

Decision Notice



Decision 238/2013 Roy Mackay and Midlothian Council

Failure to carry out a review

Reference No: 201302294

Decision Date: 24 October 2013

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Rosemary Agnew

Scottish Information Commissioner

Kinburn Castle
Doubledykes Road
St Andrews KY16 9DS
Tel: 01334 464610



Summary

This decision considers whether Midlothian Council (the Council) complied with the technical requirements of the Freedom of Information (Scotland) Act 2002 (FOISA) in responding to information request made by Mr Roy Mackay (Mr Mackay).

Background

1. On 18 April 2013, Mr Mackay wrote to the Council requesting certain specified information.
2. Although the Council acknowledged the request on 18 April 2013, Mr McKay did not receive a response to his request for information.
3. On 15 July 2013, Mr Mackay wrote to the Council requesting a review of its failure to respond.
4. Mr Mackay did not receive a response to his requirement for review and on 1 October 2013 wrote to the Commissioner's Office, stating that he was dissatisfied with that failure and applying to the Commissioner for a decision in terms of section 47(1) of FOISA.
5. The application was validated by establishing that Mr Mackay 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

6. On 14 October 2013, the Council was notified in writing that an application had been received from Mr Mackay and was invited to comment on the application.
7. The Council responded on 22 October 2013 and its submissions are considered in the Commissioner's analysis and findings below.



Commissioner's analysis and findings

Information Request

8. The Council explained that a response was emailed to Mr Mackay's request for information on 17 May 2013. It has been able to provide documentary evidence that it was sent to Mr Mackay. The author of the email also confirms that no 'failure to deliver' message was received to alert the Council that the email had not reached the intended recipient.
9. The Commissioner is required to come to a conclusion, on the balance of probabilities, as to whether the email containing the Council's response to Mr Mackay was in fact sent on 17 May 2013. In the light of the information provided by the Council, she is satisfied that it was. The Commissioner has concluded that the Council complied with section 10(1) of FOISA.

Request for Review

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, subject to certain exceptions which are not relevant in this case.
11. The Council advised the investigating officer that it was investigating whether it had received Mr Mackay's request for review of 15 July 2013. At the same time, the Council asked the investigating officer to contact Mr Mackay, to ask him if he could verify that his email had reached the Council.
12. Mr Mackay then contacted the Technical Support Team for his email provider to ask them to check if his email had reached the Council. They responded by providing documentary evidence that the email was received successfully by the Council's destination mail server. They have commented that they cannot confirm whether it reached the intended recipients after that.
13. The Council's IT Department has now confirmed that it has located a record confirming that Mr Mackay's email was received by the Council. They explained that (in terms of an analogy) this is a receipt with their electronic post-room, which then distributes emails to the relevant email accounts. Mr Mackay's email did not appear to have reached either of the two email accounts in question or the Council's 'Public Enquiries' system.
14. The problem with Mr Mackay's email occurred after that stage, and the Council is not clear what happened. It is unable to trace any incoming emails before 16 September 2013 as the emails are purged monthly from the two accounts in question. The only possible explanation is that the Council had an upgrade to their Microsoft Exchange System around this time, and that some tracking history was lost.



15. The Council regrets that there has been an IT breakdown resulting in Mr Mackay not receiving a response to his request review. The Council states that, had the email been received as usual, it would have been logged onto their freedom of information (FOI) logging and tracking system and responded to within the prescribed timescale.
16. Since the Council did not provide a response to Mr Mackay's requirement for review within 20 working days, the Commissioner finds that it failed to comply with section 21(1) of FOISA.
17. As no review has been carried out in this case, the Commissioner finds that the Council failed to discharge these requirements: she now requires a review to be carried out in accordance with them, noting that the Council has already indicated that it intends to do this.

DECISION

The Commissioner finds that Midlothian Council (the Council) failed to comply with Part 1 of the Freedom of Information (Scotland) Act 2002 (FOISA) in dealing with the information request made by Mr Mackay, in particular by failing to respond to Mr Mackay's requirement for review within the respective timescales laid down by section 21(1) of FOISA.

The Commissioner therefore requires the Council to undertake a review in respect of Mr Mackay's request for information, in line with the requirements of section 21 of FOISA, within 45 calendar days after the date of intimation of this decision notice, that is by **Monday 9 December 2013**.

Appeal

Should either Mr Mackay or Midlothian 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.

Alison Davies
Deputy Head of Enforcement
24 October 2013

Decision 238/2013
Roy Mackay
and Midlothian Council





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.

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