

Decision Notice 019/2022

Biogenic Reef Habitats

Applicant: The Applicant

Public authority: Scottish Ministers

Case Ref: 202100765



Scottish Information
Commissioner

Summary

The Ministers were asked for a range of information about biogenic reef habitats. During the investigation, the Ministers made it clear, for the first time, that they did not hold the information. The Commissioner was satisfied that no information was held. However, by failing to make this clear when the Applicant initially asked for the information, and by failing to respond to the request and review in line with the technical requirements of the EIRs, the Ministers breached the EIRs.

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(a) (Duty to make available environmental information on request); 9(1) and (3) (Duty to provide advice and assistance); 10(1), (2) and (4)(a) (Exceptions from duty to make environmental information available); 13(a), (b) and (c)) (Refusal to make information available); 16(3), (4) and (5) (Review by Scottish public authority)

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

Background

1. On 1 March 2021, the Applicant made a request for information to Marine Scotland, a Directorate of the Scottish Ministers (the Ministers). The request is set out in full in Appendix 2. The Applicant asked the Ministers to explain, amongst other things:
 - how General Policy 9b, NatureScot advice on the impacts of fishing pressures on PMFs (Priority Marine Feature) and the conclusions of the Scottish Marine Assessment 2020 have been accounted for within Marine Scotland's weekly licensing decisions
 - which measures Marine Scotland has taken to achieve GES [Good Environmental Status] for biogenic reefs
 - how Marine Scotland has had regard to the strategy when making decisions regarding fisheries management
 - any measures Marine Scotland is taking to adapt its approach to ensure that there is no further loss of these habitats and specifically over what timescale
2. The Ministers responded on 6 April 2021, giving some explanation of the situation, but without making it clear, in terms of the EIRs, what information they held or whether any information was being withheld.
3. On 16 April 2021, the Applicant wrote to the Ministers requesting a review of their decision. It did not consider the request had been responded to. It commented that its requests were requests for environmental information under the EIRs.
4. The Ministers notified the Applicant of the outcome of their review on 19 May 2021, providing a further explanatory response.
5. On 22 June 2021, the Applicant wrote to the Commissioner, applying 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 stated it was dissatisfied with the outcome of the Ministers' review because they had not provided adequate information on some of the questions raised, the responses were delayed and the Ministers did not provide appropriate advice and assistance.

Investigation

6. The application was accepted as valid. The Commissioner confirmed that the Applicant made requests for information to a Scottish public authority and asked the authority to review its response to those requests before applying to him for a decision.
7. On 6 July 2021, the Ministers were notified in writing that the Applicant had made a valid application. The case was then 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. On 15 September 2021, the Ministers were invited to comment on this application and to answer specific questions. These related to the searches undertaken by the Ministers to determine what recorded information they held falling within scope of the Applicant's requests. The Ministers responded on 14 October 2021.
9. On the same day, the Ministers provided an updated response to the Applicant, stating that they did not hold the information it had requested (regulation 10(4)(a) of the EIRs).
10. During the investigation, the Ministers were asked for further submissions.

Commissioner's analysis and findings

11. In coming to a decision on this matter, the Commissioner considered all of 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

12. It is clear from the subject of the request that the information sought is environmental information, as defined in regulation 2(1) of the EIRs. It relates to marine areas, biological diversity and factors that affect the environment and so falls within the definition of environmental information set out in regulation 2(1), in particular paragraphs (a), (b) and (c) of that definition.
13. The Applicant made no comment on the Ministers' application of the EIRs in this case and the Commissioner will consider the request in what follows solely in terms of the EIRs.

Regulation 5(1) of the EIRs – Duty to make environmental information available

14. Regulation 5(1) of the EIRs requires a Scottish public authority which holds environmental information to make it available when requested to do so. This obligation relates to recorded information held by the authority when it receives a request.
15. On receipt of a request for environmental information, therefore, the authority must ascertain what information it holds falling within the scope of the request. Having done so, regulation 5(1) requires the authority to make that information available, unless a qualification in regulations 6 to 12 applies (regulation 5(2)(b)).

Information sought by the Applicant

16. At the start of the investigation, the Applicant was asked for, and provided, further description of the recorded information it considered fell within scope of the request. These explanations were passed on to the Ministers, so that they could consider and respond.

