

Decision Notice 034/2020

Legal Advice: Acoustic Deterrent Devices

Applicant: The Applicant

Public authority: Scottish Ministers

Case Ref: 201901973



Scottish Information
Commissioner

Summary

The Ministers were asked for legal advice recently received by Marine Scotland on the use of Acoustic Deterrent Devices on fish farms. The Ministers withheld the information, arguing that, as the advice was legally privileged, it was in the public interest not to disclose the advice.

The Commissioner investigated and found that the Ministers were entitled to withhold the advice.

Relevant statutory provisions

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

The full text of each of the statutory provisions cited above is reproduced in Appendix 1 to this decision. The Appendix forms part of this decision.

Background

1. On 26 August 2019, the Applicant made a request for information to the Scottish Ministers (the Ministers). With reference to the minute of a meeting held on 8 November 2016 between Scottish Natural Heritage (SNH) and Marine Scotland about the use of Acoustic Deterrent Devices (ADDs) on fish farms, the Applicant requested:
 - (i) the legal advice received by Marine Scotland and referred to in the minutes on the definition of "reckless"; and
 - (ii) any other legal advice received by Marine Scotland or other parts of the Scottish Government, previously or subsequent to that meeting, on the legality of the use of ADDs on fish farms where there is a risk that they could disturb whales, dolphins or porpoises (cetaceans) whether deliberately or recklessly.
2. The Ministers responded on 24 September 2019. The Ministers concluded that the information was environmental information for the purposes of the EIRs. The Ministers withheld the information on the basis that regulation 10(4)(e) of the EIRs (internal communications) applied as it was internal legal advice. They argued that the public interest lay in withholding the advice as it was legally privileged.
3. On 28 September 2019, the Applicant wrote to the Ministers requesting a review of their decision. They argued it was in the public interest to disclose the legal advice received by Marine Scotland about the disturbance of cetaceans by ADDs used on fin fish farms.
4. The Ministers notified the Applicant of the outcome of their review on 28 October 2019. The Ministers confirmed their earlier decision.
5. Later that day, the Applicant wrote to the Commissioner. The Applicant applied to the Commissioner for a decision in terms of section 47(1) of the Freedom of Information (Scotland) Act 2002 (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 was dissatisfied with the outcome of the Ministers' review because they did not believe that legal advice to officials and Ministers should be confidential. The Applicant believed there was a clear public interest in knowing whether the legal advice received by Marine Scotland that the use of ADDs on fish farms in areas used by cetaceans constitutes disturbance.

Investigation

6. 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.
7. On 13 November 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.
8. Section 49(3)(a) of FOISA requires the Commissioner to give public authorities an opportunity to provide comments on an application. The Ministers were invited to comment on this application and to answer specific questions.

Commissioner's analysis and findings

9. In coming to a decision on this matter, the Commissioner considered all of the withheld information and the relevant submissions, or parts of submissions, made to him by both the Applicant and the Ministers. He is satisfied that no matter of relevance has been overlooked.

Application of the EIRs

10. The Commissioner is satisfied that the information covered by this request (information related to the management of the marine environment) is environmental information, as defined in regulation 2(1) of the EIRs. In reaching this conclusion, the Commissioner has considered the information in question, along with paragraphs (a), (b) and (c) of the definition of environmental information (reproduced in Appendix 1), and he agrees with the Ministers in categorising the information as environmental. (The Applicant has not disputed the Ministers' decision to handle the request under the EIRs.)

Regulation 5(1) of the EIRs

11. Regulation 5(1) of the EIRs (subject to the various qualifications contained in regulations 6 to 12) requires a Scottish public authority which holds environmental information to make it available when requested to do so by any applicant.
12. Under the EIRs, a public authority may refuse to make environmental information available if one or more of the exceptions in regulation 10 apply.

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

13. Regulation 10(4)(e) of the EIRs provides that a Scottish 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.

14. As with all of the exceptions contained within regulation 10, a Scottish public authority applying this exception must interpret the exception in a restrictive way (regulation 10(2)(a)) and apply a presumption in favour of disclosure (regulation 10(2)(b)). Even where the exception applies, the information must be disclosed unless, in all the circumstances, the public interest in making the information available is outweighed by that in maintaining the exception (regulation 10(1)(b)).
15. Having considered the information withheld under this exception, the Commissioner is satisfied that all of this information comprises internal communication and is therefore subject to the exception in regulation 10(4)(e). The information is, as the Ministers describe, internal legal advice.
16. He must, therefore, go on to consider whether, in all of the circumstances, the public interest in making the information available is outweighed by the public interest in maintaining the exception.

Public Interest test

17. The Applicant stated that under Scots Law it is illegal for a person to disturb any cetacean, recklessly or deliberately, unless the person holds a European Protected Species (EPS) licence. These licences are issued by Marine Scotland when ADDs are used in offshore engineering work, for instance, to scare cetaceans away before even louder pile-driving work commences.
18. The Applicant submitted that, in 2017, SNH wrote to Scottish Ministers and Marine Scotland to say that there is sufficient evidence to show that ADDs disturb cetaceans. The Applicant submitted that Marine Scotland has never issued any EPS licences for the use of ADDs on fish farms, with Marine Scotland arguing that they can be used legally if the intention is not to disturb cetaceans.
19. In the Applicant's view, this must constitute reckless disturbance if the ADD is used without knowledge of the consequences for cetaceans and must constitute deliberate disturbance if the effect on cetaceans is known. (The Applicant commented that the issue has been widely discussed and is mentioned in the trade description of the devices, so must be known by all fish farm managers.)
20. The Applicant believed there was a clear public interest in knowing whether the legal advice received by Marine Scotland confirms that the use of ADDs on fish farms in areas used by cetaceans constitutes disturbance, and if so, whether "Marine Scotland is knowingly allowing the law to be broken".

