

F0192449 FORMAL REVIEW OF F0192311 FINDINGS

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A. Original Request and Response

Timeline of Requests

Date	Status F0192311
23/08/2020	EIR Request F0192311 received
07/09/2020	EIR Request F0192311 acknowledged
18/09/2020	EIR Request F0192311 response issued
21/09/2020	Formal Review Request F0192449
23/09/2020	Formal Review Request F0192449 acknowledged
19/10/2020	Formal Review response issued

Original Requested Information

Redacted for personal information.

Please provide information on [SEPA Employee] solely in relation to Kames Fish Farming since 1 January 2019.

Please include any email correspondence between [SEPA Employee] and Kames employees including [name], [name] and any other Kames staff

As context, please note that it was suggested to Scottish Salmon Watch in an email received today that SEPA's [SEPA Employee] has been tipping off Kames re. any investigation into the use of Formaldehyde.

Scottish Salmon Watch has previously requested - I understand this is still under review - information on the use of Formaldehyde including the use by Kames in Loch Tralaig (SEPA has refused to disclose reams of emails believed to be from [SEPA Employee] to third parties in relation to Kames in Loch Tralaig).

Please consider this a formal request for information under the relevant FOI and Environmental Information regulations.

Please provide a receipt for this FOI request. Please provide the information electronically.

Requested Information F0192311

Edited to comply with a potential neither confirm nor deny response.

Please provide information on SEPA solely in relation to Kames Fish Farming since 1 January 2019.

Please include any email correspondence between SEPA and Kames.

Please consider this a formal request for information under the relevant FOI and Environmental Information regulations.

Please provide a receipt for this FOI request.
Please provide the information electronically.

Also, can you please provide copies of any associated SEPA responses to the Incident Reports?

Original Response F0192311

In relation to information requested in your request, SEPA neither confirms nor denies whether such information is held.

B. Points raised by requester at Formal Review

Please consider this a formal review of F:0192311 (attached for easy reference along with [...] FOI request dated 23 August 2020).

Suffice to say that a blanket refusal is simply unacceptable.

[...] has dealt with Kames in relation to Loch Tralaig since at least July 2019 (according to emails already disclosed via FOI).

Since [...] works for Kames it is a legitimate public interest issue to ascertain whether Kames has been notified, briefed or tipped off in any way.

C. Scope of Formal Review F0192449

The requester contacted SEPA on 21 September 2020 seeking a review of release decisions made in request F0192311. In line with the Environmental Information (Scotland) Regulations (EIRs) 2004 process a Formal Review was initiated. Acknowledgement of the Formal Review was provided 23 September 2020.

Formal Review F0192449 findings will address:

- The handling of the original request
- The information provided for the response
- The application of regulations/exceptions to the response

Review Officer Comments

- **The Review Officer noted the points raised by the requester in their request for a Formal Review.**
- **The Review Officer noted that the scope of the Formal Review is limited to the release of recorded information under the under the terms of the Environmental Information (Scotland) Regulations 2004 (EIRs).**
- **The Review Officer then considered the findings of the Formal Review.**

D. Findings presented to Review Group

1. Handling of the original request

It was reported that the requester sought information, on 23 August 2020, relating Kames Fish Farming. A response was provided to the requester on 18 September 2020 on the statutory deadline. SEPA's duties under Regulation 5(1) of the EIRs to provide a response "*as soon as possible and in any event no later than 20 working days*" were met.

Review Officer Comments

- **The Review Officer confirmed that the handling of the original request met the requirements of Regulation 5(1) of the EIRs.**

2. Information Provided

It was reported that following a search of SEPA recorded information SEPA's issued response neither confirmed nor denied whether such information was held under Regulation 11(2) and Regulation 11(6) of the Environmental Information Regulations. The Review Officer considered the Legitimate Interest Test; the searches of SEPA recorded information; and the specific information in scope to come to a recommendation.

