



Scottish Information  
Commissioner  
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# Decision Notice 033/2024

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## Clyde Cod Spawning Closure Consultation

**Authority: Scottish Ministers**

**Case Ref: 202200208**

### Summary

The Applicant asked the Authority for a copy of a study undertaken by the Scottish Oceans Institute and Clyde Fisherman's Association referenced within the current Clyde Cod Spawning Closure Consultation document. The Authority refused to make the information available as it argued that the information was material in the course of completion, unfinished documents or incomplete data.

The Commissioner investigated and found that the Authority had not been entitled to refuse to make the draft report available to the Applicant.

### Relevant statutory provisions

Freedom of Information (Scotland) Act 2002 (FOISA) section 47(1) and (2) (Application for decision by Commissioner)

The Environmental Information (Scotland) Regulations 2004 (the EIRs) regulations 2(1) (definition of "the Act", "the applicant", "the Commissioner" and "environmental information" (paragraph (a) and (c)) (Interpretation); 5(1) (Duty to make environmental information available on request); 10(1) and (2) and (4)(d) (Exceptions from duty to make environmental information available); 13(d) (Refusal to make information available); 17(1), (2)(a), (b) and (f) (Enforcement and appeal provisions)

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 2 November 2021, the Applicant made a request for information to the Authority. They asked for:
  - (a) a copy of the study undertaken by the Scottish Oceans Institute and Clyde Fisherman's Association referenced at paragraph 11 of the [current Clyde Cod Spawning Closure Consultation](#)<sup>1</sup>
  - (b) all correspondence within the Authority and between the Authority and other parties with reference to this study, since 1 January 2019.
2. The Authority responded under the EIRs on 1 December 2021, having applied section 39(2) of FOISA. The Authority made some information available to the Applicant falling within scope of part (b) of the request, subject to redaction. It relied on the exception in regulation 10(4)(e) to withhold other information covered by part (b) of the request. In response to part (a) of the request, the Authority informed the Applicant that it was relying on the exception in regulation 10(4)(d) of the EIRs, and the requested report would be made available as soon as possible after the final review. It noted that a meeting date was scheduled for January 2022 to review the report, and it hoped this would enable publication shortly afterwards.
3. On 6 December 2021, the Applicant wrote to the Authority requesting a review of its decision. The Applicant stated that they were dissatisfied with Authority's reliance on the exceptions in regulations 10(4)(d) and 10(4)(e) of the EIRs.
4. The Authority notified the Applicant of the outcome of its review on 6 January 2022. In doing so, the Authority concluded that a different decision should be reached. The Authority stated that it did not in fact hold a copy of the research report (covered by part (a) of the request). As such it was now seeking to rely on the exception in regulation 10(4)(a) i.e. that the information was not held.
5. As regards the information it withheld in respect of part (b) of the request, the Authority commented that it had reviewed this information and had concluded that this information related to the consultation, and not specifically the research report. It noted that correspondence relating to the research report was released (in response to the request), with personal data redacted.
6. On 16 February 2022, the Applicant wrote to the Commissioner, applying for a decision in terms of section 47(1) of FOISA. By virtue of regulation 17 of the EIRs, Part 4 of FOISA applies to the enforcement of the EIRs as it applies to the enforcement of FOISA, subject to specified modifications. The Applicant stated they were dissatisfied with the outcome of the Authority's review for the following reasons:
  - They did not believe the Authority does not hold the requested information (a copy of the study undertaken).
  - The Authority had given an assurance that, following a meeting on 25 January 2022, the study document would be finalised, and made available. The Applicant noted that as of 14 February 2022, the meeting had still to be arranged. The Applicant did not believe that the meeting would go ahead, and as such the Authority would not make the document available.

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<sup>1</sup> <https://www.gov.scot/publications/clyde-cod-spawning-closure-2022-23-consultation/documents/>

- The Applicant was unhappy with the Authority's decision to apply an exception to the draft document.
- The Applicant considered the public interest to lie in making the information available.

