

Decision Notice



Decision 034/2010 Mr D Cooney and the Scottish Ministers

Failure to respond to a request for review

Reference No: 201000078
Decision Date: 04 March 2010

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Kevin Dunion

Scottish Information Commissioner

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Summary

This decision considers whether the Scottish Ministers (the Ministers) complied with the technical requirements of the Freedom of Information (Scotland) Act 2002 (FOISA) in responding to an information request made by Mr Cooney.

Background

1. On 4 December 2009, Mr Cooney wrote to the Ministers requesting copies of all the reports, paper work etc., concerning a particular matter of interest to him.
2. The Ministers responded on 9 December 2009, indicating that Mr Cooney should contact a different Scottish public authority with a view to obtaining the information requested. In responding, the Ministers did not specifically confirm whether they held the information or not or provide Mr Cooney with details of how to request a review of their decision.
3. On 14 December 2009, Mr Cooney wrote to the Ministers requesting a review of their decision. In particular, Mr Cooney stated that he considered the Ministers' response to be a refusal to supply the information requested.
4. Mr Cooney did not receive a response to his request for review and on 25 January 2010 he wrote to the Commissioner, stating that he was dissatisfied with the Ministers' failure to respond to his request for review and applying to the Commissioner for a decision in terms of section 47(1) of FOISA.
5. The application was validated by establishing that Mr Cooney 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

6. On 10 February 2010, the Ministers were notified in writing that an application had been received from Mr Cooney and were invited to comment on the application.



7. The Ministers responded on 24 February 2010. In their response, the Ministers' acknowledged that they had received Mr Cooney's request for review, however in the circumstances of this case the Ministers had decided that there was no case to review and consequently, a response to Mr Cooney's request for review was not issued.

Commissioner's analysis and findings

8. Section 21(1) of FOISA gives authorities a maximum of 20 working days following the date of 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.
9. The Ministers have not stated their intention to issue a response to Mr Cooney's requirement for review, appearing to regard the matter as closed on the basis that they have advised Mr Cooney that they do not hold the information he is seeking and directed him to the appropriate public authority. The Commissioner cannot agree with this position, however. Even assuming the Ministers' letter of 9 December 2009 could be regarded as notice that the Ministers did not hold the information requested by Mr Cooney, he remained entitled (under section 20(1) of FOISA) to challenge that assertion and require the Ministers to review their initial response to him. In this connection, the Commissioner can see no basis for regarding the requirement for review made by Mr Cooney as invalid: it appears to meet all of the requirements set out in the remainder of section 20.
10. The Ministers did not provide a response to Mr Cooney's requirement for review of 14 December 2009, or (it would appear) carry out the review Mr Cooney had requested. Consequently, the Commissioner finds that the Ministers failed to comply with section 21 of FOISA. As the Ministers have not yet complied with the requirement in accordance with section 21, the Commissioner requires them to do so.

DECISION

The Commissioner finds that the Scottish Ministers (the Ministers) failed to comply with Part 1 of the Freedom of Information (Scotland) Act 2002 (FOISA), by failing to comply with Mr Cooney's requirement for review as required by section 21 of FOISA.

The Commissioner therefore requires the Ministers to respond to Mr Cooney's request for review, in accordance with the requirements of section 21 of FOISA, by 19 April 2010.



Appeal

Should either Mr Cooney or the Scottish Ministers 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
04 March 2010



Appendix

Relevant statutory provisions

20 Requirement for review of refusal etc.

- (1) An applicant who is dissatisfied with the way in which a Scottish public authority has dealt with a request for information made under this Part of this Act may require the authority to review its actions and decisions in relation to that request.
- (2) A requirement under subsection (1) is referred to in this Act as a "requirement for review".
- (3) A requirement for review must-
 - (a) be in writing or in another form which, by reason of its having some permanency, is capable of being used for subsequent reference (as, for example, a recording made on audio or video tape);
 - (b) state the name of the applicant and an address for correspondence; and
 - (c) specify-
 - (i) the request for information to which the requirement for review relates; and
 - (ii) the matter which gives rise to the applicant's dissatisfaction mentioned in subsection (1).
- (4) For the purposes of paragraph (a) of subsection (3) (and without prejudice to the generality of that paragraph), a requirement for review is treated as made in writing where the text of the requirement is as mentioned in paragraphs (a) to (c) of section 8(2).
- (5) Subject to subsection (6), a requirement for review must be made by not later than the fortieth working day after-
 - (a) the expiry of the time allowed by or by virtue of section 10 for complying with the request; or
 - (b) in a case where the authority purports under this Act-
 - (i) to comply with a request for information; or



- (ii) to give the applicant a fees notice, a refusal notice or a notice under section 17(1) that information is not held,

but does so outwith that time, the receipt by the applicant of the information provided or, as the case may be, the notice.

...

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.
- (2) If-
 - (a) the authority is the Keeper of the Records of Scotland; and
 - (b) a different authority is, by virtue of section 22(4), to review a decision to which the requirement relates,subsection (1) applies with the substitution, for the reference to the twentieth working day, of a reference to the thirtieth working day.
- (3) A requirement for review may be withdrawn by the applicant who made it, by notice in writing to the authority, at any time before the authority makes its decision on 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.
- (6) The Scottish Ministers may by regulations provide that subsections (1) and (5) and section 47(4)(b) are to have effect as if the reference in subsection (1) to the twentieth (or as the case may be the thirtieth) working day were a reference to such other working day as is specified in (or determined in accordance with) the regulations.



- (7) Regulations under subsection (6) may-
 - (a) prescribe different days in relation to different cases; and
 - (b) confer a discretion on the Scottish Information Commissioner.
- (8) Subsection (1) does not oblige a Scottish public authority to comply with a requirement for review if-
 - (a) the requirement is vexatious; or
 - (b) the request for information to which the requirement for review relates was one with which, by virtue of section 14, the authority was not obliged to comply.
- (9) Where the authority considers that paragraph (a) or (b) of subsection (8) applies, it must give the applicant who made the requirement for review notice in writing, within the time allowed by subsection (1) for complying with that requirement, that it so claims.
- (10) A notice under subsection (5) or (9) must contain particulars about the rights of application to the Commissioner and of appeal conferred by sections 47(1) and 56.