

Decision Notice



Decision 062/2011 Mr K Ovenstone and Fife Council

Failure to respond

Reference No: 201100296
Decision Date: 22 March 2011

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Kevin Dunion
Scottish Information Commissioner

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Summary

This decision considers whether Fife Council (the Council) complied with the technical requirements of the Freedom of Information (Scotland) Act 2002 (FOISA) and the Environmental Information (Scotland) Regulations 2004 (the EIRs) in responding to an information request made by Mr Ovenstone.

Background

1. Mr Ovenstone had been in correspondence with the Council regarding a planning application, which made reference to an electronic file held in relation to the application.
2. As a result of this previous correspondence, on 23 November 2010 Mr Ovenstone wrote to the Council requesting the following information;
 - a) A hard copy printed from the electronic file;
 - b) A copy of Fife Council's Planning approval procedures (including details of the approval Committee and the name and contact details of the Chair of the Committee).
 - c) Confirmation that the addressee had studied certain correspondence submitted to the relevant case officer(s) in July 2010.
3. On 2 December 2010 the Council acknowledged Mr Ovenstone's request, stating that it would be responded to within 20 working days.
4. On 9 January 2011, having received no response, Mr Ovenstone wrote to the Council requesting a review.
5. On 13 January 2011 the Council wrote to Mr Ovenstone, stating that some of the information requested was available online and that the Council's Development Services would provide a further response.
6. Mr Ovenstone did not receive a response to his request for review, and on 16 February 2011 wrote to the Commissioner's Office, stating that he was dissatisfied with that failure and applying to the Commissioner 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 certain specified modifications.



7. The application was validated by establishing that Mr Ovenstone had made a request for information to a Scottish public authority and had applied to the Commissioner for a decision only after asking the authority to review its response to that request. The case was then allocated to an investigating officer.

Investigation

8. On 2 March 2011, the Council was notified in writing that an application had been received from Mr Ovenstone and was invited to comment on the application, as required by section 49(3)(a) of FOISA.
9. The Council responded on 15 March 2011, acknowledging that it had failed to provide a full response to Mr Ovenstone's requirement for review.
10. The Council confirmed that it had conducted a review and had notified Mr Ovenstone of its outcome on 9 March 2011. Its letter to Mr Ovenstone apologised for the delay and provided him with further information. The Council also informed Mr Ovenstone that it was appropriate for it to handle his request in terms of the EIRs, since the Council considered the information Mr Ovenstone had requested to be environmental information as defined by regulation 2(1) the EIRs.

Commissioner's analysis and findings

11. The Commissioner notes that the Council responded to Mr Ovenstone's requirement for review in terms of the EIRs. Since this decision is concerned only with the Council's compliance with the statutory timescales for responding to this requirement, the Commissioner has not reached any conclusion as to whether the information requested by Mr Ovenstone is environmental information. Noting the Council's determination that the information is properly regarded as environmental, he has considered the technical matters raised by the case in terms of both FOISA and the EIRs.
12. In **Decision 218/2007 Professor A D Hawkins and Transport Scotland** 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.
13. Section 21(1) of FOISA gives authorities a maximum of 20 working days after receipt of the requirement to comply with a requirement for review, subject to exceptions which are not relevant in this case. The remainder of section 21 governs the review process and the giving of notice of the outcome to the applicant (see Appendix below, particularly subsections (4) and (5)).



14. Regulation 16(4) of the EIRs gives authorities a maximum of 20 working days after the date of receipt of the applicant's representations to notify the applicant of its decision on review. Other parts of regulation 16, particularly paragraphs (3) and (5), govern the review process and the giving of notice of the outcome to the applicant (see Appendix below).
15. The Commissioner is not satisfied that the Council's letter of 13 January 2011 can be accepted as an adequate response to Mr Ovenstone's requirement for review of 9 January 2011. In the circumstances, he does not consider that the Council provided a response to that requirement for review, or that it carried out a review meeting the requirements of either section 21 or regulation 16, within the respective timescales required by section 21(1) of FOISA and regulation 16(4) of the EIRs.
16. Given that the Council has now provided a response to Mr Ovenstone's requirement for review, the Commissioner does not require the Council to take any further steps in response to this decision.

DECISION

The Commissioner finds that Fife Council (the Council) failed to comply with Part 1 of the Freedom of Information (Scotland) Act 2002 (FOISA) and the Environmental Information (Scotland) Regulations 2004 (the EIRs), by failing to respond to Mr Ovenstone's requirement for review as required by section 21 of FOISA and regulation 16 of the EIRs.

Given that the Council has now responded to Mr Ovenstone's request for review, the Commissioner does not require the Council to take any action in respect of this failure in response to Mr Ovenstone's application.



Appeal

Should either Mr Ovenstone or the Council wish to appeal against this decision, there is an 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 notice.

Euan McCulloch
Deputy Head of Enforcement
22 March 2011



Appendix

Relevant statutory provisions

Freedom of Information (Scotland) Act 2002

21 Review by Scottish public authority

- (1) Subject to subsection (2), a Scottish public authority receiving a requirement for review must (unless that requirement is withdrawn or is as mentioned in subsection (8)) comply promptly; and in any event by not later than the twentieth working day after receipt by it of the requirement.

...

- (4) The authority may, as respects the request for information to which the requirement relates-
- (a) confirm a decision complained of, with or without such modifications as it considers appropriate;
 - (b) substitute for any such decision a different decision; or
 - (c) reach a decision, where the complaint is that no decision had been reached.
- (5) Within the time allowed by subsection (1) for complying with the requirement for review, the authority must give the applicant notice in writing of what it has done under subsection (4) and a statement of its reasons for so doing.

...

The Environmental Information (Scotland) Regulations 2004

16 Review by Scottish public authority

- (1) Subject to paragraph (2), an applicant may make representations to a Scottish public authority if it appears to the applicant that the authority has not complied with any requirement of these Regulations in relation to the applicant's request.

...

- (3) The Scottish public authority shall on receipt of such representations-
- (a) consider them and any supporting evidence produced by the applicant; and



- (b) review the matter and decide whether it has complied with these Regulations.
- (4) The Scottish public authority shall as soon as possible and no later than 20 working days after the date of receipt of the representations notify the applicant of its decision.
- (5) Where the Scottish public authority decides that it has not complied with its duty under these Regulations, it shall immediately take steps to remedy the breach of duty.