

# Assessment report



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<b>Scottish public authority:</b>	Scottish Prison Service
<b>Dates of on-site assessment:</b>	28 February and 1 March 2011
<b>Assessors from OSIC:</b>	Alistair Rennie and Claire Stephen
<b>Date of issue:</b>	2 June 2011

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## Executive summary and recommendations

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This report sets out the findings of an assessment of the Scottish Prison Service (the SPS), which was carried out by representatives of the Scottish Information Commissioner (the Commissioner) on 28 February and 1 March 2011.

The assessment considered all aspects of the SPS's handling of information requests in relation to compliance with the Freedom of information (Scotland) Act 2002 (FOISA), the Environmental Information (Scotland) Regulations (the EIRs) and the associated codes of practice.

In selecting the SPS for assessment the Commissioner had been mindful of applications he had received (and decisions he had made) in relation to the SPS's handling of requests for information. He was also keen to review the progress the SPS had made in relation to the internal review of its FOI procedures undertaken two years ago as a consequence of a particular decision the Commissioner issued in 2007<sup>1</sup>. As the SPS is an agency of the Scottish Government, the Commissioner also wished to consider the changes made to policies and procedures following the assessment of Transport Scotland<sup>2</sup> in early 2010. The combination of these factors provided the basis for this assessment.

In conducting this assessment, the assessors noted a positive attitude towards Freedom of Information (FOI). This was demonstrated in discussions with staff throughout the SPS. The assessors identified a number of areas of good practice in the SPS's procedures in dealing with requests for information, and (given the SPS's organisational structure) acknowledged the suitability of a "devolved" structure for handling requests for information. It was clear that the SPS had taken on board learning points from the Transport Scotland assessment and worked closely with the Scottish Government's central FOI Unit in developing its processes and addressing identified training needs.

The assessors also identified areas where the SPS's current practice was either not compliant with statutory requirements or fell short of good practice as set out in the codes of practice. These areas are discussed in detail within the body of this report, but a primary area for the SPS to address lies in the need to develop key members of staff with responsibility for responding to requests, to ensure that they are in a position to properly cite, reason and explain the application of a particular exemption / exception to a requestor when this is required (and ensure that the public interest test is considered where applicable). The other areas of concern noted by the assessors focused largely on administrative matters concerning the handling of requests for information, and this report details the recommendations proposed to allow the SPS to address these issues going forward.

In carrying out this assessment, the assessors noted the unique environment the SPS operates within and how this impacts on the type of requests it receives and from which groups of requestor.

The recommendations following the assessment of the SPS are set out in detail within the body of this report and are further summarised in tabular form in the "Conclusions and summary of recommendations" section at the end of the report.

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<sup>1</sup> <http://www.itspublicknowledge.info/UploadedFiles/Decision147-2007.pdf>

<sup>2</sup> <http://www.itspublicknowledge.info/uploadedfiles/AssessmentReportTransportScotland.pdf> & <http://www.itspublicknowledge.info/uploadedfiles/AssessmentActionPlanTransportScotland.pdf>



## Scope and objectives of assessment

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1. This report sets out the findings of an assessment of the Scottish Prison Service (the SPS) by representatives of the Scottish Information Commissioner (the Commissioner). The purpose of the assessment was to establish whether the SPS was complying with good practice in dealing with requests for information in terms of the **Freedom of Information (Scotland) Act 2002 (FOISA)**, the **Environmental Information (Scotland) Regulations 2004 (the EIRs)** and the associated codes of practice<sup>3</sup>, and to identify and make recommendations in relation to areas where procedure and practice were not in line with expected good practice. The assessment considered all aspects of the way in which the SPS handled information requests.
2. The SPS is an executive agency of the Scottish Ministers. It is not a public authority in its own right for the purposes of compliance with FOISA and the EIRs, but falls within the ambit of the Scottish Ministers, who are collectively a Scottish public authority, responsible for compliance by all of their agencies.
3. The Scottish Government's Freedom of Information Unit (the FOI Unit) provides guidance, training and support on FOISA and the EIRs to staff across the Scottish Government and its agencies. The FOI Unit also handles all applications to the Commissioner on behalf of the SPS.
4. The SPS has its own logging, monitoring and tracking systems in place for dealing with requests for information and subsequent requests for review made by requestors. As such, the FOI Unit is not involved in the day-to-day management of information requests made to the SPS.

## Assessment process

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5. The SPS was notified of the Commissioner's intention to carry out an assessment in a letter dated 7 April 2010. Alistair Rennie and Claire Stephen (the assessors) conducted the on-site part of the assessment on behalf of the Commissioner on 28 February and 1 March 2011. During these two days, they met the SPS members of staff noted below. As the SPS is an executive agency of the Scottish Ministers, a representative from the FOI Unit was present throughout the onsite assessment :
  - Chief Executive, SPS
  - Director Prisons, SPS
  - Head of Legal Services, SPS
  - Senior Legal Services Manager, SPS
  - Corporate Affairs Manager, SPS
  - Administration Manager, HMP Dumfries
  - Head of Operations, HMP Dumfries
  - Business Improvement Manager, HMP Glenochil
  - Residential Unit Manager, HMP Glenochil

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<sup>3</sup> The relevant Code of Practice is the Scottish Ministers' Code of Practice on the Discharge of Functions by Public Authorities Under the Freedom of Information (Scotland) Act 2002 the Environmental Information (Scotland) Regulations 2004 for Scottish Public Authorities (referred to in this report as the "section 60 and 62 Code of Practice"). It should be noted that the assessment did not assess compliance with the Freedom of Information (Scotland) Act Code of Practice on Records Management (commonly referred to as "the section 61 code").



- Community Integration Manager, SPS
  - Legal Services Officer, SPS
  - Prisoner Records Manager, SPS
  - Head of FOI Casework, FOI Unit, Scottish Government
6. In conducting the assessment, the assessors worked through a list of questions which had been prepared in advance of the on-site assessment, based on the responses received to the pre-assessment questionnaire and the policies and procedures the SPS had provided in advance of the assessment.
  7. The assessors also made reference to the assessment checklist published within the Commissioner's Investigations and Enforcement Procedures<sup>4</sup> to ensure that each relevant area of practice had been considered and appropriate evidence gathered.
  8. The assessors did not review in detail the SPS's publication scheme, which was last approved in May 2008 and is not due to be re-approved until May 2012. The assessors noted, however, that the scheme includes a schedule of charges in relation to environmental information.
  9. At the end of the assessment, a concluding meeting was held with the Chief Executive, Corporate Affairs Manager and the Head of FOI Casework, FOI Unit. This meeting provided an opportunity for the assessors to feed back on the key findings off the assessment. The feedback provided in that meeting is reflected and expanded upon in the points addressed below.

