

Decision Notice



Decision 116/2010 Loch Awe Improvement Association and Argyll District
Salmon Fishery Board and the Scottish Ministers

Statutory records kept by a fish farming business

Reference No: 200901638
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Kevin Dunion
Scottish Information Commissioner

Kinburn Castle
Doubledykes Road
St Andrews KY16 9DS
Tel: 01334 464610



Summary

Fish Legal on behalf of Loch Awe Improvement Association and Argyll District Salmon Fishery Board (Fish Legal) requested from the Scottish Ministers (the Ministers) information relating to an escape of farmed fish including statutory records kept by the fish farming business. The Ministers responded by providing much of the information requested but also indicated that they did not hold the information contained in statutory records maintained by the fish farming business. Following a review, Fish Legal remained dissatisfied and applied to the Commissioner for a decision, arguing that the records were held by the fish farm on behalf of the Ministers, and so (in terms of regulation 2(2)(b)) were held by the Ministers for the purposes of the EIRs.

Following an investigation, the Commissioner found that statutory records compiled and retained by the fish farming business were not held on behalf of the Ministers therefore that the Ministers were correct to advise Fish Legal that these records were not held.

Relevant statutory provisions and other sources

The Environmental Information (Scotland) Regulations 2004 (the EIRs) regulations 2(1) (definitions (a) and (c) of environmental information; 2(2)(b) (Interpretation); 10(1) and (4)(a) (Exceptions from duty to make environmental information available)

Aquaculture and Fisheries (Scotland) Act 2007 (AFSA) sections 1 (Information about fish farms and shellfish farms) and 2 (Information: offences)

The Fish Farming Businesses (Record Keeping)(Scotland) Order 2008 (the Order) article 3 (Information about fish farms)

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 12 June 2009, Fish Legal acting on behalf of Loch Awe Improvement Association and Argyll District Salmon Fishery Board (Fish Legal) wrote to the Fisheries Research Service (FRS, then an Executive Agency of the Scottish Ministers) requesting information in relation to an escape of farmed fish that occurred on 5 May 2009. All of the information was subsequently supplied by the Ministers either in response to the request or during the subsequent investigation with the exception of one element of Fish Legal's request, which is the subject of this decision:

Records, kept by the [fish farm] operator pursuant to schedule 2 of the Fish Farming Businesses (Record Keeping) Scotland Order 2008 (the Order).

Schedule 2 of the Order lists a range of records in relation to the containment, prevention of escape and recovery of fish from fish farms which a fish farm is required to compile in order to comply with article 3 of the Order.

2. Shortly after the request was received, the FRS became part of Marine Scotland, a directorate of the Ministers. Accordingly, this decision names (and will hereafter refer to) the Scottish Ministers as the public authority to which Fish Legal's information request was made.
3. The Ministers responded on 7 July 2009 indicating that they did not hold copies of the statutory records kept by the fish farm operator.
4. On 13 July 2009, Fish Legal requested a review of this decision. It indicated that it believed that the statutory record keeping framework for fish farming businesses had the practical effect of fish farming businesses holding the statutory records on behalf of the Ministers and, therefore, that this information was held by the Ministers for the purposes of the EIRs.
5. Fish Legal's letter of 13 July 2009 indicated that it would be content for the review process to be delayed until the Commissioner's decision on another case (which raised similar issues) had been issued. However, subsequent correspondence from the Ministers clarified that, although both parties were content to do so, there was no basis for an applicant and a public authority to reach an agreement regarding timescales outside those specified in the EIRs. It was therefore agreed that the Ministers would proceed with the review.
6. The Ministers notified Fish Legal of the outcome of their review on 25 August 2010. The Ministers upheld without alteration the earlier decision that they did not hold the information contained within the statutory records kept by fish farming businesses.
7. On 11 September 2009, Fish Legal 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 certain specified modifications.



