Decision Notice 046/2021

Treatment of salmon farming wellboat discharges

Applicant: Scottish Salmon Watch

Public authority: Scottish Environment Protection Agency

Case Ref: 202000275

Scottish Information Commissioner

Summary

SEPA was asked for information on the treatment of salmon farming wellboat discharges since 1 January 2018.

SEPA withheld the majority of the information requested, claiming it was commercially confidential. SEPA disclosed some information already in the public domain, with personal data redacted.

The Commissioner investigated and found that SEPA partially breached the EIRs, by wrongly withholding some information. He found that SEPA correctly withheld the remaining information on the basis that it was commercially confidential.

Relevant statutory provisions

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) and (6) (General entitlement); (2(1)(b) (Effect of exemptions); 39(2) (Health, safety and the environment)

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 available environmental information on request); 10(1), (2) and (5)(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 23 October 2019, the Applicant made a six-part request for information to the Scottish Environment Protection Agency (SEPA) on the discharge of salmon farming wellboats since 1 January 2018, which included the following request:

   Please include any information relating to CleanTreat and the treatment of wellboat discharges including details of any meetings and correspondence with Benchmark and other companies. Please include information relating to "high level talks to facilitate trials of the [CleanTreat] system in Scotland".

2. The remaining parts of the request do not form part of the Applicant's application to the Commissioner.

3. SEPA responded on 11 November 2019, having identified the request as a request for environmental information in terms of the EIRs and so applied section 39(2) of FOISA. It confirmed it held a small amount of information, which it withheld under regulation 10(5)(f) of the EIRs, arguing that disclosure would be likely to prejudice substantially the interests of the third party who provided the information (the public interest weighing against disclosure). SEPA provided the dates of meetings it had attended with Benchmark Animal Health Ltd (Benchmark).

4. On 11 November 2019, the Applicant wrote to SEPA asking it to review its decision to refuse to provide the information. Noting that SEPA had met with Benchmark on a number of occasions, the Applicant argued that refusing to disclose any information on those meetings flew in the face of Freedom of Information and, as SEPA was publicly funded, it must be held

publicly accountable. The Applicant confirmed it was happy for the names of individuals to be redacted in any information disclosed.

5. SEPA notified the Applicant of the outcome of its review on 13 December 2019, modifying its original decision and withdrawing reliance on regulation 10(5)(f). SEPA now considered the majority of the information identified to be exempt from disclosure in terms of regulation 10(5)(e) of the EIRs, on the basis that disclosure would prejudice substantially the confidentiality of commercial or industrial information. SEPA believed the tests for this exception to apply had been met, as details of the specified treatment were not publicly available and were commercial in nature, and disclosure would cause substantial prejudice to third party commercial interests (which was not in the public interest).

6. On 19 December 2019, the Applicant again wrote to SEPA, asking it to reconsider its refusal to disclose information relating to CleanTreat. In support of its view, the Applicant argued that this was in marked contrast to disclosures[1][2][3], under FOISA, by the Scottish Government and the views of the Commissioner in *Decision 160/2019*[4].

7. SEPA notified the Applicant of the outcome of its supplementary review on 31 January 2020. Where already disclosed by the Scottish Government, SEPA released information (with personal data redacted under regulation 11(2) (Personal data) of the EIRs). SEPA continued to withhold the remainder of the information under regulation 10(5)(e), as per its review outcome of 13 December 2019.

8. On 21 February 2020, 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 it was dissatisfied with the outcome of SEPA's decision, at review, to withhold the information under regulation 10(5)(e), because it believed the public interest favoured disclosure.

Investigation

9. 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.

10. On 5 March 2020, SEPA was notified in writing that the Applicant had made a valid application and was asked to send the Commissioner the information withheld from the Applicant. SEPA provided the information and the case was allocated to an investigating officer.

