



# Decision Notice 068/2024

---

## Named councillor – number of emails received and responded to

**Authority: Inverclyde Council**  
**Case Ref: 202200263**

### Summary

The Applicant asked the Authority for the total number of emails a named councillor had received and responded to over a specified period. The Authority stated that it held the information on behalf of the named councillor and therefore did not hold it for the purposes of FOISA. During the Commissioner's investigation, the Authority changed its position, accepted that it did hold the information on its own behalf and subsequently provided the information to the Applicant.

### Relevant statutory provisions

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1), (2), (4) and (6) (General entitlement); 3(2)(a)(i) (Scottish public authorities); 17(1) (Notice that information is not held); 47(1) and (2) (Application for decision by Commissioner)

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

1. On 26 December 2021, the Applicant made a request for information to the Authority. The Applicant asked for the number of emails received and sent by a named councillor since their election in 2017.
2. The Authority responded on 28 January 2022 with a notice, under section 17(1) of FOISA, that it did not hold the information requested. The Authority explained that elected members

and political parties were “not subject to” FOISA and it therefore did not hold the information requested.

3. On 29 January 2022, the Applicant wrote to the Authority requesting a review of its decision. The Applicant stated that they were dissatisfied with the decision because they considered the Authority did hold the information requested. The Applicant also submitted that they were only seeking “figures” of the number of emails sent and received by the named councillor.
4. The Authority notified the Applicant of the outcome of its review on 25 February 2022. The Authority upheld its original decision and explained that, in terms of section 3(2)(a)(i) of FOISA, it did not hold the information requested on its own behalf, but on behalf of the named councillor.
5. On 2 March 2022, the Applicant wrote to the Commissioner, applying for a decision in terms of section 47(1) of FOISA. The Applicant stated that they were dissatisfied with the outcome of the Authority’s review for the same reasons set out in their requirement for review.

## **Investigation**

6. The Commissioner determined that the application complied with section 47(2) of FOISA and that he had the power to carry out an investigation.
7. On 26 April 2022, the Authority was notified in writing that the Applicant had made a valid application. The case was subsequently allocated to an investigating officer.
8. Section 49(3)(a) of FOISA requires the Commissioner to give public authorities an opportunity to provide comments on an application. The Authority was invited to comment on this application and to answer specific questions. These related to searches undertaken by the Authority for the information requested and the reasons it considered the information to be held on behalf of the named councillor.

## **Commissioner’s analysis and findings**

9. The Commissioner has considered all of the submissions made to him by the Applicant and the Authority.
10. 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 are not relevant in this case.
11. Section 3(2) of FOISA defines the circumstances in which information can be considered held by a Scottish public authority. In this case, section 3(2)(a)(i) of FOISA is relevant: it states that if a Scottish public authority holds the information on behalf of another person (e.g., it is present within the authority's premises and systems only because it is held on behalf of that other person), then the information is not held by that authority for the purposes of FOISA.
12. This means that, if the information requested is held on behalf of another person, the authority must give the applicant notice under section 17(1) of FOISA.

13. The standard of proof to determine whether a Scottish public authority holds information (assuming it can be considered held in terms of section 3(2)) 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.
14. The Commissioner 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.

#### *The Authority's submissions*

15. During the Commissioner's investigation, the Authority revised its position and disclosed the information sought by the Applicant.
16. The Authority explained that it had initially interpreted the information request as seeking information held by the named councillor in relation to their party political and constituency work.
17. However, the Authority stated it had subsequently come to interpret the information request as seeking "general figures only" – information which it accepted it held in its own right for the purposes of FOISA.
18. The Authority therefore disclosed this information to the Applicant, and recognised that it should have done so when it first responded to their information request.

#### *The Applicant's submissions*

19. The Applicant explained that they considered the named councillor to be "part of" the Authority and noted that the named councillor's email address was the same as those used by employees of the Authority.
20. The Applicant stated that they therefore did not believe that the Authority did not hold the information they requested, particularly since the named councillor's use of their email address would necessarily leave a record of their correspondence.

#### *The Commissioner's view*

21. As rehearsed earlier, the Authority accepted, during the Commissioner's investigation, that it did hold the information requested by the Applicant for the purposes of FOISA and subsequently provided them with the information.
22. The Commissioner therefore finds that the Authority was wrong to state, at the time of the Applicant's information request, that it did not hold the information requested.
23. In making this finding, the Commissioner recognises that the Authority initially misinterpreted the Applicant's information request as seeking information it held on behalf of the named councillor (i.e. emails relating to their party political and constituency account).
24. The Applicant, however, was only seeking purely numerical information regarding the number of emails received and sent by the named councillor over a specified period.
25. The Commissioner is therefore satisfied, in the circumstances, that the Authority held in its own right for the purposes of FOISA the information requested.

26. The Commissioner therefore finds that the Authority was not entitled to inform the Applicant that it did not hold information relevant to their request in terms of section 17(1) of FOISA, and therefore breached section 1(1) of FOISA in doing so.

## **Decision**

The Commissioner finds that the Authority failed to comply with Part 1 of the Freedom of Information (Scotland) Act 2002 by failing to respond to the information request made by the Applicant in terms of section 1(1).

Given that, during his investigation, the Authority disclosed the information to the Applicant, the Commissioner does not require the Authority to take any action in response to this failure.

## **Appeal**

Should either the Applicant or the Authority 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.

**David Hamilton**  
**Scottish Information Commissioner**

**25th April 2024**

## Appendix 1: Relevant statutory provisions

### 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.
- (2) The person who makes such a request is in this Part and in Parts 2 and 7 referred to as the “applicant.”
- ...
- (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.
- ...
- (6) This section is subject to sections 2, 9, 12 and 14.

...

#### 3 Scottish public authorities

- ...
- (2) For the purposes of this Act but subject to subsection (4), information is held by an authority if it is held-
  - (a) by the authority otherwise than-
    - (i) on behalf of another person; or
    - ...

...

#### 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.

...

## **47 Application for decision by Commissioner**

- (1) A person who is dissatisfied with -
- (a) a notice under section 21(5) or (9); or
  - (b) the failure of a Scottish public authority to which a requirement for review was made to give such a notice.

may make application to the Commissioner for a decision whether, in any respect specified in that application, the request for information to which the requirement relates has been dealt with in accordance with Part 1 of this Act.

- (2) An application under subsection (1) must -
- (a) be in writing or in another form which, by reason of its having some permanency, is capable of being used for subsequent reference (as, for example, a recording made on audio or video tape);
  - (b) state the name of the applicant and an address for correspondence; and
  - (c) specify –
    - (i) the request for information to which the requirement for review relates;
    - (ii) the matter which was specified under sub-paragraph (ii) of section 20(3)(c);  
and
    - (iii) the matter which gives rise to the dissatisfaction mentioned in subsection (1).