

# Decision Notice 146/2020

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## 3G pitches at the new Madras College

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**Applicant: Applicant**

**Public authority: Fife Council**

**Case Ref: 202000078**



Scottish Information  
Commissioner

## Summary

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The Council was asked about its decision to build two 3G pitches at the new Madras College, instead of one 3G pitch and one sand-based pitch, as originally agreed.

The Council provided the Applicant with some information, but notified her that other information was not held.

The Commissioner investigated and found that the Council was entitled to claim that some information was not held, but that it failed to identify all of the information falling within the scope of parts of the request. He also found that the Council had failed to comply within the required timescales.

By the end of the investigation, the Commissioner was satisfied that the Council had identified all of the information covered by the request.

## Relevant statutory provisions

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

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

## Background

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1. On 7 October 2019, the Applicant made a request for information to Fife Council (the Council). The information requested was:
  - (i) Minutes of meetings covering the subject of changing the scope of the synthetic pitches at the new Madras College from one 3G pitch and one sand based pitch (as per planning drawing number MC-AHR-S0-XX-DR-L-90-007) to two 3G pitches.
  - (ii) Copies of correspondence (for example e-mails and letters) concerning the decision to change from one 3G pitch and one sand based pitch to two 3G pitches.
  - (iii) Copies of forecast pitch usage, i.e. number of people, their age group and the type of sport to be played, and how this will be accommodated at the new school pitch configuration. This should cover both school curriculum and estimated community usage.
  - (iv) Copies of minutes of internal meetings at Madras College where the information in the bullet point above was used to inform the choice of two 3G pitches.
  - (v) Copies of any correspondence with external statutory consultees after the decision was made to construct two 3G synthetic pitches at the new Madras College.
2. The Council failed to respond to this request.
3. On 18 November 2019, the Applicant wrote to the Council requesting a review of its failure to respond to her request for information.

4. The Council also failed to respond to this request for review and, on 23 December 2019, the Applicant applied to the Commissioner, asking him to investigate the Council's failure to respond. The application was accepted as valid and the Council was notified that the Commissioner had received a valid application.
5. The Council subsequently provided the Applicant with the outcome of its review on 9 January 2020. It notified the Applicant, under section 17(1) of FOISA, that it did not hold any information falling within the scope of parts (i), (iii) and (iv) of the request, and it disclosed some redacted documents in response to parts (ii) and (v) of the request. The Council also apologised for its delay in responding to the Applicant's requirement for review.
6. On 14 January 2020, the Applicant wrote to the Commissioner, applying for a decision in terms of section 47(1) of FOISA. The Applicant stated she was dissatisfied with the outcome of the Council's review because she considered that more information was held, in particular she considered that there were missing emails and minutes of meetings.

## **Investigation**

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7. The application was accepted as valid. The Commissioner confirmed that the Applicant made a request for information to a Scottish public authority and asked the authority to review its response to that request before applying to him for a decision.
8. On 15 January 2020, the Council was notified in writing that the Applicant had made a valid application and the case was 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 and to answer specific questions. These related to the searches it had carried out to identify relevant information as well as questions about minutes and correspondence referred to in the documents disclosed to the Applicant.

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

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10. In coming to a decision on this matter, the Commissioner considered all of the relevant submissions, or parts of submissions, made to him by the Applicant and the Council. He is satisfied that no matter of relevance has been overlooked.

### **Scope of investigation**

11. There are five parts to the Applicant's request. However, in her application to the Commissioner, the Applicant indicated that she was satisfied with the Council's response to part (iii) of her request. The Commissioner will therefore not consider part (iii) of the Applicant's request in this decision notice.
12. This decision will consider whether the Council was right to give the Applicant notice, under section 17(1) of FOISA, that it did not hold information falling within the scope of parts (i) and (iv) of her request. The decision will also consider whether the Council holds further information falling within the scope of parts (i), (ii), (iv) and (v) of her request.

### **Information held by the Council**

13. In terms of section 1(4) of FOISA, the information to be provided in response to a request under section 1(1) is that falling within the scope of the request and held by the authority at

the time the request is received. This is subject to qualifications, but these are not applicable here. If no such information is held by the authority, section 17(1) of FOISA requires the authority to give the applicant notice in writing to that effect.

