

# Decision Notice 165/2021

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## **The Water Environment (Controlled Activities) Scotland Regulations 2011 – failure to respond**

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**Applicant: The Applicant**

**Public authority: Scottish Environment Protection Agency**

**Case Ref: 202101109**



Scottish Information  
Commissioner

## Summary

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On 1 June 2021 the Applicant asked the Scottish Environment Protection Agency (SEPA) for information about licensing under The Water Environment (Controlled Activities) Scotland Regulations 2011. In particular, the Applicant wanted to see the assessments made for discharges from the salmon hatchery at Barcaldine and the CAR licence for that discharge.

This decision finds that SEPA failed to respond to the request within the timescale allowed by the Freedom of Information (Scotland) Act 2002 (FOISA) and the Environmental Information (Scotland) Regulations 2004 (the EIRs). The decision also finds that SEPA failed to comply with the Applicant's requirement for review within the timescale set down by FOISA and the EIRs.

## Background

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1. The Applicant made an information request to SEPA on 1 June 2021.
2. SEPA did not respond to the information request.
3. On 8 July 2021, the Applicant wrote to SEPA, requiring a review of its failure to respond.
4. The Applicant did not receive a response to his requirement for review.
5. The Applicant wrote to the Commissioner on 6 September 2021, stating that he was dissatisfied with SEPA's failure to respond and applying to the Commissioner for a decision in terms of section 47(1) of FOISA. The enforcement provisions of FOISA apply to the enforcement of the EIRs, subject to specified modifications – see regulation 17.
6. On 9 September 2021, SEPA was notified in writing that an application had been received from the Applicant and was invited to comment on the application.
7. The Commissioner received submissions from SEPA. These submissions are considered below.

## Commissioner's analysis and findings

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8. It is apparent from the terms of the request that at least some of the information caught by it will be environmental information as defined by regulation 2(1) of the EIRs. In *Decision 218/2007 Professor A D Hawkins and Transport Scotland*<sup>1</sup>, the Commissioner confirmed (at paragraph 51) that where environmental information is concerned, there are two separate statutory frameworks for access to that information and, in terms of the legislation, an authority is required to consider the request under both FOISA and EIRs.
9. SEPA acknowledged that it had not responded to the Applicant's information request and requirement for review on time.
10. It explained that a variety of factors had contributed to this, in particular the continued office closure and restrictions due to Covid-19 and the impact of the criminal cyber-attack against SEPA on 24 December 2020.

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<sup>1</sup> <http://www.itspublicknowledge.info/ApplicationsandDecisions/Decisions/2007/200600654.aspx>

11. SEPA noted specific issues contributing to the delay in responding to this request, in particular the Access to Information Team's loss of access to its usual systems and resources, external communication failures and technical issues with access to the [foi@sepa.org.uk](mailto:foi@sepa.org.uk) mail box.
12. Section 10(1) of FOISA 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. The same timescale is laid down by regulation 5(2)(a) of the EIRs.
13. It is a matter of fact that SEPA 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 section 10(1) of FOISA and regulation 5(2)(a) of the EIRs.
14. Section 21(1) of FOISA 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. Again, this is subject to qualifications which are not relevant in this case. The same timescale is laid down by regulation 16(4) of the EIRs.
15. It is a matter of fact that SEPA 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 section 21(1) of FOISA and regulation 16(4) of the EIRs.
16. As SEPA responded to the Applicant's requirement for review on 17 September 2021, the Commissioner does not require it to take any further action in relation to the Applicant's application. In relation to systemic issues arising out of the 24 December 2020 cyber-attack, the Commissioner is working with SEPA to assist in rebuilding its Freedom of Information capacity, by way of a Level 2 Intervention under his Intervention Procedures. Notwithstanding that intervention and his willingness to be supportive in this challenging time, the Commissioner must reiterate what he said in decision 069/2021 as regards meeting the required timescales: where they are not met, he has no option but to find that there has been a breach of the above provisions.
17. The Commissioner notes that SEPA has apologised to the Applicant for its failure to comply with the required timescales.

## Decision

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The Commissioner finds that the Scottish Environment Protection Agency (SEPA) failed to comply with Part 1 of the Freedom of Information (Scotland) Act 2002 (FOISA) and with the Environmental Information (Scotland) Regulations 2004 (the EIRs) in dealing with the information request made by the Applicant. In particular, SEPA failed to respond to the Applicant's request for information and requirement for review within the timescales laid down by sections 10(1) of 21(1) of FOISA and regulations 5(2) and 16(4) of the EIRs.

The Commissioner does not require SEPA to take any action in respect of these failures, in response to the Applicant's application, given that a response has now been issued.

## **Appeal**

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Should either the Applicant or the Scottish Protection Environment Agency (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.

**Euan McCulloch**  
**Deputy Head of Enforcement**

**18 October 2021**

**Scottish Information Commissioner**

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