

Decision Notice



Decision 220/2010 Ms X and the Scottish Public Services Ombudsman

Failure to adhere to statutory timescale

Reference No: 201001947

Decision Date: 22 December 2010

www.itspublicknowledge.info

Kevin Dunion

Scottish Information Commissioner

Kinburn Castle
Doubledykes Road
St Andrews KY16 9DS
Tel: 01334 464610



Summary

This decision considers whether the Scottish Public Services Ombudsman (the SPSO) complied with the technical requirements of the Freedom of Information (Scotland) Act 2002 (FOISA) in responding to an information request made by Ms X.

Background

1. On 30 June 2010, Ms X wrote to the SPSO requesting the following information:
 - a. The reference numbers of all the complaints submitted to the SPSO using the online complaint form during the period 26 April 2010 until 2 May 2010, clearly indicating:
 - i. The exact time each one of them was submitted;
 - ii. The public service bodies those complaints were made against
 - b. The stage each complaint has reached at the time of your response;
 - c. The target time to make preliminary assessment for submitted complaints;
 - d. A copy of those submitted complaints and the SPSO response to them, if such a response has been made by the time of your disclosure to this FOI request.
2. On 1 July 2010, Ms X again wrote to the SPSO, adding a number of additional points to her request, to include a range of statistical, procedural and performance information. However, this decision notice is concerned only with the original request as set out above.
3. The SPSO responded on 29 July 2010. It provided a range of information to Ms X in response to her requests of 30 June and 1 July 2010. In particular, this included a table containing 16 entries purporting to provide details of complaints received, as requested in parts a) i), and b) of Ms X's request. The SPSO also provided details of relevant performance indicators in response to part c) of the request.
4. The SPSO refused to supply the information in parts a) ii) and d) of the request as it considered this information to be exempt in terms of section 26(a) of FOISA. It also refused to supply the reference numbers for complaints received, as it considered them to be personal information exempt in terms of section 38(1)(b) of FOISA.



5. A previous decision (215/2010) has considered the SPSO's handling of some aspects of Ms X's request for information, which were raised in the first of two requests for review that were made in relation to the same information request.
6. This decision is concerned the second request for review that was made only after Ms X had submitted the application to the Commissioner that prompted decision 215/2010. At the outset of the investigation that led to decision 215/2010, the investigating officer highlighted to Ms X that her request for review to the SPSO had not expressed dissatisfaction with the decision to withhold the reference numbers or identity of the body complained against. She was advised that the investigation leading to decision 215/2010 would therefore not be able to consider this matter.
7. On 7 September 2010, Ms X wrote to the SPSO requesting a further review of its handling of her request, in relation to the decision to withhold details of the public authority complained about and the reference number of each complaint. Ms X indicated that she did not consider that releasing the name of the public authority or the SPSO case reference number would contravene any of the data protection principles. In support of her request for review, Ms X indicated that the SPSO did publish these details on its own website in relation to some cases investigated by it.
8. Ms X received an acknowledgment of receipt of her request for review indicating that a substantive response would be provided as soon as possible and in any case by 6 October 2010. However she did not receive any further response to her request for review and on 7 October 2010 wrote to the Commissioner's Office, stating that she was dissatisfied with that failure and applying to the Commissioner for a decision in terms of section 47(1) of FOISA.
9. The application was validated by establishing that Ms X 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.
10. On 20 October 2010 Ms X informed the Commissioner that she had received a response to her request for review the previous day, having been informed by the SPSO that the letter containing the outcome had been returned undelivered by the Royal Mail. Ms X expressed concern that the response had been sent to an address she no longer occupied. The case was then allocated to an investigating officer.

Investigation

11. On 2 November 2010, the SPSO was notified in writing that an application had been received from Ms X and was invited to comment on the application.



