

# Decision Notice 041/2021

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## Windfarm lease arrangements – failure to respond

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**Applicant: The Applicant**

**Public authority: Forestry and Land Scotland**

**Case Ref: 202100167**



Scottish Information  
Commissioner

## Summary

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The Applicant asked Forestry and Land Scotland (FLS) for information relating to the land disposal/access arrangements for the Clashindarroch II windfarm development between FLS (or its predecessors) and Vattenfall Windpower Limited (or other) (including any arrangement executed by the Scottish Ministers). This decision finds that FLS failed to comply with the Applicant's 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).

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

## Background

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1. The Applicant made an information request to FLS on 22 January 2020
2. FLS responded to the information request on 28 February 2020.
3. On 6 March 2020, the Applicant wrote to FLS, requiring a review of its decision.
4. The Applicant did not receive a response to its requirement for review.
5. The Applicant wrote to the Commissioner on 9 February 2021, stating that it was dissatisfied with FLS'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. The Commissioner exercised his discretion, under section 47(5) of FOISA, to accept an application made after the expiry of the time allowed by section 47(4).
7. On 18 February 2021, FLS was notified in writing that an application had been received from the Applicant and was invited to comment on the application. The investigating officer asked FLS to let her know if it considered its handling of the request had been affected by COVID-19 and if it considered that the provisions of the Coronavirus (Scotland) Act 2020 as amended (the 2020 Act) were relevant to this case. (These provisions are considered in more detail below.)
8. FLS is an agency of the Scottish Ministers (the Ministers). The Ministers contacted the investigating officer to provide comments on the application (as required by section 49(3)(a) of FOISA). Any reference to submissions made by FLS in this decision includes submissions made on its behalf by the Ministers.
9. The Commissioner received submissions from FLS. These submissions are considered below.

## Commissioner's analysis and findings

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10. 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*<sup>1</sup>, the Commissioner confirmed (at paragraph 51) that where environmental information is concerned, there are two separate

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

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.

11. FLS confirmed the requirement for review had been received and accepted that it had failed to respond to the Applicant's requirement for review within the timescale allowed.
12. FLS explained that the initial delay in responding was due to the large volume of information that had been identified, and this was later compounded by the impact of Covid-19 on staff capacity and staff changes in both Scottish Forestry and FLS.
13. FLS confirmed that a response would be issued to the Applicant and a copy provided to the Commissioner. A response has not yet been provided to the Commissioner.
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. 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 FLS did not provide a response to the Applicants' 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. In Part 2 of Schedule 6 to the 2020 Act, paragraph 6 allows the Commissioner to find that a Scottish public authority has not failed to comply with section 21(1), where he is satisfied that the failure was due to, inter alia, the effect of coronavirus on the authority generally or its ability to carry out its functions.
17. Guidance issued by the Commissioner<sup>2</sup>, "Coronavirus (Scotland) Act 2020: Determining the effects of the coronavirus on an authority's ability to respond to requests", makes it clear that public authorities will need to provide the Commissioner with evidence as to the effects of the coronavirus on their ability to respond within the maximum 20 working day timescale to individual requests (paragraph 10). The guidance sets out what evidence the Commissioner will require from an authority to allow him to make a determination (paragraph 16) and makes a number of recommendations to authorities about what information they should document in order to record the effects of the coronavirus on their ability to respond to requests (paragraph 18).
18. However, the response from FLS simply makes a passing reference to the impact of Covid-19, with no further detail on how it impacted on FLS's staff and their ability to respond to this request. In all the circumstances, bearing in mind the involvement of the Scottish Ministers in providing the submissions in question, the Commissioner is satisfied that this is not a matter into which he need inquire further.
19. The remainder of section 21 and regulation 16 set 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 FLS failed to discharge these requirements: he now requires a review to be carried out in accordance with section 21 and regulation 16.
20. The Commissioner recommends that the FLS considers whether it would be appropriate to apologise to the Applicant for its failure to comply.

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<sup>2</sup> <https://www.itspublicknowledge.info/ScottishPublicAuthorities/Covid-19AuthorityGuidance.aspx>

## Decision

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The Commissioner finds that Forestry and Land Scotland (FLS) failed to comply with Part 1 of the Freedom of Information (Scotland) Act 2020 (FOISA), or with the Environmental Information (Scotland) Regulations (the EIRs), in dealing with the information request made by the Applicant. In particular, FLS failed to respond to the Applicant's requirement for review within the timescales laid down by section 21(1) of FOISA and regulation 16(4) of the EIRs.

The Commissioner requires FLS to respond to the Applicant's requirement for review, by **Tuesday 4 May 2021**.

## Appeal

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Should either the Applicant or Forestry and Land Scotland 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

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

**Euan McCulloch**  
**Deputy Head of Enforcement**

**18 March 2021**

**Scottish Information Commissioner**

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