## Overview: culture and practice

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10. The SPS is legally required to deliver custodial services for all those sent by the courts. The purpose of the service is to maintain secure custody and good order within prisons whilst caring for prisoners with humanity and delivering opportunities which give the best chance to reduce re-offending once a prisoner returns to the community. The Chief Executive is accountable to the Scottish Ministers for the operation of the SPS and he is supported by the SPS's Executive Board.
11. As previously stated, the assessors noted a positive attitude towards FOI, demonstrated at all levels within the organisation. Discussions with staff demonstrated a desire to make available information to requestors as a matter of course, and analysis of a sample of requests conducted as part of the assessment process highlighted the relatively small number of occasions where the SPS had withheld information. Understandably, given the role of the SPS, the exception to this rule is to be found in the SPS's application of exemptions relating to requests for personal data (whether the requestor's own or that of a third party).
12. In preparing for the assessment the assessors also considered the number of decisions issued by the Commissioner, which had focused on the SPS's failure to adhere to the statutory timescales set out in FOISA<sup>5</sup>.

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<sup>4</sup> Available online at [http://www.itspublicknowledge.info/web/FILES/publication\\_scheme/Investigations\\_Enforcement\\_Proc\\_v8.pdf](http://www.itspublicknowledge.info/web/FILES/publication_scheme/Investigations_Enforcement_Proc_v8.pdf)

<sup>5</sup> From the 40 decisions issued by the Commissioner since FOISA came into effect, it was noted by the assessors that breaches in relation to section 10 and/or 21 of FOISA were noted in 10 of them (i.e. 25%).



13. Since the issue of Decision 147/2007 by the Commissioner, the SPS has embarked on a programme of process improvement in relation to its handling of requests for information under FOISA, with assistance and support from the FOI Unit. The assessors also noted further developments to FOI procedures during 2010, which in part may be put down to the pro-active approach the SPS took in relation to the outcomes following the Transport Scotland assessment, where it decided to take on board (in conjunction with the FOI Unit) the learning points from that assessment in advance of its own good practice assessment.
14. The SPS has a devolved structure for handling requests for information, with a network of key FOI staff throughout the organisation responsible for responding to requests. Those specialists are supported at senior level by one of 5 SPS Directors, who are each responsible for FOI in their particular areas. Strategic responsibility for FOI has been delegated to the SPS's Corporate Affairs Manager.
15. The SPS has developed a strong knowledge sharing network. Key FOI staff have the opportunity to meet formally on a 6 monthly basis, while weekly meetings are held within SPS HQ to discuss matters relating to FOI and individual prisons have systems in place to monitor FOI performance at a local level. The Corporate Affairs Manager is also responsible for providing a quarterly update to the SPS's Executive Board, which focuses on FOI performance.
16. During the course of the assessment the assessors were able to work constructively with SPS staff and it was evident to the assessors that there is a desire to take on board any recommendations to help ensure that the SPS's processes and procedures remain robust.

## **Detailed outcomes, findings and recommendations**

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17. The following sections provide details of the main areas of practice assessed and addressed in the assessors' findings and any associated recommendations.

### **Receipt of requests and recording systems**

18. Requests for information are received by both individual prisons and at SPS's HQ. A significant proportion of requests are received via email but they are also received at times by fax. Requests made by prisoners are largely received by letter. Within HQ, requests for information made via email are primarily received into one of two electronic mailboxes which have been set up to deal with enquiries from the general public and the media. Requests for information received by individual prisons are normally received by letter or by fax.
19. During discussions it was acknowledged that requests could also be received directly by SPS staff and it was confirmed that requests received from prisoners are often handed directly to prison staff or made via established communication channels set up within prisons. Given the potential for requests to be passed from prisoners, either directly to members of staff or via established communication channels, the assessors emphasised the importance, which the SPS acknowledged, of considering such a request to have been received by the authority at



that point, even if the member of staff receiving or picking up the request is not the individual ultimately responsible for dealing with the request.

20. It was also noted that the SPS receives requests for information forming part of a complaint made to the SPS. From the assessors' analysis of a sample of requests, they were satisfied that these "hidden requests" are being appropriately identified and handled.
21. On receipt, a request is passed to the person responsible for logging, tracking and monitoring requests. In HQ, this task is currently the responsibility of a Legal Services Officer (LSO). Responsibility for this within each prison is assigned on the basis of each establishment's needs. Requests are initially logged onto an Excel spreadsheet (the FOI Tracker). The FOI Tracker is a Microsoft application, accessible to all staff through the SPS's "Sharepoint" and is used by HQ and each prison to log, track and monitor requests they receive. The FOI Tracker allows for an individual reference number to be generated for each request, and has been set up with a view to capturing essential information relating to the request so that the SPS can monitor progress in relation to its responses.
22. The FOI Tracker is also utilised in the review process. Certain key documentation is attached to the FOI Tracker, i. e. a copy of the initial response and where relevant a copy of the response issued in relation to a request for review.
23. Where a request has been received by HQ, the LSO will then establish which area/member of staff would be best placed to respond to the request. In doing this the LSO will identify the most appropriate FOI Lead (see "Adequacy of administrative arrangements" below) to receive the request. The SPS attaches a standard memo to the department when seeking a response from the FOI Lead; this reminds the department of the relevant statutory obligations and the SPS's internal processes and standards for responding. The assessors considered this to be an example of good practice.
24. Where a request has been received and it requires input from more than one area, the LSO will identify a lead department. That department will then be responsible for coordinating the response. The FOI Lead in that department will be responsible for collating their own area's information pertinent to the request and will communicate with other departments accordingly. In doing this, the FOI Lead will provide each department with a deadline allowing sufficient time to consider the information and compile an appropriate response issued within timescales. FOI leads have at their disposal an escalation process to management level, should this be necessary. The FOI Lead is responsible for issuing the response to the requestor, taking advice from Legal Services should this be necessary before doing so, and for ensuring that the response is issued within the appropriate timescales. Documentation relating to requests is not kept electronically in one place by the SPS. However, within HQ, the LSO maintains a paper-based system where documentation pertinent to each request is kept in a manual folder. Closed cases are maintained in a separate folder.
25. The process for logging, monitoring and tracking requests for information by individual prisons follows largely the same process as detailed above. Requests are logged onto the FOI Tracker by the FOI Lead, who is usually the prison's Business Improvement Manager. Appropriate staff are contacted within the prison by the FOI Lead in relation to searching for information (should this be necessary) and the FOI Lead will then put together and issue the response to the requestor, ensuring that the FOI Tracker is updated accordingly at each step



