



# Freedom of Information (Scotland) Act 2002

2002 asp 13

## PART 4

### ENFORCEMENT

#### 47 Application for decision by Commissioner

- (1) A person who is dissatisfied with—
- (a) a notice given under section 21(5) or (9); or
  - (b) the failure of a Scottish public authority to which a requirement for review was made to give such a notice,
- may make application to the Commissioner for a decision whether, in any respect specified in that application, the request for information to which the requirement relates has been dealt with in accordance with Part 1 of this Act.
- (2) An application under subsection (1) must—
- (a) be in writing or in another form which, by reason of its having some permanency, is capable of being used for subsequent reference (as, for example, a recording made on audio or video tape);
  - (b) state the name of the applicant and an address for correspondence; and
  - (c) specify—
    - (i) the request for information to which the requirement for review relates;
    - (ii) the matter which was specified under sub-paragraph (ii) of section 20(3)(c); and
    - (iii) the matter which gives rise to the dissatisfaction mentioned in subsection (1).
- (3) For the purposes of paragraph (a) of subsection (2) (and without prejudice to the generality of that paragraph), an application under that subsection is treated as made in writing where the text of the application is as mentioned in paragraphs (a) to (c) of section 8(2).

- (4) Subject to subsection (5), an application to the Commissioner under subsection (1) must be made—
- (a) where the application concerns a matter mentioned in paragraph (a) of subsection (1), before the expiry of six months after the date of receipt by the applicant of the notice complained of; or
  - (b) where the application concerns a matter mentioned in paragraph (b) of that subsection, before the expiry of six months after the period allowed in section 21(1) for complying with a requirement for review has elapsed.
- (5) The Commissioner may consider an application under subsection (1) made after the expiry of the time allowed by subsection (4) for the making of that application if, in the opinion of the Commissioner, it is appropriate to do so.
- (6) The Scottish Ministers may by regulations provide—
- (a) that a paragraph of subsection (4) is to have effect as if the reference in that paragraph to six months were a reference to such other period of months (being a period of not less than six months) as is specified in (or determined in accordance with) the regulations; and
  - (b) that subsection (5) is to have effect accordingly.
- (7) Regulations under subsection (6) may—
- (a) prescribe different periods of months in relation to different cases; and
  - (b) confer a discretion on the Commissioner.
- (8) This section is subject to section 48.

#### **48 When application excluded**

No application may be made to the Commissioner for a decision under section 47(1) as respects a request for review made to—

- (a) the Commissioner;
- (b) a procurator fiscal; or
- (c) the Lord Advocate, to the extent that the information requested is held by the Lord Advocate as head of the systems of criminal prosecution and investigation of deaths in Scotland.

#### **49 Commissioner's decision**

- (1) The Commissioner must make a decision in relation to an application made in accordance with section 47(1) which is not excluded by section 48 unless—
- (a) in the opinion of the Commissioner, the application is frivolous or vexatious; or
  - (b) in the opinion of the Commissioner, the application appears to have been withdrawn or abandoned.
- (2) In a case where the Commissioner determines that subsection (1) does not require a decision to be made, that officer must give the applicant and the Scottish public authority in question notice in writing within one month of receipt of the application, or within such other period as is reasonable in the circumstances, specifying—
- (a) that no decision falls to be made in relation to the application; and
  - (b) the reasons why that is the case.

- (3) In any other case, the Commissioner must—
  - (a) give that authority notice in writing of the application and invite its comments; and
  - (b) if no settlement has in the meantime been effected, reach a decision on the application before the expiry of four months after receiving it, or before the expiry of such other period as is reasonable in the circumstances.
- (4) The Commissioner may endeavour to effect a settlement between the applicant and that authority before the expiry of the period allowed by subsection (3) for reaching a decision on the application.
- (5) The Commissioner must give the applicant and that authority, within the time allowed by subsection (3), notice in writing (referred to in this Act as a “decision notice”) of any decision under paragraph (b) of that subsection.
- (6) Where the Commissioner decides that that authority has not dealt with a request for information in accordance with Part 1 of this Act, the notice under subsection (5) must specify—
  - (a) the provision of that Part with which the authority has failed to comply and the respect in which it has so failed;
  - (b) the steps which, in the opinion of the Commissioner, the authority must take to comply with the provision; and
  - (c) the time within which those steps must be taken.
- (7) The time specified under subsection (6)(c) must not expire before the end of the period within which an appeal may be brought under section 56 against the decision of the Commissioner and, if such an appeal is brought, no step which is affected by the appeal need be taken before the cause is finally determined.
- (8) A notice under subsection (2) or (5) must contain particulars of the right of appeal conferred by section 56.
- (9) This section is subject to section 52.

## **50 Information notices**

- (1) Where the Commissioner—
  - (a) has received an application under section 47(1); or
  - (b) reasonably requires information—
    - (i) for the purpose of determining whether a Scottish public authority has complied or is complying with the provisions of this Act; or
    - (ii) for the purpose of determining whether the practice of a Scottish public authority conforms with the code of practice issued under section 60 or 61,

that officer may give the authority notice in writing (referred to in this Act as “an information notice”) requiring it, within such time as is specified in the notice, to give the officer, in such form as may be so specified, such information relating to the application, to compliance with this Act or to conformity with the code of practice as is so specified.
- (2) An information notice must contain—

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*Status: This is the original version (as it was originally enacted).*