The Ministers' submissions

17. The Ministers considered the description provided by the Applicant. The Ministers stated that they had reviewed the searches conducted during the initial handling of the request and review accordingly. Further searches were also conducted during the investigation, and it was concluded that the information was not held.

Searches

18. The Ministers explained that searches were conducted by the reviewer, who requested the Sea Fisheries Licencing Team officials and senior management, as well as branch heads of Science, and officials with the Scottish Government Legal Directorate to conduct searches of their personal records for any written opinion or documents held relating to each of the questions raised in the Applicant's request. These specific officials were asked to conduct searches as they were the most likely to hold any relevant information. These searches did not return any results. The Ministers provided copies of correspondence supporting their response.
19. Searches were also conducted of the Ministers' electronic Records Data Management System (eRDMS) using a range of key words. These searches returned 924 documents in total. The majority of these documents were discounted by the Ministers, and those that were viewed, did not contain the requested information.
20. Additional searches were undertaken: individuals within the sea fisheries licensing and marine conservation teams were asked to search their inboxes for any further information, using the same searches as those used to search the eRDMS. These individuals are responsible for fishing licence processing and marine environmental management and, the Ministers submitted, would therefore be aware of any information they held which would fall within the scope of the request. However, no recorded information was identified.

The Commissioner's conclusions on information requested and held

21. The Commissioner notes that the Ministers provided the Applicant with descriptive, but not definitive, responses.
22. It is clear that the Applicant did not consider these explanatory responses to be helpful. In the absence of a definitive response, the further communication between the Ministers and the Applicant appears to have led to further confusion and dissatisfaction.
23. It was only during the investigation that the Ministers made it clear to the Applicant that they did not hold any recorded information falling within scope of its request and, therefore, applied the exception in regulation 10(4)(a) of the EIRs. (Under regulation 10(4)(a) of the EIRs, a Scottish public authority may refuse to make environmental information available to the extent that it does not hold the information.) The delay in clarifying this position breached regulation 13(b) of the EIRs (set out in full in Appendix 1).
24. The Commissioner considered whether the Ministers were entitled to apply the exception in regulation 10(4)(a) of the EIRs.

25. The standard of proof to determine whether a Scottish public authority holds information is the civil standard of the balance of probabilities. In determining where the balance lies, the Commissioner considers the scope, quality, thoroughness and results of the searches carried out by the public authority.
26. Having considered all the relevant submissions, and the terms of the request, the Commissioner is satisfied that, by the end of the investigation, the Ministers had taken adequate, proportionate steps to establish whether they held any information falling within the scope of the request. The Commissioner is satisfied that any recorded information covered by the request would have been identified by the searches conducted by the Ministers.
27. The Commissioner is therefore satisfied that the Ministers do not hold recorded information falling within scope of the request and that the exception in regulation 10(4)(a) therefore applies.

The public interest

28. The exception in regulation 10(4)(a) of the EIRs is subject to the public interest test in regulation 10(1)(b) and so can only apply if, in all the circumstances of the case, the public interest in maintaining the exception outweighs that in making the information available. The question of whether or not a public authority holds information is a factual one, determined on the balance of probabilities. If a public authority does not hold the information, then there is no meaningful public interest test that can be undertaken.
29. In this case, for the reasons set out above, the Commissioner is satisfied that the Ministers do not hold any recorded information covered by the request. Consequently, he accepts that there is no conceivable public interest in requiring the disclosure of such information and finds that the public interest in making information available is outweighed by that in maintaining the exception.

Advice and assistance

30. Under regulation 9(1) of the EIRs, a Scottish public authority must provide reasonable advice and assistance. The Applicant argued that the Ministers had not complied with this duty.
31. The Ministers told the Commissioner that the Applicant's initial request was not recognised as a request for information that fell to be responded to under FOISA/the EIRs. Consequently, a "business as usual" response was issued in which they attempted to answer, as fully as possible, the questions raised, in order to be helpful. Furthermore, when responding to the request for review, the response provided as much information as possible in their responses to each of the questions. This additional information was provided at both stages in order to aid the Applicant's understanding.
32. The Ministers concluded that they had met their duty to provide advice and assistance to the Applicant.
33. The Commissioner notes that the Ministers engaged in dialogue and provided explanatory responses to the Applicant. While the failure to recognise that the request was an EIRs request led to the Ministers breaching regulation 13(b) (see above), the Commissioner is satisfied that, in the circumstances, the Ministers did provide reasonable advice and assistance.

