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XXXXXXXX@XXXXXXXX.XX.XX

29 September 2016

Dear xxxxx xxxxxxxx,

**Request for Review under Freedom of Information (Scotland) Act 2002  
FOI 201604**

Thank you for your request for a review of our handling of your Freedom of Information Request. We received your request for review on 6 September 2016. This gave a statutory deadline for responding of 4 October 2016 under the terms of the Freedom of Information (Scotland) Act 2002 ("FOISA").

The review was undertaken by staff who were not involved in the original decision making process. As part of the request for information related to the Director of the prison, the review was carried out by the Director of Custodial Operations for Serco Ltd along with another member of Serco staff from outside of the HMP Kilmarnock contract. We did this to ensure that the decision making process was impartial.

In summary, your request asked for the salary information for the Director and Deputy Director of the prison for each of the last 5 years, along with details of any bonuses or ex-gratia payments within the same period. You received a response to the request stating that the information was exempt under section 38(1)(b) of the Act as it related to third party personal data.

You requested a review of this decision stating that the accountability of a public official is a legitimate interest and that public sector organisations in Scotland routinely publish the salary details of its senior staff.

The members of staff conducting the review agreed that the information you requested is information which is held by Serco Ltd, and agreed that the information falls within the scope of the Freedom of Information (Scotland) Act 2002 as it related to the operation of HMP Kilmarnock.

It was the opinion of the reviewing committee that the information requested could be exempted from disclosure by virtue of section 38(1)(b) of the Act, relating to third-party personal data. The committee also took the view that, due to the fact that the salary of the Director and Deputy Director are a matter of individual negotiation, the information requested could be exempt under section 33(1)(b) which relates to commercial interests. This exemption would be subject to a 'substantial prejudice' test and a 'public interest' test.

The review committee agreed that the information requested is personal data as defined in section 1(1) of the Data Protection Act 1998, and agreed that there is a possibility that the exemption under section 38(1)(b) of FOISA, read in conjunction with section 38(2)(a)(i) of the Act, may be engaged. It was therefore necessary to assess whether the release of the information requested would indeed breach any of the data protection principles set out in Part I of Schedule 1 to the Data Protection Act 1998.

The first data protection principle states that personal data shall be processed fairly and lawfully and, in particular, shall not be processed unless at least one of the conditions within Schedule 2 is met. The reviewing committee considered the conditions within Schedule 2 and concluded that the sixth condition could give a relevant reason by which the information could be released.

Condition 6 provides that processing, which includes disclosure, would be fair and lawful if it is necessary for the purposes of legitimate interests pursued by the data controller or by a third party to whom the data are disclosed. In your request for a review you stated that you had a legitimate interest in the accountability of senior public officials. The reviewing committee considered this in line with your statement that public sector organisations in Scotland publish salary details of their senior staff.

Serco Ltd is classed as a Scottish Public Authority for the purposes of the Freedom of Information (Scotland) Act 2002 only by way of a section 5 order made by the Scottish Parliament purely for the purpose of the operation of HMP Kilmarnock. The reviewing committee did not consider Serco Ltd or HMP Kilmarnock to be a public body and accordingly did not view the Director or Deputy Director to be public officials. In reaching this view, the committee considered that the salary information of the Scottish Prison Service's Chief Executive is published but the individual salaries of the Prison Governors and Deputy Governors is not made public. Rule 4(1)(c) of the Prisons and Young Offenders Institutions (Scotland) Rules 2011 draws a direct comparison between Governors of public sector prisons and Directors of private prisons.

The reviewing committee agreed with your views that the publishing of salary information for senior public officials is a legitimate interest, but did not hold your view that the Director and Deputy Director of HMP Kilmarnock were senior public officials, and therefore concluded that condition 6 was not met.

For the sake of completeness the reviewing committee proceeded to consider the other aspects of condition 6, namely that the disclosure would be necessary to achieve any legitimate interest and that it would not cause unwarranted prejudice to the rights and freedoms or legitimate interests of the data subjects. The committee agreed that there would be no way of obtaining the salary information other than from disclosure by Serco, but felt that any disclosure of the requested information would potentially cause distress to the data subjects taking into account reasonable expectations of the data subjects that the information would not be disclosed.

In conclusion, the reviewing committee held that the decision to exempt the information under section 38(1)(b) was correct. The committee did not consider it necessary to proceed to consider the possibility of the information being exempt under section 33(1)(b).

We understand that this may not be the decision that you had hoped for. If you are dissatisfied with the outcome of the review, you are entitled to apply to the Scottish Information Commissioner for a decision. If you wish to do so you must appeal to them within six months of receiving this review outcome.

The Commissioner's contact details are as follows:

The Scottish Information Commissioner  
Kinburn Castle  
Doubledykes Road  
St Andrews  
Fife KY16 9DS

Email: [enquiries@itspublicknowledge.info](mailto:enquiries@itspublicknowledge.info)

Tel: 01334 464610

Yours sincerely,

A handwritten signature in black ink that reads "Billy Menzies". The signature is written in a cursive, slightly slanted style.

**William Menzies**  
Assistant Director Performance and Compliance