

Decision Notice



Decision 126/2012 Mr Severin Carrell and the Scottish Ministers

Compliance with timescales

Reference No: 201201241
Decision Date: 31 July 2012

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Rosemary Agnew
Scottish Information Commissioner

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Summary

This decision considers whether the Scottish Ministers (the Ministers) 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 Carrell.

Background

1. On 26 September 2011, Mr Carrell wrote to the Ministers, requesting certain specified information relating to the Torness and Hunterston Nuclear Power Stations, making reference to both FOISA and the EIRs.
2. The Ministers acknowledged Mr Carrell's request on 7 October 2011, stating that it would take considerable resources to respond and suggesting that Mr Carrell might wish to narrow the scope of his request. On 12 October 2011, Mr Carrell responded with a reduced timespan for his request.
3. On 14 October 2012, the Ministers acknowledged the narrowed scope of the request. They informed Mr Carrell that due to the volume and complexity of the information requested, it was impracticable to respond within the 20 working days allowed by regulation 5(2) of the EIRs. Therefore, in line with regulation 7(1)(a) of the EIRs, they were extending the response date by a further 20 working days. The Ministers stated that a response was therefore due by 21 November 2011. Mr Carrell acknowledged that he was happy with the extended response date.
4. The Ministers wrote to Mr Carrell again on 17 November 2011, informing him that the response date of 21 November 2011 would not be met. They apologised and advised that they hoped to respond by 30 November 2011.
5. On 1 December 2011, Mr Carrell wrote to the Ministers asking when he could expect a response to his request. On 5 December 2011, the Ministers informed him that they were at the final stages of confirming the relevant information and would respond as soon as possible. He asked them if they could provide a more precise date and was told that they could not.
6. Mr Carrell made a further request for an update on 20 December 2011, noting that at least two deadlines had been missed. Having received no response, he followed this up with a further reminder on 13 March 2012.



7. The Ministers responded on 15 March 2012, informing Mr Carrell that a response had been prioritised and should be issued by the end of the following week. It was not, and Mr Carrell followed this up with the Ministers on 28 March 2012. On the same day, the Ministers advised that they expected to respond the following week.
8. On 17 April 2012, Mr Carrell wrote again to advise the Ministers that he had received no response. He followed this with a further request for an update on 19 April.
9. On 19 April 2012, the Ministers again apologised for the delay in responding and informed Mr Carrell that he had the right to make an application to the Commissioner for a decision.
10. Although he submitted another reminder on 20 June 2012, Mr Carrell did not receive any further response from the Ministers. On 26 June 2012, he wrote to the Commissioner, stating that he was dissatisfied with the Ministers' failure to respond to his request or requirement for review 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.
11. The application was validated by establishing that Mr Carrell made a request for information to a Scottish public authority and applied to the Commissioner for a decision only after asking the authority to review its failure to respond to that request. The case was then allocated to an investigating officer.

Investigation

12. On 2 July 2012, the Ministers were notified in writing that an application had been received from Mr Carrell. They were invited to comment on the application, as required by section 49(3)(a) of FOISA. The Ministers were informed that if no comments were received by 23 July 2012, it would be assumed that they did not wish to make any comment and a decision would be issued on that basis.
13. Notwithstanding two telephone reminders, the Ministers did not respond to the letter of 2 July 2012.

Commissioner's analysis and findings

14. 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.