2.1 Legitimate Interest Test

The Review Officer first confirmed that the necessary Legitimate Interest Test for application of Regulation 11 of EIRs was completed. The Review Officer reviewed the Legitimate Interest Test which is based around the following three questions:

1. Does the person making the information request have a legitimate interest in obtaining the personal data?
2. If yes, is the disclosure of the personal data necessary to achieve that legitimate interest?
3. Even if the processing is necessary to achieve that legitimate interest, is that overridden by the interests or fundamental rights and freedoms of the data subject(s)?

The Review Officer found that the Legitimate Interest Test adequately tackled the consideration of the rights of the potential data subjects in line with office of the Scottish Information Commissioner (OSIC) guidance on the application of Regulation 11: [EIRs Briefing Regulation 11: Personal Data](#) and the [SEPA Privacy Policy](#) which defines personal data as:

“information can be anything that identifies and relates to a living person. This can include information that when put together with other information can then identify a person”

However, the Review Officer found that the Legitimate Interest Test failed to apply it's finding to the results of the searches conducted of SEPA recorded information for the request. The Review Officer recommended that the template for the Legitimate Interest Test be reviewed and updated to ensure this is taken into consideration in future requests.

2.2 Search of SEPA Recorded Information

The Review Officer conducted secondary searches and confirmed that the search of SEPA recorded information was comprehensive and identified 3 documents in scope of the request. The Review Officer noted that SEPA does not hold any correspondence between the named member of SEPA staff and the named members of Kames staff and that these documents fall into the scope of the request for 'any other Kames staff'.

- **1.0 20190304_ff_fee waiver letter**
- **2.0 CAR_L_1000233_20200722 Loch Tralaig FCFE 2019 Compliance Assessment Scheme**
 - **2.1 Loch Tralaig Desk Base Assessment 2019 [attachment to 2.0]**

The Review Officer examined the documents and reconsidered the Legitimate Interest Test in the context of the specific documents.

The Review Officer agreed that theoretically to confirm or deny whether information in the scope of this request is held by SEPA could be used to directly or indirectly identify a living person/s which would constitute a breach of the fundamental rights and freedoms of the data subject/s.

This original decision was made to be consistent with the outcome of the following 2013 appeal; referenced in the office of the Scottish Information Commissioner (OSIC) guidance on the application of Regulation 11 [EIRs Briefing Regulation 11: Personal Data](#):

Reference	Decision number	Authority	Summary
Neither confirm nor deny Paragraph 9	277/2013	Scottish Environment Protection Agency	SEPA were asked to confirm that a named individual was a SEPA employee. In the circumstances, we were satisfied that revealing whether it held the information would breach the first data protection principle.

However, in practice the three documents identified do not refer to the named Kames staff and relate to SEPA's core regulatory activities and as such would not have been considered for withholding or a neither confirm nor deny response had it not been for individuals being named in the request.

The original response to F0192311 intended to protect the fundamental rights and freedoms of the named individuals, both SEPA and Kames. However, the Review Officer noted that issuing a neither confirm nor deny response in this instance had created a perception of potential wrongdoing and/or that SEPA has 'something to hide'. The searches of SEPA recorded information in fact found standard regulatory documentation and appropriate professional interactions between the relevant parties.

The Review Officer recommended the decisions of the original Legitimate Interest test and the neither confirm nor deny response be overturned. The Review Officer recommended that the three documents identified in scope of the request be released, subject to redactions for personal data under Regulation 11(2).

Review Officer Comments

- **The Review Officer confirmed that the search of SEPA recorded information was comprehensive.**
- **The Review Officer considered the Legitimate Interest Test; the searches of SEPA recorded information; and the specific information in scope.**
- **The Review Officer recommended that the neither confirm nor deny response be overturned.**
- **The Review Officer recommended the release of 3 documents subject to redactions for personal data under Regulation 11(2).**

3. Application of Regulations/Exceptions

3.1 Applying Environmental Information (Scotland) Regulations 2004 - Section 39(2)

It was reported that the exemption under Section 39(2) of the Freedom of Information (Scotland) Act 2002 was applied due to the environmental nature of the information requested. As a result the request was handled under Environmental Information (Scotland) Regulations 2004 (EIRs). It was asserted that in this case the public interest in maintaining this exemption and in dealing with the

request in line with the requirements of the EIRs outweighs any public interest in disclosing the information under FOISA.

