

# Decision Notice

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**Decision 036/2016: Mr Marc Ellison and West Lothian Council**

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**Measures to address the potential radicalisation of students**

Reference No: 201501562

Decision Date: 15 February 2016



Scottish Information  
Commissioner

## Summary

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On 19 June 2015, Mr Ellison asked West Lothian Council (the Council) for information concerning discussions on IT measures to detect the potential radicalisation of students.

The Council initially informed Mr Ellison that it held the information, but it was exempt from disclosure under FOISA. During the investigation, the Council informed Mr Ellison that it did not hold any information falling within the scope of his request.

The Commissioner investigated and found that the Council had failed to respond to Mr Ellison's request for information in accordance with Part 1 of FOISA. This was because it had failed to give notice in terms of section 17(1) of FOISA that it did not hold the information requested. The Commissioner accepted that the Council did not hold the information.

## Relevant statutory provisions

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Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) and (4) (General entitlement); 17(1) (Notice that information is not held)

The full text of each of the statutory provisions cited above is reproduced in Appendix 1 to this decision. The Appendix forms part of this decision.

## Background

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1. On 19 June 2015, Mr Ellison made a request for information to the Council. The information request was as follows:

*In light of the new Counter-Terrorism and Security Act 2015, please tell me what discussions have taken place since January 2015 to adapt IT measures to detect the potential radicalisation of students? This should include:*

- *How many primary or secondary schools currently use, or will start to use, anti-radicalisation IT solutions provided by Impero, Securus and Future Digital? Please list each school.*
- *What internal education-oriented meetings have taken place to address potential IT measures in schools to detect the potential radicalisation of students? Please provide minutes, agendas, emails associated with any of these meetings.*

2. The Council responded on 17 July 2015. It informed Mr Ellison that the information was exempt from disclosure in terms of sections 30 (Prejudice to effective conduct of public affairs) and 39 (Health, safety and the environment) of FOISA.
3. On 17 July 2015, Mr Ellison wrote to the Council requesting a review of its decision. He did not consider the Council had justified the application of the exemptions cited and believed the public interest favoured disclosure of the information.
4. The Council notified Mr Ellison of the outcome of its review on 20 August 2015. The Council upheld its original decision without modification.

5. On 25 August 2015, Mr Ellison wrote to the Commissioner. He applied to the Commissioner for a decision in terms of section 47(1) of FOISA. Mr Ellison stated he was dissatisfied with the outcome of the Council's review. He did not consider the Council had provided adequate reasons for withholding the information.

## Investigation

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6. The application was accepted as valid. The Commissioner confirmed that Mr Ellison made a request for information to a Scottish public authority and asked the authority to review its response to that request before applying to her for a decision.
7. On 17 September 2015, the Council was notified in writing that Mr Ellison had made a valid application. The Council was asked to send the Commissioner the information withheld from him.
8. In response, the Council stated that it did not hold any recorded information falling within the scope of Mr Ellison's request. The case was then allocated to an investigating officer.
9. Section 49(3)(a) of FOISA requires the Commissioner to give public authorities an opportunity to provide comments on an application. The Council was invited to comment on this application, with reference to its new assertion that it did not hold the information. The investigating officer pointed out that if the Council held no recorded information falling within the scope of Mr Ellison's request, it could not claim the information Mr Ellison sought was exempt from disclosure under any of the exemptions in Part 2 of FOISA.
10. In response, the Council suggested that it did hold information, although that information answered all of Mr Ellison's questions in the negative. It continued to claim the information was exempt from disclosure in terms of sections 30 and 39 of FOISA.
11. The investigating officer contacted the Council again and the Council acknowledged that no relevant information was held at the time it received Mr Ellison's request.
12. The Council also stated that it now considered it appropriate to give notice in terms of section 18(1) of FOISA. Section 18 allows a Scottish public authority, in certain circumstances, to refuse to reveal whether it holds information, or whether it exists, if it considers that to do so would be contrary to the public interest.
13. The investigating officer then pointed out to the Council, given that it had previously claimed it held the information requested by Mr Ellison, it would make no sense now to refuse to confirm or deny whether the information existed or was held by it.
14. The Council then changed its position again, acknowledging that it did not hold the information requested. It confirmed that it was prepared to inform Mr Ellison accordingly.
15. On 11 January 2016, the Council wrote to Mr Ellison, giving notice in terms of section 17(1) of FOISA that it did not hold the information requested.
16. The investigating officer subsequently contacted Mr Ellison to ascertain whether, in view of the Council's amended response, he still required a decision from the Commissioner. Mr Ellison stated he was dissatisfied with the Council's latest response and considered it odd that the Council was now stating the information was not held.

