

Decision Notice



Decision 104/2011 Mr R and the Scottish Ministers

Compliance with timescales and compliance with requirement for review

Reference No: 201100721
Decision Date: 26 May 2011

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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 an information request made by Mr R.

Background

1. On 28 January 2011, Mr R wrote to the Ministers requesting information on their response to a specified matter.
2. On 10 March 2011, having received no response to his request, Mr R wrote to the Ministers requesting a review of the Ministers' failure to reach a decision on the request.
3. Mr R did not receive a response to his requirement for review and on 10 April 2011 wrote to the Commissioner's Office, stating that he was dissatisfied with the Minister's failure to reach a decision and applying to the Commissioner for a decision in terms of section 47(1) of FOISA.
4. The application was validated by establishing that Mr R 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

5. On 21 April 2011, the Ministers were notified in writing that an application had been received from Mr R and were invited to comment on the application.
6. The Ministers failed to respond in writing to the invitation to comment on Mr R's application to the Commissioner. Although the Ministers advised the investigating officer by telephone that a response would be provided by Friday 20 May 2011, no response had been received by the date of this decision.



Commissioner's analysis and findings

7. 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.
8. In the absence of any submissions on this point from the Ministers, the Commissioner finds that the Ministers failed to respond to Mr R's request for information within the 20 working days allowed under section 10(1) of FOISA.
9. 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 review, again subject to exceptions which are not relevant to this case.
10. 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.
11. 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 on review, and consequently 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.
12. 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.
13. Assuming the requirement is not withdrawn, the only circumstances in which an authority would not be obliged to comply with a requirement for review (in a case where it had not responded to the original information request) would be where it considered the requirement for review to be vexatious (see text of section 21(8) in the Appendix below). The authority would still, however (within the 20 working days specified in section 21(1)), be obliged to give the applicant notice in writing that it considered the requirement to be vexatious (section 21(9)).
14. In the absence of any submissions from the Ministers on this point, the Commissioner finds that the Ministers failed to deal with Mr R's requirement for review of 10 March 2011, in accordance with section 21 of FOISA, within the 20 working days allowed by section 21(1) of FOISA.
15. The Commissioner now requires the Ministers to deal with Mr R's requirement for review, in accordance with the requirements of section 21 of FOISA.



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 R, in particular by failing to respond to Mr R'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 deal with Mr R's requirement for review, in accordance with the requirements of section 21 of FOISA, by 11 July 2011.

Appeal

Should either Mr R 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.

Kevin Dunion
Scottish Information Commissioner
26 May 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.
- ...
- (4) The information to be given by the authority is that held by it at the time the request is received, except that, subject to subsection (5), any amendment or deletion which would have been made, regardless of the receipt of the request, between that time and the time it gives the information may be made before the information is given.
- ...
- (6) This section is subject to sections 2, 9, 12 and 14.
- ...

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.
...
- (8) Subsection (1) does not oblige a Scottish public authority to comply with a requirement for review if-
 - (a) the requirement is vexatious; or
 - (b) the request for information to which the requirement for review relates was one with which, by virtue of section 14, the authority was not obliged to comply.
- (9) Where the authority considers that paragraph (a) or (b) of subsection (8) applies, it must give the applicant who made the requirement for review notice in writing, within the time allowed by subsection (1) for complying with that requirement, that it so claims.
- (10) A notice under subsection (5) or (9) must contain particulars about the rights of application to the Commissioner and of appeal conferred by sections 47(1) and 56.