Time to respond

34. The Applicant was dissatisfied that the Ministers had failed to respond to its initial request and review response on time.
35. Regulation 5(2)(a) of the EIRs gives Scottish public authorities up to 20 working days to comply with a request for information (subject to certain qualifications which are not relevant in this case).
36. The Ministers told the Commissioner that, as the initial request was not recognised as a request under the EIRs, the team which received the request were not aware of the statutory deadlines for responding. The Ministers acknowledged that the response was five days late.
37. Given that the Ministers did not respond to the request within 20 working days, or issue a refusal notice meeting the requirements of regulation 13 within that time, the Ministers failed to comply with the requirements of regulations 5(2)(a) and 13 of the EIRs.
38. The Applicant's email of 16 April 2021, requesting a review, expressed dissatisfaction with the Ministers' failure to respond under the EIRs.
39. The Ministers noted that work had commenced on preparing a response when the request for review was received. However, due to an administrative delay, the review was not formally assigned to a case handler until 13 May 2021. As the initial response was ready, the response was issued on 19 May 2021 (two working days after the deadline of 17 May 2021). Once the review had been concluded, a further response was prepared, which the Ministers understood had been issued on 27 May 2021. However, during the investigation, it came to light that the response may not have actually been issued to the Applicant.
40. Regulation 16 of the EIRs states that, on receipt of a requirement to conduct a review, the authority shall decide whether it has complied with the EIRs, within 20 working days (regulations 16(3) and (4)). It also states that, where an authority has not complied with its duty under the EIRs, it shall immediately take steps to remedy the breach of duty (regulation 16(5)).
41. The Commissioner finds that the Ministers failed to meet the requirements of regulation 16(3), (4) and (5) of the EIRs in responding to the requirement for review.
42. As the Ministers issued a full response to the Applicant on 14 October 2021, and as the Commissioner is satisfied that no information is held, he does not require the Ministers to take any further action, with respect to these failures.

Decision

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

However, he finds that, as a result of not recognising the request as a request for environmental information, the Ministers failed to comply with the requirements of regulations 5(2)(a), 13 and 16(3), (4) and (5) of the EIRs.

In the circumstances, the Commissioner does not require the Ministers to take any action in relation to these breaches.

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.

Daren Fitzhenry
Scottish Information Commissioner

14 February 2022

Appendix 1: Relevant statutory provisions

The Environmental Information (Scotland) Regulations 2004

2 Interpretation

(1) In these Regulations –

“...
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"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)-

- (a) shall be complied with as soon as possible and in any event no later than 20 working days after the date of receipt of the request; and

...

9 Duty to provide advice and assistance

(1) A Scottish public authority shall provide advice and assistance, so far as it would be reasonable to expect the authority to do so, to applicants and prospective applicants.

...

(3) To the extent that a Scottish public authority conforms to a code of practice under regulation 18 in relation to the provision of advice and assistance in a particular case, it shall be taken to have complied with the duty imposed by paragraph (1) in relation to that case.

...

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
 - (a) it does not hold that information when an applicant's request is received;
- ...

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-

- (a) be given in writing as soon as possible and in any event no later than 20 working days after the date of receipt of the request for the information;
 - (b) specify the reasons for the refusal including, as appropriate, any exception under regulation 10(4) or (5) or provision of regulation 11 and how the Scottish public authority has reached its decision with respect to the public interest under regulation 10(1)(b);
 - (c) state the basis on which any exception relied on under regulation 10(4) or (5) or provision of regulation 11 applies if it would not otherwise be apparent;
- ...

16 Review by Scottish public authority

- ...
- (3) The Scottish public authority shall on receipt of such representations-
 - (a) consider them and any supporting evidence produced by the applicant; and
 - (b) review the matter and decide whether it has complied with these Regulations.
 - (4) The Scottish public authority shall as soon as possible and no later than 20 working days after the date of receipt of the representations notify the applicant of its decision.
 - (5) Where the Scottish public authority decides that it has not complied with its duty under these Regulations, it shall immediately take steps to remedy the breach of duty.

Appendix 2: The information request

I read with interest the Scottish Marine Assessment 2020. It is an extremely impressive piece of work providing a vast amount of evidence so congratulations to you and Marine Scotland for its publication. I was, however, alarmed by several of its findings. Most notably the continued decline (failure to halt decline) in biogenic reef habitats, the failures to achieve conservation objectives in most MPAs, and the fact that around half of the fish stocks assessed (as of 2018) remain overfished.