8. The application was initially validated by establishing that Fish Legal had made a request for information to a Scottish public authority and had applied to the Commissioner for a decision only after asking the authority to review its response to that request.
9. However, the commencement of the investigation was delayed while the validity of the case was reconsidered in the light of the decision of the Court of Session on 30 September 2009 in Glasgow City Council and Dundee City Council -v- Scottish Information Commissioner [2009] CSIH 73¹. This Opinion considered a request which had been made by a solicitor on behalf of an unnamed client. The Court concluded that such a request was not valid for the purposes of FOISA because it did not fulfil the requirement (contained in section 8 of FOISA) that an information request names the true applicant on behalf of whom information is being sought.
10. In this case, Fish Legal did not state in either its request or request for a review to the Ministers that it was acting on behalf of the Loch Awe Improvement Association and Argyll and District Salmon Fishery Board. As a result, the Commissioner concluded that having failed to name the true applicants, the request under consideration was not valid for the purposes of FOISA.
11. However, following further discussions with both Fish Legal and the Ministers, it was accepted by all parties that the EIRs do not contain any equivalent requirement to name the applicant making a request. Accordingly, it was confirmed that the request under consideration was valid for the purposes of the EIRs and that the application was also valid in terms of the EIRs.

Investigation

12. Fish Legal's application to the Commissioner initially asked the Commissioner to consider the Ministers' decision to withhold certain information as well as its decision that the statutory records were not held.
13. On 23 March 2010, the Ministers were notified in writing that the application from Fish Legal had been validated and were asked to provide the Commissioner with any information withheld from it. The Ministers responded with the information requested. The case was then allocated to an investigating officer.
14. 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. In particular, the Ministers were asked to justify their reliance on any provisions of the EIRs they considered applicable to the information requested.

¹ <http://www.scotcourts.gov.uk/opinions/2009CSIH73.html>



15. During the investigation, the Ministers provided all of the previously withheld information to Fish Legal but maintained their position that statutory records kept by fish farming businesses did not amount to information held on behalf of the Ministers.
16. Fish Legal, on receipt of the withheld information indicated that it no longer wished the Commissioner to issue a decision with respect to this information. However, it confirmed that it still wanted the Commissioner to issue a decision regarding the question of whether the statutory records requested were held by fish farms on behalf of the Ministers, and so whether these are held by the ministers for the purposes of the EIRs.
17. Accordingly, as indicated in paragraph 1, this decision notice will only address the Minister's position that they do not hold the statutory records kept by the fish farming business in question.

Commissioner's analysis and findings

18. In coming to a decision on this matter, the Commissioner has considered all of the information and the submissions made to him by both Fish Legal and the Ministers and is satisfied that no matter of relevance has been overlooked.

Handling under the EIRs

19. The Ministers responded to Fish Legal's information request in terms of the EIRs. As noted above, the request made by Fish Legal was valid for the purposes of the EIRs, but not in terms of FOISA. In order to consider this application under the EIRs the Commissioner first has to be satisfied that the information requested is environmental information as defined in regulation 2(1) of the EIRs.
20. Given the subject matter of the information requested by Fish Legal, the Commissioner has no difficulty in agreeing that any information caught by this request would be environmental information for the purposes of the EIRs. The information concerned relates to measures (used by fish farms for the purposes of containment, prevention of escape and recovery of fish from fish farms) affecting or likely to affect the state of elements of the environment (in particular natural sites) referred to in paragraph (a) of the definition of environmental information in regulation 2(1).
21. The Commissioner therefore concludes that the information requested by Fish Legal falls within paragraph (c) of that definition and that the Ministers were correct to consider this request under the terms of the EIRs.

Consideration of regulation 2(2)(b) – Information held on behalf of a Scottish public authority

22. Regulation 2(2)(b) indicates that environmental information is held by a Scottish public authority for the purposes of the EIRs if it is held by another person on that authority's behalf (subject to certain conditions that are not relevant in this case).