11. Section 49(3)(a) of FOISA requires the Commissioner to give public authorities an opportunity to provide comments on an application. SEPA was invited to comment on this application and to answer specific questions. These focused on the searches carried out by SEPA to identify the relevant information, and its justification for withholding the information under regulation 10(5)(e) of the EIRs.

[1] https://www.gov.scot/publications/foi-19-02443/
[2] https://www.gov.scot/publications/foi-19-01398/
[3] https://www.gov.scot/publications/foi-18-00985/
[4] https://www.itspublicknowledge.info/ApplicationsandDecisions/Decisions/2019/201900504.aspx

12. The Applicant was asked to provide additional submissions on why it believed disclosure of the information was in the public interest.

13. Both parties provided submissions to the Commissioner.

14. The Applicant did not challenge SEPA's decision to withhold personal data from the information disclosed, and so the Commissioner will not consider this further.

Commissioner's analysis and findings

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

Handling in terms of the EIRs

16. SEPA considered the Applicant's request under the EIRs, having concluded that the information requested was environmental information as defined in regulation 2(1) of the EIRs and applied the exemption in section 39(2) of FOISA. The Applicant has not disputed SEPA's decision to deal with the request under the EIRs. The Commissioner is satisfied that the information is environmental information (definitions (a), (b) and (c) of environmental information in regulation 2(1) of the EIRs) and will consider SEPA's handling of the case in what follows solely under the EIRs.

Regulation 5(1) of the EIRs

17. 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.

18. 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 provide that information to the requester, unless a qualification in regulations 6 to 12 applies (regulation 5(2)(b)).

19. In its submissions to the Commissioner, SEPA explained, and provided supporting evidence of, the searches carried out to identify the information captured by the request. It submitted that the request was scoped to staff who were involved in aquaculture activities both in a regulatory and scientific capacity. Information collated for previous requests was also checked and added to the collated information, along with details of the attendees at the meetings relating to CleanTreat. At review stage, a more detailed search was undertaken which identified additional correspondence regarding CleanTreat.

20. As set out above, in its supplementary review outcome of 31 January 2020, SEPA disclosed some of this information to the Applicant, with personal data redacted.

Regulation 10(5)(e) of the EIRs

21. Under the EIRs, a public authority may refuse to make environmental information available if one or more of the exceptions in regulation 10 applies, but only if (in all the circumstances) the public interest in maintaining the exception or exceptions outweighs the public interest in making the information available.

22. SEPA submitted that the information withheld was excepted from disclosure by virtue of regulation 10(5)(e) of the EIRs.

23. In its application to the Commissioner, the Applicant disagreed with SEPA's decision to withhold the information requested under regulation 10(5)(e), believing SEPA had wrongly concluded that commercial confidentiality took precedence over public disclosure.

24. Regulation 10(5)(e) provides that a Scottish public authority may refuse to make environmental information available to the extent that its disclosure would, or would be likely to, prejudice substantially the confidentiality of commercial or industrial information where such confidentiality is provided for by law to protect a legitimate economic interest.

25. 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)). As noted above, 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)).

26. The Aarhus Convention: an Implementation Guide[5] (which offers guidance on the interpretation of the Aarhus Convention, from which the EIRs are derived) notes (page 88) that the first test for considering this exception is whether national law expressly protects the confidentiality of the withheld information. The law must explicitly protect that type of information as commercial or industrial secrets. Secondly, the confidentiality must protect a "legitimate economic interest": this term is not defined in the Convention, but its meaning is considered further below.

27. Having taken this guidance into consideration, the Commissioner's view is that before regulation 10(5)(e) can be engaged, authorities must consider the following matters:

- Is the information commercial or industrial in nature?
- Does a legally binding duty of confidence exist in relation to the information?
- Is the information publicly available?
- Would disclosure of the information cause, or be likely to cause, substantial harm to a legitimate economic interest?

Is the information commercial or industrial in nature?

