

# Decision Notice

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## Decision 128/2014 Protect Wild Scotland and the Scottish Ministers

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### Scottish Fish Farms Annual Production Survey

Reference No: 201400276

Decision Date: 13 June 2014



Scottish Information  
Commissioner

## Summary

On 16 October 2013, Protect Wild Scotland (PWS) asked the Scottish Ministers (the Ministers) for the information from the Scottish Fish Farms Annual Production Survey 2012 questionnaire returns. The Ministers withheld the information under the Environmental Information (Scotland) Regulations 2004, as they considered disclosure would substantially prejudice the interests of the providers of the information (who were not obliged to provide it and who did not consent to disclosure). Following a review, PWS remained dissatisfied and applied to the Commissioner for a decision.

Following an investigation, the Commissioner found that the Ministers had dealt with PWS's request for information in accordance with the EIRs.

## Relevant statutory provisions

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The Environmental Information (Scotland) Regulations 2004 (the EIRs) regulations 2(1)(a) and (c) (Interpretation); 5(1) and (2)(b) (Duty to make available environmental information on request); 10(1), (2) and (5)(f) (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

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1. On 16 October 2013, PWS wrote to the Ministers requesting the following information:  
“... please provide [The Scottish Fish Farms Annual Production Survey 2012](#) questionnaire returns for ALL companies in relation to Atlantic salmon (production data AND smolt data).”
2. By way of background, these are survey returns issued and collected by Marine Scotland Science (part of the Scottish Government) which are aggregated, analysed and published annually:  
<http://www.scotland.gov.uk/Topics/marine/science/Publications/stats/FishFarmProductionSurveys>
3. The Ministers responded on 12 November 2013 and applied regulation 10(5)(f) of the EIRS. They submitted that disclosure would result in commercially sensitive information being in the public domain which would cause detriment to the individual fish-farming companies and also to Scottish aquaculture as a whole.
4. On 13 November 2013, PWS wrote to the Ministers, requesting a review of their decision. PWS argued that data on fish mortality rates were already published by various fish-farming companies.
5. The Ministers notified PWS of the outcome of their review on 10 December 2013. They upheld the application of regulation 10(5)(f) of the EIRs.
6. On 7 February 2014, PWS wrote to 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.

7. The application was validated by establishing that PWS made a request for information to a Scottish public authority and applied to the Commissioner for a decision only after asking the authority to review its response to that request.

## **Investigation**

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8. On 14 February 2014, the Ministers were notified in writing that an application had been received from PWS and were asked to provide the Commissioner with any information withheld from it. The Ministers responded with the information requested and the case was then allocated to an investigating officer.
9. The investigating officer subsequently contacted the Ministers, giving them an opportunity to provide comments on the application (as required by section 49(3)(a) of FOISA) and asking them to respond to specific questions. Specifically, they were asked to justify their reliance on regulation 10(5)(f) of the EIRs.
10. The Ministers provided submissions in response. During the investigation, PWS was also asked for and provided submissions.

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

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11. 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 PWS and the Ministers. She is satisfied that no matter of relevance has been overlooked.

### **FOISA or EIRs?**

12. The Ministers dealt with PWS on the basis that the information requested was environmental information, as defined in regulation 2(1) of the EIRs. The information in question comprises salmon and smolt production data for fish farms in Scotland and the Commissioner is satisfied that this falls within either paragraph (a) or paragraph (c) of the definition of environmental information contained in regulation 2(1) of the EIRs (these definitions are reproduced in the appendix).

### **Regulation 10(5)(f) of the EIRs**

13. In terms of regulation 10(5)(f) of the EIRs, 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 the interests of the person who provided the information where that person:
  - (i) was not under, and could not have been put under, any legal obligation to supply the information;
  - (ii) did not supply it in circumstances such that it could, apart from the EIRs, be made available; and
  - (iii) has not consented to its disclosure.
14. Regulation 10(2) of the EIRs provides that this exception must be interpreted in a restrictive way and that the public authority shall apply a presumption in favour of disclosure. The exception is also subject to the public interest test in regulation 10(1)(b).

