Scottish Information Commissioner
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Decision Notice 208/2026

Salmonid farms identified as high risk for sea lice impacts on wild fish populations

Authority: Scottish Environment Protection Agency
Case Ref: 202301144

Summary

The Applicant asked the Authority to provide the names of the 21 salmonid farms identified as high risk for sea lice impacts on wild fish populations. The Authority refused to make the information available as it argued that it was material in the course of completion, unfinished documents or incomplete data. During the investigation, the Authority claimed that the information was now publicly available and easily accessible. The Commissioner investigated and found that the Authority failed to comply with the EIRs in responding to the Applicant's information request. He required the Authority to disclose the information requested.

Relevant statutory provisions

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1), (2) and (6) (General entitlement); 2(1)(b) (Effect of exemptions); 39(2) (Health, safety and the environment); 47(1) and (2) (Application for decision by Commissioner).

The Environmental Information (Scotland) Regulations 2004 (the EIRs) regulations 2(1) (definition of "the Act", "applicant", "the Commissioner" and "environmental information") (Interpretation); 5(1) (Duty to make environmental information available on request); 6(1)(b) (Information already available and accessible); 10(1), (2) and (4)(d) (Exceptions from duty to make environmental information available); 17(1), (2)(a), (b) and (f) (Enforcement and appeal provisions).

Background

1. On 4 July 2023, the Applicant made a request for information to the Authority. They asked for:

   "The names of the 21 salmonid farms identified as high risk for sea lice impacts on wild fish populations through [the Authority's] proposed screening under the sea lice framework."

2. The Authority responded on 26 July 2023 in terms of the EIRs. It informed the Applicant that it was withholding the information requested under the exception in regulation 10(4)(d) of the EIRs.

3. On 7 August 2023, the Applicant wrote to the Authority requesting a review of its decision. They stated that they were dissatisfied with the decision because they disagreed that the exception in regulation 10(4)(d) of the EIRs applied.

4. The Authority notified the Applicant of the outcome of its review on 4 September 2023, which upheld its original decision without modification.

5. On 11 September 2023 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 that they were dissatisfied with the outcome of the Authority's review for the reason set out in their requirement for review.

Investigation

6. The Commissioner determined that the application complied with section 47(2) of FOISA and that he had the power to carry out an investigation.

7. On 29 September 2023, and in line with section 49(3)(a) of FOISA, the Commissioner gave the Authority notice in writing of the application and invited its comments. The Authority was also asked to send the Commissioner the information withheld from the Applicant. The Authority provided the information and its comments on the application.

8. The case was subsequently allocated to an investigating officer.

9. On 7 December 2023, the Authority issued an updated response to the Applicant. It informed the Applicant that it had now published a list of 19 salmonid farms in the highest relative risk category and provided the Applicant with a link to where this information had been published. As it considered the information requested was now publicly available and easily accessible, it stated that it considered regulation 6(1)(b) of the EIRs applied to the information requested.

Commissioner's analysis and findings

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

Handling in terms of the EIRs

11. 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.

12. 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.

13. 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) of the EIRs.

14. The Applicant has not disputed the Authority's handling of the request under the EIRs, and the Commissioner will consider the information solely in terms of the EIRs in what follows.

Section 39(2) of FOISA – Environmental information

15. 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.

16. 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.

17. 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) of the EIRs – Duty to make available environmental information on request

18. 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.

19. On receipt of a request for environmental information, the authority must therefore 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)).

20. Under the EIRs, a public authority may refuse to make environmental information available if one or more of the exceptions in regulation 10 applies.

21. As stated above, the Authority revised its position during the investigation and stated that the information it had withheld under the exception in regulation 10(4)(d) of the EIRs was now

publicly available and it was now relying on regulation 6(1)(b) of the EIRs. In the circumstances, the Commissioner will first consider whether the Authority was entitled to rely on regulation 6(1)(b) in response to the request.

Regulation 6(1)(b) – Form and format of information

22. Regulation 6(1)(b) of the EIRs provides that a Scottish public authority shall comply with a request that environmental information be made available in a particular form or format, unless the information is already publicly available and easily accessible to the applicant in another form or format. This is a two-part test, which must (for the regulation to apply) conclude that the information is both publicly available and easily accessible.

23. During the investigation, the Authority informed the Applicant that it had now published the list of the final 19 salmonid farms in the highest relative risk category and linked the Applicant to where this information had been published. As this information was now publicly available and easily accessible, the Authority claimed that regulation 6(1)(b) of the EIRs applied.

24. In response to the Authority's update, the Applicant advised the Commissioner that the published list of the final 19 salmonid farms was not the information they originally requested. They reiterated that their request sought the list of 21 salmonid farms referred to in an earlier consultation by the Authority.