28. In its submissions to the Commissioner, SEPA explained that the information comprised correspondence, minutes and documents relating to CleanTreat, the content of which fell within the definition of "commercial interests" set out in the Commissioner's guidance[6]. It stated that the information comprised a series of iterative discussions regarding the development of the CleanTreat system, and each document had been considered individually.

29. Having considered the withheld information, which relates to an application to SEPA by a commercial company for the relevant authorisations to facilitate field trials in Scotland of the CleanTreat technology and its application on wellboats, and taking account of the circumstances in which it was produced, the Commissioner accepts that the information is commercial in nature, for the reasons argued by SEPA.

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[5] http://www.unece.org/fileadmin/DAM/env/pp/Publications/Aarhus_Implementation_Guide_interactive_eng.pdf

[6] https://www.itspublicknowledge.info/Law/EIRs/EIRsExceptions.aspx

Does a legally binding duty of confidence exist in relation to the information?

30. In the Commissioner's view, confidentiality "provided for by law" will include confidentiality imposed on any person under the common law of confidence, under a contractual obligation or by statute.

31. SEPA confirmed that it had not signed a confidentiality agreement with Benchmark, but argued that an implied duty of confidence existed. It explained that the third party (Benchmark) had explicitly asserted its intellectual property rights in the information and data, and had informed SEPA of its confidential nature.

32. In support of its position, SEPA made reference to an email from Benchmark dated 12 December 2019 evidencing its handling protocols. This set out that:

- Disclosure of information to SEPA was under a legally binding duty of confidence.
- While SEPA was unable to sign a non-disclosure agreement, it had given assurances to Benchmark that the information would be treated as confidential.
- All documents and emails were marked “Strictly confidential / commercially sensitive” and all presentation slides were marked with confidentiality statements.
- Each meeting had started with a statement from Benchmark that the information was shared on the basis of strict confidentiality, due to the potential business impact.

33. The Commissioner has considered the withheld information in the context of the request, along with SEPA’s submissions and supporting documentation. He can find nothing therein which evidences that an explicit obligation of confidentiality existed and was in place. He notes that this is supported by SEPA’s submissions and its correspondence with the third party, which confirms that SEPA had been unable to sign a non-disclosure agreement.

34. In all the circumstances, however, the Commissioner is satisfied that the information was exchanged under an implied obligation to maintain confidentiality, evidenced by the correspondence from the third party (Benchmark). He acknowledges that such an expectation is normal practice in SEPA’s consideration of applications for authorisations of this nature, where third parties are required to share, in a confidential setting, sensitive commercial information.

35. Accordingly, the Commissioner is satisfied that an implied duty of confidence existed and applied to the withheld information, at the time SEPA responded to the Applicant’s request and its requirement for review.

Is the information publicly available?

36. SEPA confirmed that the withheld information was not publicly available.

37. Following consideration of the withheld information in this context, the Commissioner queried with SEPA an inconsistency concerning the redaction of some information previously disclosed to the Applicant which, effectively, released that information into the public domain.

38. SEPA clarified that it had made a distinction between where this information was referred to as a “passing reference”, and where it could be directly linked to substantive commercially sensitive content. It identified those references it considered could be safely disclosed, and those which it continued to withhold under regulation 10(5)(e).

39. The Commissioner notes that SEPA has agreed to the disclosure of certain information which was erroneously redacted and in fact already in the public domain. However, he has

no option other than to find that SEPA wrongly withheld this information under regulation 10(5)(e). He requires SEPA to disclose this information to the Applicant.

40. For the remainder of the withheld information, the Commissioner accepts SEPA's position that the information is not publicly available and will consider it further below.

Would disclosure of the information cause, or be likely to cause, substantial harm to a legitimate economic interest?

41. The term "legitimate economic interest" is not defined in the EIRs. In the Commissioner's view, the interest in question should be financial, commercial or otherwise "economic" in nature. The prejudice to that interest must be substantial: in other words, it must be of real and demonstrable significance.

