

Decision Notice

Decision 273/2016: Mr Angus Pattison and East Dunbartonshire Council

Bears Way Cycleway Project: failure to respond within statutory timescales

Reference No: 201601830

Decision Date: 19 December 2016



Scottish Information
Commissioner

Summary

East Dunbartonshire Council (the Council) was asked to provide information relating to phases 1 to 3 of the Bears Way Cycleway Project. This decision finds that the Council failed to respond to the request for review within the timescale set down by FOISA and the EIRs.

Background

Date	Action
5 August 2016	Mr Pattison made an information request to the Council.
31 August 2016	The Council responded to the information request.
2 September 2016	Mr Pattison wrote to the Council, requiring a review of its decision.
	Mr Pattison did not receive a response to his requirement for review.
5 October 2016	Mr Pattison wrote to the Commissioner's Office, stating that he was were dissatisfied with the Council's failure 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.
31 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.
17 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 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. The same timescale is laid down by regulation 16(4) of the EIRs.
3. In response to her letter of 31 October 2016, the Council told the Commissioner that it had responded to Mr Pattison's requirement for review by email on 28 September 2016, within the time allowed by section 21(1) of FOISA and regulation 16(4) of the EIRs.

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

4. Following further correspondence, it transpired that a few minutes after attempting to send the review outcome email on 28 September 2016, the sender was informed that (in line with the Council's Internet Access and Email Policy Rules) the sending of the review outcome was delayed for verification.
5. On 29 September 2016, the sender of the review outcome asked the Council's IT service to resolve the matter. In response, the IT service stated that the matter had been resolved.
6. The Council explained that all emails over a certain size (which included this one) went through the process of requiring verification. The Council also commented that perhaps Mr Pattison's email server had rejected an email of this size.
7. Mr Pattison confirmed he did not receive a response to his requirement for review and so the Council was asked to provide the Commissioner with evidence to show that the email containing the review outcome had been re-sent to Mr Pattison on 29 August 2016. The Council was unable to provide any evidence other than a screen shot which stated that "This email has now been released". It did not indicate what "released" meant in this context (for example, whether it meant the document had been re-sent without further intervention) and although the Council was asked for further evidence to confirm the communication was actually sent, it failed to provide any.
8. In the circumstances, the Commissioner would expect the Council to have obtained confirmation that the communication was actually sent following "release".
9. It is apparent to the Commissioner that the Council attempted to send a response to Mr Pattison's requirement for review on 28 August 2016. It is also apparent that the sender was informed that the email had not been sent. In the absence of any further evidence that this email was resent, the Commissioner has concluded, on the balance of probabilities, that the Council did not provide a response to Mr Pattison's requirement for review within 20 working days, with the result that it failed to comply with section 21(1) of FOISA and regulation 16(4) of the EIRs.
10. On 17 November 2016, during the investigation, the Council provided Mr Pattison with a further copy of the review response it claimed had been resent on 29 August 2016. Mr Pattison acknowledged receipt of this.
11. Given that the Council responded to Mr Pattison's requirement for review on 17 November 2016, the Commissioner does not require it to take any further action in relation to Mr Pattison's application.
12. The Commissioner notes the issue which has arisen in relation to the size of emails and its effect on this case (and others). She would urge the Council to bear this in mind when responding to future requests, to ensure that they leave the Council's own systems when they are supposed to.

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's requirement for review within the timescale laid down by section 21(1) of FOISA and regulation 16(4) of the EIRs.

The Commissioner does not require the Council to take any action in respect of these failures, in response to Mr Pattison's application, given that a response has been issued.

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

Scottish Information Commissioner

Kinburn Castle
Doubledykes Road
St Andrews, Fife
KY16 9DS

t 01334 464610

f 01334 464611

enquiries@itspublicknowledge.info

www.itspublicknowledge.info