17. The investigating officer then asked the Council to explain the searches it had undertaken in order to establish that it did not hold any information falling within the scope of the request. The Council responded, providing details of the searches and enquiries undertaken.

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

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18. In coming to a decision on this matter, the Commissioner considered all of the relevant submissions, or parts of submissions, made to her by both Mr Ellison and the Council. She is satisfied that no matter of relevance has been overlooked.

### **Whether the information is held by the Council**

19. In its submissions to the Commissioner, the Council explained that it had contacted its Information Liaison Officer for Education, as this officer had detailed knowledge of the Education Service and was the most appropriate person to deal with the information search. This officer contacted relevant officers within both Education and IT Services; the Council provided the Commissioner with a list of the names and job titles of those individuals. The Council stated that those individuals were able to confirm that they held no information, and had not attended any meetings, falling within the scope of the request.
20. Additionally, the Council stated that minutes and agendas for Head Teachers' meetings were checked back to February 2014 and this did not identify any relevant information. The Council stated that each separate document of a minute or agenda of Head Teachers' meetings was searched electronically, using appropriate search terms.
21. In relation to IT measures, the Council stated that its IT Manager and Education Support Officer were contacted. The Council stated that these officers would have been aware of any relevant IT measures which were in place or planned. As no such measures were in place or planned, IT did not need to carry out any separate searches for relevant information.
22. The Commissioner has considered carefully all of the Council's submissions and its explanations of why the searches it conducted and enquiries undertaken would have located any information falling within the scope of Mr Ellison's request.
23. The Commissioner accepts that, by the end of the investigation, the Council carried out adequate, proportionate searches and enquiries to ascertain whether it held any information falling within the scope of Mr Ellison's request. In the circumstances of this particular case, given the scope of the request, she accepts that any information relevant to the request would have been identified using the searches and enquiries described by the Council.
24. However, by failing initially to give notice that it did not hold the information requested by Mr Ellison, the Commissioner must find that the Council failed to comply with Part 1 (and, in particular, section 1(1)) of FOISA) in responding to Mr Ellison's request.

### **Comments on the Council's handling of the request**

25. The following observations are not part of the Commissioner's findings on compliance with FOISA in this case, although they do touch on the legislative scheme established by FOISA. They cover practice issues the Commissioner has identified during this investigation about which she has concerns.
26. As noted above, the Council stated, in responding to both Mr Ellison's request and his requirement for review, that it held recorded information falling within the scope of his request. This was factually incorrect and misleading.

27. During the investigation, the Council continued to assert that it could apply exemptions to information that it appeared clear did not exist, despite being informed by the investigating officer that it could not lawfully do so under FOISA.
28. Thereafter, the Council attempted to claim that it could refuse to confirm or deny whether the information sought by Mr Ellison existed or was held by it. This was despite having already informed Mr Ellison (albeit incorrectly) that it did hold the information.
29. The Commissioner considers the Council's conduct, in all these respects, fell far short of good practice (and, indeed, any logical application of the scheme established by the legislation). It is a vital preliminary step in responding to a request for information to identify and locate any information the authority holds and which falls within the scope of that request. Adequate steps of this kind should always be able to establish if no relevant information is held. If no information is held, it follows that there is no information to which exemptions can be applied. If the authority has already stated that it either holds or does not hold the requested information, it follows that it cannot then refuse to confirm or deny that position.
30. The Commissioner would urge the Council to reflect on these aspects of its handling of the request, with a view to ensuring that future responses are both accurate and permissible under FOISA. In the Commissioner's view, if the Council had provided an accurate response from the outset, this may well have removed the need for any application by Mr Ellison.
31. The Commissioner has noted these aspects of the Council's handling of this request. In the event of any similar practice issues in future, she may take action against the Council in terms of her Enforcement Policy and Intervention Procedure.

## Decision

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The Commissioner finds that West Lothian Council (the Council) failed to comply with Part 1 of the Freedom of Information (Scotland) Act 2002 (FOISA) in responding to the information request made by Mr Ellison. By failing to give notice in terms of section 17(1) that it did not hold the information requested by Mr Ellison, the Council failed to comply with Part 1 of FOISA.

Given that the Council rectified this failure during the investigation, the Commissioner does not require it to take any action in response to this failure in response to Mr Ellison's application.

## **Appeal**

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Should either Mr Ellison or West Lothian Council wish to appeal against this decision, they have the right to 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.

**Margaret Keyse**  
**Head of Enforcement**  
**15 February 2016**

### 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.

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#### 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.

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**Scottish Information Commissioner**

Kinburn Castle  
Doubledykes Road  
St Andrews, Fife  
KY16 9DS

t 01334 464610

f 01334 464611

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

**[www.itspublicknowledge.info](http://www.itspublicknowledge.info)**