42. SEPA submitted that Benchmark's legitimate economic interests would be harmed by disclosure of the information. In support of this, it referred to the content of Benchmark's email of 12 December 2019 in which Benchmark set out its economic interests, and in what way they would be harmed by disclosure. This set out that, in Benchmark's view:

- The CleanTreat technology, its application on wellboats and the results of field trials were a key intellectual property asset, and that Benchmark held the following intellectual property rights, which would be substantially harmed by disclosure.
    - Patent rights: Technology and field trial results were the subject of a patent application, which was within the first 12 months of its priority year, and might be enhanced and supplemented by technical developments and data from those field trials, provided the information had not been disclosed. Benchmark believed disclosure would directly impact the patent application and its ability to enhance and supplement it before publication.
    - Trade secrets: Benchmark employed considerable effort and resource to ensure the CleanTreat technology, its application and field trials remained secret. All documentation was labelled "confidential", was shared internally on a "need to know" basis only, and any external sharing was under a non-disclosure agreement (unless this was not possible). Benchmark believed maintaining this confidentiality was essential to protect these trade secrets and disclosure would "destroy" them, causing real and substantial harm to its intellectual property rights.
- All information shared was confidential and sensitive to Benchmark's current and future economic interests. It believed disclosure would significantly put at risk the £20m it had invested over eight years in developing CleanTreat - an innovative potential medicine and environmental mitigation water purification system. In Benchmark's view, disclosing this proprietary and confidential information would allow competitors to gain significant commercial advantage in the information, in bringing competitive molecules and systems to the market earlier. This, it believed, would lead to a reduction in Benchmark's potential revenue, profits and return on this substantial investment.
- Disclosure would also enable competitors to copy elements of the technology and bring less rigorously-tested water purification systems to the market in the near future (with a potential impact on industry reputation and the wider environment). It would also risk ongoing investment in further new solutions and related key resources (e.g. trial facilities and further employment opportunities).

43. SEPA identified no specific provision in law to protect the confidentiality of those economic interests.

Third party comments

44. SEPA explained it had sought third party views from Benchmark at review stage, resulting in Benchmark providing detailed feedback on 12 December 2019 (as referred to above). SEPA submitted it had considered whether the information could be disclosed without harming the identified economic interests at both review and supplementary review stages.

45. Benchmark's views were, in the main, reflected in SEPA's submissions, as set out above. Benchmark further stated the information was provided to SEPA voluntarily, in a confidential manner, and that it did not consent to disclosure. Benchmark believed disclosure would cause substantial prejudice to its intellectual property rights and its commercial and industrial interests.

46. During the investigation, SEPA obtained further views from Benchmark, who added that disclosure of this sort of information, supplied to Scottish agencies in confidence, would result in stifling open communication between commercial companies and Scottish agencies/ regulatory authorities. This, in turn, would result in a delay in the adoption of, or worse, a reduction in, new technologies coming to Scotland.

The Commissioner's views – regulation 10(5)(e)

47. The Commissioner has considered the arguments put forward by SEPA, along with the withheld information itself and the third party views.

48. The Commissioner is not persuaded that SEPA has made a compelling argument sufficient to allow him to accept that all of the withheld information would, if disclosed, be capable of causing the harm envisaged. He is of the view that SEPA appears to have taken a somewhat "blanket" approach in its decision to withhold the information.

49. For some of the information withheld, the Commissioner is not persuaded that its disclosure would result in commercial disadvantage to Benchmark, as claimed by SEPA. He notes that Benchmark was not deterred by the possibility of disclosure of information under FOISA or the EIRs, as indicated by its acceptance that SEPA was unable to sign a non-disclosure agreement.

50. The Commissioner is not satisfied that disclosure of certain information would inhibit commercial companies from sharing commercially sensitive information with Scottish agencies or regulatory authorities, such as SEPA, in future. In the Commissioner's view, the information in question reflects the process any organisation, seeking to conduct field trials of this nature, would have to go through. Essentially, it relates to the regulatory process rather than revealing anything of a proprietary commercial nature.

