

Decision Notice

Decision 113/2014 Mr Robert Sells and Aberdeenshire Council

Condition of building: failure to respond to requirement for review

Reference No: 201401029

Decision Date: 27 May 2014



Scottish Information
Commissioner

Summary

On 31 January 2014, Mr Sells asked Aberdeenshire Council (the Council) for information about the condition of a specified building. The decision finds that the Council failed to comply with Mr Sells' requirement for review in accordance with FOISA and the EIRs. The Commissioner requires the Council to respond to the requirement for review.

Background

Date	Action
31 January 2014	Mr Sells made an information request to the Council.
27 February 2014	The Council responded to the information request. It provided information, but withheld other information under regulation 10(4)(e) and 10(5)(f) of the EIRs.
8 April 2014	Mr Sells wrote to the Council requiring a review of its decision.
8 May 2014	The Council wrote to Mr Sells, informing him that it would check the information it held to ascertain whether any further information could be provided, and, if so, at what cost.
14 May 2014	Mr Sells wrote to the Commissioner's Office, stating that he was dissatisfied with the Council's failure to respond to his requirement for review 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.
21 May 2014	The Council was notified in writing that an application had been received from Mr Sells and was invited to comment on the application.
21 May 2014	The Commissioner received submissions from the Council. These submissions are considered below.

Commissioner's analysis and findings

1. 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. In terms of the legislation, an authority is required to consider the request under both FOISA and the EIRs.

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

Section 21 of FOISA

2. 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. This is subject to qualifications which are not relevant in this case.
3. Section 21(4) states that the authority may do the following in respect of the initial request for information, in response to a requirement for review:
 - (a) confirm the decision complained of, with or without such modifications as it considers appropriate;
 - (b) substitute a different decision for the original decision; or
 - (c) reach a decision, where the complaint is that no decision has been reached.Clearly, only paragraphs (a) and (b) apply in this case, given that the Council responded to Mr Sells's request for information.
4. Section 21(5) then requires the authority to give the applicant notice in writing of what it has done under subsection (4), with a written statement of its reasons for so doing.

Regulation 16 of the EIRs.

5. Regulation 16 of the EIRs states that, on receipt of a requirement for review, the authority shall review the matter and decide whether it has complied with the EIRs, within 20 working days (regulations 16(3) and (4)). It also states that where an authority has not complied with its duty under the EIRs, it shall immediately take steps to remedy the breach of duty (regulation 16(5)).

The Council's handling of the case

6. The Commissioner is satisfied that Mr Sells's letter of 8 April 2014 was a valid requirement for review. This does not appear to be disputed by the Council. He indicated that he would like to see the whole file for the building in question, and the review should have addressed that area of dissatisfaction, with an outcome meeting the requirements of section 21(1), (4) and (5) of FOISA and regulation 16(3) and (4) of the EIRs.
7. In its response to the Commissioner, the Council stated that it considered its letter of 8 May 2014 to have been a response to Mr Sells' requirement for review.
8. The Commissioner notes that in its letter of 8 May 2014, the Council informed Mr Sells that it intended to consider whether any further information could be provided to Mr Sells and whether there would be a fee involved, as allowed by regulation 8 of the EIRs. The Council informed Mr Sells that it would be in touch.
9. Nowhere in the letter of 8 May 2014 is it apparent that a review has been carried out. Consequently, the Commissioner cannot accept that Mr Sells could be said to have been informed of the outcome of the review. The Commissioner would also note that nowhere in any of the Council's correspondence with Mr Sells is it apparent that the Council dealt with the request under FOISA (as it might have done, for example, by applying the exemption in section 39(2) of FOISA).

10. In all the circumstances, the Commissioner is not satisfied that the Council dealt with Mr Sells's requirement for review in accordance with FOISA or the EIRs, particularly section 21 (1), (4) and (5) of FOISA and regulation 16 (3) and (4) of the EIRs. As indicated in *Decision 157/2011 Mr Mike Shepherd and Aberdeen City Council*², the Commissioner considers the combined effect of these FOISA provisions to be that the outcome of the review must be determined, intimated to the applicant *and implemented* within the statutory period of 20 working days. Clearly, this did not happen, and indeed has not happened yet. She can identify no reason for taking a different approach under the EIRs.
11. The Commissioner requires the Council to provide Mr Sells with a response to his requirement for review, meeting the requirements of section 21 of FOISA and regulation 16 of the EIRs, by 11 July 2014.

Decision

The Commissioner finds that Aberdeenshire 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) in responding to Mr Sells's request. In particular, the Council failed to provide Mr Sells with a response to his requirement for review meeting the requirements of section 21 of FOISA and regulation 16 of the EIRs.

The Commissioner requires the Council to provide Mr Sells with a response to his requirement for review, in terms of section 21 of FOISA and regulation 16 of the EIRs, by 11 July 2014.

Appeal

Should either Mr Sells or Aberdeenshire Council wish to appeal against this decision, they have the right to appeal to the Court of Session on a point of law only. The appeal must be made within 42 days after the date of intimation of this decision.

Euan McCulloch
Deputy Head of Enforcement
27 May 2014

² <http://www.itspublicknowledge.info/ApplicationsandDecisions/Decisions/2011/201101320.aspx>

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