

Decision Notice 097/2020

District Salmon Fishery Board: failure to respond

Applicant: Corin Smith

Public authority: Lochaber District Salmon Fishery Board

Case Ref: 202000612



Summary

On 6 March 2020, the Applicant asked Lochaber District Salmon Fishery Board (the Board) for information about funding from fish farm companies. This decision finds that the Board is a Scottish public authority, in terms of regulation 2(1) of the Environmental Information (Scotland) Regulations 2004 (the EIRs), and failed to respond to the request within the timescale allowed by the EIRs. The decision also finds that the Board failed to comply with the Applicant's requirement for review within the timescale set down by the EIRs.

The Commissioner has not required the Board to take any action in this case, given that it responded to the Applicant's requirement for review during the investigation.

Background

Date	Action
6 March 2020	The Applicant made an information request to the Board
	The Applicant did not receive a response to his information request.
14 April 2020	The Applicant wrote to the Board, requiring a review in respect of what he considered to be a failure to respond.
14 April 2020	The Board wrote to the Applicant, stating that it was not a Scottish public authority covered by the EIRs and therefore did not consider itself obliged to respond to his request or requirement for review.
22 April 2020	The Applicant wrote to the Commissioner's Office, stating that he was dissatisfied with the Board's failures to respond and applying to the Commissioner for a decision in terms of section 47(1) of the Freedom of Information (Scotland) Act 2002 (FOISA). The enforcement provisions of FOISA apply to the enforcement of the EIRs, subject to specified modifications – see regulation 17.
23 April 2020	The Board was notified in writing that an application had been received from the Applicant and was invited to comment on the application.
11 June 2020	The Board informed the investigating officer, applying regulation 10(4)(a) of the EIRs, that it did not hold the information requested by the Applicant. This decision was communicated to the Applicant and the Applicant confirmed having received it: he still sought a decision from the Commissioner, with regard to the Board's status under the EIRs and (assuming it was covered as a Scottish public authority) its compliance with the request in accordance with the relevant timescales.
20 June 2020	The Board confirmed to the investigating officer that it now acknowledged it was a Scottish public authority in terms of regulation 2(1) of the EIRs.

Commissioner's analysis and findings

1. It is apparent from the terms of the request that any information caught by it would be environmental information as defined by regulation 2(1) of the EIRs (the Board has never claimed otherwise). Any Scottish public authority (as defined in regulation 2(1)) receiving a request for this information would, therefore, be required to respond to it in accordance with the requirements of the EIRs.
2. The Board is a district salmon fishery board established in terms of Part 3 of the Salmon and Freshwater Fisheries (Consolidation) (Scotland) Act 2003 (the 2003 Act)¹. The Commissioner acknowledges, as the Board has submitted, that such boards vary considerably in the resources available to them – and that the Lochaber Board is a relatively small one, with limited available resources. However, if the Board falls within any of the limbs of the definition of a Scottish public authority in regulation 2(1), it will be covered by the EIRs and therefore required to respond to requests for environmental information: there is no de minimis threshold.
3. The Applicant set out a number of reasons why he considered the Board to be a Scottish public authority in terms of regulation 2(1), including submissions on the application of paragraph (c) of the definition. Paragraph (c) covers “any other Scottish public authority with mixed functions or no reserved functions (within the meaning of the Scotland Act 1998)”. As the Commissioner’s guidance “Which bodies are covered by the EIRs?”² states, a body will have no reserved functions where it operates exclusively in Scotland and its functions are wholly within the legislative competence of the Scottish Parliament. The Board, operating wholly within a defined area of Scotland and operating entirely under an Act of the Scottish Parliament, would appear to be a body with no reserved functions.
4. As the above guidance has noted, paragraph (c) does not appear, on first sight, to be a direct transposition of any of the limbs of definition of a public authority in Directive 2003/4/EC³. However, the EIRs are intended to implement the Directive in Scots Law and must be interpreted in line with the Directive. In the Commissioner’s view, paragraph (c) is intended as a counterpart of paragraph (b) in the definition in the Directive:
“any natural or legal person performing public administrative functions under national law, including specific duties, activities or services in relation to the environment”
The Applicant made submissions on this basis, referring to the key decision of the European Court of Justice in the case of *Fish Legal v Information Commissioner*⁴.
5. As the Applicant noted, the *Fish Legal* decision (at paragraph 52) identifies this part of the definition as concerning:
“... administrative functions defined in functional terms, namely entities, be they legal persons governed by public law or by private law, which are entrusted, under the legal regime which is applicable to them, with the performance of services of public interest, inter alia in the environmental field, and which are, for this purpose, vested with special powers beyond those which result from the normal rules applicable in relations between persons governed by private law.”

