



Decision Notice 099/2022

Educational services for deaf children and young people – failure to respond

Applicant: The Applicant

Authority: Midlothian Council

Case Ref: 202200842

Summary

The Applicant asked the Authority a range of questions about its specialist education services for deaf or hearing-impaired children and young people. This decision finds that the Authority failed to respond to the request within the timescale allowed by the Freedom of Information (Scotland) Act 2002 (FOISA). The decision also finds that the Authority failed to comply with the Applicant's requirement for review within the timescale set down by FOISA.

Background

1. The Applicant made an information request to the Authority on 28 February 2022. The information request was contained in an attachment to an email from the Applicant.
2. On 22 March 2022, the Authority informed the Applicant that it had not received the attachment to the email and was therefore unable to respond to the request. It asked the Applicant to re-send the attachment. The Applicant did so later that day.
3. On 9 May 2022, the Applicant wrote to the Authority, requiring a review in respect of its failure to respond.
4. The Applicant did not receive a response to its email of 9 May 2022.
5. On 27 July 2022, the Applicant wrote to the Commissioner, stating that it was dissatisfied with the Authority's failure to respond and applying to the Commissioner for a decision in terms of section 47(1) of FOISA.
6. The Commissioner determined that the application complied with section 47(2) of FOISA and that he had the power to carry out an investigation.

Investigation

7. Section 49(3)(a) of FOISA requires the Commissioner to notify public authorities of an application and to give them an opportunity to comment. The Commissioner did this on 28 July 2022.
8. The Authority acknowledged that it had not responded to the Applicant's information request and requirement for review.

Information request

9. 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.
10. The Authority stated that it had been unable to respond to the original request of 28 February 2022 as the "response template" containing the information request had not been attached to the covering email. It had therefore asked the Applicant to provide the attachment on 22 March 2022.
11. The Authority advised the Commissioner that it held no record of having received a response to this email. Consequently, the request remained "on hold" and no further action was taken.
12. The Commissioner must determine, based on the balance of probabilities, whether the Authority received the information request from the Applicant. The Commissioner notes that the Applicant's information request of 28 February 2022 was made to a range of bodies within Scotland. He is not aware of any other Scottish public authority having faced an issue with the attachment to the email.
13. The Applicant has provided the Commissioner with evidence that it re-sent the response template to the Authority on 22 March 2022. The email was sent to the email address of the person who had asked for a further copy of the template.
14. The Authority advised the Commissioner that the email was not in its system and that the person the email was sent to had no recollection of having received the email.
15. In all the circumstances, the Commissioner is satisfied that the information request was received by the Council – even if it was not received on 28 February 2022 (he does not consider it necessary to make a finding on this point), he is satisfied, from the evidence provided to him by the Applicant, and on the basis of wider issues with the handling of this request, that it was received on 22 March 2022.
16. The Commissioner therefore finds that the Authority did not provide a response to the Applicant's request for information within 20 working days and that it failed to comply with section 10(1) of FOISA.

Request for review

17. 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.
18. The Authority confirmed that it had received the request for review on 9 May 2022, but that it did not appear to have been acted on or registered on its system.

19. It is a matter of fact that the Authority 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.
20. The remainder of section 21 sets out the requirements to be followed by a Scottish public authority in carrying out a review. The Authority advised the Commissioner, on 10 August 2022, that it had undertaken to complete the request and that it would send the Commissioner a copy of the response once it had been completed.
21. The Authority has not yet provided the Commissioner with any evidence that a response has been sent to the Applicant. As no review has been carried out in this case, the Commissioner now requires a review to be carried out in accordance with section 21.
22. While the Commissioner has no option but to give the Authority six weeks to comply with this decision, he hopes, given the age of the request and the undertaking given by the Authority on 10 August 2022, that the decision will be complied with well within this time limit.
23. In addition, the Commissioner would recommend that the Authority considers whether it would be appropriate to apologise to the Applicant for its failure to comply.

Decision

The Commissioner finds that the Authority failed to comply with Part 1 of the Freedom of Information (Scotland) Act 2002 (FOISA) in dealing with the information request made by the Applicant. In particular, the Authority failed to respond to the Applicant's request for information and requirement for review within the timescales laid down by sections 10(1) and 21(1) of FOISA. The Commissioner requires the Authority to respond to the requirement for review, by **Monday 21 November 2022**.

Appeal

Should either the Applicant or the Authority 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

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

Margaret Keyse
Head of Enforcement

6 October 2022