of the process. Individual prisons maintain their own systems for keeping correspondence and documentation relating to requests, but from discussions with staff from two prisons it became apparent to the assessors that a paper-based system is generally utilised as the primary method of holding documentation in one place.

26. It was noted that the FOI Tracker is used by individual prisons and HQ. Prior to October 2010 each establishment and HQ utilised a logging and tracking system, but this was operated and maintained at a local level. Consequently, the SPS was required to get details from each prison when producing reports on FOI performance, collating the information centrally. The assessors noted that since 2008, the SPS had made efforts to improve the quality of the information captured at local level and processes had developed in such a way that most establishments were using a similar format for their individual trackers. In any event, a decision had been taken to establish one FOI Tracker, accessible by all prisons and HQ, and this process has been in place formally since October 2010. The assessors did note one exception to this. Due to IT difficulties, one prison is currently unable to access the central FOI Tracker via the "Sharepoint" system and as such maintains its own identical version of the FOI Tracker at a local level.
27. Conclusions/recommendations: Although the SPS utilises a simple Excel based logging and tracking system and maintains its audit trail of the correspondence and documentation relevant to each request in a paper-based arrangement, the assessors were satisfied that requests for information are processed efficiently and that the SPS is in a position to analyse performance and report to senior management and the Executive Board. Given that the centralised FOI Tracker has been in place for a relatively short period of time, the assessors would recommend that the FOI Leads are reminded that only this centralised system should now be used (and therefore to cease utilising any local tracking systems – with the exception, until the current IT difficulties are resolved, of the one prison currently unable to access the central system).

### **Adequacy of administrative arrangements**

28. Although responsibility for identifying requests for information lies with all staff within the SPS, due to the size and geographical spread of the organisation, the SPS has in place a "devolved" structure in relation to dealing with requests. As previously noted this approach has led to the establishment of a group of FOI specialists, based in HQ and in individual prisons, who in practice are responsible for dealing with and responding to requests for information.
29. Strategic responsibility for FOI within the SPS lies with the Corporate Affairs Manager, with the Senior Legal Services Manager providing day-to-day advice and assistance to staff dealing with requests and requests for review. This particular individual will on occasion respond to initial requests and when required, to requests for review which are to be dealt with by HQ, however this individual's FOI knowledge and experience are such that he focuses primarily on providing advice to staff.
30. It was established by the assessors that the SPS has suitable cover in place throughout the organisation for periods of annual leave or other unplanned absence of those responsible for responding to requests. For example, the FOI Lead in HQ is supported by the Senior Legal



Services Manager and Corporate Affairs Manager. It was also evident to the assessors through discussions with staff from two SPS prisons that suitable cover is in place and that this approach is replicated throughout the organisation.

31. Although the SPS has suitable arrangements in place to cover annual leave and other unplanned absence, through discussions it became evident that due to sensitivities regarding access to email and correspondence addressed to specific individuals, there could be a situation where emails or letters may not be responded to until the individual returns to work. The SPS stressed that this is not an area which had been identified as an issue to date, and also that it was SPS policy to ensure that an “out of office” message was activated by staff when absent. However, it is important that the SPS has suitable processes in place to ensure that this potential situation does not have a negative impact on its ability to respond to requests within the statutory timescales.
32. It was also noted by the assessors that the Business Improvement Manager’s role and responsibilities within the prison means that they have an overarching operational knowledge and access to a range of information and systems within the prison.
33. HQ and FOI Leads from individual prisons also have access to specialist staff based in HQ. This is particularly important with respect to the carrying out of searches for information relevant to a request. For example, each prison (along with HQ) has access to a large proportion, but not all, of the organisation’s Prisoner Records System (PR2). This system is utilised as a primary source of information in relation to certain requests, but it is a large database which cannot be accessed by all staff in its entirety and the assessors noted that it can be difficult to extract information relevant to a request. Expert advice on how the PR2 database works and how to extract information from it is, however, available from the Prison Records Manager (PRM).
34. As has been previously noted, the SPS currently utilises a paper-based system both in HQ and in individual prisons for maintaining an audit trail for each request. The FOI Tracker holds limited information relating to the processing of the request. The SPS’s procedures require all correspondence and documentation regarding a request to be maintained on file. However, it became evident through discussions with staff that the approach to this is inconsistent. This was further demonstrated through the sample of requests analysed as part of the assessment process, where certain correspondence in relation to some cases could not be provided to the assessors for consideration.
35. FOI Leads within the SPS meet formally on a six monthly basis. These meetings provide a forum for key FOI staff to discuss matters related to FOI. This includes looking at FOI performance and conducting training events. Additionally, the Scottish Government, through its FOI Unit, holds quarterly FOI meetings with all of its executive agencies. The SPS is always represented at these meetings and they are considered by the SPS to be an effective way of keeping up to date with developments within the FOI Unit and to provide a useful forum in which to discuss FOI matters, including decisions issued by the Commissioner and changes to guidance issued by the FOI Unit relating to how executive agencies should handle requests for information.
36. The SPS has also introduced a weekly meeting which brings together key FOI staff from HQ and the Press Office, at which progress of individual requests is monitored. This allows the



SPS to identify cases where the statutory deadlines are approaching and issue reminders to appropriate staff with a view to ensuring that statutory timescales are met. These meetings also provide an opportunity for the Press Office to keep abreast of FOI issues, which allows them to better prepare for contact with the media and journalists.

