

Decision Notice 038/2022

Update to Climate Change Plan – December 2020 – failure to respond

Applicant: The Applicant

Public authority: Scottish Ministers

Case Ref: 202200043



Scottish Information
Commissioner

Summary

The Applicant asked the Scottish Ministers (the Ministers) for information about the topics on the Update to the Climate Change Plan December 2020, in relation to:

- Buildings
- Electricity
- Miscellaneous (including the number of data analysts employed by the Energy & Climate Change Directorate and flooding)
- Industry
- Negative Emissions Technology

This decision finds that the Ministers failed to respond to the requests 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 Ministers failed to comply with the Applicant's requirement for review within the timescale set down by FOISA/the EIRs.

The Commissioner has ordered the Ministers to comply with the requirement for review.

Background

1. On 3 September 2021, the Applicant made a number of information requests to the Ministers. His application to the Commissioner is about the five requests listed above.
2. The Ministers did not respond to these information requests.
3. On 21 October 2021, the Applicant wrote to the Ministers requiring a review of their failure to respond.
4. The Applicant did not receive a response to his requirement for review.
5. On 11 January 2022, the Applicant wrote to the Commissioner, stating that he was dissatisfied with the Minister'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.
6. On 9 March 2022, the Ministers were notified in writing that an application had been received from the Applicant and were invited to comment on the application.
7. The Ministers issued a review response to the Applicant on 15 March 2022 regarding one of his requests (Electricity).
8. The Commissioner received submissions from the Ministers on 23 March 2022. These submissions are considered below.

Commissioner's analysis and findings

9. It is apparent from the terms of the requests that at least some of the information caught by them 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.
10. In their submissions to the Commissioner, the Ministers confirmed that, due to an administrative error, the Applicant's requests and requirement for review was overlooked and this error was only identified when they received notification of the Applicant's appeal to the Commissioner.
11. They confirmed that these requests were received by post at a time when there was significant disruption to office working with the majority of staff working remotely. The Ministers confirmed that work is ongoing to finalise review responses for each of the outstanding requests and that the Commissioner will be provided with copies of the review responses once they have been issued.
12. 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.
13. It is a matter of fact that the Ministers did not provide a response to the Applicant's requests for information within 20 working days, so the Commissioner finds that they failed to comply with section 10(1) of FOISA and regulation 5(2)(a) of the EIRs.
14. 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.
15. It is a matter of fact that the Ministers did not provide a response to the Applicant's requirement for review within 20 working days, so the Commissioner finds that they failed to comply with section 21(1) of FOISA and regulation 16(4) of the EIRs.
16. The remainder of section 21 and regulation 16 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 (apart from the request "Electricity"), the Commissioner finds that the Ministers failed to discharge these requirements: he now requires a review to be carried out in accordance with section 21 and regulation 16.
17. As the Ministers responded to the Applicant's requirement for review on 15 March 2022 concerning the request "Electricity", the Commissioner does not require them to take any further action in relation to this part of the Applicant's application.
18. The Commissioner recommends that the Ministers considers whether it would be appropriate to apologise to the Applicant for their failure to comply.

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

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) and with the Environmental Information (Scotland) Regulations 2004 (the EIRs) in dealing with these information requests made by the Applicant. In particular, the Ministers failed to respond to the Applicant's requests for information and requirement for review within the timescales laid down by sections 10(1) and 21(1) of FOISA and regulations 5(2) and 16(4) of the EIRs.

The Commissioner requires the Ministers to respond to the remaining 4 requests, by **Thursday 12 May 2022**.

Appeal

Should either the Applicant or the Ministers 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 Ministers fail to comply with this decision, the Commissioner has the right to certify to the Court of Session that the Ministers have failed to comply. The Court has the right to inquire into the matter and may deal with the Ministers as if they had committed a contempt of court.

Margaret Keyse
Head of Enforcement

31 March 2022

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