



Decision Notice 061/2023

Rights of Public Access – failure to respond

Applicant: The Applicant

Authority: Inverclyde Council

Case Ref: 202300607

Summary

The Applicant asked the Authority for information about investigations which preceded the issue of an Opinion, and a subsequent revised Opinion, relating to the right of public access under the Land Reform (Scotland) Act 2003 at a specified location. This decision finds that the Authority failed to respond to the requests within the timescales allowed by the Freedom of Information (Scotland) Act 2002 (FOISA) and the Environmental Information (Scotland) Regulations 2004 (the EIRs). The decision also finds that the Authority failed to comply with the Applicant's requirement for review within the timescales set down by FOISA/the EIRs.

Background

1. The Applicant made three separate information requests to the Authority on 6 February 2023.
2. The Authority acknowledged receipt of the requests on 6 February 2023.
3. On 2 March 2023, the Authority wrote to the Applicant, informing him that there may be a delay in responding.
4. The Applicant did not receive a response to his requests.
5. On 20 March 2023, the Applicant wrote to the Authority requiring a review in respect of its failure to respond to his three requests.
6. The Applicant wrote to the Authority again on 3 April 2023 and 9 May 2023, chasing up its response.
7. The Applicant did not receive a response to his requirement for review for all three requests.

8. The Applicant wrote to the Commissioner on 15 May 2023, stating that he was dissatisfied with the Authority's failure to respond and applying to the Commissioner for a decision in terms of section 47(1) of FOISA (for all three requests). The enforcement provisions of FOISA apply to the enforcement of the EIRs, subject to specified modifications – see regulation 17.
9. The Commissioner determined that the application complied with section 47(2) of FOISA and that he had the power to carry out an investigation.

Investigation

10. Section 49(3)(a) of FOISA requires the Commissioner to notify public authorities of an application and to give them an opportunity to comment. The Commissioner did this on 18 May 2023.
11. The Commissioner received submissions from the Authority on 8 June 2023. These submissions are considered below.
12. It is apparent from the terms of the requests that at least some of the information caught by them will be environmental information as defined by regulation 2(1) of the EIRs. In [Decision 218/2007](#)¹, 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 the EIRs.
13. The Authority acknowledged that it had failed to respond to the requests and requirement for review. It apologised that its processes and procedures had failed on this occasion.
14. The Authority explained that the reviewing officer had not been made aware of the requirement for review received on 20 March 2023. However, the reviewer had been made aware of a delay in responding to these requests in April 2023, at which point guidance had been given to the relevant service on how to respond. The Authority recognised that a review should have been carried at that time, rather than directing the service to respond.
15. The Authority confirmed that a review would now be carried out and a review response issued to the Applicant.
16. 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.
17. It is a matter of fact that the Authority did not provide a response to the Applicant's three requests 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.
18. 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.

¹ <https://www.itspublicknowledge.info/decision-2182007>

19. It is a matter of fact that the Authority did not provide a response to the Applicant's requirement for review for all three requests 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.
20. The remainder of section 21 and regulation 16 sets out the requirements to be followed by a Scottish public authority in carrying out a review. As no review has been carried out in this case, the Commissioner finds that the Authority failed to discharge these requirements: he now requires a review for all three requests to be carried out in accordance with section 21 and regulation 16.
21. The Commissioner recommends that the Authority considers whether it would be appropriate to apologise to the Applicant for its failure to comply.

Decision

The Commissioner finds that the Authority 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 three information requests made by the Applicant. In particular, the Authority failed to respond to the Applicant's requests for information and requirement for review within the timescales laid down by sections 10(1) and 21(1) of FOISA and regulations 5(2) and 16(4) of the EIRs. The Commissioner requires the Authority to respond to the Applicant's requirement for review by **28 July 2023**.

Appeal

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

Wendy Snedden
Freedom of Information Officer

13 June 2023