## **Investigation**

7. The Commissioner determined that the application complied with section 47(2) of FOISA and that he had the power to carry out an investigation.
8. On 30 March 2023, the Authority was notified in writing that the Applicant had made a valid application. The Authority was asked to send the Commissioner the information withheld from the Applicant. The Authority provided the information and the case was allocated to an investigating officer.
9. Section 49(3)(a) of FOISA requires the Commissioner to give public authorities an opportunity to provide comments on an application. The Authority was invited to comment on this application and to answer specific questions. These related to the nature and breadth of searches carried out by it to establish that it did not hold information which would fulfil part (a) of the Applicant's request. Submissions were also invited around the Authority's application of the exception in regulation 10(4)(d) of the EIRs, together with its consideration of the application of the public interest test.
10. During the course of the investigation, the Authority explained it had identified that it did hold a copy of the draft report, and so, was no longer relying on the exception in regulation 10(4)(a). The Authority acknowledged that it should have considered whether it could make the draft report available. But it stated that it was relying on the exception in regulation 10(4)(d) of the EIRs.
11. Because the Authority has recognised that it does (and did at the time of receiving the Applicant's request) hold a copy of the draft report, the Commissioner must find that it was wrong to rely on the exception in regulation 10(4)(a) in its response to the Applicant's requirement for review.
12. Also, during the course of the investigation, the Authority provided the Applicant with a final version of the report covered by their request. Whilst the Applicant acknowledged receipt of this they wished to continue with their application for a Decision.

## **Commissioner's analysis and findings**

13. The Commissioner has considered all of the submissions made to him by the Applicant and the Authority.

### **Handling in terms of the EIRs**

14. The Authority considered the Applicant's request under the EIRs, having concluded that the information requested was environmental as defined in regulation 2(1) of the EIRs.
15. Where information falls within scope of this definition, a person has a right to access it (and the public authority a corresponding obligation to respond) under the EIRs, subject to various restrictions and exceptions contained in the EIRs.
16. The Commissioner is satisfied that the information covered by the Applicant's request falls within the definition of environmental information set out in regulation 2(1), in particular paragraphs (a) and (c) of that definition.

## **Section 39(2) of FOISA – Environmental information**

17. The exemption in section 39(2) of FOISA provides, in effect, that environmental information (as defined by regulation 2(1) of the EIRs) is exempt from disclosure under FOISA, thereby allowing any such information to be considered solely in terms of the EIRs. In this case, the Commissioner accepts that the Authority was entitled to apply this exemption to the information withheld under FOISA, given his conclusion that it is properly classified as environmental information.
18. As there is a statutory right of access to environmental information available to the Applicant in this case, the Commissioner accepts, in all the circumstances, that the public interest in maintaining this exemption (and responding to the request under the EIRs) outweighs any public interest in disclosing the information under FOISA. Both regimes are intended to promote public access to information and there would appear to be no reason why (in this particular case) disclosure of the information should be more likely under FOISA than under the EIRs.
19. The Commissioner therefore concludes that the Authority was correct to apply section 39(2) of FOISA and consider the Applicant's information request under the EIRs.

## **Regulation 5(1) and (2)(b) of the EIRs – Duty to make available environmental information on request**

20. Regulation 5(1) of the EIRs requires a Scottish public authority, which holds environmental information, to make it available when requested to do so by any applicant. This obligation relates to information that is held by the authority when it receives a request.
21. On receipt of a request for environmental information, therefore the authority must ascertain what information it holds falling within scope of the request. Having done so, regulation 5(1) requires the authority to provide that information to the requester, unless a qualification in regulations 6 to 12 applies (regulation 5(2)(b)).
22. Under the EIRs, a public authority may refuse to make environmental information available if one or more of the exceptions in regulation 10 applies.

## **Regulation 10(4)(d) – material in the course of completion, unfinished documents or incomplete data**

23. The Authority refused to make information available under this exception in response to the Applicant's request and re-iterated this position during the course of the investigation. The Applicant disagreed with the application of this exception.
24. Regulation 10(4)(d) of the EIRs provides an exception from the duty to make environmental information available, where the request relates to material which is still in the course of completion, to unfinished documents or to incomplete data. Where a Scottish public authority refuses to make information available on this basis, it must state the time by which the information will be finished or completed (regulation 13(d)).
25. [The Aarhus Convention: An Implementation Guide](#)<sup>2</sup> provides guidance (at page 85) as to the type of material this exception is intended to cover. It describes the expression "in the course of completion" as relating to the process of preparation of the information or

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<sup>2</sup> [The Aarhus Convention: An Implementation Guide \(second edition\) | UNECE](#)

document and not to any decision-making process for the purpose of which the information or document has been prepared. It states that the mere status of something as a draft alone does not automatically bring it within the exception. It also states that the words “in the course of completion” suggest that the term refers to individual documents that are actively being worked on by the public authority, and which will have more work done on them within some reasonable timeframe. Once these documents are no longer “in the course of completion” they may be released, even if they are still unfinished and even if the decision to which they pertain has not yet been resolved.

