

# Decision Notice



Decision 182/2012 Mr X and the Scottish Prison Service

Policy review and impact assessment

Reference No: 201201419

Decision Date: 6 November 2012

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**Rosemary Agnew**

Scottish Information Commissioner

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## Summary

Mr X asked the Scottish Prison Service (SPS) for an impact assessment referred to in a Governors & Managers Action note (GMA) and for information about the review of that GMA. The SPS advised Mr X that it did not hold the requested information.

Following an investigation, the Commissioner found that the SPS had partially failed to deal with Mr X's request for information in accordance with Part 1 of FOISA, specifically in not responding to Mr X's request and requirement for review within 20 working days. However, the Commissioner found that the SPS complied with Part 1 by advising Mr X that it did not hold any information covered by his request.

## Relevant statutory provisions

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Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) and (4) (General entitlement); 10(1)(a) (Time for compliance); 17(1) (Notice that information is not held); 21(1) (Review by Scottish public authority)

The full text of each of the statutory provisions cited above is reproduced in the Appendix to this decision. The Appendix forms part of this decision.

## Background

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1. On 30 March 2012, Mr X asked the SPS for:
  - (a) ".....all such information as is held by the SPS pursuant to the 'Impact Assessment' to which reference is made in para 6 of the GMA." [Governors & Managers: Action 3A/12]
  - (b) "...all and any information held by the SPS pursuant to the policy review to be completed by 18 March [2012]."
2. On 11 April 2012, the SPS provided a response to the other matters raised by Mr X, but did not respond to his request for information.
3. On 17 May 2012, Mr X wrote to the SPS requesting a review of its decision, as he had not received a response to his request.



4. The SPS notified Mr X of the outcome of its review on 20 June 2012. It advised Mr X that the impact assessment (to which his request referred) is carried out in conjunction with the writing of the policy and is not a separate document; therefore, it did not hold the information. With regard to the information held by the SPS and relating to the policy review, he was advised that this information was not held either. The SPS explained that there was a typing error within this GMA and the reference to the review of the policy should have read “to have been completed by 18 March 2013”, not “2012”.
5. On 23 July 2012, Mr X wrote to the Commissioner, stating that he was dissatisfied with the outcome of the SPS’s review and applying to the Commissioner for a decision in terms of section 47(1) of FOISA.
6. The application was validated by establishing that Mr X 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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7. The SPS is an agency of the Scottish Ministers (the Ministers) and, in line with agreed procedures, the Ministers were notified in writing that an application had been received from Mr X and invited to comment on the application. Subsequent references to submissions requested and received from the SPS in this decision are references to those sought and received from the Ministers' Freedom of Information (FOI) Unit on behalf of the SPS.
8. The investigating officer contacted the SPS on 8 August 2012, giving it an opportunity to provide comments on the application (as required by section 49(3)(a) of FOISA) and asking it to respond to specific questions. The SPS was asked to provide details of the searches it had undertaken to determine whether it held any information falling within the scope of the request. The SPS was also asked to provide a copy of the previous impact assessment and details about the review of policies, following their implementation.
9. The SPS responded to the investigating officer’s questions and provided the information requested.
10. The relevant submissions received from both the SPS and Mr X will be considered fully in the Commissioner’s analysis and findings below.



## Commissioner's analysis and findings

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11. In coming to a decision on this matter, the Commissioner has considered all of the submissions made to her by both Mr X and the SPS and is satisfied that no matter of relevance has been overlooked.

### Section 17 - Information not held

12. In terms of section 1(4) of FOISA, the information to be provided in response to a request made under section 1(1) is, subject to limited provisions which are not relevant here, that held at the time the request is received.
13. Where a Scottish public authority receives a request for information that it does not hold, it must, in line with section 17(1) of FOISA, notify the applicant that it does not hold the information.
14. In order to determine whether the SPS dealt with Mr X's request correctly, the Commissioner must be satisfied as to whether, at the time it received Mr X's request, it held any information covered by his request.

### *Impact Assessment*

15. In its submissions, the SPS explained that the Impact Assessment for GMA 3A/12 was completed on 19 June 2012, some time after Mr X's request had been received.
16. The SPS went on to explain that whilst it is the case that the SPS impact assesses policies as they are being reviewed or created, the practice of committing the assessment to a permanent record is inconsistent and there is currently no set timescale for this work to be completed. The SPS advised that it was taking steps to address this issue.
17. The SPS considered that it is best practice to impact assess policies as they are being reviewed or created, as this allows the policy to be shaped while it is being developed, as opposed to being reviewed again due to issues being identified in the impact assessment. To support this position, the SPS also provided a copy of a guide to conducting practical impact assessments.
18. The SPS advised that it had not completed the Impact Assessment at the date of Mr X's request and, following a reasonable search, the Impact Assessment was not located. The SPS commented that occasionally, in the past, policies have not been impact assessed, and therefore the fact that one could not be found was not considered to be unexpected.
19. The Commissioner has considered both the guidance document, the completed Impact Assessment and the submissions provided by the SPS, and is satisfied that the Impact Assessment was completed after Mr X's request was received.



