

Decision Notice



Decision 113/2010 Mr Ian Archibald and City of Edinburgh Council

Failure to comply with required timescales or carry out review

Reference No: 201001194
Decision Date: 05 July 2010

www.itspublicknowledge.info

Kevin Dunion
Scottish Information Commissioner

Kinburn Castle
Doubledykes Road
St Andrews KY16 9DS
Tel: 01334 464610



Summary

This decision considers whether City of Edinburgh 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 Archibald.

Background

1. On 12 January 2010, Digby Brown Solicitors on behalf of Mr Archibald (referred to hereafter as Mr Archibald) wrote to the Council requesting certain information in respect of the footpaths of Wolseley Terrace, Edinburgh, for the period 1 January 2008 to the date of the request.
2. The Council wrote to Mr Archibald on 19 January 2010, informing him that it had received his request that day and would respond promptly, and in any event by 16 February 2010.
3. The Council further responded to Mr Archibald on 17 February 2010, informing him that there would be a delay in providing the information and hoping that a response would be provided within the next 10 working days.
4. On 1 April 2010, Mr Archibald wrote to the Council requesting a review of its decision. In particular, Mr Archibald drew the Council's attention to the fact that it had not responded within the period of 20 working days allowed by section 10 of FOISA.
5. The Council acknowledged receipt of Mr Archibald's request for review on 8 April 2010, indicating that it would endeavour to provide a response within 20 working days.
6. Mr Archibald did not receive a response to his request for review and on 10 June 2010 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 Archibald 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 16 June 2010, the Council was notified in writing that an application had been received from Mr Archibald and was invited to comment on the application. The Council responded on 30 June 2010, indicating that an internal review had been carried out and that a response had been forwarded to Mr Archibald. While acknowledging that the initial failure to respond to the request for review was unacceptable, it advised the investigating officer of new arrangements which it believed should prevent such failures in future.
9. The Council provided a copy of this response, which informed Mr Archibald that since the request was for environmental information it considered it should have been dealt with under the EIRs. The Council apologised to Mr Archibald for failing to provide an adequate response within the 20 day statutory timescale prescribed under regulation 5(2)(a) of the EIRs and advised that the FOI Officer of the department holding the information requested had been asked to arrange a full response as a matter of urgency.

Commissioner's analysis and findings

10. The Commissioner notes that in its response to Mr Archibald of 30 June 2010, the Council informed Mr Archibald that it considered his request to be a request for environmental information under the EIRs and apologised for failing to respond within the 20 day statutory timescale prescribed under regulation 5(2)(a) of the EIRs. From the terms of the request, it does appear likely that the requested information will be environmental information.
11. 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.
12. Section 10(1) of FOISA gives Scottish public authorities a maximum of 20 working days after receipt of the request to comply with a request for information, subject to certain exemptions which are not relevant in this case.
13. Regulation 5(2)(a) of the EIRs gives Scottish public authorities a maximum of 20 working days after receipt of the request to comply with a request for information, subject to certain exemptions which are not relevant in this case.
14. Although the Council wrote to Mr Archibald on 19 January 2010 acknowledging his request and again on 17 February 2010 indicating that it hoped to provide a full response within 10 working days, it did not provide a response to Mr Archibald's request for information.



15. The Commissioner therefore finds that the Council failed to respond to Mr Archibald's request for information of 12 January 2010 within the 20 working days allowed by section 10(1) of FOISA and regulation 5(2)(a) of the EIRs.
16. 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)).
17. 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 comply with a requirement for review, subject to exceptions which are not relevant in this case. 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).
18. The Council did not provide a response to Mr Archibald's requirement for review of 1 April 2010, or (it would appear) carry out the review Mr Archibald requested. Consequently, the Commissioner finds that the Council failed to comply with section 21 of FOISA and regulation 16 of the EIRs.
19. In response to the Commissioner's request for comments, the Council stated that it had carried out a review and that a response had been provided to Mr Archibald on 30 June 2010. However, the Commissioner notes that the letter of 30 June 2010 merely apologised for failing to respond to the request within 20 days and informed Mr Archibald that the Council expected a response would be sent to him shortly.
20. The Council has an obligation to provide a response to Mr Archibald's requirement for review which satisfies the requirements of section 21 of FOISA (in particular subsections (4) and (5)) and regulation 16 of the EIRs (in particular subsections (3) and (5)). The letter of 30 June 2010 to Mr Archibald did not satisfy these requirements, or indeed suggest that a review satisfying these requirements had been carried out. As the Council has not yet complied with the requirement in accordance with section 21 or regulation 16, the Commissioner requires it to do so.

DECISION

The Commissioner finds that City of Edinburgh 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 Archibald's request for information within the timescales laid down by section 10(1) of FOISA and regulation 5(2)(a) of the EIRs.

The Commissioner also finds the Council failed to comply with Mr Archibald's requirement for review as required by section 21 of FOISA and regulation 16 of the EIRs.



The Commissioner therefore requires the Council to respond to Mr Archibald's requirement for review, in accordance with the requirements of section 21 of FOISA and regulation 16 of the EIRs, by 20 August 2010.

Appeal

Should either Mr Archibald or City of Edinburgh 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
05 July 2010



Appendix

Relevant statutory provisions

Freedom of Information (Scotland) Act 2002

10 Time for compliance

- (1) Subject to subsections (2) and (3), a Scottish public authority receiving a request which requires it to comply with section 1(1) must comply promptly; and in any event by not later than the twentieth working day after-
 - (a) in a case other than that mentioned in paragraph (b), the receipt by the authority of the request; or

...

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

5 Duty to make available environmental information on request

- (1) Subject to paragraph (2), a Scottish public authority that holds environmental information shall make it available when requested to do so by any applicant.
- (2) The duty under paragraph (1)-
 - (a) shall be complied with as soon as possible and in any event no later than 20 working days after the date of receipt of the request; and

...

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.