

Decision Notice



Decision 097/2009 Liz Longden and the Scottish Ministers

Failure to respond to a request within the required timescale

Reference No: 200900627

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Summary

This decision considers whether the Scottish Ministers (the Ministers) complied with the technical requirements of the Freedom of Information (Scotland) Act 2002 (FOISA) in responding to information request made by Liz Longden.

Background

1. On 21 January 2009, Ms Longden wrote to the Scottish Ministers (the Ministers) requesting the following information:
All correspondence between the First Minister's Office and Visit Scotland concerning Homecoming 2009, since January 2008.
2. The Ministers did not respond to this request. On 4 March 2009, Ms Longden wrote to the Ministers requesting a review of their decision.
3. On 12 March 2009, the Ministers acknowledged receipt of Ms Longden's request for review and advised her that it had been forwarded to the relevant Director General's offices and that she could expect to hear from the officers who had been assigned to review her case shortly.
4. On 24 March 2009, the Ministers wrote again to Ms Longden, stating that they had completed their review. They apologised for the delay in responding to her request, and explained that this was due to human error. The Ministers advised Ms Longden that she would receive a substantive response to her request shortly.
5. Ms Longden did not receive a substantive response to her information request, and on 6 April 2009, wrote to the Commissioner, stating that she was dissatisfied with that failure and applying for a decision in terms of section 47(1) of FOISA.
6. The application was validated by establishing that Ms Longden had made a request for information to a Scottish public authority and had applied to the Commissioner for a decision only after asking the authority to review its response to that request. The case was then allocated to an investigating officer.



Investigation

7. On 6 May 2009, the Ministers were notified in writing that an application had been received from Ms Longden and were invited to comment on the application, as required by section 49(3)(a) of FOISA.
8. This letter noted that the Ministers had failed to provide a response to Ms Longden's information request and that, although the Ministers' letter of 24 March had indicated that a review had been conducted, this process did not appear to have produced any of the possible outcomes specified in section 21(4) of FOISA.
9. The letter pointed out that section 21(4) of FOISA sets out the options for an authority conducting a review, and that, where no response has been made (as in Ms Longden's case), the only one available would be to provide the response that should have been provided within the initial 20 working day period.
10. The Ministers responded to this letter on 20 May 2009. They accepted that they had breached the timescale set out in FOISA when responding to Ms Longden's information request, and advised that this was due to human error, because the request had not been passed to the relevant policy area until after the 20 working day timescale had passed. The Ministers acknowledged that the time delay was entirely unacceptable and they apologised for this occurrence, which they considered to be a one-off.
11. However, the Ministers disagreed with the Commissioner's interpretation of section 21 of FOISA, and maintained that their review (the outcome of which was specified in their letter of 24 March 2009) constituted a valid review in terms of FOISA. They indicated that this letter had made reference (in good faith) to the expected imminent completion of the work in preparing to despatch the substantive response.
12. However, they noted that further delays had meant that they did not provide their substantive response to Ms Longden's information request until 1 May 2009. The Ministers advised that these delays had arisen in relation to the collation and processing of the information that was to be released to Ms Longden, and then while discussions were held with the Office of the First Minister and other colleagues, before clearance was given for the response to be issued.
13. The Ministers accepted that they should have met the statutory deadlines in this case, but they submitted that the First Minister's Office is very busy and is involved in all the major issues that affect the Scottish Government. The Ministers indicated that several issues had arisen during the time period in which Ms Longden had submitted her initial information request, and they had required urgent attention. The Ministers noted that the handling of FOI requests and reviews had had to be fitted in around the regular work of the First Minister's Office during this time, and this had contributed towards the delays.



14. In the light of the different interpretation of the provisions of section 21 identified above, the Ministers and the Commissioner have engaged in further discussion and correspondence on this subject, which is relevant to his consideration of this and a number of other cases. These exchanges have also been taken into consideration in what follows.

Commissioner's analysis and findings

15. 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, subject to certain exceptions which are not relevant in this case.
16. The Ministers acknowledged that, having received Ms Longden's request for information on 21 January 2009, they did not provide any response until 1 May 2009. The Commissioner therefore finds that the Ministers failed to respond to Ms Longden's request for information of 21 January 2009, within the 20 working days allowed by section 10(1) of FOISA.
17. Section 21(1) of FOISA gives authorities a maximum of 20 working days following the date of receipt of the requirement to comply with a requirement for review, again subject to exceptions which are not relevant in this case.
18. Section 21(4) of FOISA states that, on receipt of a requirement for review, an authority may do the following in respect of the information request to which it relates:
- (a) confirm a decision complained of, with or without such modifications as it considers appropriate;
 - (b) substitute for any such decision a different decision; or
 - (c) reach a decision, where the complaint is that no decision had been reached.
19. The Commissioner's view is that, where no response has been made to an information request, the first two options are unavailable to the authority, and so the only appropriate review outcome in a case such as this is for the authority to reach a decision where none has been reached before, in line with section 21(4)(c) of FOISA.
20. The Commissioner has considered the content of the letter sent to Ms Longden by the Ministers on 24 March 2009, and has noted that the Ministers' review did not do any of the things listed in section 21(4) of FOISA. Instead, it simply acknowledged and apologised for the delay in responding to the request and advised that a response would be forthcoming shortly. The Commissioner is unable to accept that this response met the requirements of section 21(4) of FOISA.
21. The Ministers argued that, since section 21(4) of FOISA uses the word "*may*" when referring to the three options available, the options listed therein are not an exhaustive list of the things an authority may do when conducting a review.