Review Officer Comments

- **The Review Officer recommended that the exception under Section 39(2) of the Freedom of Information (Scotland) Act be upheld.**

3.2 Personal data - 11(2) & 11(6)

The Review Officer reported that in response to F0192311 SEPA neither confirmed nor denied whether such information was held, and applied the exception under the terms of regulation 11(2) of the EIRs read in conjunction with Regulation 11(6) of the EIRs. The text of the regulations are reproduced below;

11 (2) To the extent that environmental information requested includes personal data of which the applicant is not the data subject and in relation to which either the first or second condition set out in paragraphs (3) and (4) is satisfied, a Scottish public authority shall not make the personal data available.

11(6) For the purposes of this regulation, a Scottish public authority may respond to a request by not revealing whether information exists or is held by it, whether or not it holds such information, if to do so would involve making information available in contravention of this regulation.

Review Officer Comments

- **The Review Officer recommended that the exception at Regulation 11(2) and 11(6) of the EIRs be overturned.**

E. Outcome

The Review Officer considered the points raised by the requester of F0192311 at request for review; the original response provided; information provided; the exceptions applied; and the Office of the Scottish Information Commissioner [EIRs Exceptions Briefing](#).

The Review Officer overturned the application of Regulation 11(2) and 11(6) of the EIRs in the original response to F0192311.

The Review Officer released 3 documents in response to F0192311; subject to redactions for personal data.

The Review Officer confirmed that SEPA does not hold any correspondence between the named member of SEPA staff and the named members of Kames staff.

Please be assured SEPA takes its obligations and responsibilities under the Freedom of Information (Scotland) Act 2002 and the Environmental Information (Scotland) Regulations 2004 very seriously. Feedback will be provided from this Review to relevant staff that where any shortcomings have been identified or lessons have been learned, these will be actioned in the handling of future requests.

Review Officer Comments

- **The Review Officer overturned the decisions made in request F0192311.**
- **The Review Officer instructed that SEPA release the 3 documents identified in scope of F0192311; subject to redactions for personal data.**
- **The Review Officer confirmed that SEPA does not hold any correspondence between the named member of SEPA staff and the named members of Kames staff.**

If you are not satisfied with our response to your request for Review, you can appeal, in writing, to the Scottish Information Commissioner, within six months of date of this response.

Scottish Information Commissioner
 Kinburn Castle
 Doubledykes Road
 St Andrews
 Fife
 KY16 9DS
 Telephone: 01334 464610
 Fax: 01334 464611
 Email: enquiries@itspublicknowledge.info
www.itspublicknowledge.info/appeal

Should you wish to appeal against the Scottish Information Commissioner's decision, you 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 the decision.

Summary of Findings

<i>Scope</i>	The Review Officer noted the points raised by the requester in their request for a Formal Review.
	The Review Officer noted that the scope of the Formal Review is limited to the release of recorded information under the terms of the Environmental Information (Scotland) Regulations 2004 (EIRs).
	The Review Officer then considered the findings of the Formal Review.
<i>Handling</i>	The Review Officer confirmed that the handling of the original request met the requirements of Regulation 5(1) of the EIRs.
<i>Information Provided</i>	The Review Officer confirmed that the search of SEPA recorded information was comprehensive.
	The Review Officer considered the Legitimate Interest Test; the searches of SEPA recorded information; and the specific information in scope.
	The Review Officer recommended that the neither confirm nor deny response be overturned.
	The Review Officer recommended the release of 3 documents subject to redactions for personal data under Regulation 11(2).
<i>Application of Regulations/Exceptions</i>	The Review Officer recommended that the exception under Section 39(2) of the Freedom of Information (Scotland) Act be upheld.
	The Review Officer recommended that the exception at Regulation 11(2) and 11(6) of the EIRs be overturned.
<i>Outcome</i>	The Review Officer overturned the decisions made in request F0192311.
	The Review Officer instructed that SEPA release the 3 documents identified in scope of F0192311; subject to redactions for personal data.
	The Review Officer confirmed that SEPA does not hold any correspondence between the named member of SEPA staff and the named members of Kames staff.