20. As the Impact Assessment was not in existence at the date of Mr X's request, the Commissioner is satisfied that the SPS acted in accordance with Part 1 of FOISA by giving Mr X notice, in terms of section 17(1) of FOISA, that it did not hold any information pertaining to his request.

#### *GMA 3A/12 Policy Review*

21. In its submissions, the SPS explained that the previous version of the policy had been reviewed on two occasions over the past 18 months: GMA45A/11 (August 2011) was a policy review of GMA 12/11; and GMA 3A/12 (January 2012) was a policy review of GMA45A/11. These reviews were conducted within the timescale in GMA12/11, and the latest GMA (3A/12) will be reviewed by 18 March 2013.
22. The SPS had discussed the review date with the policy owner and stated that the date of 18 March 2012 was carried over in error from the previous versions of the GMA. The SPS commented that it did not make sense to review a policy within two months of the last review as there would be insufficient time to collate information and analysis to inform change, and stated that the given date of 18 March 2012 was an oversight.
23. The Commissioner has considered the previous and current versions of the GMA and has concluded that the date of 18 March 2012 was an error carried over from the previous versions of the GMA, and that the policy had not been reviewed or due for review in March 2012.
24. The Commissioner is therefore satisfied that the SPS acted in accordance with Part 1 of FOISA by giving Mr X notice, in terms of section 17, that they did not hold any information pertaining to his request.

#### **Time to respond**

25. Section 10(1) of FOISA allows Scottish public authorities a maximum of 20 working days after receipt of a request to comply with a request for information, subject to certain exceptions which are not relevant in this case.
26. Mr X made his information request by letter on 30 March 2012, but the SPS did not provide a response within 20 working days.
27. Section 21(1) of FOISA gives public authorities a maximum 20 working days following the date of receipt of the requirement to comply with the requirement for review, subject to exceptions which are not relevant to this case.
28. Mr X submitted a requirement for review to the SPS on 7 May 2012, but the SPS did not issue a review response until 20 June 2012.
29. In its submissions, the SPS explained that Mr X's initial request was made in the context of other general correspondence. The person who responded to the general correspondence did not immediately identify the request. The SPS acknowledged that there was a failure to process the request through the established mechanisms.



30. In relation to its delayed response to the requirement for review, the SPS apologised for this oversight.
31. The SPS submitted that the occurrence of such administrative errors can never be fully prevented. In the year to date, the SPS advised that it had complied with 93.4% of requests and 92.6% of requests for review within the statutory timescales.
32. The Commissioner has noted the SPS's explanation, but has concluded that it failed to comply with the timescales required by section 10(1) and 21(1) of FOISA.

## DECISION

The Commissioner finds that the Scottish Prison Service (SPS) partially complied with Part 1 of the Freedom of Information (Scotland) Act 2002 (FOISA) in responding to the information request made by Mr X.

The Commissioner finds that by notifying Mr X, in line with section 17(1) of FOISA, that it did not hold the requested information at the time of his request, the SPS complied with Part 1 of FOISA.

However, in failing to provide any response to Mr X's request and in not providing a response to his requirement for review within 20 working days, the Commissioner finds that the SPS failed to comply with sections 10(1) and 21(1) of FOISA.

Given that a response to Mr X's requirement for review was later provided to him, the Commissioner does not require the SPS to take any action in response to these failures.

## Appeal

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Should either Mr X 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.

**Margaret Keyse**  
**Head of Enforcement**  
**6 November 2012**



## 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.

...

- (4) The information to be given by the authority is that held by it at the time the request is received, except that, subject to subsection (5), any amendment or deletion which would have been made, regardless of the receipt of the request, between that time and the time it gives the information may be made before the information is given.

...

##### 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

...

##### 17 Notice that information is not held

- (1) Where-

- (a) a Scottish public authority receives a request which would require it either-

- (i) to comply with section 1(1); or  
(ii) to determine any question arising by virtue of paragraph (a) or (b) of section 2(1),

if it held the information to which the request relates; but

- (b) the authority does not hold that information,



it must, within the time allowed by or by virtue of section 10 for complying with the request, give the applicant notice in writing that it does not hold it.

...

## **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.

...