51. In the circumstances, the Commissioner is not convinced that disclosure of this particular information would allow competitors to gain significant commercial advantage, or be able to copy elements of the technology. Indeed, an overview of the process is already published on Benchmark's own website, including information in a brochure pre-dating the request[7], and the Commissioner does not see how disclosure of this particular information would add to what is already known, to any great extent. In the Commissioner's view, the information in

[7] https://www.benchmarkplc.com/wp-content/uploads/2019/09/CleanTreat_A5-Brochure_EN.pdf

question does not reveal anything that could be deemed to be commercially confidential, or which would prejudice the third party's economic interests.

52. Having carefully considered the content of the withheld information alongside SEPA's arguments, for certain information, the Commissioner does not accept that disclosure would be likely to cause substantial prejudice to a legitimate economic interest. While acknowledging the information is commercial in nature, he is not satisfied that its disclosure would allow competitors to gain significant economic advantage, or be able to bring to the market new innovations at an earlier stage.

53. Accordingly, for this information, the Commissioner does not accept that the tests for regulation 10(5)(e) to apply have been met, and he requires SEPA to disclose this information to the Applicant.

54. However, for the remainder of the withheld information, the Commissioner accepts that its disclosure would be likely to cause substantial prejudice to the economic interests of Benchmark. In relation to this information, he is satisfied that the harm identified by SEPA is a real threat, and not just a hypothetical possibility.

55. Having considered SEPA's arguments, including the third party comments (set out above and not replicated here), the Commissioner accepts these to be sound in relation to the remainder of the withheld information.

56. The Commissioner acknowledges that the remaining withheld information relates to what appears to be a unique process which is trademarked by Benchmark. It includes technical data and specific details relating to the process which appear to be linked to it being a trade secret.

57. As the Commissioner has already found, the information is not publicly available and an implied duty of confidentiality exists. In the Commissioner's view, disclosure of this commercially confidential information would unfairly impact the legitimate economic interests of the third party, in this case Benchmark.

58. The Commissioner considers disclosure of this sensitive information, relating to the treatment and the process which is the focus of this request, would put Benchmark in an unfavourable position, by allowing competitors to access the data, and possibly reverse-engineer some of it. This would give competitors significant unfair commercial advantage, enabling them to copy elements of the technology and develop their own treatment process, which may result in less thoroughly tested products being brought to the market at an earlier stage. This, the Commissioner accepts, would adversely impact Benchmark's commercial and financial interests.

59. The Commissioner therefore finds that the exception in regulation 10(5)(e) of the EIRs is engaged for some, but not all, of the withheld information. Where the exception is engaged, he will go on to consider the public interest test as required by regulation 10(1)(b) of the EIRs. For the information found to have been wrongly withheld under regulation 10(5)(e), as indicated above, the Commissioner requires SEPA to disclose it to the Applicant.

Public interest test

60. Having accepted that the exception in regulation 10(5)(e) applies to the remaining information withheld from the Applicant, the Commissioner is required to consider the public interest test in regulation 10(1)(b) of the EIRs. This states that a Scottish public authority may only withhold 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.

SEPA's submissions on the public interest

61. In its submissions to the Commissioner, SEPA set out the following factors it had taken into account in considering where the balance of public interest lay. These included:

Factors favouring making the information available

- Increased public access to, and dissemination of environmental information contribute to a greater awareness of environmental matters, free exchange of views, more effective public participation in environmental decision-making and, eventually, to a better environment.
- The remainder of the information has been disclosed.
- Extensive publication of information[8][9] by SEPA on its approach to aquaculture.
- The general obligation of the EIRs to promote openness and transparency, and the presumption in favour of disclosure provided for in the EIRs.