14. The standard of proof to determine whether a Scottish public authority holds information is the civil standard of the balance of probabilities. In determining this, the Commissioner will consider the scope, quality, thoroughness and results of any searches carried out by the public authority. He will also consider, where appropriate, any reason offered by the public authority to explain why the information is not held.
15. As noted above, the Council gave the Applicant notice, under section 17(1) of FOISA, that it did not hold any information falling within the scope of parts (i) and (iv) of her request.

*Requests (i) and (iv)*

16. In both of these requests, the Applicant asked for minutes of meetings that were held and which recorded the Council's decision to change its pitch plan from one sand-based and one 3G pitch, to two 3G pitches.
17. The Council was asked to provide the Commissioner with evidence of searches that the Council undertook before it concluded that it held no information falling within the scope of requests (i) and (iv). In response, the Council submitted that the Project Manager explained that no minutes existed as neither he nor anyone else at the meetings took any. The Project Manager stated that open discussions took place at the meetings and, if anyone should have taken a note of the discussions, it should have been him, but he did not. The Council did provide the Commissioner with handwritten notes written by an attendee of the meeting, but the Commissioner does not consider that these particular notes can be described as minutes: the notes comprise of a very short, informal, list of bullet points which do not convey anything about the subject or the outcome of the meeting. The Commissioner has therefore concluded that the handwritten notes in question fall outwith the scope of the Applicant's requests.
18. The Commissioner has reviewed the emails that were disclosed to the Applicant as a result of the Council's review, and he notes that there was at least one meeting which lasted 90 minutes (and which considered pitch type) and the conclusion of that meeting was that two 3G pitches was the best outcome. It is clear from emails exchanged, that the decision to change the plan from one sand-based and one 3G pitch, to two 3G pitches was not universally popular. In fact, there was strong opposition from those in support of hockey (which requires a sand-based pitch), including councillors and the school's own P.E. department. The Commissioner notes that this issue has also gained local media coverage.
19. Given the views contained in the emails reviewed by the Commissioner, he considers it likely that the Council was aware that a change of pitch type would result in a level of unhappiness amongst interested third parties, and that there would be a strong public interest in how the Council reached this decision. It is therefore surprising that the Council did not take minutes at the meetings, when it knew that what was discussed or agreed was likely to come under public scrutiny.
20. FOISA does not require authorities to record or retain particular information. Therefore, the Commissioner cannot require the Council to take minutes at meetings or record discussions; it is an authority's decision whether or not it records its decision-making processes. However, by failing to record the decision-making process, the Council appears to have increased concern that due process may not have been followed.

21. However, having considered the submissions made by the Council, which provided the Commissioner with details of the searches carried out, and explanations from the Project Manager who attended the meetings that fell within the scope of requests (i) and (iv), the Commissioner accepts, in light of the evidence of the searches conducted, that no minutes were taken.
22. The Commissioner must therefore conclude, on the balance of probabilities, the Council was correct to give the Applicant notice, under section 17(1) of FOISA, that it did not hold the information she had requested.

*Requests (ii) and (v)*

23. In requests (ii) and (v), the Applicant asked for copies of correspondence regarding the decision to change from one sand-based and one 3G pitch, to two 3G pitches as well as copies of correspondence with external statutory consultees after the decision was made.
24. In her submissions to the Commissioner, the Applicant expressed doubt that the Council had identified all relevant information falling within the scope of her request. In particular, she referred to the text of the emails that had been disclosed, noting in one case that an attachment appeared to be missing. This attachment was included in an email from the PE Department to the Head Teacher of the school, but it had not been provided to her.
25. The Council was asked to conduct searches for this attachment, and to ensure that the Head Teacher was asked whether he still had a copy of the attachment. In the Council's response, it indicated that the Head Teacher did not hold a copy of the attachment, nor did he have any recollection of seeing the document. The Council provided the Commissioner with evidence of the searches it had undertaken in relation to the request, and which contained the response of the Head Teacher. The Council was then asked if it had asked the sender of the email (or any of the individuals who had been copied into the email) if they still retained a copy of the attachment.
26. In response, the Council acknowledged that, originally, it had not asked the sender of the email whether she still had a copy of the attachment. The Council explained that it had now done so and the sender was able to provide the missing attachment. The Council disclosed this attachment to the Applicant during the investigation.
27. The Council was asked why it had not located the attachment at an earlier stage (and why it had not asked the sender of the attachment to search their files). In response, the Council stated that the author of the attachment was not involved in the correspondence and decision-making processes of the Council.
28. In response to questions about request (v), the Council explained that that the officer who dealt with external consultees no longer works for the Council. The Council explained that this individual's emails and files have been closed, and that the only external consultee he was in contact with was SportScotland. The Council submitted that it has provided the Applicant with all of the emails from this individual to SportScotland which were copied to the Project Manager. The Council explained that the Project Manager was copied into these email threads for information only, and that no-one else in the project team was involved.
29. The Council explained that all of the project information (regarding the new school) is held in its property drives, and that individual project folders are created and are then used to store data. The Council explained that there are two project folders for the new school, and it provided the Commissioner with the file structure of those folders. The Council confirmed that it searched all of the electronic files, paper files and emails and that all of the relevant