23. It is Fish Legal's contention that the statutory framework with respect to record keeping by fish farms has the effect that the records that are required to be compiled under the terms of the Order are held by fish farms on behalf of the Ministers.
24. The Order was made by the Ministers in exercise of powers conferred by section 1 of the Aquaculture and Fisheries (Scotland) Act 2007 (AFSA). The Order requires fish farming businesses to compile and retain for three years, records identified in the schedules to the Order. In effect these records fall into two categories, relating to the prevention, control and reduction of parasites and to the containment, prevention and recovery of escape of fish.
25. Section 1(5) of the AFSA creates rights of inspection and copying of records compiled and maintained by fish farming businesses in accordance with the Order granted to inspectors appointed by or on behalf of the Ministers under AFSA.
26. Fish Legal expressed the view that the Ministers were wrong in law in claiming not to hold the statutory records kept by the fish farming business. It argued generally that the clear statutory requirement to hold the records for a period of three years satisfies regulation 2(2)(b) of the EIRs.
27. Fish Legal also argued specifically in relation to the statutory records kept by the particular fish farm where the escape referred to in its request had occurred, that the records must have been inspected following the escape and would be required for any future enforcement action or criminal proceedings. Fish Legal argued that these particular records, *having been inspected by the Ministers on site*, were clearly held by the fish farming business on behalf of the Ministers. Fish Legal further argued that it makes no sense to suggest that, given the prospect of the records forming part of evidence supporting future action, the records are not held by the fish farm operator, in some way, to the Ministers order or command.
28. Fish Legal accepted that the Order made a sensible administrative arrangement as to who keeps certain records and eliminates unnecessary wholesale copying of the records to the Ministers. However Fish Legal also took the view that wherever the records are physically kept, they are required by law to serve an environmental regulatory purpose and the Order should not be used as a device to avoid disclosure and proper public scrutiny.
29. The Ministers considered that the records are held by fish farming businesses in accordance with statutory requirements and not on behalf of the Ministers. They wished to emphasise to the Commissioner that while such records are inspected, for example during audit and inspection visits to fish farms, they are not routinely collected. The Ministers accepted that if copies of the records are taken by inspectors, in accordance with statutory powers, then the information contained in such copies will be held by them. The Ministers advised the Commissioner that advice² issued to inspectors contains the following guidance regarding the inspection and copying of statutory records:

² <http://www.frs-scotland.gov.uk/FRS.Web/Uploads/Documents/Containmnet%20Guidance%20website%20update%202-12-08.doc>



An inspector may i) require the production of; ii) inspect and; iii) take copies of any records which a person is required to retain as detailed in the order [Part 1, Section1(5)]. Whilst copies of records will not be routinely collected, they may be collected where a case may proceed to reporting to the procurator fiscal. Records which are collected may be accessed by third parties following request under the Freedom of Information (Scotland) Regulations and the Environmental Information (Scotland) Regulations. There may be exemptions and exceptions to releasing certain information, especially if such is to be involved in any criminal proceedings.

30. The Ministers further argued that the express powers of inspection and the taking of copies of records retained by fish farming businesses in accordance with the Order, contained in section 1(5) of the AFSA would not have been required if the information in the records was held on behalf of the Ministers.

Conclusions

31. The Commissioner has considered the submissions of both the Ministers and Fish Legal, along with the statutory provisions that are set out in the appendix to this decision. He does not agree with Fish Legal that the records held by fish farms are held on behalf of the Ministers.
32. In reaching this conclusion, he has first of all noted that neither AFSA and the Order contain any explicit provision to suggest that this is the case. Rather, these provisions together require the collation of the records, and their retention for a specified period by the fish farms, and then make provision for access to and taking copies of those records by inspectors. The Commissioner notes that section 2 of the Order also creates criminal offences relating to the failure to keep records, creating false records or amending records to become false records.
33. Given the terms these provisions, the Commissioner does not consider it to be evident that in order for the regulatory and enforcement regime to operate effectively, the records must be considered to be held by the fish farms on the Ministers' behalf (either in general, or following inspection of the particular records).
34. The Commissioner does not dispute that the statutory records (whether inspected in a particular case or otherwise) would form part of the evidence supporting enforcement action. However, where the records are required by the Ministers for this purpose, there is a right to take copies, following which, they would be held by the Ministers.
35. The Commissioner is of the opinion that it would be ineffective to base any regulatory or criminal action on evidence that remained solely in the possession of the person or body subject to that action. It is the power to copy the records that provides the Ministers with the ability to compile an evidence base upon which to found future action.



36. The Commissioner agrees with the Ministers that if the intention of the AFSA was to require fish farming businesses to hold the statutory records on behalf of the Ministers, thus effectively vesting possession and ownership of the records with the Ministers, there would have been no need to also include statutory powers of inspection and copying of those records in the AFSA.
37. The Commissioner is satisfied that the principal records kept by the fish farming business are not held on behalf of the Ministers, and so are not held by the Ministers for the purposes of EIRs by virtue of regulation 2(2)(b).