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- (a) in a case mentioned in paragraph (a) of subsection (1) a statement that the Commissioner has received an application under section 47(1); or
  - (b) in a case mentioned in paragraph (b) of that subsection, a statement of—
    - (i) the purpose mentioned in that paragraph for which that officer regards the specified information as relevant;
    - (ii) the officer’s reasons for so regarding the information; and
    - (iii) the time within which the information is to be given.
- (3) An information notice must contain also particulars of the right of appeal conferred by section 56.
- (4) The time specified under subsection (2)(b)(iii) in an information notice must not expire before the end of the period within which an appeal may be brought under section 56 against the notice; and, if such an appeal is brought, the information need not be given pending the determination or withdrawal of the appeal.
- (5) A Scottish public authority is not obliged by virtue of this section to give the Commissioner information in respect of—
- (a) a communication between professional legal adviser and client in connection with the giving of legal advice to the client with respect to that client’s obligations under this Act; or
  - (b) a communication between professional legal adviser and client, or between such adviser or client and another person, made in connection with or in contemplation of proceedings under or arising out of this Act and for the purpose of such proceedings.
- (6) In subsection (5), references to the client of a professional legal adviser include references to a person representing such client.
- (7) Subject to subsection (5), neither—
- (a) an obligation to maintain secrecy; nor
  - (b) any other restriction on disclosure,
- however arising or imposed, affects the duty to comply with an information notice.
- (8) The Commissioner may cancel an information notice by notice in writing given to the authority.
- (9) In this section, “information” includes unrecorded information.

## **51 Enforcement notices**

- (1) If the Commissioner is satisfied that a Scottish public authority has failed to comply with a provision of Part 1 of this Act, the Commissioner may give the authority a notice (referred to in this Act as “an enforcement notice”) requiring the authority to take, within such time as is specified in the notice, such steps as are so specified for so complying.
- (2) An enforcement notice must contain—
- (a) a statement of the provision with which the Commissioner is satisfied that the authority has failed to comply and the respect in which it has not done so; and
  - (b) particulars of the right of appeal conferred by section 56.
- (3) The time specified under subsection (1) must not expire before the end of the period within which an appeal may be brought under section 56 against the notice and, if

such an appeal is brought, the notice need not be complied with before the cause is finally determined.

- (4) The Commissioner may cancel an enforcement notice by notice in writing given to the authority.
- (5) This section is subject to section 52.

## **52 Exception from duty to comply with certain notices**

- (1) This section applies to a decision notice or enforcement notice which—
  - (a) is given to the Scottish Administration; and
  - (b) relates to a perceived failure, in respect of one or more requests for information, to comply with section 1(1) in respect of information which, by virtue of section 29, 31(1), 32(1)(b), 34, 36(1) or 41(b), is exempt information.
- (2) A decision notice or enforcement notice to which this section applies ceases to have effect, in so far as it relates to the perceived failure, if, not later than the thirtieth working day following the effective date, the First Minister of the Scottish Executive, after consulting the other members of that Executive, signs and gives the Commissioner a certificate stating that the First Minister has on reasonable grounds formed, after such consultation, the opinion both that—
  - (a) there was no such failure; and
  - (b) the information requested is of exceptional sensitivity.
- (3) The First Minister is, by not later than the tenth working day after such a certificate—
  - (a) is given, to lay a copy of it before the Parliament; and
  - (b) is given in relation to a decision notice, to inform the person to whose application the notice relates of the reasons for the opinion formed,except that the First Minister is not obliged to provide information under paragraph (b) if, or to the extent that, compliance with that paragraph would necessitate the disclosure of exempt information.
- (4) In subsection (2), “the effective date”, in relation to a notice, means—
  - (a) the day on which the notice was given to the Scottish Administration; or
  - (b) where an appeal under section 56 is brought, the day on which the cause is finally determined.

## **53 Failure to comply with notice**

- (1) If a Scottish public authority has failed to comply with—
  - (a) so much of a notice given to it by the Commissioner under subsection (5) of section 49 as, by virtue of subsection (6)(b) of that section, requires steps to be taken by the authority;
  - (b) an information notice; or
  - (c) an enforcement notice,the Commissioner may certify in writing to the court that the authority has failed to comply with the notice.
- (2) For the purposes of this section, a Scottish public authority which, in purported compliance with an information notice—
  - (a) makes a statement which it knows to be false in a material respect; or

(b) recklessly makes a statement which is false in a material respect, is to be taken to have failed to comply with the notice.

(3) Where a failure to comply is certified under subsection (1), the court may inquire into the matter and, after hearing any witness who may be produced against or on behalf of the authority, and after hearing any statement that may be offered in defence, may deal with the authority as if it had committed a contempt of court.

(4) In this section, “the court” means the Court of Session.

#### **54 Powers of entry and inspection**

Schedule 3, which makes provision as to powers of entry and inspection, has effect.

#### **55 No civil right of action against Scottish public authority**

(1) This Act does not confer a right of action in civil proceedings in respect of failure by a Scottish public authority to comply with a duty imposed by, under or by virtue of this Act.

(2) Subsection (1) does not affect the powers of the Commissioner under section 53(1).

#### **56 Appeal against notices under Part 4**

An appeal, on a point of law, to the Court of Session may be made—

- (a) against a decision by the Commissioner under subsection (2) of section 49, by the person who applied for that decision;
- (b) against a decision by the Commissioner under subsection (3)(b) of that section—
  - (i) by that person; or
  - (ii) by the Scottish public authority in respect of which the decision was made; or
- (c) against the decision which resulted in the giving of—
  - (i) an information notice; or
  - (ii) an enforcement notice,to a Scottish public authority, by that authority.