

Decision Notice

Decision 171/2014 The Royal Society for the Protection of Birds and the Scottish Ministers

Birds and named offshore windfarms: failure to respond within statutory timescales

Reference No: 201401456

Decision Date: 5 August 2014



Scottish Information
Commissioner

Summary

On 13 February 2014, the Royal Society for the Protection of Birds (RSPB) asked the Scottish Ministers (the Ministers) for information relating to birds and five offshore windfarms. This decision finds that the Ministers failed to comply with RSPB's request and requirement for review within the timescales set down by FOISA and the EIRs.

Background

Date	Action
13 February 2014	RSPB made an information request to the Ministers.
21 February 2014	The Ministers asked RSPB to clarify the scope of its request. RSPB did so on 15 April 2014.
25 April 2014	The Ministers informed RSPB that it was taking longer than expected to deal with the request due to the volume of information to be considered.
4 June 2014	As the Ministers had still not responded to the information request, RSPB emailed the Ministers asking them to carry out a review of their failure to respond.
	RSPB did not receive a formal response to its requirement for review.
4 July 2014	RSPB emailed the Commissioner's Office, stating that it was dissatisfied with the Ministers' failure(s) to respond and applying to the Commissioner for a decision.
15 July 2014	The Ministers were notified in writing that an application had been received from RSPB and were invited to comment on the application.
28 July 2014	The Commissioner received submissions from the Ministers. These submissions are considered below.

Commissioner's analysis and findings

1. From the terms of the request, it is apparent that at least some of the information caught by it will be environmental information as defined by regulation 2(1) of the Environmental Information (Scotland) Regulations 2004 (the EIRs). In *Decision 218/2007 Professor A D Hawkins and 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 the Freedom of Information (Scotland) Act 2002 (FOISA) and EIRs.
2. 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.
3. Section 1(3) of FOISA states that if a public authority requires further information in order to identify and locate the requested information, and has told the applicant so, then, provided

¹ <http://www.itspublicknowledge.info/ApplicationsandDecisions/Decisions/2007/200600654.aspx>

that the requirement is reasonable, the authority is not obliged to give the requested information until it has received the information from the applicant.

4. Similarly, regulation 9(2) of the EIRs states that where a request has been formulated in too general a manner, a Scottish public authority shall ask the applicant to provide more particulars in relation to the request. Regulation 9(4) states that the date on which the further particulars are received by the authority shall be treated as the date of the request for the purposes of regulation 5(2)(a) of the EIRs.
5. On 21 February 2014, the Ministers sought further particulars from RSPB in line with regulation 9(2). RSPB clarified its request on 15 April 2014. The response from the Ministers to RSPB's request was therefore due on 19 May 2014 (20 working days, taking bank holidays into account).
6. It is a matter of fact that the Ministers did not provide a response to RSPB's request for information within 20 working days from the date they received clarification from RSPB, so the Commissioner finds that they failed to comply with section 10(1) of FOISA.
7. On 25 April 2014, the Ministers wrote to RSPB to explain that it was taking longer than expected to deal with the request because of the volume of information that needed to be considered, collated and reviewed.
8. Regulation 7(1) of the EIRs allows a Scottish public authority to extend the time allowed by regulation 5(2)(a) by a further period of up to 20 working days, if the volume and complexity of the information requested makes it impracticable for the authority to provide an earlier response. In such cases, therefore, the time allowed for a response can be extended to a maximum of 40 working days. Regulation 7(3)(b) and (c) of the EIRs specifies the notification that is required to be given to an applicant, if the time period is to be extended for a further period of 20 working days.
9. It is not clear whether the Ministers intended to rely upon the provisions in regulation 7(1) of the EIRs to claim an extra 20 working days when they wrote to RSPB on 25 April 2014, but in any case, their email did not contain the information required if it was intended as an extension notice under regulation 7. It did not state that they were claiming an extra 20 working days, or give RSPB any indication when it could expect a full response. The Ministers did not inform RSPB of its rights in relation to review and appeal provisions, or give reasons why the information was considered to be voluminous and complex, as required by regulation 7(3)(b) and (c). The Commissioner has therefore disregarded this email when considering whether the Ministers complied with the statutory timescales for response set down in the EIRs as there is no indication it was intended as formal notification under regulation 7.
10. It is a matter of fact that the Ministers did not provide a response to RSPB's request for information within 20 working days from the date they received clarification from RSPB, so the Commissioner finds that they failed to comply with regulation 5(2) of the EIRs.
11. 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.
12. It is a matter of fact that the Ministers did not provide a response to RSPB's requirement for review within 20 working days, so the Commissioner finds that they failed to comply with section 21(1) of FOISA and regulation 16(4) of the EIRs.

13. The Ministers responded to RSPB's requirement for review on 28 July 2014. The Commissioner does not, therefore, require the Ministers to take any further action in relation to RSPB's application.

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) and with the Environmental Information (Scotland) Regulations 2004 (the EIRs) in responding to the information request made by RSPB. In particular, the Ministers failed to respond to RSPB's request for information and requirement for review within the respective timescales laid down by sections 10(1) and 21(1) of FOISA/regulation 5(2) and 16(4) of the EIRs.

Given that the Ministers have now issued a response, the Commissioner does not require the Ministers to take any action in respect of these failures.

Appeal

Should either RSPB or the Scottish Ministers 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.

Margaret Keyse
Head of Enforcement
5 August 2014

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