

# Decision Notice

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**Decision 087/2016: Mr Roy Mackay and City of Edinburgh Council**

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**Investigation and report concerning Scottish Borders Council**

Reference No: 201500927

Decision Date: 20 April 2016



Scottish Information  
Commissioner

## Summary

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On 19 October 2014, Mr Mackay asked City of Edinburgh Council (the Council) for information about an investigation, and the resulting report, it undertook on behalf of Scottish Borders Council. The Council responded, following a request for review. It withheld information on the basis that it was subject to legal professional privilege.

Mr Mackay challenged the Council's claim that legal professional privilege applied. The Commissioner investigated. She did not accept that the withheld information was exempt on this basis and required the Council to disclose the information to Mr Mackay.

## Relevant statutory provisions

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Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) and (6) (General entitlement); 36(1) (Confidentiality)

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 October 2014, Mr Mackay asked Council for information concerning its investigation of procedures and practices at another authority, Scottish Borders Council (SBC). This request was the subject of *Decision 031/2015 Mr Roy Mackay and City of Edinburgh Council*<sup>1</sup>, where the Commissioner found that the Council held the information Mr Mackay sought on its own behalf (as opposed to holding it on behalf of SBC). During the investigation of that case, the Council acknowledged that it did hold the information and issued a revised response to Mr Mackay. It is the revised response which is the subject of Mr Mackay's dissatisfaction here.
2. Mr MacKay's request of 19 October 2014 concerned SBC's statutory obligations in respect of the Curators ad Litem and Reporting Officers (Panels) (Scotland) Regulations 2001 (and SBC's handling of related matters, including complaints and requests for information). The information requested was all records relating to:
  - (i) any enquiries from SBC concerning the proposed investigation and the Council's indication that it was able and prepared to undertake the task and on what basis;
  - (ii) the investigation including – but not limited to – SBC's requirements (including in relation to the investigating personnel); the investigation's specification, objectives, scope, limitations, exclusions, terms of reference, tendering, commissioning, conduct, monitoring, revising, editing, versioning, recording, checking, approval, authorisation, evidence, documentation and reporting
  - (iii) claims for and/or payment of any and all fees and/or expenses and/or disbursements in relation to any/all of the above.

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<sup>1</sup> <http://www.itspublicknowledge.info/ApplicationsandDecisions/Decisions/2015/201402880.aspx>

3. The Council sought clarification from Mr Mackay on 28 October 2014 as it could not identify the investigation he described in his request.
4. On 28 October 2014, Mr MacKay provided the Council with a copy of a letter from SBC's Chief Executive, in which she confirmed she had commissioned the Council to carry out an investigation.
5. On 26 November 2014, Mr Mackay wrote to the Council requiring a review, on the basis that the Council had not provided a response to his request within 20 working days.
6. The Council notified Mr Mackay of the outcome of its review on 26 November 2014. It gave Mr Mackay notice in terms of section 17(1) of FOISA, stating it did not hold the information he had asked for as it was held on behalf of SBC.
7. Mr Mackay applied to the Commissioner for a decision on 19 December 2014. As indicated above, the Commissioner investigated and issued *Decision 031/2015*, which found that the information was held by the Council in its own right. The Council accepted this outcome. During the investigation, it provided Mr Mackay with a revised response, dated 19 February 2015. The Council:
  - provided some information, with personal data redacted under section 38(1)(b) of FOISA (part (i));
  - withheld information under section 36(1) of FOISA, on the basis that legal advice privilege applied (part (ii)) and
  - claimed it did not hold the information as the relevant invoice had yet to be issued (part (iii)).
8. On 18 May 2015, Mr Mackay made a new application to the Commissioner for a decision in terms of section 47(1) of FOISA. He was dissatisfied with the outcome of the Council's review (dated 19 February 2015), because he did not agree with its application of section 36(1). He made no comment on any other aspect of the Council's handling of the request, so these need not (and will not) be considered here.

## Investigation

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9. The application was accepted as valid. The Commissioner confirmed that Mr Mackay 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.
10. On 5 June 2015, the Council was notified in writing that Mr Mackay had made a valid application. The Council was asked to send the Commissioner the information withheld from Mr Mackay. The Council provided the information and the case was allocated to an investigating officer.
11. 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 and answer specific questions, with particular reference to the requirements of section 36(1).