#### *The Authority’s submissions about the exception*

26. The Authority informed the Commissioner that the report referred to in the consultation document is “Firth of Clyde Demersal Fish Surveys: Spring and Autumn 2018 report” which was carried out by the Scottish Oceans Institute at the University of St Andrews, in conjunction with the Clyde Fisherman’s Association (CFA).
27. The Authority argued that at the time of the request, the report was still in the course of completion and was actively being worked on by it at the time.
28. A number of the Authority’s scientists were involved in the review of the report and were asked to comment on the draft prior to it being finalised and published by the University of St Andrews.
29. The Authority submitted that a review of the draft, and subsequent comments remained outstanding at the time the request was received - with further work yet to be completed by it. As a consequence, the Authority considered that the draft documents remained incomplete at the time of the request and review, with further work required to be undertaken to complete the peer review process.
30. The Authority informed the Commissioner of the date on which comments were provided back to scientists at the University of St Andrews, who then worked on the document to finalise it ahead of publication.
31. It was following this additional collaboration and peer review process that the reports were considered to be complete and they were subsequently published on 13 December 2022.
32. In its submissions, the Authority acknowledged that it should not have referred to the report in the consultation document. But it noted that it had done this in good faith with the belief, at the time of the consultation, that the report was due for imminent publication.
33. In terms of its duty under regulation 13(d) of the EIRs to state the time by which it considers the information will be finished or completed, the Authority submitted that in responding to the request it considered that it had met its obligations.
34. The Authority was of the view that the statement it made informing the requester that “*it was unfortunate that circumstances out with our control or that of CFA (namely due to the Covid-19 pandemic and the impacts of the EU exit), caused delays to this report being finalised and published. We are in the process of scheduling a date in January to hold a meeting to review the report and hope that this will enable publication shortly afterwards*”, provided an indication, that at the time of responding to the request, it expected this work to be completed in early 2022. The Authority also submitted that as the reports were not its own, it was not in control of when they would be published. It also stated that it maintained contact with the requestor to advise of progress.

*The Applicant's submissions about the exception*

35. The Applicant argued that it was entirely inappropriate to use the exception in regulation 10(4)(d) where the document is relied upon for the formulation of public policy.
36. The Applicant made specific reference to text contained in the consultation document where it stated "*more recently, a study was undertaken by the Scottish Oceans Institute and Clyde Fisherman's Association (CFA) during the spawning period with demersal and pelagic gears. A final version of the report can be requested from the CFA. Early results from the study show the presence of spawning cod in the closed area during the closure period, indicating that the closure is in the right place at the right time.*" The Applicant commented that this study was not, therefore, simply relevant to "internal policy decision making". It was explicitly used in support of public policy making.
37. The Applicant also provided copies of two email chains which document correspondence between themselves and the Authority where they were seeking to understand when the report would be finalised and made available.

*The Commissioner's view about the exception*

38. The Commissioner is aware that the driver for the Applicant's request in this case was a statement made in the "Clyde Cod Spawning Closure 2022-23: Consultation" where it said at paragraph 11 "*More recently, a study undertaken by the Scottish Oceans Institute and Clyde Fisherman's Association (CFA) during the spawning period with demersal and pelagic gears. A final version of the report can be requested from the CFA. Early results from the study show the presence of spawning cod in the closed area during the closure period, indicating that the closure is in the right place at the right time.*"
39. This statement clearly implies that a final version of the report was available at the time that the consultation was launched. It also appears to rely on some of the findings documented in that report to justify the stance it is looking to take in its proposed approach to the closure of parts of the Firth of Clyde in future.
40. Having considered the guidance set out in the *Aarhus Convention: An Implementation Guide* (referred to paragraph 25 above), together with the submissions from the Authority, the Commissioner is satisfied that at the time of the request the report was in a draft form and was in the process of completion. It is evident from the Authority's submissions that it was acting as a consultee on the draft report, with the report itself having been created by scientists at the University of St Andrews. It is also clear that delays affecting its ability to carry out the peer review exercise were due to matters outwith the Authority's control.
41. The Commissioner also acknowledges, from the submissions provided by the Authority, that further work was carried out on the draft report prior to it being finalised and signed off.
42. As a consequence, the Commissioner is satisfied that the Authority was entitled to rely on the exception in regulation 10(4)(d) to refuse to make information available to the Applicant (under the EIRs) when they requested the information.
43. Regulation 13(d) of the EIRs requires a Scottish public authority relying on the exception in regulation 10(4)(d) to state the time by which the authority considers that the information will be finished or completed.
44. The Authority did not comply with this requirement. Although it informed the Applicant of an intended meeting in January 2022, when the report would be finalised and published, this meeting never occurred. Furthermore, despite the Applicant seeking clarity from the

