

Decision Notice



Decision 180/2010 Mr Kenny Angove and the Scottish Ministers

Failure to respond to request and request for review

Reference No: 201001459

Decision Date: 19 October 2010

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Kevin Dunion

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) in responding to the information request made by Mr Angove.

Background

1. On 16 September 2009, Mr Angove emailed the Ministers requesting a range of information concerning government events involving or organised by the then Minister for Culture, External Affairs and the Constitution.
2. Mr Angove did not receive a response to his request and on 6 November 2009, he emailed the Ministers asking that they review their failure to respond to his request.
3. Mr Angove did not receive a response to his request for review. He subsequently sent several reminders to the Ministers and in response was advised on a number of occasions that a response was imminent.
4. Despite the Ministers' assurances that a response to his request was imminent, none was forthcoming and, on 21 July 2010, Mr Angove wrote to the Commissioner, stating that he was dissatisfied with that failure and applying to the Commissioner for a decision in terms of section 47(1) of FOISA.
5. In terms of section 47(4)(b) of FOISA, an application to the Commissioner made under section 47(1)(b) must be made within six months of the period allowed for compliance in section 21(1) having elapsed. In this case, the application made by Mr Angove was submitted to the Commissioner outwith the six month period.
6. The Commissioner may, however, (by virtue of section 47(5) of FOISA) consider an application after the expiry of the six month period if he considers it appropriate to do so. In this case, the Commissioner applied the discretion granted to him under section 47(5) of FOISA and agreed to consider Mr Angove's application on the basis that the Ministers had continually extended the process of review by engaging in further correspondence with Mr Angove about his request, which gave the impression that the formal process set out in FOISA was still ongoing.
7. The application was validated by establishing that Mr Angove 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

8. On 22 September 2010, the Ministers were notified in writing that an application had been received from Mr Angove and were invited to comment on the application as required by section 49(3)(a) of FOISA.
9. The Ministers responded on 11 October 2010. The Ministers acknowledged that they had failed to comply with the requirements of FOISA. The Ministers stated that Mr Angove's request was wide ranging, and had proved more complex than initially thought. However they also acknowledged that their handling of his request had been unacceptable and they apologised unreservedly for this.
10. The Ministers indicated that, as a result of the difficulties encountered in the handling of this request, officials in the relevant office have undertaken a review into request handling to ensure that there is no repeat of the failings encountered with this request.
11. The Ministers stated that a full response had been prepared which they indicated should be issued to Mr Angove that week. The Commissioner has assumed this to mean that a response should be issued by Friday 15 October 2010. However, no response had been issued by the date of issuing this decision.

Commissioner's analysis and findings

12. Section 10(1) of FOISA gives Scottish public authorities a maximum of 20 working days following the date of receipt of the request, or subsequent clarification of that request, to comply with a request for information, subject to certain exceptions which are not relevant in this case.
13. The Ministers did not provide a response to Mr Angove's information request of 16 September 2009 within that timescale.
14. The Commissioner therefore finds that the Ministers failed to respond to Mr Angove's request for information of 16 September 2009 within the 20 working days allowed under section 10(1) of FOISA.
15. 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.



16. 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.
17. The Commissioner's view is that, 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.
18. Section 21(5) then requires the public authority to give the applicant notice in writing of what it has done under subsection (4) and a statement of its reasons for so doing.
19. The Ministers did not provide any response to Mr Angove's requirement for review of 6 November 2009 within the timescale required by section 21(1).
20. The Commissioner therefore finds that the Ministers failed to respond to Mr Angove's requirement for review of 6 November 2009 in line with section 21 of FOISA, and, in particular, sections 21(4) and (5) of FOISA, within the 20 working days allowed by section 21(1) of FOISA.
21. In response to the Commissioner's request for comments, the Ministers indicated that they had carried out a review and that a response had been prepared which was to be issued to Mr Angove shortly. However, as the Ministers have yet to comply with the requirement in accordance with section 21 of FOISA and, given the history of delay on the part of the Ministers in this case, the Commissioner considers it necessary to require the Ministers to respond to Mr Angove's requirement for review by 3 December 2010.

Comments on the Ministers' handling of Mr Angove's request

22. The Commissioner notes that, since receiving Mr Angove's requirement for review on 6 November 2009, the Ministers have on numerous occasions advised him that the request was being dealt with and that they hoped to provide a response to him soon. The Commissioner is aware of at least seven such communications from the Ministers, some of which had promised a response "next week" or "in the next day or two".
23. The Commissioner also notes that after receiving Mr Angove's application for a decision on 21 July 2010, the Ministers indicated to the investigating officer in early August 2010 that a response was nearly ready to be issued to Mr Angove. It is therefore extremely disappointing that the Commissioner has to note at the date of this decision, more than one year after Mr Angove first made his information request, that a response has still not been issued.



24. The Commissioner considers the Ministers' handling of Mr Angove's request to be wholly unsatisfactory. This is particularly apparent given the repeated assurances to Mr Angove over a period of many months that a response was imminent. These assurances have proved to be empty.
25. Any applicant in such circumstances would quite justifiably feel aggrieved, and might well wonder whether the authority concerned was deliberately avoiding providing information, either to them or the public in general.
26. For this reason, the Commissioner would urge the Ministers to ensure that the review into request handling noted at paragraph 10 above is carried out rigorously and that measures are put in place to ensure that there is no repeat of the failings identified in this case.

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) in dealing with the information request made by Mr Angove, in particular by failing to respond to Mr Angove's request for information and requirement for review within the respective timescales laid down by sections 10(1) and 21(1) of FOISA.

The Commissioner therefore requires the Ministers to conduct a review in relation to Mr Angove's request (which should be in terms of section 21(4)(c) of FOISA) and notify him of the outcome of the review in terms of section 21(5), by 3 December 2010.

Appeal

Should either Mr Angove or the 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.

Claire Sigsworth
Deputy Head of Enforcement
19 October 2010



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 modification 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.

47 Application for decision by Commissioner

- (1) A person who is dissatisfied with –

...

- (b) the failure of a Scottish public authority to which a requirement for review was made to give such a notice

may make application to the Commissioner for a decision whether, in any respect specified in that application, the request for information to which the requirement relates has been dealt with in accordance with Part 1 of this Act.

...

- (4) Subject to subsection (5), an application to the Commissioner under subsection (1) must be made –

...

- (b) where the application concerns a matter mentioned in paragraph (b) of that subsection, before the expiry of six months after the period allowed in section 21(1) for complying with a requirement for review has elapsed.

- (5) The Commissioner may consider an application under subsection (1) made after the expiry of the time allowed by subsection (4) for the making of that application if, in the opinion of the Commissioner, it is appropriate to do so.