

# Decision Notice



Decision 100/2009 Mr Tom Gordon and the Scottish Ministers

Failure to respond to three requests within the required timescale

Reference Nos: 200900863, 200900865 and 200900866

Decision Date: 11 August 2009

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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 the information requests made by Mr Tom Gordon.

## Background

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1. On 25 January 2009, Mr Gordon sent three separate email requests to the Ministers, each asking for copies of correspondence between a particular Minister or their office, and another named individual or their office since May 2007.
2. The Ministers did not respond to these requests. On 25 March 2009, Mr Gordon emailed the Ministers requesting a review of their decisions, and asking them to supply the information requested in full.
3. The Ministers wrote to Mr Gordon on 30 March 2009, stating that a review had been carried out. They apologised for the delay in responding to his information requests, and acknowledged that there had been a breach of the timescales required by FOISA. The Ministers stated that they intended to provide a response to Mr Gordon's information requests by 6 April 2009 at the latest.
4. Mr Gordon did not receive a substantive response to his information requests and, on 2 May 2009, wrote to the Commissioner, stating that he was dissatisfied with the response he had received and applying to the Commissioner for a decision in terms of section 47(1) of FOISA.
5. The applications were validated by establishing that Mr Gordon had made three requests for information to a Scottish public authority and had applied to the Commissioner for decisions only after asking the authority to review its response to each of the requests. The cases were conjoined for the purposes of investigation and decision, and then allocated to an investigating officer.



## Investigation

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6. On 13 May 2009, the Ministers were notified in writing that three applications had been received from Mr Gordon and were invited to comment on these applications as required by section 49(3)(a) of FOISA.
7. The Ministers responded on 27 May 2009. In their response, the Ministers stated that they are aware that the deadlines for responding to requests and review requests are statutory and that they will always endeavour to meet them when possible.
8. The Ministers explained that their failure to respond to Mr Gordon within the statutory timescale was due to an influx of requests to the private ministerial offices and an increased volume of work in the Cabinet portfolio as a whole, along with various staffing difficulties in the offices in question. They offered apologies for the delays which the pressures of work had created, but were unable to give a definite undertaking as to when they would be able to provide Mr Gordon with a response.
9. The investigating officer wrote to the Ministers again on 29 May 2009, noting that they had failed to provide a response to Mr Gordon's information requests and that, although the Ministers' letter of 30 March 2009 had indicated that a review had been conducted, this process did not appear to have produced any of the possible outcomes specified in section 21(4) of FOISA.
10. The letter pointed out that section 21(4) of FOISA sets out the options for an authority conducting a review, and that, where no response has been made (as in Mr Gordon's case), the only one available would be to provide the response that should have been provided within the initial 20 working day period.
11. The Ministers responded on 1 June 2009, disagreeing with the Commissioner's interpretation of section 21 of FOISA, and maintaining that their review (the outcome of which was specified in their letter of 30 March 2009) constituted a valid review in terms of FOISA. The Ministers referred the Commissioner to previous arguments in which they had set out legal and practical reasons why they were of the opinion that their response to the review request was valid.
12. In the light of the different interpretation of the provisions of section 21 identified above, the Ministers and the Commissioner have engaged in further discussion and correspondence on this subject, which is relevant to his consideration of this case. These exchanges have also been taken into consideration in what follows.



## Commissioner's analysis and findings

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13. Section 10(1) of FOISA gives Scottish public authorities a maximum of 20 working days from the day following receipt of the request to comply with a request for information subject to certain exceptions which are not relevant in this case.
14. The Ministers failed to respond to Mr Gordon's requests for information within that period. The Commissioner therefore finds that the Ministers failed to respond to Mr Gordon's requests for information of 25 January 2009 within the 20 working days allowed by section 10(1) of FOISA.
15. 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, again subject to exceptions which are not relevant in this case.
16. Section 21(4) of FOISA states that, on receipt of a requirement for review, an authority may do the following in respect of the information request to which it 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.
17. The Commissioner's view is that, where no response has been made to an information request, the first two options are unavailable to the authority, and so the only appropriate review outcome in a case such as this is for the authority to reach a decision where none has been reached before, in line with section 21(4)(c) of FOISA.
18. The Commissioner has considered the content of the letter sent to Mr Gordon by the Ministers on 30 March 2009, and has noted that the Ministers' review did not do any of the things listed in section 21(4) of FOISA. Instead, it simply acknowledged and apologised for the delay in responding to the request and advised that a response would be forthcoming by 6 April 2009 at the latest. The Commissioner is unable to accept that this response met the requirements of section 21(4) of FOISA.
19. The Ministers argued that, since section 21(4) of FOISA uses the word "*may*" when referring to the three options available, the options listed therein are not an exhaustive list of the things an authority may do when conducting a review.



20. The Commissioner has considered this point. However, he is unable to accept this interpretation. In particular, he has noted the terms of section 21(5) of FOISA, which states that the authority must give the applicant notice in writing of what it has done under section 21(4) and a statement of its reasons for so doing. He considers that this supports his understanding that section 21(4) obliges an authority to conduct a review which produces one of the outcomes therein.
21. The Commissioner therefore finds that the Ministers failed to carry out a review in line with section 21 of FOISA, and, in particular, sections 21(4) and (5) of FOISA, within the 20 working days allowed by section 21(1) of FOISA.
22. The Commissioner acknowledges that the offices of Ministers are busy, working on a range of important issues at any particular time. He recognises that dealing with FOI requests at the same time will be challenging.
23. However, the Ministers have highlighted the difficulties of Ministerial offices complying with the requirements of FOISA in previous cases. In paragraph 13 of *Decision 062/2009 Mr Tom Gordon and the Scottish Ministers*, which dealt with a request for information to the First Minister's Office, the Commissioner responded to arguments very similar to those made in this case, noting that FOISA should be seen as a core responsibility of public authorities.
24. The Commissioner notes the explanation and apologies given by the Ministers. However given that no substantive responses have yet been issued to Mr Gordon, the Commissioner finds it appropriate to issue a decision notice which requires the Council to respond to Mr Gordon's requests for review.

## 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 requests made by Mr Gordon, in particular by failing to respond to Mr Gordon's requests for information within the timescales laid down by section 10(1) of FOISA and by failing to carry out a review in line with sections 21(4) and (5) of FOISA within the timescales laid down by section 21(1) of FOISA.

The Commissioner therefore requires the Ministers to respond to Mr Gordon's requests for review in line with section 21(4)(c) of FOISA by 25 September 2009.



## **Appeal**

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Should either Mr Gordon 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.

**George Will**  
**Acting Deputy Head of Enforcement**  
**11 August 2009**



## 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.

##### 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

...

##### 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-
  - (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.

Decision 100/2009  
Mr Tom Gordon  
and the Scottish Ministers