22. The Commissioner has considered this point. However, he is unable to accept this interpretation. In particular, he has noted the terms of section 21(5) of FOISA, which states that the authority must give the applicant notice in writing of what it has done under subsection (4) and a statement of its reasons for so doing. He considers that this supports his understanding that section 21(4) obliges an authority to conduct a review which produces one of the outcomes therein.
23. The Commissioner therefore finds that the Ministers failed to carry out a review in line with section 21 of FOISA, and, in particular, sections 21(4) and (5) of FOISA, within the 20 working days allowed by section 21(1) of FOISA.
24. The Commissioner notes that the Ministers did provide Ms Longden with a substantive response to her information request on 1 May 2009 and that they also apologised to her for the delays in the handling of her case.
25. The Commissioner acknowledges that the First Ministers' office is a busy one, working on a range of important issues at any particular time. He recognises that dealing with FOI requests at the same time will be challenging.
26. However, the Ministers have highlighted the difficulties of this particular office complying with the requirements of FOISA in previous cases. In his decision 062/2009 (*Mr Tom Gordon and the Scottish Ministers*) the Commissioner responded to arguments very similar to those made in this case. His comments in that paragraph 13 of that decision are repeated below, because they are equally relevant in this case:
 13. The Commissioner understands that the First Minister's Office is a particularly busy one. However he would be extremely concerned if the argument was being advanced that, as a consequence, it is understandable or only to be expected that the requirements for compliance may not be met. As the Ministers acknowledge the completion of a review within the 20 working day period specified in section 21(1) is a statutory requirement, and with that in mind the Commissioner cannot accept that compliance with it (and for that matter dealing with requests under section 1(1) of FOISA more generally) is something to be "fitted around" the regular work of any part of a Scottish public authority. On the contrary, compliance with the requirements of Part 1 of FOISA should be seen as a core responsibility of the authority and addressed as such, with consequences for management and resourcing. This may be thought to be particularly the case for the First Minister's Office. Given its role it is bound to attract requests for information; given its status, it is bound to be looked to as setting an example of good practice to other parts of the Scottish Government.



27. Furthermore, the Commissioner in this particular case notes that the delays in dealing with Ms Longden's request were caused to a large extent by simple human error, as a result of the failure to pass the request for consideration after it was acknowledged. He considers that this administrative error, which could happen to any department or public authority, was a significant cause of delay in this case. As for any authority, the Commissioner takes the view that the Ministers could avoid failures of this type of delay in future by ensuring that staff are aware of procedures for handling FOI requests, and that requests are logged on receipt to ensure that they are not forgotten or subject to unnecessary delays.

DECISION

The Commissioner finds that the Ministers failed to comply with Part 1 of the Freedom of Information (Scotland) Act 2002 (FOISA) in dealing with the information request made by Ms Longden, in particular by failing to respond to Ms Longden's request for information within the timescale laid down by sections 10(1) and by failing to carry out a review in line with sections 21(4) and (5) of FOISA.

Given that the Ministers have since apologised to Ms Longden and provided a substantive response to her request for information, the Commissioner does not require the Ministers to take any action in response to these failures.

Appeal

Should either Ms Longden or the Scottish Ministers wish to appeal against this decision, there is an 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 notice.

Kevin Dunion
Scottish Information Commissioner
05 August 2009



Appendix

Relevant statutory provisions

Freedom of Information (Scotland) Act 2002

1 General entitlement

- (1) A person who requests information from a Scottish public authority which holds it is entitled to be given it by the authority.

10 Time for compliance

- (1) Subject to subsections (2) and (3), a Scottish public authority receiving a request which requires it to comply with section 1(1) must comply promptly; and in any event by not later than the twentieth working day after-
 - (a) in a case other than that mentioned in paragraph (b), the receipt by the authority of the request; or

...

21 Review by Scottish public authority

- (1) Subject to subsection (2), a Scottish public authority receiving a requirement for review must (unless that requirement is withdrawn or is as mentioned in subsection (8)) comply promptly; and in any event by not later than the twentieth working day after receipt by it of the requirement.

...

- (4) The authority may, as respects the request for information to which the requirement relates-
 - (a) confirm a decision complained of, with or without such modifications as it considers appropriate;
 - (b) substitute for any such decision a different decision; or
 - (c) reach a decision, where the complaint is that no decision had been reached.
- (5) Within the time allowed by subsection (1) for complying with the requirement for review, the authority must give the applicant notice in writing of what it has done under subsection (4) and a statement of its reasons for so doing.

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