

Decision Notice 143/2020

Revocation of planning permission – failure to respond

Applicant: The Applicant

Public authority: Midlothian Council

Case Ref: 202001189



Scottish Information
Commissioner

Summary

The Applicant asked Midlothian Council (the Council) for correspondence with Dalkeith Tennis Club relating to the revocation of planning permission. This decision finds that the Council failed to respond to the requirement for review within the timescale allowed by the Freedom of Information (Scotland) Act 2002 (FOISA) and the Environmental Information (Scotland) Regulations 2004 (the EIRs).

Background

1. On 5 June 2020, the Applicant made an information request to the Council
2. The Council responded to the information request on 6 July 2020.
3. On 24 July 2020, the Applicant wrote to the Council requiring a review of its decision.
4. The Applicant did not receive a response to his requirement for review.
5. The Applicant wrote to the Commissioner on 12 October 2020, stating that he was 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.
6. On 13 October 2020, the Council was notified in writing that an application had been received from the Applicant and was invited to comment on the application.
7. The Commissioner received submissions from the Council. These submissions are considered below.

Commissioner's analysis and findings

8. 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.
9. The Council acknowledged that the Applicant's request for review had been received and fully accepted that the Applicant did not receive a response within the timescale allowed in FOISA and the EIRs.
10. 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.
11. Section 21 also contains provision (section 21(8)) for the public authority not carrying out a review in cases where it considers section 14 of FOISA to be applicable. In such cases,

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

however, the authority is required to give the applicant notice that it does not consider a review to be required, within the 20 working day timescale referred to above (section 21(9)). It should also be noted that there is no similar provision in the EIRs – and, in any case, the Council has acknowledged that a review should have been carried out here.

12. It is a matter of fact that the Council 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 and regulation 16(4) of the EIRs.
13. As the Council responded to the Applicant's requirement for review on 10 November 2020, the Commissioner does not require it to take any further action in relation to the Applicant's application.
14. The Commissioner notes that the Council has apologised to the Applicant for its failure to comply.

Decision

The Commissioner finds that Midlothian Council (the Council) failed to comply with Part 1 of the Freedom of Information (Scotland) Act 2020 (FOISA) and the Environmental Information (Scotland) Regulations (the EIRs) in dealing with the information request made by the Applicant. In particular, the Council failed to respond to the Applicant's requirement for review within the timescale laid down by sections 21(1) of FOISA and regulation 16(4) of the EIRs. Given that the Council has since responded to the requirement for review, the Commissioner does not require any further action to be taken in respect of this breach, in response to the Applicant's application.

Appeal

Should either the Applicant or the 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

11 November 2020

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