Authority as to when the report would be finalised, the Authority was unable to commit to a date. The Commissioner is therefore not satisfied that the Authority did state a time by which it considered that the information would be finished or completed. Nor does he agree with the Authority's submission that it maintained contact with the Applicant to keep them advised of progress. From the evidence seen by the Commissioner it appears that the Applicant was the one maintaining contact and seeking progress reports. The Authority should have sought clarification from those in control of the report as to when it would be finished or completed.

45. As the Commissioner is satisfied that the Authority was entitled to rely on the exception in regulation 10(4)(d) to refuse to make information available he must go on to consider whether, 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 – Regulation 10(1)(b)***

46. Having found that the Authority was entitled to refuse to make information in the draft report available in line with the exception in regulation 10(4)(d), the Commissioner is required to consider the public interest test in regulation 10(1) of the EIRs in respect of that information. This specifies that a public authority may only refuse to make information available to which an exception applies where, in all the circumstances, the public interest in making the information available is outweighed by the public interest in maintaining the exception.

*The Authority's submissions about the public interest*

47. The Authority recognised the public interest in release of the draft report as part of open, transparent and accountable government. But it considered this to be met by publication of the completed report. It also acknowledged the public interest in understanding the evidence that was referred to in the consultation.
48. However, the Authority saw no public interest in releasing drafts of the report before the work was completed.
49. The Authority submitted that peer review is an established process within academia ensuring quality control and it is critical to ensuring research is valid and reliable, thereby enhancing the integrity of the study. This, the Authority argued, ensures that standards are maintained, and builds trust in the findings. It is the Authority's contention that release of the report before it has been peer reviewed by scientists and appropriate scrutiny and due diligence carried out is not in the public interest.
50. The Authority also argued that there is a strong public interest in maintaining a good working interest with both the CFA and the University of St Andrews, in order to continue collaborative work in the future in areas which are otherwise under resourced and have a historic lack of data. In the Authority's view, making available draft versions of work prior to appropriate scrutiny would jeopardise this relationship.
51. As a consequence, the Authority concluded that the public interest is in favour of upholding the exception and refusing to make available the report in this case.

*The Applicant's submissions about the public interest*

52. In the Applicant's view, at the point where incomplete or unfinished documents are being relied upon in public, by the Authority, in the context of a formal consultation, then the balance of the public interest would require this study, incomplete or not, to be provided when requested.

53. The Applicant commented that these draft documents having been used to substantiate a public policy decision to be consulted on means the public interest in disclosing the information outweighs the public interest in withholding it. The Applicant indicated that they found it hard to imagine a clearer instance where disclosure should be required.
54. It is the Applicant's submission that disclosure of the draft report would enhance the scrutiny of decision-making processes and thereby improve accountability and participation. In the Applicant's view, the public have a right when participating in consultation processes to see all material cited in support of the proposals being consulted on, and when they do not have access to it, accountability demands its release. The Applicant also argued that disclosure would help to ensure that the Authority is adequately discharging its functions, and would also clearly contribute to a debate on a matter of public interest.

*The Commissioner's view on the public interest - Regulation 10(1)*

55. The Commissioner has fully considered the submissions from both the Applicant and the Authority.
56. In doing so, the Commissioner agrees with the Applicant that where, as in this case, the Authority referred to the availability of the final report in the narrative of the consultation document and also quoted certain information from it to apparently support its position regarding Cod Closures on the River Clyde, it would be reasonable and within the public interest for this information to be made available. This would ensure that those interested in, and responding to, the consultation, have full information available to them when considering the questions posed by the Authority. To not make this information available leaves consultees at a distinct disadvantage.
57. Furthermore, the Commissioner agrees that there is a general public interest in making the information in the draft report available to promote accountability and transparency.
58. However, on the other hand, the Commissioner does acknowledge the Authority's submission that it mentioned the presence of the report and the contents of it in good faith, believing that it would soon be ready for publication. That said, it is the Commissioner's view that it would perhaps have been appropriate for the Authority to check the status of the report with the CFA and the University of St Andrews prior to including this text in the consultation document.
59. Furthermore, it is evident from the Authority's submissions that there was never an indication that there would be a final report, as such, and the Authority must have been satisfied that the results referred to were robust and reliable enough that they could be included in the consultation document. Therefore, the Commissioner is unable to accept the assertion from the Authority that there was no public interest in making the draft document available before the work was completed.
60. Overall, and in all of the circumstances, the Commissioner has concluded that the public interest in making the information available is not outweighed by that in maintaining the exception.
61. For that reason, the Commissioner finds that the Authority failed to comply with regulation 5(1) of the EIRs and requires the Authority to disclose the draft report to the Applicant.



