

Decision Notice



Decision 191/2011 Ms Lara Russell and East Dunbartonshire Council

Information relating to a named road

Reference No: 201101447

Decision Date: 22 September 2011

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Kevin Dunion

Scottish Information Commissioner

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Summary

This decision considers whether East Dunbartonshire Council (the Council) 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 information request made by Ms Russell.

Background

1. On 30 March 2011, Ms Russell wrote to East Dunbartonshire Council (the Council) requesting the following information:
 - a. The gritting schedule for Waterside Road in Kirkintilloch between 17 and 18 March 2011 inclusive
 - b. Work cards, or any other records completed to indicate what actual gritting was carried out and when on Waterside Road between 17 and 18 March 2011 inclusive.
 - c. Weather forecasts received by the Council for 17 and 18 March 2011 inclusive
 - d. Any and all internal and external correspondence (letters, emails, memos, minutes of meetings etc) regarding the road traffic accidents which occurred on Waterside Road on Friday 18 March 2011.
 - e. Any and all internal and external correspondence (letters, emails, memos, minutes of meetings, etc) regarding all road traffic accidents that have occurred on Waterside Road in 2011.
 - f. Any and all internal and external correspondence (letters, emails, memos, minutes of meetings, etc) regarding the road signage on Waterside Road in 2011 and particularly after 18 March 2011.
 - g. Work cards or any other records completed to indicate what (if any) new signage has been erected since 18 March 2011 on Waterside Road.
 - h. Details of any previous complaints about ice or slippery conditions on Waterside Road in 2011 and what (if any) remedial action has been taken.
 - i. Details of any previous complaints about surface water pooling on Waterside Road in 2011 and what (if any) remedial action has been taken.



- j. Details of what maintenance the Council's gritting vehicles undergo and/or what (if any) checks are employed to ensure an adequate layer of grit is dispersed by these vehicles onto the road.
 - k. What (if any) steps are taken by the Council to ensure that areas of the road network particularly prone to ice are gritted adequately and given special attention during cold spells.
 - l. The name and position within the Council of the person who is in charge of road maintenance, gritting and road signage for this stretch of road.
 - m. Confirmation as to whether the Council implements a Council-wide 'no call back' policy.
 - n. If a 'no call back' policy is not a Council-wide policy, who else (alongside a Council official who Ms Russell understood to follow such a policy) among the Council's senior staff has the same policy (what are their names and positions)
 - o. Any and all information about why this policy has been adopted by the Council (if it is a Council-wide policy) or by certain senior staff (if it is not a Council wide policy).
2. The Council did not respond to this request.
 3. On 3 June 2011, Ms Russell wrote to the Council, highlighting that she had received no response, and reiterating her request, thereby requesting a review of its handling of her request.
 4. Ms Russell did not receive a response to her request for review and on 4 August 2011 wrote to the Commissioner, stating that she was dissatisfied with that failure 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.
 5. The application was validated by establishing that Ms Russell had made a request for information to a Scottish public authority and had applied to the Commissioner for a decision only after asking the authority to review its response to that request. The case was then allocated to an investigating officer.

Investigation

6. On 11 August 2011, the Council was notified in writing that an application had been received from Ms Russell and was invited to comment on the application.
7. The Council responded on 25 August 2011, accepting that it had failed to carry out a review of Ms Russell's original request and indicating that a full response to her request for review was being prepared and it would be provided to Ms Russell shortly.



8. After receiving this response, the investigating officer contacted the Council on several occasions to seek updates on progress, and to establish when a response would be issued to Ms Russell. On 1 September 2011, the investigating officer was informed in a telephone call that much of the Council's response had been prepared and just a few issues were outstanding. The Council noted that it hoped to provide a full response to Ms Russell shortly.
9. In an email on 7 September 2011, the Council advised that the information requested by Ms Russell was being finalised and it expected a response to be issued by 14 September 2011.
10. On 15 September 2011, after being asked to confirm whether it had provided Ms Russell with a response to her request, the Council confirmed that a response had not yet been issued, as further delays had arisen.
11. At this stage, the investigating officer advised the Council that due to the continuing delays she would have no option but to recommend that the Commissioner issue a Decision Notice confirming that no response had been supplied, and so compelling the Council to provide a response to Ms Russell. The investigating officer asked the Council to provide her with a progress update by 19 September 2011, noting that if no progress was made, she would proceed to draft her recommendations.
12. The investigating officer did not receive an update as requested from the Council, but sought and received confirmation on 21 September 2011 that no response had yet been issued. So far as the Commissioner understands, the Council had still not provided Ms Russell with a response to her request for review by the time of issuing this decision,