25. The Commissioner has reviewed the withheld information provided to him by the Authority (i.e. the information originally withheld under the exception in regulation 10(4)(d) of the EIRs). He is satisfied that this information is not the same information as that now published by the Authority (and, in any case, he has no basis for finding the provision to have been applicable at the time the information was requested, or when the Authority carried out its review). Consequently, he finds that the Authority was not entitled to rely on regulation 6(1)(b) of the EIRs for the information requested by the Applicant (i.e. the 21 salmonid farms referred to in the earlier consultation by the Authority).

26. The Commissioner will now go on to consider whether the Authority was entitled to withhold the information requested under the exception in regulation 10(4)(d) of the EIRs.

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

27. 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)).

28. The Aarhus Convention: An Implementation Guide[1] (the Guide) 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 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.

[1] https://unece.org/environment-policy/publications/aarhus-convention-implementation-guide-second-edition

29. The Guide 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 Applicant’s submissions

30. The Applicant explained that their request to the Authority was for the names and locations of the 21 salmonid farms referred to in a consultation document[2] published by the Authority dated May 2023. They noted that the figure “21” in Figure 4 on page 30 of the consultation document referred to the 21 salmonid farms for which they requested the names and locations.

31. The Applicant accepted that the consultation document referred to an initial screening assessment and that a simplified interim approach had been used to arrive at the list of the 21 salmonid farms. They acknowledged that the number of farms may well change as models were refined after the consultation exercise.

32. However, the Applicant submitted that, at the point of issuing the consultation document, the information relating to the 21 salmonid farms had been completed and published. The information requested was therefore not material in the course of completion, unfinished documents or incomplete data.

33. The Applicant also provided submissions on why disclosure of the information was important or otherwise in the public interest. The Commissioner has not reproduced these submissions as they are not relevant to whether the exception in regulation 10(4)(d) of the EIRs was properly applied.

The Authority’s submissions

34. The Authority explained that the Sea Lice Framework oceanographic modelling on which the list of salmonid farms had been based was not yet complete. It explained that the 21 salmonid farms mentioned in the consultation document indicated relative risk based on a simple, initial, interim screening assessment and this information was subject to change.

35. The Authority submitted that the list could be subject to major changes at a later point and that releasing the “draft” list could undermine the finished framework by presupposing conclusions.

36. The Authority submitted that the Sea Lice Framework consultation was still live and was due to close on 15 September 2023. It added that the final list of salmonid farms would be released with the publication of the Framework, which it hoped to have established by January 2024. It considered that this would allow all stakeholders to focus on salmonid farms that had been identified as high risk following the final assessments.

37. The Authority provided further submissions relating to adverse effects it considered would result from disclosure of the “draft” list of named salmonid farms. The Commissioner has not reproduced these submissions as they are not relevant to whether the exception in regulation 10(4)(d) of the EIRs was properly applied.

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[2] https://consultation.sepa.org.uk/regulatory-services/detailed-proposals-for-protecting-wild-salmon/user_uploads/230511-sea-lice-consultation-final.pdf

The Commissioner's view

38. The Commissioner has carefully considered the submissions of both parties, together with the withheld information.

39. As noted above, the fact that 21 salmonid farms had been identified as high risk for sea lice impacts on wild fish populations was published as part of the Authority's consultation document dated May 2023 (i.e. this information was in the public domain at the time of the Applicant's request).

40. The Commissioner cannot accept that the withheld information was material in the course of completion, unfinished documents or incomplete data. He does not consider that the Authority has provided any evidence to suggest that the withheld information was anything other than complete at the time of the Applicant's request.

41. The Commissioner recognises, as the Applicant did, that the number of farms might well change as models were refined after the consultation exercise. In fact, that is what happened – the Authority later published the names and locations of the 19, rather than 21, salmonid farms identified in the highest relative risk category. However, the belief or fact of later change is not sufficient for the exception in regulation 10(4)(d) of the EIRs to apply.

42. To the extent that the Authority was concerned that disclosure of this information might mislead or cause confusion, it could have chosen to provide a commentary alongside this information, placing it in context or explaining its limitations as it saw fit. Equally, it was open to the Authority to consider the application of a more suitable exception in the EIRs, if it was otherwise concerned about the effect of disclosure.

43. In all of the circumstances, the Commissioner does not accept that the Authority was entitled to withhold the information requested under the exception in regulation 10(4)(d) of the EIRs.

44. As the Commissioner has found that the exception contained in regulation 10(4)(d) of the EIRs does not apply, he is not required to consider the public interest test in regulation 10(1)(b).

45. As the Commissioner has found that the Authority was not entitled to rely on the exception in regulation 10(4)(d) of the EIRs, or regulation 6(1)(b), the Commissioner requires the Authority to disclose the withheld information 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.

Specifically, the Commissioner finds that the Authority failed to comply with regulation 5(1) of the EIRs by:

- wrongly withholding the information requested under the exception in regulation 10(4)(d) of the EIRs
- wrongly relying on regulation 6(1)(b) of the EIRs on the basis that the information requested was now publicly available and easily accessible.

The Commissioner therefore requires the Authority to disclose the withheld information to the Applicant, by 28 September 2026.

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.

Euan McCulloch
Head of Enforcement

14 August 2026