

Decision Notice 082/2020

Kelp harvesting

Applicant: The Applicant

Public authority: Scottish Ministers

Case Ref: 201901148



Scottish Information
Commissioner

Summary

The Ministers were asked for correspondence relating to proposals for kelp harvesting. They withheld some information on the basis it was internal communications and the public interest favoured withholding the information.

The Commissioner investigated and found that the EIRs allowed the Ministers to withhold the information.

Relevant statutory provisions

The Environmental Information (Scotland) Regulations 2004 (the EIRs) regulations 2(1) (definition (a), (b) and (c) of “environmental information”); 5(1) and (2)(b) (Duty to make available environmental information on request); 10(1), (2), (4)(e) (Exceptions from duty to make environmental information available)

The full text of each of the statutory provisions cited above is reproduced in the Appendix to this decision. The Appendix forms part of this decision.

Background

1. On 21 September 2018, the Applicant made a request for information to the Scottish Ministers (the Ministers) for:

“copies of any correspondence since 2015 between Fergus Ewing, as Cabinet Secretary for Rural Economy and Connectivity or Minister for Business, Energy and Tourism, and Marine Scotland and the Crown Estate relating to proposals for kelp harvesting.”
2. The Ministers responded on 6 March 2019. They disclosed some information and withheld the remainder under regulation 10(5)(e) of the EIRs (commercially confidential information) and section 30(b)(ii) (free and frank exchange of views) of the Freedom of Information (Scotland) Act 2002 (FOISA)
3. On 8 March 2019, the Applicant emailed the Ministers requesting a review of their decision. The Applicant disagreed with the reasons for withholding “an unspecified amount” of information under the exemption/exception cited. The Applicant questioned whether the information remained commercially confidential given the context of the request (noting the decision to review kelp harvesting took place in November 2018) and asked the Ministers to set out their consideration of the public interest test.
4. Following an application to the Commissioner, which led to the Commissioner requiring the Ministers to carry out a review, the Ministers notified the Applicant of the outcome of their review on 30 May 2019. The Ministers apologised for the late response, recognised that they had failed to describe their consideration of the public interest test and stated that they had erroneously cited section 30(b) of FOISA in their initial response. The Ministers went on to uphold their reliance on regulation 10(5)(e) of the EIRs to some information. In addition, the Ministers also considered some information to be excepted under regulations 10(4)(e) (internal communications) and 11(2) (personal data) of the EIRs.

5. On 3 July 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.
6. The Applicant stated he was dissatisfied with the outcome of the Ministers' review. The Applicant questioned whether the considerations of confidentiality may have lessened over time and whether it was really in the public interest to withhold the requested information.

Investigation

7. 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.
8. On 9 July 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.
9. The Ministers were asked to review the information they had provided as some documents appeared to be missing. It was also unclear what information was being withheld and what information had been published. The Ministers were also asked to confirm which regulation(s) they were relying on to withhold information.
10. On 23 August 2019, the Ministers responded to the investigating officer's questions. In response, the Ministers:
 - (i) identified further information falling within the scope of this request;
 - (ii) disclosed information to the Applicant originally withheld under regulation 10(4)(e);
 - (iii) withdrew their reliance on regulation 10(5)(e), and
 - (iv) provided the Applicant with links to information available online.
11. The Ministers confirmed that they continued to rely on regulations 10(4)(e) and 11(2) of the EIRs to withhold information.
12. 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. These related to their reasons for withholding the remaining information.
13. On 11 October 2019, the Ministers responded to the questions raised and disclosed further information to the Applicant.
14. The Applicant confirmed that he did not require the Commissioner to reach a decision on the withholding of personal data or the information which had been disclosed subsequent to the review response. As a result, the Commissioner has made no finding in relation to this information.
15. During the investigation, the Ministers were asked for, and provided, further submissions to support their reasoning why the remaining information should be withheld.

Commissioner's analysis and findings

16. In coming to a decision on this matter, the Commissioner has considered all of the withheld information 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.

Regulation 10(4)(e) of the EIRs (internal communications)

17. The Ministers withheld three documents under regulation 10(4)(e) of the EIRs:
- Document A - an email dated 13 November 2017 at 15:35 (Referred to as Document 1 by the Ministers);
 - Document B - an email dated 26 October 2017 at 10:07 (Referred to as Document 9 by the Ministers); and
 - Document C – paper entitled “Wild Seaweed Harvesting Update” dated 27 June 2018 (attached to Document B) (Referred to as Document 8a by the Ministers).
18. Under regulation 10(4)(e) of the EIRs, a public authority may refuse to make environmental information available to the extent that it involves making available internal communications. In order for information to fall within the scope of this exception, it need only be established that the information is an internal communication.
19. The Commissioner is satisfied that the information is environmental information in line with paragraphs (a), (b) and (c) of the definition in regulation 2(1) of the EIRs (see Appendix 1).
20. As with all of the exceptions in regulation 10, regulation 10(4)(e):
- (i) must be interpreted in a restrictive way (regulation 10(2)(a)) and a presumption in favour of disclosure must be applied (regulation 10(2)(b))
 - (ii) is subject to the public interest test in regulation 10(1)(b) of the EIRs.

