

# Decision Notice



Decision 010/2010 Mr H and the Scottish Prison Service

Failure to respond to request for review

Reference No: 200902153

Decision Date: 26 January 2010

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**Kevin Dunion**

Scottish Information Commissioner

Kinburn Castle  
Doubledykes Road  
St Andrews KY16 9DS  
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## Summary

This decision considers whether the Scottish Prison Service (the SPS) complied with the technical requirements of the Freedom of Information (Scotland) Act 2002 (FOISA) in responding to an information request made by Mr H.

## Background

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1. On 11 October 2009, Mr H wrote to the SPS requesting certain information.
2. The SPS responded on 28 October 2009, providing advice on FOISA and the Data Protection Act 1998 and giving its response to all five questions.
3. On 6 November 2009, Mr H wrote to the SPS requesting a review of its decision. In particular, Mr H drew the SPS's attention to those elements of its response he believed were inadequate or inaccurate.
4. On 15 December 2009, not having received a response to his request for review, Mr H wrote to the Commissioner's Office, stating that he was dissatisfied with that failure and applying to the Commissioner for a decision in terms of section 47(1) of FOISA.
5. The application was validated by establishing that Mr H had made a request for information to a Scottish public authority and had applied to the Commissioner for a decision only after asking the authority to review its response to that request. The case was then allocated to an investigating officer.

## Investigation

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6. The SPS is an executive agency of the Scottish Ministers ("the Ministers") and, in line with agreed procedures, on 6 January 2010 the Ministers were notified in writing that an application had been received from Mr H and invited to comment on the application.



7. On the 19 January 2010, the Ministers advised the Commissioner that the SPS had issued a response to Mr H's request for review on 4 December 2009. It acknowledged, however, with regret, that Mr H did not receive that response until 21 December 2009. A letter to Mr H from the Deputy Governor of the Prison dated 23 December 2009 (following his receipt of the review response and a subsequent complaint) explained that the response had been misfiled rather than being transmitted to him (through the Prison's internal systems). This letter provided Mr H with an apology.
8. The Ministers emphasised that the SPS had rigorous systems in place for the effective handling of Freedom of Information requests and hope the delay in Mr H's receipt of his response would be accepted as simply a matter of human administrative error. They also submitted that they did not consider there to have been any breach of the requirements of FOISA.
9. Mr H confirmed to the investigating officer that he had received the review response on 21 December 2009. He continued to require a decision from the Commissioner.

### **Commissioner's analysis and findings**

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10. Section 21(1) of FOISA gives authorities a maximum of 20 working days following the date of receipt of the requirement to comply with a requirement for review, subject to exceptions which are not relevant in this case.
11. Section 21(5) of FOISA requires the authority to give the applicant notice in writing of the outcome of the review, within the time allowed by section 21(1) for complying with the requirement for review. Section 74(1)(a) provides that any reference in FOISA to a notice being given is to be construed as a reference to that notice being delivered or posted. If the authority chooses to deliver the notice to the applicant (as was the case here, given that it was being communicated to him through the internal systems of the Prison), therefore, it must do so within the 20 working days allowed by section 21(1).
12. In this case, the notice in question was not delivered to Mr H until 21 December 2009. According to the Ministers, the requirement for review was received by the SPS on 9 November 2009, on which basis Mr H should have received notice of the outcome on 7 December 2009. Given that the notice was dated 4 December 2009 and having taken account of the SPS's submissions in this connection, the Commissioner accepts that it was intended to be delivered within the requisite timescale. However, it was not received by Mr H until some considerable time later. While the Commissioner accepts the likelihood that this was, as the Ministers have submitted, a matter of administrative error, it does not follow that no breach of Part 1 of FOISA occurred as a result.



13. In the circumstances of this case, therefore, the Commissioner finds that the SPS failed to comply with the statutory timescale for responding to Mr H's requirement for review, as laid down in section 21(1) of FOISA. He notes, however, that the SPS has since responded to the requirement and apologised for its earlier failure to do so.

## DECISION

The Commissioner finds that the Scottish Prison Service failed to comply with Part 1 of the Freedom of Information (Scotland) Act 2002 (FOISA), in particular by failing to respond to Mr H's requirement for review within the timescale laid down by section 21(1) of FOISA.

Given that Mr H now has the response to his requirement for review, the Commissioner does not require the Scottish Prison Service to take any action in respect of this failure in response to this particular application.

## Appeal

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Should either Mr H or the Scottish Prison Service wish to appeal against this decision, there is an 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 notice.

**Euan McCulloch**  
**Deputy Head of Enforcement**  
**26 January 2010**



## Appendix

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### Relevant statutory provisions

#### Freedom of Information (Scotland) Act 2002

##### 21 Review by Scottish public authority

- (1) Subject to subsection (2), a Scottish public authority receiving a requirement for review must (unless that requirement is withdrawn or is as mentioned in subsection (8)) comply promptly; and in any event by not later than the twentieth working day after receipt by it of the requirement.

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- (4) The authority may, as respects the request for information to which the requirement relates-
- (a) confirm a decision complained of, with or without such modifications as it considers appropriate;
  - (b) substitute for any such decision a different decision; or
  - (c) reach a decision, where the complaint is that no decision had been reached.
- (5) Within the time allowed by subsection (1) for complying with the requirement for review, the authority must give the applicant notice in writing of what it has done under subsection (4) and a statement of its reasons for so doing.

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##### 74 Giving of notice etc.

- (1) In this Act, any reference to-
- (a) a notice being given is to be construed as a reference to it being-
    - (i) delivered; or
    - (ii) posted; and

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