37. Since May 2008, SPS Directors have been responsible for FOI compliance and performance in their particular business areas. Quarterly Executive Board update reports are circulated to the SPS's Executive Group. These reports focus on FOI performance and compliance, but also provide an opportunity to identify at senior level any trends that might be forming as a consequence of its handling of requests, and identify any issues relating to the SPS's ability to respond effectively to requests for information.
38. Conclusions/recommendations: The assessors were satisfied with the administrative arrangements the SPS has in place for dealing with requests for information. The various scheduled meetings provide an excellent opportunity for key FOI staff to discuss and take forward matters relating to FOI and the quarterly FOI updates to the Executive Group are seen by the assessors as an effective way of raising the profile of FOI and apportioning accountability for performance, initially at Director level and ultimately at Board level.
39. The assessors would recommend, however, that the SPS conducts refresher training to staff responsible for dealing with FOI requests, to re-emphasise the importance of maintaining a full audit trail of all correspondence and documentation relating to a request, including details of any telephone contact with the requestor and/or internally. The assessors would also recommend that the SPS carries out a review of its resilience arrangements, with a view to minimising the identified potential risk of requests not being actioned immediately upon receipt because they have been sent to a personal email box or addressed specifically to a member of staff, where that member of staff is absent from work.

## Records management and searching

40. It is essential to successful request handling that an authority is able to identify and retrieve the information it holds on receipt of a request. The SPS holds information in both electronic and paper-based format. Information held electronically is largely accessible throughout the organisation. Paper-based information is held at HQ and at a local level in individual prisons. Archived information is held at HQ.
41. Records management currently sits within SPS's Legal Services department and is the responsibility of the Senior Legal Services Manager. In line with other executive agencies of the Scottish Government, the SPS follows the Scottish Government's Records Management Policy. This includes a retention policy, which is currently under review. It was explained to the assessors that the SPS intends to await the outcome of this review, after which it will update its own retention policy to reflect the changes made by the Scottish Government. At this time, however, the SPS relies on its current records management policy<sup>6</sup>.
42. Currently the SPS retains documentation and correspondence relating to requests for a period of 5 years, but is considering reducing this to 3 years. A final decision on this will be made

<sup>6</sup> <http://www.sps.gov.uk/multimedialogallery/66ACBC3A-6895-406F-8CF1-A33BC8298B78.pdf>



once the Scottish Government's review of its retention policy is complete, and the SPS will follow the Scottish Government's guidance on this once it is received.

43. FOI Leads, especially those based in individual prisons, usually have responsibility for matters relating to data protection, IT and information management within their establishments. The SPS believes that staff with these particular responsibilities are best placed to respond to FOI requests as they have extensive knowledge of the information held by the SPS and where and how to locate it. When required, the FOI Leads also have access to and utilise the experience of other members of staff in searching for information relevant to a request, where they have specialist knowledge and/or insight into the systems that require to be interrogated to enable a response to be issued to the requestor. A good example of this is the PRM's expertise and knowledge in relation to prisoner records.
44. It was noted by the assessors, after analysis of the sample requests provided by the SPS and through discussions with staff dealing with requests, that it is not common practice to keep on file a note of the searches undertaken in dealing with the request. The assessors identified such records as being of particular importance where the conclusion is that the information requested is not held (wholly or in part), given the potential need to justify the adequacy of the searches to a reviewer and subsequently to the Commissioner.
45. It was also noted by the assessors through discussions with staff that there is currently an inconsistent approach to recording how the cost of compliance has been arrived at where a notice under section 12 is issued. The SPS's procedures require that details of the calculations be maintained on file, which will assist with any subsequent requests for review and applications to the Commissioner.
46. Conclusions/recommendations: The assessors were satisfied that the SPS has a satisfactory records management policy in place and noted that the retention schedule will be updated in due course. The assessors were also satisfied that the SPS has staff in place with the required expertise to ensure that adequate searches are being carried out to identify information which would fall within the scope of the request, prior to making a response to the requestor. The assessors would recommend, however, that the SPS keeps a record of the searches it has conducted in relation to a request, where the conclusion has been that the information is not held. It is also recommended that the SPS maintains a record of the estimates/calculations carried out to establish that the cost of complying with a request would exceed the prescribed cost.

### **Timescales for compliance**

47. An authority in receipt of a request for information (including environmental information) must respond promptly and no later (with certain exceptions) than the 20<sup>th</sup> working day following receipt of the request.<sup>7</sup>
48. An authority receiving a requirement for review of its handling of an information request must conduct a review and notify the applicant of its decision promptly and no later (with certain specified exemptions) than the 20<sup>th</sup> working day following receipt of the requirement.<sup>8</sup>

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<sup>7</sup> Section 10 of FOISA and regulations 5 and 13 of the EIRs



49. Prior to October 2010, HQ and each individual prison maintained its own logging, tracking and monitoring systems and procedures, providing data on FOI performance to HQ when required. Since October 2010 all prison establishments (except currently one as noted above) and HQ have been utilising a central FOI Tracker, which is available to all staff through the SPS's "Sharepoint" System. This now allows the SPS to more effectively monitor FOI performance across its whole estate and has made it easier for the organisation to extract reports on an ad-hoc basis, for performance management purposes (including the preparation of the quarterly Executive Group updates).
50. The FOI Tracker is used by the SPS as its primary tool for monitoring compliance with timescales, in relation to both initial requests and requests for review, although it was noted by the assessors that staff responsible for dealing with requests tend also to keep their own electronic or manual systems, such as utilising "Outlook email" to keep a track on the requests they are dealing with.
51. Having reviewed a sample of 46 requests received by the SPS in 2010 and 2011, the assessors noted that with the exception of 1 case the SPS had responded to the requestor within the required 20 working days. In that case, the assessors noted that the response had been made in two stages. The initial response was provided within the statutory timescales, but it informed the requestor that information pertinent to one part of his request would be forwarded to him at a later date. The 20 working days allowed for the purposes of compliance with section 10 of FOISA must therefore be based on the date the second response was issued, which in this case was 14 days after the 20 working day timeframe had expired. It was noted by the assessors, however, that the first response provided an explanation of the delay in responding to the request, with an apology, acknowledging that the SPS had breached section 10 of FOISA in responding in the way it had.
52. The assessors also examined 8 requests for review dealt with by the SPS in 2010 and 2011. Between 1 April 2010 and 31 January 2011, the SPS received 19 requests for review. In the financial year 2009/10 it received 9 requests for review.
53. The assessors noted from the sample of 8 reviews examined that the SPS failed to respond to the requestor within the required 20 working days timeframe in only one case.
54. Since initially reviewing its FOI procedures in 2008, and through making changes to the way it logs, tracks and monitors requests centrally, the SPS has made steady progress with respect to its ability to comply with the statutory timescale requirements. Regular monitoring of performance at a senior level has assisted with this, along with more robust monitoring in the form of the weekly FOI meetings in HQ. Indeed it was noted by the assessors that 96% of all FOI requests were met by the SPS within 20 working days for the financial year 2009/10, and between 1 April 2010 and 31 January 2011 this was running at 94%. The Commissioner has also noticed a reduction in decisions where he has concluded that the SPS has breached its statutory obligations in relation to timescales.
55. Conclusions/recommendations: The assessors were satisfied that the SPS has suitable processes in place to track its performance in relation to responding to requests for information