15. This decision is concerned only with the Ministers' compliance with the statutory timescales for responding to the Mr Carrell's request and requirement for review. Having considered the terms of Mr Carrell's request, the Commissioner considers it likely that the information would properly be considered environmental information under the EIRs. In any event, the Ministers purported to deal with the request under the EIRs, although they did not apply the exemption in section 39(2) of FOISA. The Commissioner has therefore considered the technical matters raised by this case in terms of both FOISA and the EIRs.
16. 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 exceptions which are not relevant in this case.
17. 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 environmental information, subject to certain qualifications. These include regulation 7(1)(a), which 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.
18. In this case, while the Ministers purported to extend the timescale for response under regulation 7(1)(a), no response of any substance has ever been provided to Mr Carrell. Consequently, the Commissioner finds that the Ministers failed to comply with either section 10(1) of FOISA or regulation 5(2)(a) of the EIRs in dealing with Mr Carrell's request of 26 September 2011, as modified on 12 October 2011.
19. Section 21(1) of FOISA gives public authorities a maximum of 20 working days after receipt of the requirement to comply with a requirement for a review, subject to exceptions which are not relevant to this case. In respect of environmental information, the same timescale is laid down by regulation 16(4) of the EIRs.
20. The Commissioner accepts that Mr Carrell's email of 20 December 2011, in which he drew the Minister's attention to the fact that he had not received a response to his information request and expressed his dissatisfaction at this, clearly constituted a request for review for the purposes of both section 20(3) of FOISA and regulation 16(2) of the EIRs. It refers to the request and expresses dissatisfaction with the Ministers' failure to respond.
21. Since the Ministers did not provide a response to Mr Carrell's requirement for review within 20 working days (and, indeed, have not done so yet), the Commissioner finds that they failed to comply with section 21(1) of FOISA and regulation 16(4) of the EIRs.
22. The Commissioner notes that in correspondence with Mr Carrell, the Ministers apologised for the unacceptable delay in responding to his request. On the other hand, this matter has been ongoing for approximately ten months without resolution. The Commissioner is disappointed that the request has still to be dealt with in accordance with the relevant legislation.



23. The Commissioner now requires the Ministers to respond to Mr Carrell's requirement for review, in accordance with section 21 of FOISA and regulation 16 of the EIRs, by 14 September 2012.

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 the Environmental Information (Scotland) 2004 (the EIRs) in dealing with the information request made by Mr Carrell.

The Ministers failed to respond to Mr Carrell's request for information within the respective timescales laid down by section 10(1) of FOISA and regulation 5(2)(a) of the EIRs. In addition, they failed to respond to Mr Carrell's requirement for review within the timescale laid down by section 21(1) of FOISA and regulation 16(4) of the EIRs

The Commissioner therefore requires the Ministers to comply with Mr Carrell's requirement for review, in accordance with the requirements of section 21 of FOISA and regulation 16 of the EIRs, by 14 September 2012.

Appeal

Should either Mr Carrell or the Scottish Ministers 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
31 July 2012



Appendix

Relevant statutory provisions

Freedom of Information (Scotland) Act 2002

1 General entitlement

- (1) A person who requests information from a Scottish public authority which holds it is entitled to be given it by the authority.

...

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
- (b) in a case where section 1(3) applies, the receipt by it of the further information.

...

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

2 Interpretation

- (1) In these Regulations –

...

"environmental information" has the same meaning as in Article 2(1) of the Directive, namely any information in written, visual, aural, electronic or any other material form on –

- (a) the state of the elements of the environment, such as air and atmosphere, water, soil, land, landscape and natural sites including wetlands, coastal and marine areas, biological diversity and its components, including genetically modified organisms, and the interaction among these elements;
- (b) factors, such as substances, energy, noise, radiation or waste, including radioactive waste, emissions, discharges and other releases into the environment, affecting or likely to affect the elements of the environment referred to in paragraph (a);
- (c) measures (including administrative measures), such as policies, legislation, plans, programmes, environmental agreements, and activities affecting or likely to affect the elements and factors referred to in paragraphs (a) and (b) as well as measures or activities designed to protect those elements;
- (d) reports on the implementation of environmental legislation;
- (e) costs benefit and other economic analyses and assumptions used within the framework of the measures and activities referred to in paragraph (c); and
- (f) the state of human health and safety, including the contamination of the food chain, where relevant, conditions of human life, cultural sites and built structures inasmuch as they are or may be affected by the state of the elements of the environment referred to in paragraph (a) or, through those elements, by any of the matters referred to in paragraphs (b) and (c);

...



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
 - (b) is subject to regulations 6 to 12.

...

7 Extension of time

- (1) The period of 20 working days referred to in-
 - (a) regulation 5(2)(a);

...

may be extended by a Scottish public authority 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 either to comply with the request within the earlier period or to make a decision to refuse to do so.

- (2) Where paragraph (1) applies the Scottish public authority shall notify the applicant accordingly as soon as possible and in any event no later than 20 working days after the date of receipt of the request for the information.

...

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.
- (2) Representations under paragraph (1) shall be made in writing to the Scottish public authority no later than 40 working days after either the date that the applicant receives any decision or notification which the applicant believes does not comply with these Regulations or the date by which such a decision or notification should have been made, or any other action should have been taken, by the authority but was not made or taken.



- (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.