## Commissioner's analysis and findings

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

### Interpretation of request

13. The Commissioner has considered the terms of Mr Mackay's request carefully, insofar as it relates to the information withheld under section 36(1) of FOISA. She notes that the Council has interpreted this as including all of the documentary evidence SBC passed to the Council for the purposes of the investigation. She believes this to be interpreting the request too broadly. Essentially, the request (insofar as it relates to the withheld information) is about what the Council was asked to do by SBC, how it was commissioned to do that task and carried it out, its engagement with SBC in so doing, and the product of its work (i.e. the report).
14. From the searches carried out by the Council during the investigation, the Commissioner is satisfied that the Council has identified and located everything it held and which fell within the scope of the request. Unfortunately, however, material relevant to the conduct of the investigation was only identified during the investigation. In this respect, the Council failed to comply with section 1(1) of FOISA.
15. The Commissioner is satisfied that, in addition to the final version of the report, the information withheld under section 36(1) of FOISA and falling within the scope of Mr Mackay's request is that on pages 7 – 15 inclusive, 43 – 119 inclusive (much of which repeats as duplicates within email strings) and 121 – 148 inclusive (draft version of report) of the bundle of documents supplied by the Council to the Commissioner on 27 January 2016. Some of these pages are in fact blank (being, for example, the second side of a one page document), but the numbers have been included here for ease of reference.

### Section 36(1) – Confidentiality

16. The Commissioner will now consider the Council's application of section 36(1) of FOISA.
17. Mr Mackay has suggested that withholding information under this exemption may amount to "blocking" the relevant records with the intention of preventing the disclosure of the information in them. This would be an offence under section 65 of FOISA (Offence of altering etc. records with intent to prevent disclosure). The Commissioner cannot accept this. Section 65 is not designed to prevent a Scottish public authority from withholding information in accordance with Part 1 of FOISA. The Commissioner has no basis in this case for attributing to the Council any motive other than the proper application of these provisions.
18. Section 36(1) of FOISA exempts from disclosure information in respect of which a claim to confidentiality of communications could be maintained in legal proceedings. This includes communications which are subject to legal professional privilege. Mr Mackay provided extensive arguments why he did not believe legal professional privilege could apply to the withheld information. The Council maintained that both aspects of legal professional privilege – legal advice privilege and litigation privilege – applied to the withheld information.

### *Legal advice privilege*

19. Legal advice privilege applies to communications in which legal advice is sought or provided.
20. For legal advice privilege to apply, certain conditions must be fulfilled:
  - (i) the communications must involve a professional legal adviser, such as a solicitor or an advocate. This may include an in-house legal adviser or an external solicitor engaged by the Council.
  - (ii) the legal adviser must be acting in his/her professional capacity, and
  - (iii) the Communications must occur in the context of the legal adviser's professional relationship with his/her client.
21. The Council submitted that the report which was the outcome of its investigation was legal advice provided by one of its solicitors to SBC. Its solicitor was acting in a professional capacity and the report was provided in the context of a professional relationship with SBC, which was the client seeking legal advice.
22. The Commissioner is satisfied that the investigation was carried out, and the report drafted, by a solicitor employed by the Council.
23. No evidence was provided, however, of any standing arrangement whereby the Council's solicitors provide legal advice to SBC.
24. In the circumstances, the Commissioner would need to be satisfied that the Council's solicitors were commissioned to provide SBC with legal advice in this particular case. However, the Commissioner has not been provided with any documentation which would evidence the establishment of a legal professional relationship between the Council and SBC in this particular case. The Commissioner is not satisfied that the solicitor has been commissioned to provide legal advice, in their professional capacity, to SBC. That may be the view taken by the Council, and SBC, after the event, but it is not borne out by the correspondence between them at the time.
25. SBC instructed the Council to carry out a wide-ranging review of its handling of certain statutory processes, complaints and information requests. What the Council was asked to do was described by SBC as an "independent review": it was intended to address potential failures in meeting SBC's statutory duties, but only as part of a wider whole. At no point did the terms of reference specify the professional skills required: the officer concerned was chosen by the Council. The Council has referred to expectations of confidentiality set out in the investigation report, but these do not, in themselves, create a professional solicitor/client relationship: they may be relevant to the application of other exemptions in FOISA, but none have been claimed in this case.
26. The nature of the work carried out by the Council appeared analogous to that covered by the information under consideration by the Commissioner in *Decision 180/2012 Cal Solutions Ltd and Scottish Water*<sup>2</sup>. In that case, the Commissioner did not accept that legal advice privilege applied: the skills of a lawyer might have been helpful in the task they were instructed to do, but the task did not *require* these skills. Further, the report in that case made findings of fact, conclusions on the reasonableness of certain assertions and

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<sup>2</sup> <http://www.itspublicknowledge.info/ApplicationsandDecisions/Decisions/2012/201200792.aspx>

recommendations on matters of good contract governance: the Commissioner did not accept that it provided legal advice.

