

# Decision Notice 203/2021

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## Correspondence between a named Councillor and council officers

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**Applicant: The Applicant**

**Public authority: Fife Council**

**Case Ref: 202100134**



Scottish Information  
Commissioner

## Summary

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The Council was asked for communications between a Councillor and Council officials regarding a particular venue. The Council told the Applicant that the information was exempt from disclosure before concluding, during the investigation, that it did not hold the information. By the end of the investigation, the Commissioner was satisfied that the Council held no information within scope. However, he found that the Council had breached FOISA by failing to notify the Applicant that it held no 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 2 December 2020, the Applicant made a request for information to Fife Council (the Council). He requested all communications between a named councillor and Council officials (planners, enforcement, legal or other) for the period between 1 September 2019 and 1 September 2020 with respect to Carphin House in particular (but not exclusively) with respect to legal action being undertaken or contemplated.
2. The Council responded on 16 December 2020, and notified the Applicant that it was withholding the information under sections 34(1)(b) (Investigations by Scottish public authorities and proceedings arising out of such investigations) and 36(1) (Confidentiality) of FOISA
3. On 19 December 2020, the Applicant wrote to the Council requesting a review of its decision on the basis that he did not accept that the exemptions applied.
4. The Council notified the Applicant of the outcome of its review on 19 January 2021. It maintained that the information was exempt from disclosure under sections 34(1)(b) and 36(1) of FOISA.
5. On 29 January 2021, the Applicant wrote to the Commissioner, applying for a decision in terms of section 47(1) of FOISA. The Applicant stated that he was dissatisfied with the outcome of the Council's review because it had refused to disclose the information he had requested.

## Investigation

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6. 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.
7. On 9 March 2021, the Council was notified in writing that the Applicant had made a valid application. The Council was asked to send the Commissioner the information withheld from the Applicant.

8. At this point, the Council submitted that it did not, in fact, hold any information falling within the scope of the request, and it issued the Applicant with a new response on 28 April 2021, giving him notice, under section 17(1) of FOISA, that the information was not held. The case was subsequently allocated to an investigating officer.
9. The Applicant confirmed that he wished the Commissioner's investigation to continue on the basis that he believed the Council was blocking his legitimate request for information.
10. 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 its reasons for concluding that it did not hold any information falling within the scope of the Applicant's request.

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

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

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

12. Section 1(1) of FOISA provides that a person who requests information from a Scottish public authority which holds it is entitled to be given that information by the authority, subject to qualifications which, by virtue of section 1(6) of FOISA, allow Scottish public authorities to withhold information or charge a fee for it. The provisions in section 1(6) are not relevant here.
13. The information to be given is that held by the authority at the time the request is received, as defined in section 1(4). This is not necessarily to be equated with the information an applicant believes an authority should hold. If no relevant information is held by the authority, section 17(1) of FOISA requires the authority to give the applicant notice 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 where the balance lies, the Commissioner considers the scope, quality, thoroughness and results of the searches carried out by the public authority. He also considers, where appropriate, any reason offered by the public authority to explain why it does not hold the information. While it may be relevant as part of this exercise to explore expectations about what information the authority should hold, ultimately the Commissioner's role is to determine what relevant recorded information is (or was, at the time the request was received) actually held by the public authority.
15. The Applicant submitted that the Council appeared to have focused solely on legal communications between the parties, whereas he had requested all correspondence, not just that restricted to legal matters. The Applicant also listed all of the reasons the Council had previously given him for not disclosing the information and he questioned what information was contained in the information it was continuing to withhold. Essentially, the Applicant argued that the information he had requested should be, and is, held by the Council.
16. The Council explained that this current request followed on from a previous request made by the Applicant on 5 March 2020, when he asked for correspondence between the named Councillor and Council officers from 1 January 2020 to 5 March 2020. The Council notes

that, when that request was made, the Applicant clarified that the information requested was for the following services: Planning, Legal, and Enforcement.

17. The Council submitted that when the Applicant made this current request he stated;  
*"I would restate my request for FOI with reference to correspondence between councillor [redacted] and council officials for the period between 1st Sept 2019 and 1st Sept 2020."*
18. The Council argued that it understood that the Applicant was expanding the time frame of the request he had previously made, but that the parameters of the request were the same. The Council provided copies of the Applicant's correspondence regarding both requests as evidence to support its interpretation of the scope of the request.
19. The Council interpreted the Applicant's request as seeking all information relating to the planning applications, not only the information that was held for litigation purposes, and that this encompassed both legal and non-legal correspondence.
20. The Council provided details of the searches it had carried out. It submitted that it had searched Outlook, the Council's email system; IDOX, which is the document management system used by planning and enforcement; and Visualfiles, which is the legal document management system used to store correspondence and documents relevant to specific cases. No relevant information was located as a result of these searches. After further prompting, the Council asked its Public Protection Team to conduct searches. The Public Protection Team located one email from the named Councillor; this was a complaint to the night time noise team about the lack of access to their service. The Council deemed this email to be outwith the scope of the Applicant's request as it did not concern planning.
21. The Council also provided detailed submissions from the Service Manager of the Planning department, the Planning Enforcement Officer, and the Manager of Legal Services, outlining the searches they had carried out, the search terms used and the outcome of those searches. As a result of these searches, the Council identified one further email from the named Councillor to Council officers but it was also deemed to be outwith the scope of the Applicant's request as it related to a licensing query (not planning).
22. To support its arguments, the Council provided the Commissioner with a spreadsheet containing all of the correspondence it held regarding the named Councillor.
23. The Council submitted that none of its Services held correspondence with the named Councillor relating to the Applicant's planning applications and it maintained that it was correct to give the Applicant notice, under section 17(1) of FOISA, that the information was not held.

### **Commissioner's conclusions on section 17(1)**

24. Having considered all relevant submissions, the Commissioner is satisfied that the Council has taken adequate and appropriate steps to establish what information was held and whether it held information capable of addressing the terms of the Applicant's request.
25. The Commissioner notes the explanations provided by the Council in its correspondence with the Applicant and the submissions it has provided during this investigation, including evidence of the searches that were undertaken, and the views of staff involved in conducting searches.
26. The Commissioner has also considered the two pieces of correspondence that was identified by the Council (the complaint about access to the service provided by the night time noise

team, and the licensing query) and he is satisfied that these emails fall outwith the scope of the Applicant's request. The Commissioner acknowledges that these emails may be of interest to the Applicant, but he cannot consider them in this decision.

27. The Commissioner accepts that, by the end of his investigation, proportionate searches for any information held and falling within the scope of the request had been conducted and that the Council was correct to notify the Applicant, in terms of section 17(1) of FOISA, that it did not hold the information requested.
28. However, as indicated above, the Council initially claimed that the information was held and was exempt from disclosure under sections 34(1)(b) and 36(1) of FOISA. It is therefore clear that fully adequate searches were not conducted until after the Applicant had applied to the Commissioner, with the result that the Council failed, as required by section 17(1) of FOISA, to notify the Applicant that it did not hold any information falling within the scope of his request.
29. The Commissioner can only consider what relevant information is actually held by the Council (or was held, at the time it received the Applicant's request). He cannot consider what information it should hold, or what the Applicant believes it should hold.

## 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 failing to give the Applicant notice, under section 17(1) of FOISA, that the information was not held, the Council failed to comply with Part 1.

Given that the Commissioner is satisfied that the information is not held, 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**

**16 December 2021**

## 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.

...

#### 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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