The Ministers' view

21. The Ministers submitted that a claim to confidentiality could be maintained in legal proceedings because the correspondence in question was only shared between the Scottish Government and its legal adviser. Apart from being provided to the Commissioner as part of his investigation (in relation to this application), the advice had not at any time been shared with anyone outwith the Ministers. The information has therefore remained confidential at the time.
22. The Ministers submitted that release of the material would breach legal professional privilege by divulging information about the points being considered by lawyers, the extent of their comments, and the issues being flagged up for further consideration, particularly as the Scottish Government is currently reviewing the legislative framework for the future use and management of ADDs within the aquaculture sector, due for completion in spring 2020.

23. The Ministers recognised that there is some public interest in the release of this information as part of an open and transparent government, and to inform public debate. They also acknowledged that there is a strong public interest in the use of ADDs by the aquaculture sector, and that releasing this information could help greater public understanding with regard to this topic.
24. However, the Ministers considered that there was a very strong public interest in maintaining legal professional privilege and ensuring the confidentiality of communications between legal advisers and clients. They said that it was important in all cases that lawyers can provide free and frank legal advice which considered and discussed all issues and options without fear that that advice may be disclosed and, as a result, potentially taken out of context.
25. The Ministers submitted that, with such emotive areas which are the subject of political debate, an expectation that legal advice could be released would inevitably lead to the legal advice being much more circumspect and therefore less effective. There was, therefore, in the Ministers' view, a strong public interest in protecting the confidentiality of this information to ensure that the Ministers are able to consider legal advice privately and ensure they provide a fully considered position which is consistent with that advice. Whilst they recognised some public interest in releasing this legal advice, they believed it was not sufficient to outweigh the very strong public interest in maintaining the confidentiality of legal advice in this case.

The Commissioner's view

26. The Commissioner has considered all of these submissions carefully, alongside the withheld information (which he has accepted comprises internal communications for the purposes of this exception).
27. The Ministers have argued that the public interest favoured maintaining legal privilege. The Commissioner must consider any information which is the subject of legal professional privilege in the light of the established, inherent public interest in maintaining the confidentiality of communications between legal adviser and client.
28. As noted in previous decisions involving both FOISA and the EIRs, the courts have long recognised the strong public interest in maintaining the right to confidentiality of communications between legal adviser and client on administration of justice grounds. Many of the arguments in favour of maintaining confidentiality of communications were discussed in a House of Lords case, *Three Rivers District Council and others v Governor and Company of the Bank of England* (2004) UKHL 48¹ and in the *Department for Business, Enterprise and Regulatory Reform v Information Commissioner and O'Brien* [2009] EWHC 164 (QB)². The Commissioner will apply the same reasoning to communications attracting legal professional privilege generally. More generally, he considers there to be a strong public interest, also recognised by the courts, in the maintenance of confidences.
29. The Commissioner acknowledges that disclosure of the advice would help fulfil a public interest in understanding the Ministers' regulatory functions in relation to the marine environment and provide clarity on how it discharged those regulatory functions. He acknowledges the public interest in the subject of ADDs and related aspects of marine ecology. There is a clear and strong public interest in understanding how the Ministers address such issues in respect of the environment.

¹ <http://www.bailii.org/uk/cases/UKHL/2004/48.html>

² <http://www.bailii.org/ew/cases/EWHC/QB/2009/164.html>

30. The Commissioner agrees with the Applicant's arguments that it is in the public interest to ensure effective oversight of public action and that disclosure of the information withheld by the Ministers would, to some extent, enable such oversight.
31. On the other hand, the Commissioner recognises the strong public interest in ensuring that the Ministers (as any Scottish public authority) can give and receive legal advice in confidence to facilitate the discharge of their functions as thoroughly and effectively as possible.
32. The Commissioner accepts that the disclosure of such advice could discourage staff in a Scottish public authority from seeking internal legal advice, or would deter frankness and openness by parties involved when seeking advice if there was knowledge that the advice may be then disclosed. If, for this reason, the Ministers were unable to obtain impartial, full and objective legal advice in respect of its actions, this would not be in the public interest.
33. On balance, having examined the withheld information, the Commissioner is not satisfied that the public interest arguments in favour of disclosure presented by the Applicant are so strong as to outweigh the public interest arguments in maintaining the exception. Consequently, he finds that the public interest in maintaining the exception outweighs the public interest in disclosure, and accepts that the information was properly withheld under regulation 10(4)(e) 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 the Applicant.

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

19 February 2020

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

-

- (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.

...

Scottish Information Commissioner

Kinburn Castle
Doubledykes Road
St Andrews, Fife
KY16 9DS

t 01334 464610

f 01334 464611

enquiries@itspublicknowledge.info

www.itspublicknowledge.info