15. In the Commissioner's guidance on regulation 10(5)(f)<sup>1</sup>, she states that a number of factors should be addressed in considering whether this exception applies. These include:
- Was the information provided by a third party?
  - Was the provider, or could the provider be, required by law to provide it?
  - Is the information otherwise publicly available?
  - Has the provider consented to disclosure?
  - Would release of the information cause, or be likely to cause, substantial harm to the interests of the provider?

*Does regulation 10(5)(f) apply in this case?*

16. In their submissions, the Ministers explained that the withheld salmon and smolt data were provided to them on a voluntary basis by Scottish fish farms. The Ministers provided submissions from fish farm operators (representing, they submitted, almost two-thirds of the Scottish aquaculture industry in terms of production), indicating that they were opposed to the data being disclosed publicly for reasons of commercial sensitivity. These submissions suggested that the operators would not co-operate in future surveys should the data be disclosed. From regular contact with the industry, the Ministers understood this position to be widely shared.
17. The Ministers stated that they had no legal right to collect these data. They explained that while powers exist in the Aquaculture and Fisheries Act 2007, section 38, to make an order to collect similar information, there is no such legislation currently in place and no intention at the time to make such an order.
18. The Ministers also explained that the UK government has an obligation under EC Regulation 672/2008 to provide statistics on aquaculture, but these are only required at national, not company or farm, level.
19. Given that the Ministers have no powers to require fish farm operators to record and provide them with the data contained in the Annual Production Survey, and given that the survey questionnaires were completed on a purely voluntary basis, the Commissioner accepts that the operators providing the withheld information were not (and could not be put) under any legal obligation to supply those data. She is therefore satisfied that the first requirement of regulation (10)(5)(f) is met in this case.
20. The Commissioner cannot identify any other legal obligation, apart from those under the EIRs, which would require the disclosure of the withheld information. She therefore accepts that the second requirement of regulation 10(5)(f) is met in this case.
21. From the evidence of objection to disclosure provided by the Ministers, the Commissioner is satisfied that those providing the information do not consent to its disclosure. Consequently, she concludes that the third requirement of regulation 10(5)(f) applies to the withheld information.
22. Since the tests in regulation 10(5)(f)(i), (ii) and (iii) have been satisfied, the Commissioner must go on to consider whether disclosure of the information would, or would be likely to, prejudice substantially the interests of the persons who provided the information.

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<sup>1</sup> <http://www.itspublicknowledge.info/Law/FOISA-EIRsGuidance/section33/Section33.aspx>

### *Substantial prejudice*

23. Substantial prejudice cannot be claimed in respect of information which is already in the public domain. PWS initially submitted that data such as those requested could be found in the public domain. It could not provide examples of data published at the same very detailed and thorough level as that contained in the survey questionnaires, although it submitted that data at this detailed level *should* be made available.
24. Having researched the websites of the various fish farm operators and having looked at the web-links provided by PWS, the Commissioner has been unable to locate any published data at the detailed level of that contained in the survey questionnaires. She acknowledges that some fish mortality figures are published, but mostly at national level. She is satisfied that the level of detail contained in the survey responses is not otherwise publicly available.
25. The information in the survey responses is site-specific in relation to individual fish farms. The interests to be considered are those of the person(s) who provided the information: that is, the operators of these farms.
26. The Ministers submitted that because of the length of the production cycle, the data revealed not only details of past production but also future projected production and smolt purchases. They considered this information to be commercially sensitive as it revealed details of the operators' production strategies and (in their view) could be used to reveal differences between individual sites' production and year-on-year trends at site level. This level of detail was not, to their knowledge, released anywhere else in the world, officially or by any aquaculture production companies.
27. The Ministers argued that release of the information, at the level of detail in the survey returns, could be used by seafood buyers to influence the price they were willing to pay for the product. They submitted that in the past they had been contacted by a large buyer, which they named, asking for access to the data for this precise reason. The Ministers expressed the view that disclosure would make competition unequal, in a global industry, resulting in Scottish operators being unable to make decisions based on the same level of information about their competitors as would be available to their competitors about them.
28. Having considered the submissions made by both the Ministers and PWS the Commissioner accepts there is potential for the requested information (once in the public domain, which would be the effect of disclosure under the EIRs) being used to the commercial disadvantage of Scottish fish farming operators, which would be likely to prejudice their interests substantially.
29. The Commissioner therefore finds that the Ministers correctly applied the exception in regulation 10(5)(f) to the information under consideration. She must now go on to consider the balance of the public interest in relation to this information

