

# Decision Notice

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## Decision 086/2019: Mr B and The Scottish Ministers

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### **Kelp harvesting: failure to respond within statutory timescales**

Reference No: 201900676

Decision Date: 28 May 2019



Scottish Information  
Commissioner

## Summary

On 21 September 2018, Mr B asked the Scottish Ministers (the Ministers) for information about kelp harvesting. This decision finds that the Ministers failed to respond to both the request and the requirement for review within the timescales allowed by the Freedom of Information (Scotland) Act 2002 (FOISA) and the Environmental Information (Scotland) Regulations 2004 (the EIRs).

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

## Background

Date	Action
21 September 2018	Mr B made an information request to the Ministers.
6 March 2019	The Ministers responded to the information request.
8 March 2019	Mr B wrote to the Ministers, requiring a review of their decision.
	Mr B did not receive a response to his requirement for review.
24 April 2019	Mr B wrote to the Commissioner's Office, stating that he was dissatisfied with the Ministers' 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.
3 May 2019	The Ministers were notified in writing that an application had been received from Mr B and were invited to comment on the application.
20 May 2019	The Commissioner received submissions from the Ministers. These submissions are considered below.

## Commissioner's analysis and findings

1. 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*<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 EIRs.
2. 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

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

subject to qualifications which are not relevant in this case. The same timescale is laid down by regulation 5(2)(a) of the EIRs.

3. It is a matter of fact that the Ministers did not provide a response to Mr B'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.
4. 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
5. It is a matter of fact that the Ministers did not provide a response to Mr B'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.
6. 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.
7. The Ministers have explained to the Commissioner that administrative errors led to the delay in issuing a response and to the review request being overlooked.
8. The Commissioner requires the Ministers to issue a response to the requirement for review, and recommends that the Ministers consider whether it would be appropriate to apologise to Mr B for their failure to comply. The time taken to respond to the original request, in particular, was wholly unacceptable.

## Decision

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The Commissioner finds that the Scottish Ministers (the Ministers) failed to comply with Part 1 of the Freedom of Information (Scotland) Act 2002 (FOISA) and the Environmental Information (Scotland) Regulations 2004 (the EIRs) in responding to the information request made by Mr B.

The Ministers failed to respond to the request for information within 20 working days. In doing so, they failed to comply with section 10(1) of FOISA and regulation 5(2) of the EIRs.

The Ministers also failed to respond to requirement for review within the timescales laid down by sections 21(1) of FOISA and regulation 16(4) of the EIRs.

The Commissioner requires the Ministers to issue a review, by **12 July 2019**.

## **Appeal**

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Should either Mr B or the 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**

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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.

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

**28 May 2019**

**Scottish Information Commissioner**

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