Document A

21. The Ministers explained that, in 2017, Highland and Islands Enterprise commissioned a study “Wild seaweed harvesting as a diversification opportunity for fishermen” to determine how much kelp was available, where key stocks were located, and diversification opportunities. The study (known as the Wildweed report¹) also set out the current licensing process and considered harvesting methods, environmental impacts and the viability of seaweed harvesting, taking into account the costs involved.
22. Document A contains correspondence about the drafting of the Wildweed report, specifically correspondence from officials to the Cabinet Secretary, which contained commentary about the initial draft.

¹ <https://www.hie.co.uk/media/7639/swmid-seaweed-farm-wildplusseaweedplusharvestingplusasplusplusdiversificationplusopportunityplusforplusfishermen-a3302938.pdf>

Documents B and C

23. The Ministers withheld information in email exchanges between the Cabinet Secretary for Rural Economy and Connectivity and Marine Scotland officials. The information provides an update from officials to the Cabinet Secretary, which contains proposals and investment plans into seaweed harvesting, including financial information which is not currently publicly available.

The Commissioner's findings

24. Having considered the information withheld by the Ministers, the Commissioner is satisfied that all of the withheld information comprises internal communications and is therefore subject to the exception in regulation 10(4)(e).
25. Regulation 10(4)(e) is subject to the public interest test in regulation 10(1)(b) of the EIRs. The Ministers can only rely on the exception to withhold the information if, in all the circumstances, the public interest in making the information available is outweighed by the public interest in maintaining the exception.

The public interest test

26. With respect to document A, the Ministers considered it is essential for officials to be able to provide a briefing to Ministers, and for Ministers and officials to communicate in confidence where necessary, with regard to the work undertaken by external stakeholders, such as the Scottish Association for Marine Science, on a range of issues including kelp harvesting proposals and "potential" future ideas in this area. The Ministers considered it essential that officials are able to impart information to Ministers to enable them to understand and be aware of any developments or issues arising in this area.
27. The Ministers stated that the information withheld conveys an update from officials containing strongly critical concerns on the initial draft of the report.
28. The Ministers submitted that officials will be reluctant to provide their views as fully and frankly, either in writing or at meetings, if they believe that their input, views, criticism, etc. will be subjected to public scrutiny when these were given in what was widely considered to be a safe and confidential environment. The Ministers submitted that disclosure of Ministers' and officials' opinions and concerns on early iterative versions of the report would be likely to undermine the full and frankness of these types of discussions in future, which in turn would undermine the robustness and quality of the comments provided.
29. With regard to documents B and C, the Ministers considered that there is a greater public interest in ensuring that internal communications between officials and Ministers, which contains sensitive information relating to third party companies that is not already in the public domain, should be able to take place to inform high quality policy and decision making, without the risk of that information being made publicly available, particularly where the discussions are ongoing and in relation to a sensitive issue such as kelp harvesting in Scotland.
30. The Ministers submitted that one of the key policy responsibilities of the Scottish Government relates to economic development and, as such, involves significant engagement with the Scottish business base. The Ministers have developed relationships with a number of businesses in Scotland, and these relationships are built to a large degree on trust between both parties. The Ministers considered that this is critically important, given the sensitive commercial nature of much of the information likely to be discussed.

31. The Ministers recognised that there is a public interest in disclosing information as part of open, transparent and accountable government, and to inform public debate. They also acknowledged the public interest in Scotland in relation to kelp harvesting. The Ministers considered that this public interest is met, at least in part, by the publication of the final version of the Wildweed report.
32. However, given the importance of kelp proposals and kelp harvesting to the marine environment, the Ministers believed there was a greater public interest in allowing Ministers and officials a private space within which to communicate and share information in relation to the robustness of the Wildweed report to ensure that the Cabinet Secretary is fully aware of the current issues. This private space is essential to enable all options to be properly considered in confidence, so that good decisions can be taken based on fully informed advice and evidence, including information such as that provided by Marine Scotland staff initially before being passed to Ministers.
33. The Ministers considered that disclosure would be likely to undermine the full and frank discussion of issues between the Scottish Government and these stakeholders, which in turn would undermine the quality of the decision making process and which would not be in the public interest.
34. In addition, the Ministers considered it would not be in the public interest to damage their relationships with important stakeholders. The Ministers noted that the market is very limited for companies who can undertake the work in the proposal. Therefore, it would not be in the public interest to potentially put stakeholders off exploring options which could ultimately significantly benefit Scotland's economy.