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<sup>8</sup> Section 21 of FOISA and regulation 16 of the EIRs



and requests for review. They welcome the progress the SPS has made in this context and would encourage the SPS to maintain this focus going forward.

## Content of refusal notices and application of exemptions

56. When information is being withheld in response to an information request, the requestor should be given a refusal notice which:
- Discloses that the authority holds the information requested
  - States that the information is exempt information
  - Specifies which exemption has been judged to apply: and
  - States (if not otherwise apparent) why the exemption applies.<sup>9</sup>
57. Where the exemption claimed is subject to the public interest test, the notice must also state why, in all the circumstances of the case, the authority has judged that the public interest in maintaining the exemption outweighs that in disclosure of the information.<sup>10</sup>
58. Any such refusal notice must also provide details of the authority's procedure for dealing with complaints about its handling of requests for information and the applicant's right of review and application to the Commissioner.<sup>11</sup>
59. Broadly the same requirements are set-out in the EIRs.<sup>12</sup>
60. From the sample of requests analysed, the assessors noted 10 cases where the SPS had applied an exemption under FOISA in withholding information requested. This number included 5 examples where the SPS had cited in the response either in full or in part that the information was "otherwise accessible" to the requestor.
61. A notice under section 25 of FOISA can be issued by a Scottish public authority where the requested information is held by the public authority, but the requestor can reasonably obtain it by means other than by making a request for the information under FOISA. In consideration of this however, it is important that an authority provides advice and assistance which takes into consideration the particular circumstances of the requestor.
62. When a public authority relies on section 25 of FOISA, it must be clear that the information is actually "otherwise accessible" to the applicant. Given the duty to provide reasonable advice and assistance to requestors in line with section 15 of FOISA, public authorities should consider whether, in order to comply with this duty, they should provide requestors with a link to, for example where the information is available. It is also important that the authority ensures that where a link or reference to a location to information is provided, that it ensures that the information is indeed available. This is particularly important for example in consideration of requests from prisoners, where options in relation to accessing information are more restricted.

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<sup>9</sup> Section 16 of FOISA

<sup>10</sup> Section 16(2) FOISA

<sup>11</sup> Section 47(1) of FOISA

<sup>12</sup> Regulation 13 of the EIRs



63. The assessors noted 1 example where the requestor, a prisoner, had been informed that the information requested was held in the prison's library, however on trying to access the information the requestor discovered that a copy was not actually available in the library.
64. From the sample of requests analysed, in 1 example the SPS had correctly cited the exemption under section 25 in full, providing both an explanation of why the exemption applied and informing the requestor how to access the information. However, in the remaining 4 examples examined, although the reasoning behind the decision to apply section 25 and advice on how the requestors could access the information was provided, the section itself was not cited.
65. In addition to the application of section 25 of FOISA, from the cases examined the assessors noted 2 examples where the SPS had applied an exemption but failed to cite fully the applicable subsection. In 1 case, the assessors were of the view that the SPS had not provided sufficient arguments to support its application of the exemption being cited, and following on from this it was noted in 2 cases that the public interest test had not been applied.
66. The assessors noted that the SPS has a suite of standard template letters in place, largely modelled on those produced by the Scottish Ministers. These template letters are accessible by all staff through the internal "Sharepoint" system. Through the examination of sample requests, the assessors noted a few examples of where the template letters had not been used, and consequently certain statutory requirements of the responses were missed. The SPS acknowledged that it was imperative that staff used the template letters when responding to requests/ requests for review and stated that it had emphasised this amongst staff and would continue to do so.
67. The rights afforded to requestors under FOISA and the EIRs are fundamental and it is of paramount importance that these are correctly conveyed to requestors by public authorities. It is also vitally important that where an authority is withholding information which has been requested, it cites fully the exemption (FOISA)/exception (EIRs) it wishes to rely on and, in doing this, goes on to provide robust request-specific reasons to support its application of that particular exemption/exception. It is also vital that this information is accompanied by reasons for the authority's conclusions in respect of the public interest, where applicable.

#### *Issuing a notice under section 17 rather than section 12 of FOISA*

68. If an authority does not hold the information to which the request relates, then it must within 20 working days from receipt of the request, provide the requestor with notice in writing that it does not hold it<sup>13</sup>.
69. An authority is not obliged to respond to a request for information if the cost of doing so would exceed the prescribed limit of £600<sup>14</sup> as set out (and calculated in line with) the Fees Regulations<sup>15</sup>. Where this provision is invoked, the applicant must be notified that this is the case. Where it is found to apply, the authority should consider its obligations under section 15 of FOISA to advise and assist the applicant, and it may be appropriate to provide advice on how their request might be refined and brought within the prescribed limit.

