

Decision Notice 173/2021

Management of marine ecosystems – failure to respond

Applicant: The Applicant

Public authority: Scottish Ministers

Case Ref: 202101236



Scottish Information
Commissioner

Summary

The Applicant asked the Scottish Ministers (the Ministers) for information about the Scottish Government's approach to the management of marine ecosystems. In particular, the Applicant sought information related to weekly fishing vessel license variation decisions and measures related to biogenic reefs.

This decision finds that the Ministers failed to respond to the request within the timescale 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 the Applicant's requirement for review within the timescale set down by FOISA and the EIRs.

The Commissioner has ordered the Ministers to comply with the requirement for review.

Background

1. The Applicant made an information request to the Ministers on 2 August 2021.
2. The Ministers did not respond to the information request.
3. On 1 September 2021, the Applicant wrote to the Ministers requiring a review in respect of their failure to respond.
4. Although the Applicant received an acknowledgement on 10 September 2021, and a further update on 22 September 2021, they did not receive a response to their requirement for review.
5. The Applicant wrote to the Commissioner on 1 October 2021, stating that they were 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.
6. On 5 October 2021, the Ministers were notified in writing that an application had been received from the Applicant and were invited to comment on the application.
7. The Commissioner received submissions from the Ministers on 19 October 2021. 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. The Ministers confirmed the request and requirement for review had been received and acknowledged their failure to respond. The Ministers also apologise for this failure.

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

10. They explained that due to human error this request had been overlooked. Following notification from the Commissioner's office, the Ministers advised that they would arrange for the review to be completed and issued to the Applicant.
11. The Ministers advised that Marine Scotland are planning to set up a central team to handle information requests under the EIRs and FOISA to prevent failures to respond happening in the future. The Commissioner welcomes the steps that are being taken.
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 the Ministers did not provide a response to the Applicant's request for information within 20 working days, so the Commissioner finds that they 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 the Ministers did not provide a response to the Applicant's requirement for review within 20 working days, so the Commissioner finds that they failed to comply with section 21(1) of FOISA and regulation 16(4) of the EIRs.
16. The remainder of section 21 and regulation 16 sets out the requirements to be followed by a Scottish public authority in carrying out a review. As no review has been carried out in this case, the Commissioner finds that the Ministers failed to discharge these requirements: he now requires a review to be carried out in accordance with section 21/regulation 16.
17. The Commissioner recommends that the Ministers consider whether it would be appropriate to apologise to the Applicant for their failure to comply.

Decision

The Commissioner finds that the Scottish Ministers (the Ministers) 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, the Ministers 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 requires the Ministers to respond to the Applicant's requirement for review, by **Monday 13 December 2021**.

Appeal

Should either the Applicant 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.

Enforcement

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

Claire Stephen
Deputy Head of Enforcement

27 October 2021

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