



Decision Notice 084/2023

“Exercise Nimbus” – failure to respond

Applicant: The Applicant

Authority: Scottish Ministers

Case Ref: 202300810

Summary

The Applicant asked the Authority to confirm whether it had a copy of the “Exercise Nimbus” report (relating to Ministerial-level decision making to test the UK’s pandemic preparedness for and response to the Coronavirus outbreak) and also asked for briefings, reports, memoranda and correspondence in relation to this exercise. This decision finds that the Authority failed to comply with the Applicant’s requirement for review within the timescale set down by the Freedom of Information (Scotland) Act 2002 (FOISA).

Background

1. The Applicant made an information request to the Authority on 20 April 2023.
2. The Authority responded to the information request on 19 May 2023.
3. On 24 May 2023, the Applicant wrote to the Authority, requiring a review of its decision.
4. The Applicant did not receive a response to her requirement for review.
5. The Applicant wrote to the Commissioner on 27 June 2023, stating that she was dissatisfied with the Authority’s failure to respond and applying to the Commissioner for a decision in terms of section 47(1) of FOISA.
6. The Commissioner determined that the application complied with section 47(2) of FOISA and that he had the power to carry out an investigation.

Investigation

7. Section 49(3)(a) of FOISA requires the Commissioner to notify public authorities of an application and to give them an opportunity to comment. The Commissioner did this on 28 June 2023.
8. The Commissioner received submissions from the Authority on 12 July 2023. These submissions are considered below.
9. In their submissions to the Commissioner, the Authority explained that they only became aware of the requirement for review after the Commissioner notified them of the application.
10. The Authority explained that the review request was received via an email address linked to the Authority's case management system but not routinely monitored. The Authority advised that the Applicant should have received a message to let them know that this mailbox was not monitored and where to send correspondence. As a result of this issue, the Authority confirmed that they were working to identify a solution to prevent further requirements for review sent to this mailbox from being missed.
11. The Commissioner welcomes any remedial action being taken and is content that the Authority acknowledges that it was still obliged to respond to the requirement for review.
12. The Authority also confirmed that the review was being worked on, with a view to issuing a response to the Applicant as soon as possible. This has not been done yet.
13. Section 21(1) of FOISA gives Scottish public authorities a maximum of 20 working days following the date of receipt of the requirement to comply with a requirement for review. This is subject to qualifications which are not relevant in this case.
14. It is a matter of fact that the Authority did not provide a response to the Applicant's requirement for review within 20 working days, so the Commissioner finds that it failed to comply with section 21(1) of FOISA.
15. The remainder of section 21 sets out the requirements to be followed by a Scottish public authority in carrying out a review. As no review has been carried out in this case, the Commissioner finds that the Authority failed to discharge these requirements: he now requires a review to be carried out, in accordance with section 21.
16. The Commissioner recommends that the Authority considers whether it would be appropriate to apologise to the Applicant for its failure to comply.
17. The Commissioner notes that this issue is the same as that recorded in decision 044/2023 issued on 16 May 2023.

Decision

The Commissioner finds that the Authority failed to comply with Part 1 of the Freedom of Information (Scotland) Act 2002 (FOISA) in dealing with the information request made by the Applicant(s). In particular, the Authority failed to respond to the Applicant's requirement for review within the timescale laid down by sections 21(1) of FOISA. The Commissioner requires the Authority to respond to the Applicant's requirement for review, by **25 September 2023**.

Appeal

Should either the Applicant or the Authority wish to appeal against this decision, they have the right to 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.

Enforcement

If the Authority fails to comply with this decision, the Commissioner has the right to certify to the Court of Session that the Authority has failed to comply. The Court has the right to inquire into the matter and may deal with the Authority as if it had committed a contempt of court.

Euan McCulloch
Deputy Head of Enforcement

9 July 2023