information it holds (and that falls within the scope of requests (ii) and v)) has been provided to the Applicant.

30. The Commissioner has considered the submissions and evidence of searches provided by the Council and he accepts that the Council has searched the relevant files and has not located any further information.
31. While the Commissioner does have some concerns about the thoroughness of the searches conducted by the Council at the time of handling this request, he is now satisfied that the searches conducted during the investigation were reasonable and proportionate and sufficient to demonstrate that no further information is held in relation to requests (ii) and (v).

### **Handling of request/timescales**

32. The Applicant complained of the lack of response by the Council within statutory timescales, commenting that it had been difficult it had for her to obtain this information.
33. Section 10(1) of FOISA gives Scottish public authorities a maximum of 20 working days after receipt of the request to comply with a request for information, subject to qualifications which are not relevant in this case.
34. Section 21(1) of FOISA gives authorities a maximum of 20 working days after receipt of the requirement to comply with a requirement for review, again subject to qualifications which are not relevant in this case.
35. It is a matter of fact that the Council did not provide a response to the Applicant's request for information (7 October 2019) and requirement for review (18 November 2019) until 9 January 2020, thereby missing the 20 working day deadline for each one. The Council acknowledged this failure in its review outcome of 9 January 2020, in which it also apologised to the Applicant for overlooking her requirement for review of 18 November 2019.
36. The Council was asked to comment on its breach of timescales in this case and it submitted that it had discussed its interpretation relating to reviews with the Commissioner's Validation Officer. The Council went on to note that the outcome of this discussion was then passed on to its team dealing with review requests.
37. In the circumstances, the Commissioner must find that the Council failed to comply with section 10(1) and 21(1) in this case.
38. The Commissioner has recorded this procedural failure in line with his Intervention Procedures.

### **Decision**

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The Commissioner finds that Fife Council (the Council) partially complied with Part 1 of the Freedom of Information (Scotland) Act 2002 (FOISA) in responding to the information request made by the Applicant.

The Commissioner finds that, by correctly notifying the Applicant, under section 17(1) of FOISA, that it did not hold some information, the Council complied with Part 1.

However, by failing to identify all of the relevant information that was covered by the request until after an application had been made to the Commissioner, the Council failed to comply with section 1(1) of FOISA.

The Commissioner also finds that the Council failed to adhere to the timescales set out in section 10(1) and 21(1) of FOISA.

Given that information was disclosed to the Applicant during the investigation, the Commissioner does not require the Council to take any action in respect of this failure in response to the Applicant's application.

## **Appeal**

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Should either the Applicant 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.

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

**24 November 2020**

## Appendix 1: Relevant statutory provisions

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

...

#### 10 Time for compliance

- (1) Subject to subsections (2) and (3), a Scottish public authority receiving a request which requires it to comply with section 1(1) must comply promptly; and in any event by not later than the twentieth working day after-

- (a) in a case other than that mentioned in paragraph (b), the receipt by the authority of the request; or
- (b) in a case where section 1(3) applies, the receipt by it of the further information.

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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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#### 21 Review by Scottish public authority

- (1) Subject to subsection (2), a Scottish public authority receiving a requirement for review must (unless that requirement is withdrawn or is as mentioned in subsection (8)) comply promptly; and in any event by not later than the twentieth working day after receipt by it of the requirement.

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