12. The SPSO responded providing an explanation of the circumstances as well as a copy of the letter and envelope relating to the response originally sent by post to Ms X. The submissions of both Ms X and the SPSO, so far as they are relevant, are outlined in the Commissioner's analysis and finding set out below.

Commissioner's analysis and findings

13. Section 21(1) of FOISA gives a Scottish public authority a maximum of 20 working days following the date of receipt of the requirement to comply with a requirement for review, subject to certain exceptions which are not relevant in this case.
14. 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.
15. Section 21(5) then requires the public authority to give the applicant notice in writing of what it has done under subsection 21(4) and a statement of its reasons for so doing.
16. Ms X sent her request for review to the SPSO by email at 22:23 hours on 7 September 2010. Section 74(2)(a) of FOISA indicates that communications transmitted by electronic means are presumed to be received on the date of sending. This presumption applies irrespective of whether the communication is transmitted during the business hours of the public authority receiving it. Accordingly Ms X's request for review was received by the SPSO on 7 September 2010, and 20th working day following the date of receipt in this case was 5 October 2010.
17. The SPSO acknowledged the receipt of Ms X's request for review by email on 8 September 2010, the first working day for the purposes of calculating the timescale for response. It appears to have miscalculated the response timescale when it informed Ms X that 6 October 2010 was the last day by which it must provide a response to her.
18. Therefore, although the Commissioner is aware that a response was issued by the SPSO on 6 October 2010 (and he has seen franking marks on the envelope that confirm that it was posted on that date), he must conclude that the SPSO failed to comply with the timescale required by section 21(1) in this case.
19. Having reached this conclusion, he notes that a further cause of delay in this response reaching Ms X in this case has been the SPSO's decision to direct its response to a postal address where she could no longer be contacted.



20. The Commissioner notes that all the correspondence with respect to Ms X's information request, prior to the response to her request for review, had taken place by email. Ms X had not included any postal address for correspondence within her communications about this particular request for review. However, Ms X also did not indicate any preference as to the medium for the SPSO's response.
21. The Commissioner also understands that the SPSO had corresponded with Ms X by post in relation to other matters in the period leading up to her request for review being submitted on 7 September. The SPSO has indicated that the address to which its letter was addressed had been provided by Ms X and was the current postal address it held at the time when its response to her request for review was prepared. The SPSO noted that the address had last been confirmed as valid by Ms X on 1 September 2010 and that no notification to the contrary had been received from Ms X prior to its letter being posted to her on 6 October 2010.
22. The Commissioner recognises that an authority is entitled to respond to an information request or request for review either by post or email where the relevant contact details have been provided. However, he also considers it to be good practice to respond via the medium preferred by the applicant, where a particular request has been made.
23. While the Commissioner acknowledges that the SPSO had strong reasons for believing the postal address it held for Ms X remained accurate, he considers that it could have avoided further delays by checking whether this was the case prior to responding to the request for review under consideration.
24. He would encourage the SPSO to do so in future cases where it proposes to respond to a request or request for review by means other than those specifically mentioned in the applicant's own correspondence about that matter.
25. However, as Ms X has now received the response to her requirement for review, the Commissioner does not require the SPSO to take any further action in relation to its failure to comply with the timescale in section 21(1) of FOISA identified above.

DECISION

The Commissioner finds that the Scottish Public Services Ombudsman failed to comply with Part 1 of the Freedom of Information (Scotland) Act 2002 (FOISA) in dealing with the information request made by Ms X, in particular by failing to respond to Ms X's requirement for review within the timescale laid down by section 21(1) of FOISA

Given that the SPSO did subsequently respond to the requirement for review, the Commissioner does not require it to take any action in response to this failure.



Appeal

Should either Ms X or the SPSO 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 December 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.

...

- (6) This section is subject to sections 2, 9, 12 and 14.

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.

...



74 Giving of notice etc.

...

(2) For the purposes of any provision of this Act, a thing -

...

(b) transmitted by electronic means is presumed to be received on the day of transmission