considers that the Ministers took an overly narrow interpretation of Mr Edwards’ original request for information, and were unreasonable to persist in this interpretation when reviewing their response to his request, despite Mr Edwards providing additional clarity and context about the information he was seeking.

Regulation 10(4)(a) of the EIRs

21. Regulation 10(4)(a) of the EIRs provides that 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. The exception in regulation 10(4)(a) is subject to the public interest test in regulation 10(1)(b) of the EIRs so can only apply if, 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.
22. As noted above, the Ministers notified Mr Edwards that they did not hold the information he had requested. In submissions to the Commissioner, the Ministers contended that they were not trying to keep information from Mr Edwards, but that they discussed with him how he could amend his request to more appropriately ask for the information. The Ministers noted that Mr Edwards subsequently amended his original request and has received information.
23. The Commissioner has considered the Ministers' submissions as well as the text of Mr Edwards' original request and the wording of the second request he submitted. As indicated above, the Commissioner does not consider that the wording and meaning of the two requests differ so markedly that the Ministers were justified in providing two entirely different responses. In fact, the Commissioner notes that when the Ministers disclosed information to Mr Edwards regarding his second request, they told the Commissioner that this information "*would also cover the information requested under this case*".
24. It is the Commissioner's view that the information the Ministers identified as falling within the scope of Mr Edwards' second, amended request, also fell within the scope of his original request. The Commissioner finds that the Ministers were wrong to notify Mr Edwards that they did not hold information falling within the scope of his request and she does not uphold the application of regulation 10(4)(a) of the EIRs.

Regulation 9(1) of the EIRs

25. In his request for review, Mr Edwards asserted that the Ministers had failed to offer him appropriate advice and assistance as required by the EIRs.
26. Regulation 9(1) of the EIRs requires an authority to provide advice and assistance to applicants and prospective applicants. In this case, the Ministers maintain that they did offer advice and assistance to Mr Edwards, and they argue that this is evidenced by the fact that Mr Edwards submitted a new request on 25 April 2016, which used the phrase "draft sites" instead of "proposed". The Ministers submitted that they "*provided the appropriate advice and assistance to enable the right question to be asked to obtain the information sought*".
27. Mr Edwards submitted that he had not received any communications from the Ministers which offered advice or assistance in making a new request. The only correspondence he received from the Ministers was the response and review outcome provided in relation to the refusal of his initial request, and two acknowledgements that his correspondence relating to that request had been received.
28. As noted above, the Commissioner finds that the Ministers should have responded to Mr Edwards' request by providing the information that was later provided in response to an amended request. In these circumstances, it should not have been necessary for the Ministers to provide Mr Edwards with advice and assistance on making his request.

However, given that the Ministers found it necessary to draw a distinction between the information covered by Mr Edwards' plainly-worded request and the request he later submitted, the Commissioner finds it relevant to consider whether the Ministers provided Mr Edwards with reasonable advice and assistance in making his request.

29. Despite the submissions made by the Ministers on this point, the Commissioner does not accept that they fulfilled the duty placed on them by regulation 9(1) of the EIRs. The Ministers' initial response to Mr Edwards simply notified him that information was not held. It did not request any more information from him about what information he might find useful, or offer him any advice on re-wording his request (which, as stated, the Commissioner does not find to have been necessary, in any case).
30. In their review outcome, the Ministers responded to the points raised by Mr Edwards in his request for review and acknowledged that the Moray Firth had been a "draft site" for a SAC for harbour porpoises, but they still maintained that this was quite separate to his request for a "proposed" SAC for harbour porpoises. The Commissioner considers that the Ministers' review outcome was unnecessarily pedantic and she does not consider that Mr Edwards' decision to submit a new request using the term "draft site" can be taken as justification of the Ministers' view that they had provided sufficient advice and assistance. The Commissioner finds that the Ministers failed to comply with regulation 9(1) of the EIRs.
31. As noted above, the Commissioner considers that the information disclosed to Mr Edwards as a result of the second request he made (25 April 2016) should have been disclosed to him in response to his original request (10 March 2016). By failing to do so, the Commissioner finds that the Ministers failed to comply with regulation 5(1) of the EIRs, which states that a Scottish public authority that holds environmental information shall make it available when requested to do so by any applicant.

Decision

The Commissioner finds that the Scottish Ministers failed to comply with the Environmental Information (Scotland) Regulations 2004 (the EIRs) in responding to the information request made by Mr Edwards. The Commissioner finds that the Ministers wrongly gave notice under regulation 10(4)(a) that they did not hold information covered by his request, and failed to comply with regulation 5(1) and 9(1) of the EIRs in responding to his request.

Given that Mr Edwards has since obtained the information covered by his request, the Commissioner does not require Ministers to take any further action in relation to these failures.

Appeal

Should either Mr Edwards 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.

Margaret Keyse
Head of Enforcement

30 August 2016

The Environmental Information (Scotland) Regulations 2004

2 Interpretation

(1) In these Regulations –

...

(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.

...

10 Exceptions from duty to make environmental information available–

...

(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;

...

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