<sup>13</sup> Section 17 of FOISA

<sup>14</sup> Section 12 of FOISA

<sup>15</sup> The Freedom of Information (Fees for Required Disclosure) (Scotland) Regulations 2004



70. There is no provision in the EIRs directly equivalent to section 12 of FOISA, but a request can be refused if it is manifestly unreasonable<sup>16</sup>. Excessive cost is one of the reasons why a request might be judged to be manifestly unreasonable. The applicant should be notified of such a decision in a refusal notice. There is also an equivalent duty to provide advice and assistance within regulation 9 of the EIRs.
71. During discussions with staff, it became evident that section 17 of FOISA had been relied upon in responding to requests for information where the SPS concluded that it did not hold the information on the basis that it did not record the information in the format requested. Firstly in such cases, the authority needs to consider if it holds the information requested. This may be the case even where the information is not held in the format specified by the requestor, where the provision of the requested information would involve the extraction and/or collation of information as opposed to the creation of new information.
72. In these circumstances, the next step is for the authority to consider whether the cost of complying with the request would exceed the prescribed cost limit. If it does not, then the information should be provided to the requestor. If it does, however, then a notice under section 12 of FOISA (along with appropriate advice and assistance to assist the requestor to access the information under the cost threshold) should be issued, rather than a notice under section 17. Although there is no provision in the EIRs directly equivalent to section 12, cost may be a relevant consideration in determining whether a request can be refused as “manifestly unreasonable” under the EIRs.
73. Conclusions/recommendations: The assessors are satisfied that the standard template letters the SPS has in place to deal with requests for information under FOISA/the EIRs are sufficiently robust to meet the statutory requirements. The assessors recommend that the SPS take steps to ensure that whenever it is withholding information which has been requested, it cites fully the exemption/exception it wishes to rely on, and in doing this goes on to provide robust, request-specific reasons to support its application of that particular exemption/exception, together with consideration and reasons for its conclusions in respect of the public interest test where applicable. The SPS should continue to emphasise the importance of using the standard templates in response to a request to all staff.
74. The assessors would also recommend that when relying on section 25 of FOISA specifically, the SPS should take steps (when it is appropriate i.e. for example when a request is received from a prisoner), to ensure that the information is accessible to the requestor, taking the circumstances of the requestor into account so that an appropriate response can be provided. The SPS should also ensure that staff responding to a request for information on the basis of section 25 of FOISA that appropriate checks are carried out to ensure that the information is indeed available to the requestor.
75. The assessors also recommend that the SPS provides refresher training to its FOI Leads, to ensure that they can respond to requests where the information has been requested in a format that it does not necessarily “record” the information in, but it is identified that the information is never the less held, appropriately.

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<sup>16</sup> Regulation 10(4)(b) of the EIRs



## Review process

76. Neither FOISA nor the EIRs are prescriptive about the form of review that should be undertaken following a request for review. Under FOISA<sup>17</sup>, the review may confirm the original decision, with or without modifications, substitute a different decision for it, or reach a decision where none has previously been taken. For environmental information,<sup>18</sup> the authority must review the matter to decide whether it has complied with the EIRs and, where it finds a breach, immediately take steps to remedy this.
77. The new amalgamated Section 60 and 62 Code of Practice on FOISA and the EIRs, published in December 2010<sup>19</sup>, provides guidance on the review process. It provides that:
- authorities put in place appropriate and accessible procedures for handling reviews, which are fair, impartial and should enable different decisions to be taken if appropriate.
  - the procedures should be straightforward and capable of producing a determination of the review promptly, handled by staff that were not involved in the original decision, if possible, and allow the matter to be considered afresh.
  - the reviewer should record the process undertaken when conducting a review and produce a review report in order that the authority can learn from good/bad practice identified.
78. On conclusion of a review,<sup>20</sup> the authority must inform the applicant of what it has done and state its reasons for doing so. This notice must also explain the right of application to the Commissioner and subsequent right to make an appeal against the Commissioner's decision to the Court of Session.<sup>21</sup> The EIRs similarly require the authority to notify an applicant of the outcome of the review. Although there is no equivalent statutory provision requiring notification of the rights of appeal, the updated section 60/62 Code of Practice indicates that it is good practice to do so.
79. The SPS received 9 requests for review during financial year 2009/10, while between 1 April 2010 and 31 January 2011 had received 19 requests for review.
80. Although it was acknowledged that requests for review could be received by anyone and via a number of routes within the SPS, the standard template letters confirm that requests for review should be sent to the SPS's Chief Executive. In practice, however, requests for review are often sent directly to the member of staff who issued the initial response.
81. On receipt of a request for review whether that be within HQ or a prison, the review will be updated on the FOI tracker. Documentation and correspondence relating to the review is kept in paper-based format, in line with the request process, and is attached to the original documentation. The review response is uploaded to the FOI Tracker.
82. The review will in the first instance be passed to the line manager of the member of staff that responded to the initial request. This approach is flexible, however, and other members of staff at managerial level will be asked to conduct reviews as and when required.

<sup>17</sup> Section 21(4) of FOISA

<sup>18</sup> Regulation 16(3) and (5) of the EIRs

<sup>19</sup> <http://www.scotland.gov.uk/Resource/Doc/933/0109425.pdf>

<sup>20</sup> Section 21(5) of FOISA

<sup>21</sup> Section 21(10) of FOISA



83. SPS staff responsible for carrying out reviews have access to comprehensive guidance, accessible via the “Sharepoint” system. This guidance reflects the Scottish Government’s recently updated guidance. Reviewers will also refer to the Commissioner’s guidance in relation to the application of exemptions/exceptions. Links to the Commissioner’s website are provided via the “Sharepoint” system.
84. The assessors noted during discussions with staff responsible for carrying out reviews (from individual prisons and from HQ) that the review process is seen as an opportunity to look at the request afresh. The reviewer, it was explained, will carry out additional searches when required, particularly where the conclusion in the initial response was that the information requested was not held. The reviewer will also make contact when necessary with those who dealt with the initial response. Reviewers also have access to the various electronic systems utilised by the SPS for recording and storing information, and when required can contact specialist staff with a view to satisfying themselves that adequate searches have been conducted. Staff can also contact the Senior Legal Service Manager (SLSM) for advice, especially with respect to the application of exemptions/exceptions.
85. It was noted by the assessors that the SLSM can be approached to give advice at both the initial and review stages, and is also responsible for conducting reviews on occasion himself. The issue of whether this could lead to a conflict of interest was discussed, but it was explained that where the SLSM has been involved at the initial stage of a request he would not be responsible for carrying out a review.
86. It was made apparent to the assessors that the SPS’s approach to conducting reviews is based on the consideration that the requestor’s next step (where dissatisfied with the response received) is to make an application to the Commissioner. Consequently, the approach taken is to ensure that a comprehensive review is undertaken with a view to minimising the potential number of requests appealed to the Commissioner.
87. The assessors noted from staff interviewed regarding the review process that there had been no formal training provided to staff on how to conduct reviews, although staff do have access to comprehensive guidance from the SPS and are able to consult the SLSM for additional advice when required.
88. It was noted by the assessors that appeals made to the Commissioner relating to SPS’s handling of requests are dealt with centrally by the FOI Unit in consultation with the SPS. The FOI Unit’s guidance to its various agencies was recently updated as a consequence of the Transport Scotland assessment.
89. Conclusions/recommendations: The assessors were satisfied that the SPS has in place satisfactory processes for carrying out requests for review. However, the assessors recommend that the SPS, as detailed above, takes steps to ensure that staff responsible for responding to requests for review utilise the appropriate standard template letter to ensure that the requestor is afforded their full set of rights in every response.