Commissioner's analysis and findings

13. 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.
14. This decision is concerned only with the Council's compliance with the statutory timescales for responding to the Ms Russell's initial request and request for review. However having considered the types of the information requested by Ms Russell, the Commissioner considers it likely that some of that information may be environmental information. He has therefore considered the technical matters raised by this case in terms of both FOISA and the EIRs.
15. 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, subject to certain exceptions which are not relevant in this case.



16. Regulation 5(2)(a) of the EIRs requires a Scottish public authority to comply with its duty under regulation 5(1) as soon as possible and in any event no later than 20 working days after the date of receipt of the request for information, subject to certain exceptions which are not relevant in this case.
17. Since the Council did not provide a response to Ms Russell's first request for information within 20 working days, the Commissioner finds that the Council failed to comply with section 10(1) of FOISA and regulation 5 of the EIRs
18. Section 21(1) of FOISA gives public authorities a maximum of 20 working days following the date of receipt of the requirement to comply with a requirement for a review, again subject to exceptions which are not relevant to this case. The remainder of section 21 governs the review process and the giving of notice of the outcome to the applicant
19. Section 21(4) of FOISA states that, on receipt of a requirement for review, an authority may do the following in respect of the information request to which it 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.
20. It is the Commissioner's view, where no response has been made to an information request, the first two options are unavailable to the authority, and so the only appropriate review outcome in a case such as this is for the authority to reach a decision where none has been reached before, in line with section 21(4)(c) of FOISA.
21. In order to comply with section 21(5), the public authority is required to give notice in writing of what it has done under subsection (4) and a statement of its reasons for so doing, within the timescale required by section 21(1).
22. Regulation 16(4) of the EIRs gives authorities a maximum of 20 working days after the date of receipt of the applicant's representations to comply with a requirement for review, subject to exceptions which are not relevant in this case. Other parts of regulation 16, particularly paragraphs (3) and (5) govern the review process and the giving of notice of the outcome to the applicant (see Appendix below).
23. The Council did not provide a response to Ms Russell's requirement for review of 3 June 2011, or carry out the review she had requested within the timescales required by section 21(1) of FOISA and regulation 16(4) of the EIRs. Consequently, the Commissioner finds that the Council failed to comply with section 21 of FOISA and regulation 16 of the EIRs.



24. In its submissions, the Council commented that increasing difficulties had been faced in responding to the volume of requests it received. It explained that as a result, the Council was currently undergoing a major reconfiguration of the way in which it processed requests across the Council in order to improve on its service. It noted that the Council had been assisted in this regard by a recent assessment by the Commissioner's office and that it was currently taking forward an action plan in light of its findings.
25. The Commissioner welcomes the steps taken by the Council to improve its service to requestors. However, he is very disappointed to note that in this case, almost 6 months after making her request for information, Ms Russell has still received no response. He considers the failings in this case to be significant, and he would encourage the Council to ensure that its ongoing work to improve its request handling practice ensures that such delays do not occur in future.
26. The Commissioner now requires the Council to deal with Ms Russell's requirement for review, in accordance with the requirements of section 21 of FOISA and regulation 16 of the EIRs (the relevant provisions of which are set out in the appendix to this decision).

DECISION

The Commissioner finds that East Dunbartonshire 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 (EIRs) in dealing with the information request made by Ms Russell, in particular by failing to respond to Ms Russell's request for information and requirement for review within the respective timescales laid down by sections 10(1) and 21(1) of FOISA and regulations 5(2)(a) and 16(4) of the EIRs.

The Commissioner therefore requires the Council to comply with Ms Russell's request for review, in accordance with section 21 of FOISA and regulation 16 of the EIRs, by 7 November 2011.



Appeal

Should either Ms Russell or the Council 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.

Claire Sigsworth
Deputy Head of Enforcement
22 September 2011



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

...

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

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.

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