Factors favouring maintaining the exception

- SEPA specialist scientists assess scientific data and information received, relating to veterinary medicines (both existing and under development) to assess their potential environmental effects in the environment.
- SEPA specialist scientists and engineers assess scientific and engineering data and information received, relating to treatment processes and process controls (both existing and under development), to assess the potential efficacy of such processes and the potential environmental effects associated with their use.
- SEPA receives data and information from, and provides advice and support to, other regulators, and developers in support of other regulators. It provides advice and support to the Veterinary Medicines Directorate on the scientific evaluation and environmental risk assessment of potential new medicines, which can also include advice in relation to process controls, and to Marine Scotland on process control and environmental risk assessments for medicines which may be used in wellboats.
- Disclosure would prejudice substantially the third party's current and future commercial and economic interests.
- Disclosure would likely result in manufacturers and interested bodies ceasing to share such data with SEPA in future. This would compromise SEPA's ability to fully discharge its duties in a number of key areas:
    - The inability to provide advice and support to other regulators in the development phase of potential new medicines (i.e. pre-approval for UK use), and the potential new treatment processes or process controls for medicines. This could lead to delays in other regulators processing marketing authorisation applications, and in SEPA subsequently determining license applications.
    - A reduction in commercially sensitive data and information being voluntarily provided to SEPA, to derive and review environmental standards and to assess

[8] https://www.sepa.org.uk/regulations/water/aquaculture/

[9] https://sectors.sepa.org.uk/finfish-aquaculture-sector-plan/

efficacy of process controls. This could lead to environmental standards and assessments being derived from incomplete data, resulting in under or overly-cautious standards being set, and/or to delays in targeted investment and the availability of technologies and process controls that may reduce environmental risks.

- The voluntary submission of data and information by those regulated by SEPA, or by third parties undertaking research and development, is key to the evidence-base used in regulatory development. SEPA argued that it might be impacted by the quality and timeliness of evidence being made available.

62. SEPA referred to a national 7-week consultation held in 2018 on its Finfish Aquaculture Sector Plan[10], page 17 of which states "*It is important that the industry finds ways of ensuring that the quantity of medicine residues discharged into the environment is minimised"*. One of SEPA's aspirations for the sector identified in the plan was *"Innovation in the methods of collection and neutralisation of medicine residues, with a view to minimise discharges to the environment".*

63. SEPA submitted there were clear benefits to society through early engagement in development of new medicines and innovative treatment systems, and through regulators sharing information (including commercially sensitive information) and providing advice and support to each other. This, SEPA believed, enabled co-ordination between parties, allowing consideration of all relevant aspects of policy and regulation.

64. SEPA acknowledged there were public interest arguments in favour of disclosure, but considered these were outweighed by those in favour of non-disclosure. In SEPA's view, disclosure would substantially prejudice its ability to provide advice and support to other regulators and effectively discharge its duties in regulating discharges of medicines used in the aquaculture sector.

The Applicant's submissions on the public interest

65. In its application to the Commissioner, the Applicant believed there was a clear public interest which was best served by disclosure of the information, and which did not override protecting commercial or industrial information.

66. The Applicant argued that Benchmark has actively (and publicly) sought public and private investment in CleanTreat and was seeking to maximise income by delaying disclosure of the information. In the Applicant's view, SEPA's duty was not to Benchmark's shareholders, but to the Scottish environment and the Scottish public whose livelihoods might be impacted by Norwegian and other foreign investors controlling Benchmark.

67. In the Applicant's view, the public had a right to know what the CleanTreat process entailed, how it was going to be used and what chemicals were to be discharged and disposed of. Only with full disclosure could investors and the public make a fully informed decision as to its acceptability. The Applicant argued that SEPA had no jurisdiction to block public scrutiny and that now was the time to release the information. It believed that if the information was not disclosed before CleanTreat (and BMK08) were officially approved and in operation around Scotland, it would be too late for the public and investors to make informed decisions, including any objections.

