

Decision Notice

Decision 272/2016: Mr Angus Pattison and East Dunbartonshire Council

Bears Way Cycleway Project: failure to respond within statutory timescales

Reference No: 201601822

Decision Date: 19 December 2016



Scottish Information
Commissioner

Summary

East Dunbartonshire Council (the Council) was asked to provide the Feasibility Report and the Options Study relating to Phase 1 of the Bears Way Cycleway Project. This decision finds that the Council failed to respond to the request within the timescale allowed by the Freedom of Information (Scotland) Act 2002 (FOISA) and the Environmental Information (Scotland) Regulations 2004 (the EIRs). The decision also finds that the Council failed to comply with Mr Pattison's requirement for review within the timescale set down by FOISA and the EIRs.

Background

Date	Action
13 July 2016	Mr Pattison made an information request to the Council.
	Mr Pattison did not receive a response to his information request.
29 August 2016	Mr Pattison wrote to the Council, requiring a review in respect of its failure to respond.
	The Council did not respond to the requirement for review.
5 October 2016	Mr Pattison wrote to the Commissioner's Office, stating that he was dissatisfied with the Council's failures to respond and applying to the Commissioner for a decision in terms of section 47(1) of FOISA. The enforcement provisions of FOISA apply to the enforcement of the EIRs, subject to specified modifications – see regulation 17.
28 October 2016	The Council was notified in writing that an application had been received from Mr Pattison and was invited to comment on the application.
11 November 2016	The Commissioner received submissions from the Council. These submissions are considered below.

Commissioner's analysis and findings

1. It is apparent from the terms of the request that at least some of the information caught by it will be environmental information as defined by regulation 2(1) of the EIRs. In *Decision 218/2007 Professor A D Hawkins and Transport Scotland*¹, 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.
2. 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. This is subject to qualifications which are not relevant in this case. The same timescale is laid down by regulation 5(2)(a) of the EIRs.

¹ <http://www.itspublicknowledge.info/ApplicationsandDecisions/Decisions/2007/200600654.aspx>

3. In its submissions to the Commissioner, the Council stated that it had issued a response to Mr Pattison on 27 July 2016, and so had complied with the requirements of section 10(1) of FOISA and regulation 5(2)(a) of the EIRs.
4. The Council was asked to provide evidence to show that the response had been sent to Mr Pattison on that date. Given recent problems experienced by the Council in sending electronic communications with attachments, and bearing in mind that Mr Pattison had not received the response the Council claimed to have issued on 27 July 2016, the investigating officer was not satisfied (on the basis of a copy email alone) that the response had left the Council's systems. The Council did not provide any further evidence of sending.
5. In the absence of such evidence, the Commissioner finds, on the balance of probabilities, that the Council failed to comply with section 10(1) of FOISA and regulation 5(2)(a) of the EIRs in responding to Mr Pattison's request.
6. 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. Again, this is subject to qualifications which are not relevant in this case. The same timescale is laid down by regulation 16(4) of the EIRs.
7. In its submissions to the Commissioner, the Council accepted that it had not responded to Mr Pattison's requirement for review of 29 August 2016. It is therefore a matter of fact that the Council did not provide a response to Mr Pattison's requirement for review within 20 working days, so the Commissioner finds that it failed to comply with section 21(1) of FOISA and regulation 16(4) of the EIRs.
8. On 28 November 2016, during the investigation, the Council provided Mr Pattison with a copy of the response it claimed to have issued on 27 July 2016. Mr Pattison acknowledged receipt of this response.
9. Given that the Council responded to Mr Pattison on 28 November 2016, following Mr Pattison requirement for review of 29 August 2016, the Commissioner considers the response of 28 November 2016 should be taken as a response to that requirement for review. Should Mr Pattison be dissatisfied with that response, he has the right to make a further application to the Commissioner.
10. The Commissioner recommends that the Council considers whether it would be appropriate to apologise to Mr Pattison for its failure to comply.

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 (the EIRs) in responding to the information request made by Mr Pattison. In particular, the Council failed to respond to Mr Pattison request for information and requirement for review within the timescales laid down by sections 10(1) and 21(1) of FOISA and regulation 5(2) and 16(4) of the EIRs.

Appeal

Should either Mr Pattison or East Dunbartonshire Council 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.

Euan McCulloch
Deputy Head of Enforcement

19 December 2016

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