27. *Decision 180/2012* was drawn to the Council's attention. No further submissions were received from the Council on the relevance of legal advice privilege and the Commissioner is unable to accept that it could apply on the basis of the submissions she has received.
28. The Council went on to submit that the information was subject to litigation privilege, another aspect of legal professional privilege, given that litigation privilege was found to apply to the information in *Decision 180/2012*. The Commissioner will consider these arguments now.

#### *Litigation privilege*

29. Litigation privilege covers documents created in contemplation of litigation (also known as communications *post litem motam*.) Communications *post litem motam* are granted confidentiality to ensure that any person or organisation involved in or contemplating a court action can prepare their case as fully as possible, without the risk that their opponent/s or prospective opponent/s will gain access to the material generated by their preparations. The privilege covers communications at the stage when litigation is pending or in contemplation.
30. As indicated in *Decision 180/2012*, whether litigation privilege applies in any particular case will be a question of fact, the key question generally being whether litigation was actually in contemplation at a particular time. There, given the history of dealings between Scottish Water and a third party, the Commissioner found it reasonable to accept that the report was prepared in contemplation of litigation, and was of a character which brought it within the scope of litigation privilege. Similar circumstances will need to be established wherever a Scottish public authority is seeking to rely on litigation privilege to withhold information under section 36(1) of FOISA.
31. The Council provided recent (December 2015) correspondence from SBC, confirming its understanding that the report was requested in contemplation of litigation. Mr Mackay had made a number of complaints against SBC officers. SBC commented that these complaints, in turn, were made in the context of a backdrop of repeated, complex correspondence from Mr Mackay over an extended period of time. SBC commented that Mr Mackay was clearly very aggrieved at SBC's perceived actions, and his initial grievance arose out of court proceedings (not involving the Council directly). According to SBC, he appeared to have reached "a point of considerably entrenched anger and resentment against SBC".
32. All of the background narrated above may be true, but it does not necessarily follow that litigation was in contemplation at the time the investigation and report were instructed by SBC. There is nothing in correspondence between SBC and the Council at that time to suggest that it was. No evidence has been provided to suggest that Mr Mackay was contemplating litigation at that time, and certainly none to the effect that he was threatening it. He was aggrieved at actions of SBC and had conveyed that in lengthy correspondence. Many people do this without seriously contemplating litigation against the public authority in question.
33. The investigation and report were commissioned by SBC after its own internal consideration of his complaints failed to reach a conclusion which was to his satisfaction. Mr Mackay was aware of this, and was made aware (in summary) of the report's findings and recommendations. At no point, up to the present, does he appear to have suggested he is contemplating litigation against the Council. He may remain unhappy, but that is another matter.

34. Having considered the submissions received from the Council, the Commissioner cannot accept that any of the withheld information was subject to litigation privilege. Consequently, she cannot accept the application of section 36(1) of FOISA to any of the withheld information, on the basis of the submissions she has received. Having reached this conclusion, she is not required to consider the public interest test.
35. Consequently, she now requires the Council to disclose the withheld information (as detailed in paragraph 15 of this Decision Notice) to Mr Mackay.
36. Mr Mackay has not disputed the withholding of personal data from the information disclosed to him already and the Commissioner confirms that personal data may be redacted from the information to be disclosed now, on the same basis as that earlier disclosure.

## Decision

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The Commissioner finds that, in the respects specified in Mr Mackay's application, City of Edinburgh 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 Mackay.

The Commissioner finds that the Council was not entitled to apply the exemption in section 36(1) of FOISA to the information it withheld. In this respect, she finds that the Council breached Part 1 (and in particular section 1(1)) of FOISA. It also failed to comply with section 1(1) in failing to identify all of the information falling within the scope of Mr Mackay's request until during the investigation.

The Commissioner therefore requires the Council to disclose the withheld information by **6 June 2016**.

## Appeal

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Should either Mr Mackay or the 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.

## Enforcement

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If the Council fails to comply with this decision, the Commissioner has the right to certify to the Court of Session that the Council has failed to comply. The Court has the right to inquire into the matter and may deal with the Council as if it had committed a contempt of court.

**Margaret Keyse**  
**Head of Enforcement**

**20 April 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.

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(6) This section is subject to sections 2, 9, 12 and 14.

#### **36 Confidentiality**

(1) Information in respect of which a claim to confidentiality of communications could be maintained in legal proceedings is exempt information.

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