[10] https://sectors.sepa.org.uk/media/1155/finfish-aquaculture-sector-plan.pdf

68. In support of its position, the Applicant provided the Commissioner with various links to information in the public domain, including the following:

- A news report[11] from 28 February 2020 about Benchmark having submitted a dossier to (undisclosed) regulators on the BMK08 lice treatment to be used with CleanTreat, Benchmark's filtration system. This explained that regulatory approval was sought in one country at a time, enabling any alterations during the process to be included in subsequent applications in other jurisdictions.
- An article[12] dated 17 March 2020, reporting on the lack of transparency, and the alleged potential harm to the marine environment, surrounding plans by the Scottish salmon farming industry to use BMK08 (containing the chemical imidacloprid, which was banned in 2018 by the European Commission for all outdoor use on plants due to identified risk to bees) in conjunction with the CleanTreat filtration system which, the industry claimed, removed pollution, and should be trialled in Scotland. The article stated that both the Scottish Government and SEPA had confirmed that no new licence applications had been received in this regard.
- A blog[13] dated 17 March 2020, reporting on Benchmark's refusal to publicly name the ingredients rebranded as BMK08, the risks associated with imidacloprid, and the call for transparency on Benchmark's plans to use this in Scottish salmon farming.

69. In its submissions to the Commissioner, the Applicant strongly believed there was a public interest in disclosure of information on CleanTreat, including BMK08. It referred to public confirmation[14] by Benchmark on 20 March 2020 that BMK08 was imidacloprid. The Applicant believed this added considerable weight to the public interest in disclosure of the information.

70. The Applicant referred to a blog[15] dated 6 June 2020, which noted that the patents secured by Benchmark claimed that imidacloprid was safe for fish, contrary to other scientific advice it cited.

71. In the Applicant's view, SEPA's refusal to disclose information on CleanTreat, BMK08 and imidacloprid, and its apparent protection of the commercial interests of a Norwegian-funded industry at the expense of the Scottish environment, went against transparency, public accountability and SEPA's role as a publicly-funded environment watchdog. The Applicant submitted that this was unacceptable and unreasonable, arguing that media coverage of the issue since March 2020, when it was publicly revealed that CleanTreat used a banned toxic neonicotinoid insecticide, was evidence enough to warrant disclosure of the information.

The Commissioner's views on the public interest

72. The Commissioner has carefully considered the submissions made by both SEPA and the Applicant on the public interest.

73. The Commissioner has already concluded that disclosure of the remaining withheld information would be likely to cause substantial harm to a legitimate economic interest, and

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[11] https://www.fishfarmingexpert.com/article/new-lice-treatment-now-in-hands-of-regulators/

[12] https://theferret.scot/fish-farm-companies-bee-harming-pesticide/

[13] https://donstaniford.typepad.com/my-blog/2020/03/revealed-toxic-neonicotinoid-insecticide-used-to-cleantreat-lousy-scottish-salmon-.html

[14] https://www.benchmarkplc.com/news/bmk08/

[15] https://donstaniford.typepad.com/my-blog/2020/06/patent-lifts-lid-on-neonicotinoid-use-in-salmon-farming-.html

has also found an implied duty of confidence in relation to this information. As he has recognised in previous cases, there is a strong public interest in maintaining confidentiality, where confidentiality is provided for by law.

74. The Commissioner also recognises there is a considerable public interest in transparency and public scrutiny in relation to how public authorities make decisions, particularly those involving and impacting on the environment (and especially where, as claimed by the Applicant, these decisions relate to a process which may potentially be harmful to the environment). In this case, disclosure would contribute to the public's understanding of the issue in question, and whether SEPA was making informed decisions, taking account of the interests of the community and the impact on the environment, in its discussions and negotiations with Benchmark.

75. On the other hand, bearing in mind the substantial harm he has identified, the Commissioner accepts that there is no public interest in disclosing information that would impede parties involved in those negotiations from being able to conclude those discussions in a confidential setting. The Commissioner considers it is in the public interest that SEPA is not treated unfairly, simply as a result of being a public body with the role of assessing and deciding on applications of this nature submitted by third party commercial bodies, where disclosure of the information may have a consequential impact on its ability to make fully-informed decisions, or prevent it from dealing freely with other commercial bodies on similar issues in future.