## Other aspects of request handling

### *Recognising an EIR request*

90. From the completed pre-assessment questionnaire, the assessors noted that prior to the current financial year 2010/11, the SPS did not record whether it received requests for environmental information under the EIRs. On looking at the FOI Tracker for the current financial year, the assessors noted that the SPS had processed only a very small number of requests under the EIRs.
91. From the sample of requests provided by the SPS the assessors noted that there were no examples of cases processed under the EIRs. On further examination of the subject matter of those requests, the assessors were satisfied that they were all correctly dealt with under FOISA.
92. In reviewing its own FOI procedures and in consideration of the Commissioner's findings in the Transport Scotland assessment, the SPS was concerned about the level of knowledge held throughout the organisation in relation to the EIRs. With a view to combating this, EIR training was provided to the FOI Leads in October 2010 and a follow-up session is planned for the next FOI Leads meeting in April 2011.
93. The assessors were encouraged by the SPS's pro-active recognition that, as an organisation, it had not historically considered the EIRs to the extent it should have in ensuring that it responded to requests under the appropriate regime. This recognition has led to specific training being provided to FOI Leads. Going forward, meetings and training will take the EIRs into consideration, while tracking and monitoring systems are now in place to ensure that requests for environmental information are recorded. It was also noted by the assessors that the SPS's standard template letters take into account requests for environmental information.
94. Support for the FOI Leads in responding to requests under the EIRs can be accessed via the "Sharepoint" system, advice can be obtained from the SLSM and additional advice and assistance can be obtained via the Scottish Government's FOI Unit.
95. Conclusions/recommendations: The assessors welcome the focus the SPS is now placing on the importance of recognising when a request for information is for environmental information. Although it appears that the SPS receives only a very small number of requests that should be dealt with under the EIRs, the assessors would encourage the authority to keep a focus on training its FOI Leads to be able to identify requests for environmental information and respond to them accordingly. Although training in relation to the EIRs has to date focused on the FOI Leads (which appears to be the most appropriate approach given the volume of environmental requests currently received by the SPS), the assessors would recommend that organisation-wide awareness training be conducted to ensure that all staff are able to identify a request for environmental information, e.g. to ensure that all staff are aware that requests for environmental information can be made verbally and then what process they should follow upon receipt of such a request.



### *Providing advice and assistance*

96. The recently updated Section 60/62 Code of Practice, states that “Authorities should publish guidance for applicants which explains how to make an information request, the procedure the authority will follow in handling it, and when fees will be charged”. FOISA also refers specifically to the duty to provide advice and assistance to requestors under section 15<sup>22</sup> and this is further specified in the EIRs under regulation 9<sup>23</sup>.
97. Whilst it was noted that the SPS provides advice on its website to assist requestors to make requests, it was also noted by the assessors that a significant proportion of requests the organisation receive come via the prisoner population, who may not have access to electronic means of communication such as the internet. Consequently the assessors discussed the measures the SPS has in place to enable it to fulfil this particular obligation under the Code of Practice.
98. The assessors noted that the SPS had in the past utilised the prisoners in-house magazine to inform them of FOI when the legislation first came into effect, although no activity in this regard has taken place since then. Discussions with staff indicated that with a view to addressing this point, the SPS will consider ways that it can ensure that prisoners in individual prisons are aware of how to make a request and the procedures relevant to this.
99. It was explained to the assessors that each prisoner upon entering prison is provided with access to a specific prison officer during their time in prison, whose role is to be the prisoner’s key point of contact. There is also a system of “peer” support available to prisoners. These support mechanisms provide prisoners with the opportunity to seek advice and get assistance should this be required when making a request for information.
100. Conclusions/recommendations: The assessors would recommend that the SPS reviews its position in relation to this aspect of the Code of Practice and puts in place suitable measures to ensure that prisoners have access to guidance that explains how to make an information request, the procedure the authority will follow in handling it, and when fees will be charged.

### **Training and awareness arrangements**

101. As part of the pre-assessment questionnaire, the SPS was asked to provide the assessors with copies of any training materials and details of its awareness arrangements. In response, the SPS provided copies of agendas and notes from two FOI Leads’ meetings held in April and October 2010, a copy of an EIR training pack delivered as part of the October meeting and a copy of a FOISA refresher pack also delivered at the October meeting.
102. The SPS also provided copies of updated FOI guidance, which originated from the Scottish Government’s review following the Transport Scotland assessment. This guidance has been adopted by the SPS and includes guidance on handling FOISA/EIR requests, handling FOISA/EIRs reviews, new FAQs, updated exemption/exception guidance and new guidance

<sup>22</sup> <http://www.itspublicknowledge.info/nmsruntime/saveasdialog.asp?IID=1842&SID=63>

<sup>23</sup> <http://www.hmso.gov.uk/legislation/scotland/ssi2004/20040520.htm>



on dealing with requests that have been appealed to the Commissioner. All this guidance, along with copies of the training materials, is available to staff via the “Sharepoint” system.