I am writing to enquire about the consideration of these issues within Marine Scotland's decision making and I would be grateful if you could help me with the following questions,

- General Policy 9b of the National Marine Plan sets out that no activity should have a significant impact on the national status of a Priority Marine Feature (PMFs). NatureScot advice has set out that any bottom towed fishing would have a significant impact on the national status of several of these PMFs. We are aware of the "PMF Review" which led to the publication of the distribution of PMFs known to NatureScot across Scotland's inshore zone. We remain concerned that the process is badly delayed and will potentially under-deliver. However, in the meantime Marine Scotland continues to make authorisation and enforcement decisions about bottom towed fishing activities, including weekly licence variations, which permit these activities in areas holding PMFs. The weekly variation to the fishing licence can be used to establish closed areas and other spatial management measures: for example it was recently used in this way for the 'Outer Hebrides Inshore Fisheries Pilot. Can you explain how General Policy 9b, NatureScot advice on the impacts of fishing pressures on PMFs and the conclusions of the Scottish Marine Assessment 2020 have been accounted for within Marine Scotland's weekly licensing decisions?
- Regulation 4 of the Marine Strategy Regulations 2010 requires that devolved administrations take the necessary measures to achieve or maintain Good Environmental Status (GES) of marine waters within the marine strategy area by 31st December 2020. This was not achieved, and the Scottish Marine Assessment 2020 confirms that (amongst other indicators of GES) that the 'no loss' target for biogenic reefs was failed. It also found that seafloor habitats are in poor condition across more than half of their area in nine out of 21 regions, and that disturbance of seafloor habitats from towed, bottom-contacting fishing activity is widespread. Regulation 9 states that devolved administrations must have regard to any marine strategy when exercising any function capable of affecting the marine area. Could you please explain which measures Marine Scotland has taken to achieve GES for biogenic reefs? Could you also explain how Marine Scotland has had regard to the strategy when making decisions regarding fisheries management? We note that Scotland's Fisheries Management Strategy provides no timeline for the protection of PMFs.
- Given the failed 2020 target, can you also explain any measures Marine Scotland is taking to adapt its approach to ensure that there is no further loss of these habitats and specifically over what timescale?
- The Scottish Marine Assessment 2020 MPA assessment finds that 15 MPAs have yet to meet their Conservation Objectives. Whilst the cause of this failure is not explained, the Pressures assessment states that it relies upon data taken (mostly) from MPA monitoring which finds pressures associated with fishing to be the dominant impact. Section 82 of the Marine (Scotland) Act sets out that public authorities must exercise their function in a manner which best furthers and least hinders the Conservation Objectives. Specifically Section 82(12) requires that public authorities have regard to advice or guidance given by NatureScot under

Section 80. NatureScot provided Management Option Papers as part of the MPA designation process in 2013 alongside other advice. Does protection of MPAs comprise any part of Marine Scotland's work under Regulation 4 of the Marine Strategy Regulations 2010? Can you explain how Marine Scotland have had regard to advice given relating to bottom towed fishing gear inside MPAs when exercising its function with regards to the management of bottom towed fisheries operating inside these sites

- Section 95 of the Marine (Scotland) Act makes it an offence to kill or injure animals that are designated as protected features of an MPA, or damage or destroy any habitat or other 'feature' which is designated as a protected feature of an MPA, if this act significantly hinders the achievement of the MPA's Conservation Objectives and unless the person took such steps as were reasonably practicable to minimise the hindrance. In the past Marine Scotland staff have responded to reports of fishing activities taking place within MPAs without Fisheries or Marine Conservation Orders in place by stating that in their view, the vessel is not breaking the law, regardless of whether there is any damage to the protected feature. Does Marine Scotland accept that an offence has been committed in these circumstances?
- Section 97(2) sets out that it is not an offence for a person to breach Section 95 if the effect on the feature could not have "reasonably been avoided". In the past the Minister has stated that it is Scottish Government's view that "compli[ance] with all current regulations in place" constitutes reasonable avoidance. Can you confirm whether this remains Scottish Government's view?
- Finally, has Scottish Government undertaken an Appropriate Assessment of fishing within each of the SACs that form part of the Network of MPAs? If not, are you able to share your justification for not doing so, particularly for sites designated for sensitive features such as Sound of Arisaig SAC? If so, please can you share the Appropriate Assessments with us?

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