



Decision Notice 116/2022

Transfrontier Shipments (TFS) – failure to respond

Applicant: The Applicant

Authority: Scottish Environment Protection Agency

Case Ref: 202200990

Summary

The Applicant asked the Authority for various information about Transfrontier shipments for all waste leaving Scotland for the years 2020, 2021 and 2022 (to date of request). This decision finds that the Authority failed to respond to the request within the timescale allowed by the Freedom of Information (Scotland) Act 2002 (FOISA) and the Environmental Information (Scotland) Regulations 2004 (the EIRs). The decision also finds that the Authority failed to comply with the Applicant's requirement for review within the timescale set down by FOISA/the EIRs.

Background

1. The Applicant made an information request to the Authority on 6 June 2022. He clarified the scope of his request on 7 June 2022 by specifying the timeframe for the information he wanted (i.e. for 2020, 2021 and 2022 to the date of his request).
2. The Authority did not respond to the information request, but apologised to the Applicant (on 7 July 2022) for the delay and provided the Applicant with details of the right to seek a review of its failure to respond.
3. On 26 July 2022, the Applicant wrote to the Authority requiring a review in respect of its failure to respond.
4. The Applicant did not receive a response to his requirement for review, but received another apology from the Authority on 25 August 2022 for the delays, with guidance on making an application to the Commissioner for the failures to respond.
5. The Applicant wrote to the Commissioner on 5 September 2022, stating that he was 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.

6. 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

7. 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 8 September 2022.
8. The Commissioner received submissions from the Authority on 22 September 2022. These submissions are considered below.
9. 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.
10. The Authority acknowledged that it had not responded to the Applicant's information request and request for review on time.
11. 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.
12. The Authority confirmed that a dedicated additional resource had now been put in place to work on this request, giving a timescale of December 2022 to issue a response. The Authority explained that it was a substantial piece of work that required data to be manually input into the relevant IT system to enable interrogation and reporting of the data. The Authority confirmed that it was currently collating the information in order to respond to the request fully.
13. 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.
14. It is a matter of fact that the Authority did not provide a response to the Applicant's 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.
15. 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.

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

16. The Authority provided a partial response to the Applicant's requirement for review on 22 September 2022 with an apology for the delay, advising the Applicant that it was continuing to work towards providing a complete response. The Applicant was provided with a spreadsheet detailing all TFS's for the year 2020 for Refuse Derived Fuel (RDF).
17. It is a matter of fact that the Authority did not provide a response to the Applicant's 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.
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 on the request relating to any other information on waste shipments 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/regulation 16.
19. The Commissioner notes that the Authority has apologised in its response 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 Applicant's 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 provide a response to the remainder of the request by 19 December 2022.

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.

Colin MacFadyen
(Acting) Deputy Head of Enforcement

2 November 2022