Regulation 10(4)(a)

38. Regulation 10(4)(a) of the EIRs states 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.
39. Having established that the statutory records held by fish farming business were not held on behalf of the Ministers, the investigating officer asked the Ministers to confirm that they did not hold any copies of these records that might have been taken during inspections and audits undertaken at the firm farm in question. The Ministers confirmed that all relevant case files had been checked and that no copies of the statutory records were held by them.
40. Therefore, the Commissioner is satisfied that the Ministers correctly advised Fish Legal that the information requested was not held by the Ministers, and that regulation 10(4)(a) is applicable in this case.

Public interest test

41. The exception in regulation 10(4)(a) is subject to the public interest test in regulation 10(1)(b) of the EIRs. Therefore, a public authority may only refuse to make available information 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. In this case, the Commissioner is satisfied that no relevant information was actually held by the Ministers at the time Fish Legal's request was received. Consequently he does not consider there to be any conceivable public interest in requiring that any information be made available.
42. The Commissioner therefore concludes that, in all the circumstances of this case, 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. Consequently, he is satisfied that the Ministers were entitled to refuse Fish Legal's request under regulation 10(4)(a) of the EIRs.



DECISION

The Commissioner finds that the Scottish Ministers (the Ministers) complied with the Environmental Information (Scotland) Regulations 2004 (the EIRs) in responding to the information request made by Fish Legal on behalf of Loch Awe Improvement Association and Argyll District Salmon Fishery Board that is considered in this decision notice.

Appeal

Should either Fish Legal or the Scottish Ministers wish to appeal against this decision, there is an 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 notice.

Kevin Dunion
Scottish Information Commissioner
5 July 2010



Appendix

Relevant statutory provisions

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

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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;

...

- (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;

...

- (2) For the purpose of these Regulations, environmental information is held by a Scottish public authority if it is-

...

- (b) held by another person on that authority's behalf,

and, in either case, it has not been supplied by a Minister of the Crown or department of the Government of the United Kingdom and held in confidence.

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.
- ...
- (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;
 - ...

Aquaculture and Fisheries (Scotland) Act 2007

1 Information about fish farms and shellfish farms

- (1) The Scottish Ministers may make an order if it appears to them necessary or expedient to do so for the purpose of obtaining information in relation to the prevention, control and reduction of parasites—
 - (a) on fish farms,
 - (b) on shellfish farms.
- (2) An order under subsection (1) may require any person who carries on a business of fish farming or shellfish farming—
 - (a) to provide to the Scottish Ministers such information, in writing, as may be specified in the order in relation to the purpose mentioned in that subsection,
 - (b) to compile such records as may be so specified in relation to that purpose,
 - (c) to retain for such period (not exceeding 3 years) as may be so specified, any records compiled by virtue of paragraph (b).
- (3) The Scottish Ministers may make an order if it appears to them necessary or expedient to do so for the purpose of obtaining information in relation to—
 - (a) the containment of fish on fish farms,
 - (b) the prevention of escape of fish from fish farms,



- (c) the recovery of escaped fish.
- (4) An order under subsection (3) may require any person who carries on a business of fish farming—
 - (a) to provide to the Scottish Ministers such information, in writing, as may be specified in the order in relation to the purpose mentioned in that subsection,
 - (b) to compile such records as may be so specified in relation to that purpose,
 - (c) to retain for such period (not exceeding 3 years) as may be so specified, any records compiled by virtue of paragraph (b).
- (5) An inspector may require the production of, and inspect and take copies of, any records which a person is required to retain by virtue of an order under this section.
- (6) Information provided, records compiled and records retained by virtue of an order under this section may be provided, compiled and retained electronically.

2 Information: offences

- (1) A person commits an offence who—
 - (a) fails, without reasonable excuse, to comply with a requirement of an order under section 1,
 - (b) in purported compliance with a requirement of an order under section 1 knowingly provides any information or compiles a record which is false in a material particular,
 - (c) knowingly alters a record compiled in accordance with a requirement of an order under section 1 so that the record becomes false in a material particular.
- (2) A person who commits an offence under subsection (1) is liable on summary conviction to a fine not exceeding level 4 on the standard scale.

The Fish Farming Businesses (Record Keeping) (Scotland) Order 2008

3 Information about fish farms

A person who carries on a business of fish farming shall in respect of each site at which fish are farmed in the course of the business—



- (a) in relation to the prevention, control and reduction of parasites on fish farms, compile the records that are specified in Schedule 1; and
- (b) in relation to the containment, prevention of escape and recovery of fish from fish farms, compile the records that are specified in Schedule 2,

and in both cases shall retain the records for a period of 3 years.