## **Decision**

The Commissioner finds that the Authority failed to comply with the Environmental Information (Scotland) Regulations 2004 (the EIRs) in responding to the information request made by the Applicant.

The Commissioner finds that the Authority failed to comply with regulation 5(1) of the EIRs by relying on the exception in regulation 10(4)(d) of the EIRs for refusing to make information available which would fulfil part (a) of the Applicant's request. The Commissioner also finds that the Authority did not fulfil its obligation under regulation 13(d). Furthermore, the Commissioner finds that the Authority failed to comply with regulation 5(1) of the EIRs by relying on the exception in regulation 10(4)(a) in response to the Applicant's requirement for review.

The Commissioner therefore requires the Authority to disclose the draft report referred to in paragraph 11 of the consultation document "Firth of Clyde Demersal Fish Surveys: Spring and Autumn 2018 report", by **2 May 2024**.

## **Appeal**

Should either the Applicant or the Authority 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 Authority fails to comply with this decision, the Commissioner has the right to certify to the Court of Session that the Authority has failed to comply. The Court has the right to inquire into the matter and may deal with the Authority as if it had committed a contempt of court.

**David Hamilton**  
**Scottish Information Commissioner**

**18 March 2024**

## Appendix 1: Relevant statutory provisions

### Freedom of Information (Scotland) Act 2002

...

#### 47 Application for decision by Commissioner

- (1) A person who is dissatisfied with -
  - (a) a notice under section 21(5) or (9); or
  - (b) the failure of a Scottish public authority to which a requirement for review was made to give such a notice.

may make application to the Commissioner for a decision whether, in any respect specified in that application, the request for information to which the requirement relates has been dealt with in accordance with Part 1 of this Act.

- (2) An application under subsection (1) must -
  - (a) be in writing or in another form which, by reason of its having some permanency, is capable of being used for subsequent reference (as, for example, a recording made on audio or video tape);
  - (b) state the name of the applicant and an address for correspondence; and
  - (c) specify –
    - (i) the request for information to which the requirement for review relates;
    - (ii) the matter which was specified under sub-paragraph (ii) of section 20(3)(c); and
    - (iii) the matter which gives rise to the dissatisfaction mentioned in subsection (1).

### The Environmental Information (Scotland) Regulations 2004

#### 2 Interpretation

- (1) In these Regulations –
  - “the Act” means the Freedom of Information (Scotland) Act 2002;
  - “applicant” means any person who requests that environmental information be made available;
  - “the Commissioner” means the Scottish Information Commissioner constituted by section 42 of the Act;
  - “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.

...

## **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

...

- (d) the request relates to material which is still in the course of completion, to unfinished documents or to incomplete data; or

...

## **13 Refusal to make information available**

Subject to regulations 10(8) and 11(6), if a request to make environmental information available is refused by a Scottish public authority in accordance with regulation 10, the refusal shall-

...

- (d) if the exception in regulation 10(4)(d) is relied on, state the time by which the authority considers that the information will be finished or completed;

...

...

## **17 Enforcement and appeal provisions**

- (1) The provisions of Part 4 of the Act (Enforcement) including schedule 3 (powers of entry and inspection), shall apply for the purposes of these Regulations as they apply for the purposes of the Act but with the modifications specified in paragraph (2).
- (2) In the application of any provision of the Act by paragraph (1) any reference to -
  - (a) the Act is deemed to be a reference to these Regulations;
  - (b) the requirements of Part 1 of the Act is deemed to be a reference to the requirements of these Regulations;
  - ...
  - (f) a notice under section 21(5) or (9) (review by a Scottish public authority) of the Act is deemed to be a reference to a notice under regulation 16(4); and
  - ...