

Decision Notice

Decision 087/2019: ABC and the Scottish Ministers

Montrose Port Authority: failure to respond within statutory timescales

Reference No: 201900165

Decision Date: 28 May 2019



Scottish Information
Commissioner

Summary

On 13 September and 24 September 2018, ABC asked the Scottish Ministers (the Ministers) for information they held about Montrose Port Authority. This decision finds that the Ministers failed to respond to the requests within the timescales 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 ABC's requirements for review within the timescales set down by FOISA and the EIRs.

Background

Date	Action
13 & 24 September 2018	ABC made information requests to the Ministers.
11 & 16 October 2018	The Ministers advised ABC that, under regulation 7 of the EIRs, they were extending the deadline for responding to the requests as follows: <ul style="list-style-type: none">• Response due by 11th October 2018 extended by 20 working days to 8 November 2018.• Response due by 22 October 2018 extended by 10 working days to 5 November 2018.
2 November 2018	The Ministers responded to the information requests.
7 November 2018	ABC wrote to the Ministers, requiring reviews of their decisions.
	ABC did not receive responses to its requirements for review.
29 January 2019	ABC wrote to the Commissioner's Office, stating it was dissatisfied with the Ministers' 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.
25 February 2019	The Ministers were notified in writing that an application had been received from ABC and were invited to comment on the application.
8 March 2019	The Commissioner received submissions from the Ministers. These submissions are considered below.

Commissioner's analysis and findings

1. 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

¹ <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.

2. Regulation 5(2)(a) of the EIRs 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 (the same timescale is contained in section 10(1) of FOISA). Under regulation 7(1) of the EIRs, this timescale can be extended by a further period of up to 20 working days, provided certain requirements are met. Among these are regulation 7(3)(b), which stipulates that the notification given to the applicant of such an extension must include the authority's reasons for considering the information to be voluminous and complex.
3. Having considered the notifications given to ABC in this case, the Commissioner is not satisfied that they met the requirements of regulation 7(3)(b). They simply asserted that the information was considered to be voluminous and complex, following searches, without any explanation of this conclusion. Consequently, the Commissioner is not satisfied that the Ministers were entitled to extend the timescale for responding in terms of regulation 7(1) and therefore finds that they failed to comply with regulation 5(2)(a) of the EIRs (or section 10(1) of FOISA) in responding to ABC's request for information.
4. Section 16(4) of the EIRs 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 (the same timescale is contained in section 21(1) of FOISA). This is subject to qualifications which are not relevant in this case.
5. It is a matter of fact that the Ministers did not provide responses to ABC's requirements for reviews within 20 working days, so the Commissioner finds that they failed to comply with regulation 16(4) of the EIRs and section 21(1) of FOISA.
6. The Ministers responded to ABC's requirements for review on 6 March and 8 March 2019, with apologies for the delays in doing so, so the Commissioner does not require them to take any further action in relation to ABC's application. He would, however, note the serious nature of these delays, particularly at review stage. These would appear to have been due to administrative oversight: while the Ministers have given assurances that the underlying causes are being addressed, the Commissioner must still observe that the delays in this case were unacceptable.

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), or with the Environmental Information (Scotland) Regulations 2004 (the EIRs), in responding to the information requests made by ABC. In particular, the Ministers failed to respond to the requests or the subsequent requirements for review within the timescales laid down by sections 10(1) and 21(1) of FOISA and regulations 5(2)(a) and 16(4) of the EIRs.

The Commissioner does not require the Ministers to take any action in respect of these failures, in response to ABC's application, given that review outcomes have since been issued.

Appeal

Should either ABC or the Scottish 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.

Euan McCulloch
Deputy Head of Enforcement

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