¹ <https://www.legislation.gov.uk/asp/2003/15/contents>

² <https://www.itspublicknowledge.info/Law/EIRs/EIRsCoverage.aspx>

³ <https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2003:041:0026:0032:EN:PDF>

⁴ <https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62012CJ0279:EN:HTML>

He went on to explain why he considered the Board to meet these criteria, with reference to its statutory functions under the 2003 Act.

6. Given the nature of the statutory scheme under which it is established, the Board would appear to be a distinct form of legal person. Given that statutory scheme, its functions relating to the protection or improvement of fisheries (with particular reference to salmon) appear to be intended as functions to be exercised in the public interest, rather than simply for the benefit of the represented proprietors. Although not essential for this part of the definition to apply, the functions would appear to be environmental in nature.
7. The Applicant also highlighted examples of what he believed to be special powers, beyond those resulting from the normal rules applying to relations between persons subject to private law. Key powers, in his view, were the right to levy an assessment on fishery proprietors in its area, which the proprietors were obliged to pay (section 44 of the 2003 Act), and also the power to appoint water bailiffs with numerous enforcement powers (section 45). The Commissioner agrees: both of these powers seem inherent to the special nature of public administration. The law enforcement powers of bailiffs, in particular, are powers analogous to those of constables (albeit more limited and within a limited sphere) and not powers there could be any legitimate expectation of being extended to bodies of a truly “private” nature.
8. In all the circumstances, therefore, the Commissioner finds that the Board is properly considered to be a Scottish public authority within the meaning of paragraph (b) of the definition in regulation 2(1) of the EIRs. He is glad to see that the Board reached the same conclusion during the investigation and complied with the request.
9. Regulation 5(2)(a) of the EIRs gives Scottish public authorities a maximum of 20 working days following the date of receipt of the request to comply with a request for information. This is subject to qualifications which are not relevant in this case.
10. It is a matter of fact that the Board did not provide a response to the Applicant’s request for information within 20 working days, so the Commissioner finds that it failed to comply with regulation 5(2)(a) of the EIRs.
11. Regulation 16(4) of the EIRs gives Scottish public authorities a maximum of 20 working days following the date of receipt of the requirement to comply with a requirement for review.
12. It is a matter of fact that the Board did not provide a response to the Applicant’s requirement for review within 20 working days, so the Commissioner finds that it failed to comply with regulation 16(4) of the EIRs.
13. The Board has since responded to the Applicant’s requirement for review, so the Commissioner does not require it to take any further action in relation to the Applicant’s application.

Decision

The Commissioner finds that Lochaber District Salmon Fishery Board (the Board) failed to comply with the Environmental Information (Scotland) Regulations 2004 (the EIRs) in responding to the information request made by the Applicant. In particular, the Board (having failed to recognise that it was a Scottish public authority in terms of regulation 2(1) of the EIRs) failed to respond to the Applicant's request for information and requirement for review within the timescales laid down by regulation 5(2) and 16(4) of the EIRs.

The Commissioner does not require the Board to take any action in respect of this failure, in response to the Applicant's application, given that the Board has since responded to the request.

Appeal

Should either the Applicant or the Board wish to appeal against this decision, they have the right to appeal to the Court of Session on a point of law only. Any such appeal must be made within 42 days after the date of intimation of this decision.



Margaret Keyse
Head of Enforcement

27 August 2020

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