103. In response to any cases appealed to the Commissioner, the SPS produces “Lessons Learned Reports”, which are used primarily as a training and development tool. The report provides background to the case, a summary of the Commissioner’s decision, what went well and what could have been done better and finally a recommendations section. These reports are discussed at each of the FOI Leads’ meetings and are available on the “Sharepoint” system. The assessors were impressed with the format of these reports and considered this to be an excellent training tool.
104. The assessors also noted that the SPS is currently working on what training is provided to new staff coming into the organisation in relation to FOI. The SPS operates different induction training programmes depending on the role that is being filled. It has been identified that some of these programmes might currently not provide a section on FOI. It was emphasised that although it is quite acceptable for an organisation to operate a system of dealing with requests which places the majority of responsibility on a network of FOI specialists, authorities should still, in line with the Section 60/62 Code of Practice, provide training to ensure that all of their staff have sufficient knowledge of the regimes applicable. To this end, all staff should have at least a basic understanding of FOISA and the EIRs and be in a position to identify such a request and be able to pass it to the appropriate member of staff to deal with it. This is particularly important in an organisation such as the SPS, where the majority of staff in establishments will have regular direct contact with service users.
105. In addition, the SPS can access training via the Scottish Government’s FOI Unit. Bespoke training can be arranged based on SPS’s needs, while the regular FOI Leads’ meetings provide an excellent opportunity for training needs to be identified (but also provides a forum in which training can be delivered).
106. The SPS is also considering developing an E-learning package on FOI. If this package were to be approved it is envisaged that it would be mandatory for all staff to go through this training package and would consequently form part of each member of staff’s appraisal for the year. Although not currently part of the initial plan for this package, the assessors noted the importance of including an introduction to the EIRs and the basic differences between the two regimes should this project be taken forward.
107. The assessors have noted areas where the SPS should carry out training for staff and these recommendations are detailed in the body of the various sections of this report.
108. Conclusions/recommendations: The assessors welcomed the focus the SPS is placing on training and commends the use of the Lessons Learned Reports. The assessors would recommend, however, that the SPS carries out a review of its current induction training arrangements to ensure that all staff (including temporary staff) receive an introduction to FOI upon taking up employment with the organisation. The assessors would also recommend that in considering its project into the viability of an E-learning package, the SPS considers incorporating an introduction to the EIRs.



## Conclusions and summary of recommendations

The SPS has over the past couple of years introduced a number changes to the way it logs, tracks, monitors and deals with requests for information under FOISA, and the assessors further noted the positive attitude towards FOI, demonstrated through discussions with senior staff within the SPS and further evidenced through interviews with key members of staff responsible for dealing with requests for information from both HQ and individual prisons. The assessors noted a number of areas of good practice now incorporated as part of the SPS's procedures for dealing with requests for information, and were impressed with the "devolved" structure the SPS has in place to deal with requests for information throughout the organisation. It was also noted that the SPS has taken on board the learning points from the Transport Scotland assessment and has worked closely with the Scottish Government's central FOI Unit in developing its processes and addressing identified training needs.

On the whole, the SPS's current practices meet statutory requirements and good practice as set out in the code of practice. However, the assessors identified some occasions where staff had not properly followed the SPS's current procedures and guidance, leading to failure to comply with statutory requirements and/or good practice. These areas are discussed in detail within the body of this report, but key areas for the SPS to address focus on the requirement to develop key members of staff with responsibility for responding to requests, to ensure that they are in a position to properly cite, reason and explain the application of a particular exemption / exception to a requestor when this is required, and also to ensure that the public interest test is considered when applicable. The additional areas of concern noted by the assessors focused largely on administrative matters concerning the handling of requests for information, with recommendations primarily relating to training.

Comprehensive details of the areas of good practice identified are to be found in the body of this report. Where recommendations have been made by the assessors (these are summarised in the table below), it is recommended that the SPS develops an action plan to address these areas.

In particular the assessors recommend:

Priority 1	Immediate action required
Recommendation Number	
1	That the SPS provides refresher training to its FOI Leads, to ensure that where an exemption/exception is being applied it is cited in full, with robust, case-specific reasons being provided to support the application of that particular exemption/exception, together with reasons for its conclusions in respect of the public interest test where applicable.
2	That the SPS re-emphasises to staff the importance of using the standard template letters in responding to requests for information, to ensure that requestors are provided with adequate information on their rights at each stage in the process.

Priority 2	Medium term action to be completed within 3 months
3	That the SPS reminds staff to carry out appropriate checks to ensure that information is accessible/available when citing section 25 of FOISA.



4	That the SPS provides refresher training to its FOI Leads to ensure that they can identify the difference between information that is not held and information which is held but has been requested in a format that the SPS does not record the information and the cost of complying with the request would consequently exceed the upper cost limit (i.e. section 12 of FOISA).
5	That the SPS provides training to its FOI Leads to re-emphasise the importance of maintaining a full audit trail of all correspondence/documentation relating to a request.
6	That the SPS takes steps to ensure that details of the searches conducted, where the outcome is that the information is not held, are kept on file and that FOI Leads are updated to ensure this is consistently done.
7	That the SPS takes steps to ensure that where section 12 of FOISA has been applied, details of the estimations/calculations used to establish this position are kept on file.
8	That the SPS ensures that staff throughout the organisation are able to identify a request for environmental information and are aware of who to pass the request to should they not be responsible for dealing with the request themselves.
9	That the SPS reviews its practices to ensure that prisoners have access to guidance that explains how they can make an information request, the procedure it will follow in handling a request and when fees will be charged.

<b>Priority 3</b>	<b>Action to be completed within 6 months</b>
Recommendation Number	
10	That the SPS carries out a review of its resilience arrangements with a view to minimizing the potential risk of requests not being attended to immediately upon receipt due to staff absence from work.
11	That the SPS reminds all relevant staff that all FOI requests should be logged, tracked and monitored via the central FOI Tracker
12	That the SPS carries out a review of its induction training arrangements to ensure that all staff are provided with an introduction to FOI upon taking up employment with the organisation.
13	That the SPS in considering it's project into the viability of an FOI E-learning package considers incorporating an introduction to the EIRs.

The assessors consider that all steps which require to be taken in relation to these recommendations can reasonably be completed within a period of six months, and they are aware that the SPS has already taken steps to address some of the recommendations.

A copy of the action plan prepared by the SPS, setting out the actions it has taken and intends to take to satisfy the recommendations in this is attached at appendix 1.

At the end of the six month period (from date of publication of this assessment) the Commissioner will ask the SPS to submit a report to him explaining the measures put in place to address the issues identified in the assessment and the outcomes of the action plan. Following receipt of this report, the Commissioner may seek a follow-up meeting with the SPS to discuss progress and any outstanding issues.



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