

Decision Notice 007/2022

Land bridge development – failure to respond

Applicant: The Applicant

Public authority: Scottish Protection Environment Agency

Case Ref: 202101461



Scottish Information
Commissioner

Summary

The Applicant asked the Scottish Environment Protection Agency (SEPA) for information about the the construction of a land bridge between the Islands of Torsa Beag and Luing. The Applicant wanted to see details of any consultation between SEPA and the developer or other stakeholders prior to construction.

This decision finds that SEPA failed to respond to the request and 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).

Background

1. The Applicant made an information request to SEPA on 25 September 2021.
2. Although SEPA acknowledged the request on 27 September 2021 and provided an update on 22 October 2021, it did not respond to the information request.
3. On 27 October 2021, the Applicant wrote to SEPA requiring a review of its failure to respond.
4. Again, although the Applicant received an acknowledgement on 27 October 2021 and a further update on 24 November 2021, the Applicant did not receive a response to his requirement for review.
5. On 24 November 2021, the Applicant wrote to the Commissioner, stating that he was dissatisfied with SEPA'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 7 December 2021, SEPA was notified in writing that an application had been received from the Applicant and was invited to comment on the application.
7. The Commissioner received submissions from SEPA. These submissions are considered below.

Commissioner's analysis and findings

8. 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*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.
9. SEPA acknowledged that it had not responded to the Applicant's information request and requirement for review on time.
10. It explained that a variety of factors had contributed to this, in particular the continued office closure and restrictions due to Covid-19 and the impact of the criminal cyber-attach against SEPA on 24 December 2020.

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

11. SEPA noted specific issues contributing to the delay in responding to this request, in particular the Access to Information Team's loss of access to its usual systems and resources.
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 SEPA did not provide a response to the Applicant's request for information within 20 working days, so the Commissioner finds that it 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 SEPA did not provide a response to the Applicant's requirement for review within 20 working days, so the Commissioner finds that it failed to comply with section 21(1) of FOISA and regulation 16(4) of the EIRs.
16. As SEPA responded to the Applicant's requirement for review on 16 December 2021, the Commissioner does not require it to take any further action in relation to the Applicant's application. In relation to the systemic issues arising out of the 24 December 2020 cyber-attack, the Commissioner is working with SEPA (as noted in Decision 165/2021) to assist in rebuilding its Freedom of Information capacity, by way of a Level 2 Intervention under his Intervention Procedures.
17. Notwithstanding that intervention and his willingness to be supportive in this challenging time, the Commissioner must reiterate what he said in Decision 069/2021 as regards meeting the required timescales: where they are not met, he has no option but to find that there has been a breach of the above provisions.
18. The Commissioner notes that SEPA has apologised to the Applicant for its failure to comply with the required timescales.

Decision

The Commissioner finds that the Scottish Environment Protection Agency (SEPA) failed to comply with Part 1 of the Freedom of Information (Scotland) Act 2020 (FOISA) and with the Environmental Information (Scotland) Regulations (the EIRs) in dealing with the information request made by the Applicant. In particular, SEPA failed to respond to the Applicant's request for information and requirement for review within the timescales laid down by sections 10(1) of 21(1) of FOISA and regulations 5(2) and 16(4) of the EIRs.

The Commissioner does not require SEPA to take any action in respect of these failures, in response to the Applicant's application, given that a response has now been issued.

Appeal

Should either the Applicant or SEPA 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

17 January 2022

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