76. The Commissioner also recognises there is no public interest in the disclosure of commercially confidential information that would unfairly impact the legitimate economic interests of the third party, in this case Benchmark. As he has recognised above, disclosure of sensitive information relating to CleanTreat and its use would allow competitors to gain significant unfair commercial advantage. The information was provided to SEPA as part of a due process, with an expectation of confidentiality. In the Commissioner's view, there is no public interest in unfairly substantially prejudicing Benchmark's commercial interests through disclosure, simply as a result of it entering into discussions with a Scottish public authority.

77. The Commissioner has considered carefully all the public interest arguments he has received. He must consider the actual circumstances of the case, and whether SEPA was correct in its decision, at the time it responded to the request and subsequent requirement for review. That position may change in time (and indeed may have changed since the information request in question was made), but the issue here is whether SEPA responded to this particular request correctly at the relevant time.

78. In all of the circumstances of the case, the Commissioner finds that the public interest in maintaining the exception outweighed that in making the remaining information available, at the time SEPA responded to the Applicant's request and requirement for review. He therefore concludes that SEPA was entitled to withhold the remaining information under regulation 10(5)(e) of the EIRs.

Compliance

79. The Commissioner requires SEPA to disclose to the Applicant the information he has found to have been wrongly withheld under regulation 10(5)(e). This will be identified on a marked-up copy of the withheld information, which will be provided to SEPA.

80. The Commissioner is mindful that the information to be disclosed contains some personal data. As the Applicant has raised no dissatisfaction with SEPA's decision to withhold any

personal data, SEPA may give consideration to the redaction of personal data when disclosing the information as required by this decision notice.

Decision

The Commissioner finds that the Scottish Environment Protection Agency (SEPA) partially complied with the Environmental Information (Scotland) Regulations 2004 (the EIRs) in responding to the information request made by the Applicant.

The Commissioner finds that SEPA was correct to withhold some information under the exception in regulation 10(5)(e), on the basis that it was commercially confidential, and so complied with the EIRs in that respect.

However, the Commissioner also finds that SEPA wrongly withheld some other information under the exception in regulation 10(5)(e), and so failed to comply with the EIRs (in particular, regulation 5(1)) in that respect.

The Commissioner therefore requires SEPA to disclose to the Applicant the information he has found to have been wrongly withheld under regulation 10(5)(e) of the EIRs, by **7 June 2021**.

Appeal

Should either the Applicant or SEPA 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 SEPA fails to comply with this decision, the Commissioner has the right to certify to the Court of Session that SEPA has failed to comply. The Court has the right to inquire into the matter and may deal with SEPA as if it had committed a contempt of court.

Margaret Keyse
Head of Enforcement

21 April 2021

Appendix 1: Relevant statutory provisions

Freedom of Information (Scotland) Act 2002

1 General entitlement

(1) A person who requests information from a Scottish public authority which holds it is entitled to be given it by the authority.

…

(6) This section is subject to sections 2, 9, 12 and 14.

2 Effect of exemptions

(1) To information which is exempt information by virtue of any provision of Part 2, section 1 applies only to the extent that –

…

(b) in all the circumstances of the case, the public interest in disclosing the information is not outweighed by that in maintaining the exemption.

…

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…

(2) Information is exempt information if a Scottish public authority-

(a) is obliged by regulations under section 62 to make it available to the public in accordance with the regulations; or

(b) would be so obliged but for any exemption contained in the regulations.

…

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.

…

(5) A Scottish public authority may refuse to make environmental information available to the extent that its disclosure would, or would be likely to, prejudice substantially-

…

(e) the confidentiality of commercial or industrial information where such confidentiality is provided for by law to protect a legitimate economic interest;

…

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