

# Decision Notice



Decision 035/2010 Mr Allan Rae and the Scottish Ministers

Failure to respond to request and request for review

Reference No: 200901874  
Decision Date: 4 March 2010

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**Kevin Dunion**  
Scottish Information Commissioner

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## Summary

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

## Background

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1. On 23 July 2009, Mr Rae wrote to the Ministers making four requests for information (within a single email) regarding planning for the contingency of Scotland's withdrawal from the Union. Mr Rae requested correspondence between the Ministers or officials and three energy companies on this subject. He also requested information as to the number and cost of civil servants undertaking work on such contingency planning, and the amount of budgetary resource allocated to supporting the civil servants' work.
2. Mr Rae did not receive a response to his request and, on 18 September 2009, he wrote to the Ministers asking that they review their failure to respond to his request.
3. Mr Rae did not receive a response to his request for review and, on 25 October 2009, wrote to the Commissioner stating that he was dissatisfied with the Ministers' failure to respond to his request for information and requirement for review and applying for a decision in terms of section 47(1) of FOISA.
4. The application was validated by establishing that Mr Rae 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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5. On 16 November 2009, the Ministers were notified in writing that an application had been received from Mr Rae and were invited to comment on the application as required by section 49(3)(a) of FOISA. The Ministers were also provided with a copy of Mr Rae's information request and requirement for review.



6. The Ministers responded on 24 November 2009 explaining that, having conducted various searches which they itemised, no trace had been found by them of Mr Rae's request or of his requirement for review. The Ministers concluded that they had not received the emails containing Mr Rae's requests and so could not respond to these.
7. However, Mr Rae subsequently confirmed that he had received electronic receipts for both of his emails to the Ministers. On 11 December 2009, the Ministers confirmed that, having conducted further searches of deleted items, they had established that Mr Rae's request and requirement for review had been received and were subsequently deleted.
8. The Ministers indicated that the team which handled this work had no record of what happened to that correspondence, and could not recall who dealt with the requests, nor to whom (if anyone) they had been passed on to deal with. They noted, however, that the mailbox to which Mr Rae directed his requests was not intended for routine correspondence or freedom of information requests, but was specifically for Ministerial correspondence.
9. The Ministers apologised for what appeared to them to be a case of human error resulting in Mr Rae's request and requirement for review being lost in the system.
10. In their letter of 24 November 2009, the Ministers indicated to the Commissioner that (although at that stage they did not believe that they had actually received Mr Rae's information requests) they did not believe that the three requests for correspondence made by Mr Rae were valid information requests. This conclusion had been reached following the Ministers' consideration of comments contained in the Court of Session Opinion in the case of Glasgow City Council and Dundee City Council v Scottish Information Commissioner [2009] CSIH 73, which was issued in September 2009.
11. The Ministers repeated this point in their email of 11 December 2009. At this stage, they indicated that they would forward the fourth request (for staffing and cost information) to the relevant policy team for action.
12. The Commissioner subsequently corresponded and met with the Ministers to discuss the validity of a number of information requests (including Mr Rae's) that the Ministers had judged to be invalid in the light of the Court of Session's comments.
13. The Ministers subsequently reconsidered their position with respect to Mr Rae's information requests. They notified the Commissioner on 11 February 2010 that they no longer considered Mr Rae's requests to be invalid.

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

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14. The Commissioner has first of all noted and would agree with the Ministers' conclusion that each of Mr Rae's information requests were valid.



15. Section 10(1) of FOISA gives Scottish public authorities a maximum of 20 working days following the date of receipt of the request, or subsequent clarification of that request, to comply with a request for information, subject to certain exceptions which are not relevant in this case.
16. The Ministers did not provide a response to Mr Rae's information request of 23 July 2009 within that timescale.
17. The Commissioner therefore finds that the Ministers failed to respond to Mr Rae's request for information of 23 July 2009 within the 20 working days allowed under section 10(1) of FOISA.
18. Section 21(1) of FOISA gives public authorities a maximum of 20 working days following the date of receipt of the requirement to comply with a requirement for a review, again subject to exceptions which are not relevant to this case.
19. The Ministers did not provide a response to Mr Rae's requirement for review of 18 September 2009 within that timescale.
20. The Commissioner therefore finds that the Ministers failed to respond to Mr Rae's requirement for review of 18 September 2009 within the 20 working days allowed under section 21(1) of FOISA.
21. Since the Ministers have not yet responded to either Mr Rae's request or his subsequent requirement for review, the Commissioner requires the Ministers to conduct a review and to reach a decision on Mr Rae's request in terms of section 21(4)(c) of FOISA and to notify Mr Rae of its outcome in terms of section 21(5) of FOISA.

## DECISION

The Commissioner finds that the Scottish Ministers (the Ministers) failed to comply with Part 1 of the Freedom of Information (Scotland) Act 2002 (FOISA) in dealing with the information request made by Mr Rae, in particular by failing to respond to Mr Rae's request for information and requirement for review within the respective timescales laid down by sections 10(1) and 21(1) of FOISA.

The Commissioner therefore requires the Ministers to conduct a review (which should be in terms of section 21(4)(c) of FOISA) and notify Mr Rae of the outcome of the review by 19 April 2010.



## Appeal

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Should either Mr Rae or the Ministers 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.

**Margaret Keyse**  
**Head of Enforcement**  
**4 March 2010**



## Appendix

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### Relevant statutory provisions

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

##### 1 General entitlement

- (1) A person who requests information from a Scottish public authority which holds it is entitled to be given it by the authority.

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##### 10 Time for compliance

- (1) Subject to subsections (2) and (3), a Scottish public authority receiving a request which requires it to comply with section 1(1) must comply promptly; and in any event by not later than the twentieth working day after-
  - (a) in a case other than that mentioned in paragraph (b), the receipt by the authority of the request; or
  - (b) in a case where section 1(3) applies, the receipt by it of the further information.

...

##### 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.

...

- (4) The authority may, as respects the request for information to which the requirement relates-

...

- (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.

Decision 035/2010  
Mr Allan Rae  
and the Scottish Ministers