The Applicant's submissions

35. The Applicant submitted that the correspondence about kelp harvesting dates back a number of years, and that considerations of confidentiality may have lessened over time. He also pointed out that the issue was of considerable public interest and generated media coverage while proposals were live. The Applicant submitted there is a strong public interest justification for knowing what the Ministers and potential kelp harvesters said to each other about an issue of such importance for the sustainability of Scotland's seas.

The Commissioner's findings

36. The Commissioner has carefully considered the submissions made by both the Ministers and the Applicant.
37. The Commissioner recognises the public interest in accountability and transparency with regard to the decision making processes of public authorities, and in understanding how particular decisions are reached and how particular strategies are developed.
38. The Commissioner also accepts that there can be a public interest in ensuring that officials and public authority employees have a private space in which they can discuss options and issues in detail, without fear that such discussions will be disclosed. The Commissioner accepts that good decision making can rely on the free and frank provision of advice and views, in order that all options can be discussed and that the policy making that ensues from such discussions is fully informed. From the submissions put forward, and the information under consideration, he is satisfied that such arguments are relevant here.
39. The Commissioner also recognises that the topic of harvesting of sea kelp is a matter that has received considerable public interest.

40. The Commissioner notes that document A is a discussion of an early draft of the Wildweed report, the final version of which was published prior to the Applicant's request. The discussion contains criticisms of the initial draft in light of the original report brief, highlighting points that were not included in the draft and that the report will be revised.
41. Documents B and C are internal discussions between officials and Ministers conveying commercial information relating to third parties.
42. The Commissioner is of the view that officials should be allowed a private space to discuss such matters and offer opinions without the concern that such discussions would be published. He also recognises the need for the Ministers to forge relationships with Scottish businesses, which may include the provision of sensitive commercial information, and the public interest, with regard to future economic development, in allowing those exchanges to take place in a safe environment. However, this must be balanced with the considerable public interest in ensuring transparency in the decision-making process.
43. Having considered the competing public interest considerations, the Commissioner is satisfied, having taken into account the information which has now been disclosed, together with the publication of the Wildweed report, that, on balance, the public interest in making the information available is outweighed by that in maintaining the exception.
44. The Commissioner therefore concludes that the Ministers were entitled to apply the exception contained in regulation 10(4)(e) to the information that remains withheld.

The Ministers' handling of the request and review

45. The following observations are not part of the Commissioner's findings on compliance with the EIRs, but cover practice issues the Commissioner has identified during this investigation and about which he has concerns.
46. The Applicant submitted his request on 11 September 2018, but it took over a year (11 October 2019) for the Ministers to finally disclose the remaining non-exempt information to the Applicant. The information was disclosed in a piecemeal fashion.
47. The Commissioner notes that the Ministers' initial and review responses were significantly delayed, despite the Applicant sending reminders to the Ministers about his request.
48. Had the Ministers carried out proper searches for the information and given greater consideration as to whether disclosure would cause the harm identified, the Ministers would have disclosed the information at the time they dealt with the request, rather than following an application to the Commissioner. Such disclosure may have obviated the need for an application to be made to the Commissioner, and avoided what could be considered unnecessary work for both the Commissioner's staff and those of the Ministers.

Decision

Given that, during the investigation, the Applicant narrowed the scope of his application to the information still being withheld, the Commissioner finds that the Scottish Ministers complied with the Environmental Information (Scotland) Regulations 2004 in responding to his information request.

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.

Margaret Keyse
Head of Enforcement

22 June 2020

Appendix 1: Relevant statutory provisions

The Environmental Information (Scotland) Regulations 2004

2 Interpretation

(1) In these Regulations –

“the Act” means the Freedom of Information (Scotland) Act 2002;

...

“environmental information” has the same meaning as in Article 2(1) of the Directive, namely any information in written, visual, aural, electronic or any other material form on

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(a) the state of the elements of the environment, such as air and atmosphere, water, soil, land, landscape and natural sites including wetlands, coastal and marine areas, biological diversity and its components, including genetically modified organisms, and the interaction among these elements;

(b) factors, such as substances, energy, noise, radiation or waste, including radioactive waste, emissions, discharges and other releases into the environment, affecting or likely to affect the elements of the environment referred to in paragraph (a);

(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

...

- (e) the request involves making available internal communications.

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