



# Decision Notice 015/2023

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## Pollution complaints – failure to respond

**Applicant: The Applicant**

**Authority: Scottish Environment Protection Agency**

**Case Ref: 202300077**

### Summary

The Applicant asked the Authority for details about complaints and incidents involving forestry operations, which resulted in pollution or other impact on the water environment (including private water supplies). This decision finds that the Authority 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 the Authority on 31 October 2022.
2. Although the Authority acknowledged the request on 1 November 2022, it did not respond to the information request.
3. The Authority provided a further update on 30 November 2022, apologising that it was not able to issue a response and giving the Applicant advice on seeking a review.
4. On 2 December 2022, the Applicant wrote to the Authority, requiring a review in respect of its failure to respond. This was acknowledged on 5 December 2022.
5. The Authority provided a further update on 6 January 2023, apologising again that it was unable to respond and giving the Applicant information on applying to the Commissioner. The Applicant did not receive a response to his requirement for review.
6. On 18 January 2023, the Applicant wrote to the Commissioner, stating that he 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. The enforcement provisions of FOISA apply to the enforcement of the EIRs, subject to specified modifications – see regulation 17.

7. 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

8. 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 23 January 2023.
9. The Commissioner received submissions from the Authority on 6 February 2023.
10. 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 Transport Scotland](#)<sup>1</sup>, 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 the EIRs.
11. The Authority acknowledged that it had not responded to the Applicant's information request and requirement for review on time.
12. It explained the factors that contributed to this failure related to restrictions due to COVID-19, the impact of the cyber-attack against the Authority on 24 December 2020, resource constraints that delayed the progression of the response and technical issues in accessing the information in order to respond to the request.
13. 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.
14. It is a matter of fact that the Authority 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.
15. 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.
16. The Authority provided a partial response to the requirement for review on 18 January 2023, with an apology for the delay, advising the Applicant that it was continuing to work towards providing a full response.
17. 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 and regulation 16(4) of the EIRs.

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<sup>1</sup> <https://www.itspublicknowledge.info/decision-2182007>

18. The remainder of section 21 and regulation 16 set out the requirements to be followed by a Scottish public authority in carrying out a review. As only a partial review was carried out in this case, the Commissioner finds that the Authority failed to discharge these requirements: he now requires a full review to be carried out in accordance with section 21 and regulation 16.

## **Decision**

The Commissioner finds that the Authority failed to comply with Part 1 of the Freedom of Information (Scotland) Act 2002 (FOISA) and with the Environmental Information (Scotland) Regulations 2004 (the EIRs) 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 and regulations 5(2) and 16(4) of the EIRs. The Commissioner requires the Authority to respond to the remainder of the request, by **29 March 2023**.

## **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.

**Euan McCulloch**  
**Deputy Head of Enforcement**

**15 February 2023**