



Decision Notice 130/2024

WhatsApp or text messages – failure to respond

Applicant: The Applicant

Authority: Scottish Ministers

Case Ref: 202400708

Summary

The Applicant asked the Authority for “out of scope” redacted information relating to information disclosed by the Authority in response to an information request for WhatsApp or text messages sent or received by any Government Minister/Cabinet Secretary on government business in March and August 2021. This decision finds that the Authority failed to respond to the requirement for review within the timescale allowed by the Freedom of Information (Scotland) Act 2002 (FOISA).

Background

1. The Applicant made an information request to the Authority on 18 March 2024. The Authority’s response to the information request the Applicant referred to in her request is available on the Authority’s [website](#)¹.
2. The Authority responded to the information request on 15 April 2024.
3. On 22 April 2024, the Applicant wrote to the Authority requiring a review of its decision.
4. The Applicant did not receive a response to her requirement for review.
5. The Applicant wrote to the Commissioner on 22 May 2024, stating that she 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.
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.

¹ <https://www.gov.scot/publications/foi-202100255908/>

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 23 May 2024.
8. The Commissioner received submissions from the Authority on 6 June 2024.
9. The Authority accepted that it had not responded to the Applicant's requirement for review within the timescale allowed by FOISA.
10. The Authority explained that it had not been able to respond because of work pressures in the team responsible for this information, the transition to a new First Minister which directly impacts the team's work and consultation with legal colleagues being required due to the sensitivity of the information.
11. The Authority stated that it would will issue a review response, but it has yet to do so.
12. 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.
13. 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.
14. The remainder of section 21 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.
15. 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) in dealing with the information request made by the Applicant. In particular, the Authority failed to respond to the Applicant's requirement for review within the timescales laid down by section 21(1) of FOISA. The Commissioner requires the Authority to respond to the Applicant's requirement for review, by **1 August 2024**.

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.

Cal Richardson
Deputy Head of Enforcement

17 June 2024