### *Public interest in relation to regulation 10(5)(f)*

30. PWS submitted that disclosure of historic data was in the public interest. It argued that the general public had the right to know, for example, how much individual companies were producing and the differences in mortality rates between different companies, which it considered to be a useful indicator of the health and state of the industry. PWS submitted that in the interests of transparency, the public had a right to know which companies and which sites were having production problems. With this information, the public could judge for itself the sustainability of the industry.

31. The Ministers accepted that there was a need for government to be open and transparent where possible. They acknowledged the right of the public to be informed about fish farming and its impact. They believed this public interest in fish farming to be met, in part, by the information published (at national level) in the Scottish Fish Farms Production Survey.
32. The Ministers believed the public interest in disclosure was outweighed by factors which included the breakdown of a cooperative and mutually beneficial relationship between the Marine Scotland and the aquaculture industry, allowing for the publication of the annual production survey and the continuation of a 35 year old dataset. Citing the objections made to disclosure, they expressed the view that once the co-operation of even one major player was lost, the value of the survey would be seriously diminished. They stated that marine spatial planning was a developing area, relying on accurate underlying data to manage the seas for the benefit of all. Accuracy of the data could be reviewed readily when it was collated at site level.
33. The Ministers stated that the results of the survey questions were all published (in the form of data aggregated by geographical area) in the survey and no relevant data were ignored or not published. This was a key principle underlying the publication of official statistics. They cited the value attached to the published information by a range of stakeholders.
34. In considering the public interest in disclosure against that in maintaining the exception, the Commissioner acknowledges that there is a legitimate public interest in transparency generally and that there is a strong public interest in transparency in environmental matters such as the health and safety of fish farming operations. However she must also give weight to the public interest in the continued voluntary provision of the data contained in the survey returns, given that removal of the co-operation of the fish farms would impact upon Scotland's marine spatial development (on the basis of accurate data) and the availability of information widely considered valuable.
35. The Commissioner has taken account of the fact that the substantial information which is published in the annual survey report goes some way towards addressing the issue of transparency, without adversely affecting the interests of either the Scottish fish farm operators or wider public. While she acknowledges the interests in transparency identified above, it is not entirely clear to her what would be added to public understanding by the publication of raw site-specific data.
36. On balance, the Commissioner has concluded that the public interest in maintaining the exception in regulation 10(5)(f) of the EIRs outweighs the public interest in disclosure of the withheld information. Therefore she finds that the Ministers were entitled to withhold the information under regulation 10(5)(f) of the EIRs.

## Decision

The Commissioner finds that the Scottish Ministers complied with the Environmental Information (Scotland) Regulations 2004 in responding to the information request made by Protect Wild Scotland.



## **Appeal**

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Should either Protect Wild Scotland 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.

**Rosemary Agnew**  
**Scottish Information Commissioner**  
**13 June 2014**

## Appendix

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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;

"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; "the Directive" means Directive 2003/4/EC of the European Parliament and of the Council on public access to environmental information and repealing Council Directive 90/313/EEC;

"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.
- (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-

...

- (f) the interests of the person who provided the information where that person-
- (i) was not under, and could not have been put under, any legal obligation to supply the information;
  - (ii) did not supply it in circumstances such that it could, apart from these Regulations, be made available; and
  - (iii) has not consented to its disclosure; or

...

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