



Decision Notice 038/2023

Pulp and Board Plant – failure to respond

Applicant: The Applicant

Authority: Scottish Environment Protection Agency

Case Ref: 202300444

Summary

The Applicant asked the Authority for various pieces of information relating to permits, a dust management plan and all monitoring data relating to the plant. This decision finds that the Authority failed to respond to the information request and requirement for review within the timescale allowed by the Freedom of Information (Scotland) Act 2002 (FOISA) and the Environmental Information (Scotland) Regulations 2004 (the EIRs).

Background

1. The Applicant made an information request to the Authority on 20 December 2022 and received an acknowledgement on 21 December 2022.
2. The Authority then sought clarification of the request on 19 January 2023. The Applicant provided clarification on the same day.
3. Although the Authority acknowledged and sought clarification of the request, it did not respond to the information request.
4. On 17 February 2023, the Applicant wrote to the Authority requiring a review in respect of its failure to respond. The Applicant received an acknowledgement on 20 February 2023.
5. Again, although the Authority sent an acknowledgement, the Applicant did not receive a response to their requirement for review.
6. The Applicant wrote to the Commissioner on 6 April 2023, stating that they were dissatisfied with the Authority'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.

7. 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

8. 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 11 April 2023.
9. The Commissioner received submissions from the Authority on 27 April 2023. These submissions are considered below.
10. 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 Transport Scotland](#)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 EIRs.
11. The Authority acknowledged that it had not responded to the Applicant's information request and requirement for review on time.
12. It explained the factors that had contributed to this failure related to resource issues and in particular, the restrictions caused by Covid-19 and the impact of the criminal cyber-attack against the Authority on 24 December 2020.
13. The Authority explained that a number of documents had been identified as being within the scope of the request, all of which required to be assessed. The Authority explained that final checks are currently being carried out on these documents with a view to issuing a response to the Applicant. This has not been done yet.
14. 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.
15. It is a matter of fact that the Authority did not provide a response to the Applicants' 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.
16. 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.
17. It is a matter of fact that the Authority did not provide a response to the Applicants' 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.

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

18. 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 to be carried out in accordance with section 21 and regulation 16.

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 information request made by the Applicant. In particular, the Authority failed to respond to the Applicants' request 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 issue a response, by **Tuesday 13 June 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.

Jill Walker
Freedom of Information Officer

02 May 2023