

# Decision Notice

---

**Decision 046/2015: Mr Roy Mackay and Scottish Borders Council**

---

## **Evidence of searches**

Reference No: 201500112

Decision Date: 31 March 2015



Scottish Information  
Commissioner

## Summary

---

On 17 April 2014, Mr Mackay asked Scottish Borders Council (the Council) for information relating to searches carried out in relation to previous requests to the Council and decisions by the Commissioner.

The Council told Mr Mackay that it did not hold the requested information. During the investigation, the Council notified the Commissioner that it did hold information falling within the scope the request and redacted information was provided to Mr Mackay. As a result, the Commissioner finds that the Council was incorrect to inform Mr Mackay earlier that it did not hold information falling within the scope of the request.

The Commissioner also recorded her disappointment at the Council's handling of the request.

## Relevant statutory provisions

---

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

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

## Background

---

1. On 17 April 2014, Mr Mackay made an information request to the Council. Mr Mackay requested information held relating to the searches conducted by the Council as a result of five requests for information and three requirements for review he had submitted to the Council. He also sought information regarding searches made during previous investigations conducted by the Commissioner, which led to three Decision Notices being issued.
2. The Council failed to respond and, on 23 May 2014, Mr Mackay wrote to the Council, requesting a review on the basis that it had failed to respond.
3. Following an application to the Commissioner on 27 June 2014, the Council notified Mr Mackay's of the outcome of its review on 15 July 2014. It informed him that it did not hold any information falling within the scope of his request, applying section 17(1) of FOISA.
4. On 25 July 2014, the Commissioner issued *Decision 166/2014 Mr Roy Mackay and Scottish Borders Council*, regarding the Council's failure to respond within the time allowed by FOISA.
5. On 14 January 2015, Mr Mackay wrote to the Commissioner. He applied to the Commissioner for a decision in terms of section 47(1) of FOISA. Mr Mackay did not accept that the Council held no information falling within the scope of nine parts of his request.

## Investigation

---

6. 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. The case was allocated to an investigating officer.
7. Section 49(3)(a) of FOISA requires the Commissioner to give public authorities an opportunity to provide comments on an application.
8. On 10 February 2015, the investigation officer notified the Council that Mr Mackay had made a valid application to the Commissioner and was invited to comment on his application. It was asked to explain what steps it had taken to identify and locate the information covered by Mr Mackay's application.
9. The Council responded, explaining that, following further investigation, it had located information falling within the scope of the nine parts of Mr Mackay's request which were the subject of the Commissioner's investigation. It also provided submissions on the searches carried out to identify and locate the information requested.
10. The Council accepted that it had been incorrect to issue a response to Mr Mackay in terms of section 17(1) of FOISA. It confirmed that it had given Mr Mackay a further response, otherwise than under section 17(1).
11. Mr Mackay confirmed receipt of the further response, making further submissions regarding the Council's handling of his request and its apparent failure to follow its own FOISA procedures.

## Commissioner's analysis and findings

---

12. 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 Mackay and the Council. She is satisfied that no matter of relevance has been overlooked.
13. 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. This obligation is 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 qualifications contained in section 1(6) are not applicable in this case.
14. 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 information an applicant believes the authority should hold. If no such information is held by the authority, section 17(1) of FOISA requires it to give the applicant notice in writing to that effect.
15. In providing submissions to the Commissioner, the Council explained that, at the time of Mr Mackay's request, it did not use search sheets or formally record searches. Mr Mackay's requests had largely been discussed verbally by Council Officers, it submitted, and the relevant information which could be located was therefore limited. From the information it had, it explained the searches that were carried out and the search terms used: these searches embraced both electronic and paper files.

16. The Council further submitted that at the time of the request under consideration here, its Legal Services had prepared some information for release. It could not explain why the review outcome of 15 July 2014 informed Mr Mackay that no information was held.
17. The Council further explained the searches and enquiries it undertook during this investigation to ascertain what information it held, and confirmed that it had identified and located information falling within the scope of Mr Mackay's request. The Council explained that members of staff who had dealt with Mr Mackay's request had since left its employment, with the result that any relevant information held within their personal email accounts had been permanently deleted.
18. The Council confirmed, however, that the general FOI email account had been checked (along with other email accounts and relevant electronic records) and further information had been located and retrieved.
19. Having considered all relevant submissions and the terms of the requests, the Commissioner accepts that (by the close of the investigation) the Council carried out adequate searches to ascertain whether any relevant information was held. She is also satisfied that the information located during the investigation has now been provided to Mr Mackay, subject to redactions which are not the subject of this investigation.
20. Based on those submissions, the Commissioner finds that in failing to take adequate steps to identify, locate and provide the requested information in responding to Mr Mackay, the Council failed to comply with section 1(1) of FOISA. In these circumstances, the Council was incorrect to give Mr Mackay notice, in terms of section 17(1) of FOISA, that it held no information falling within the scope of his request.

### **Handling of the Request**

21. The Commissioner has a number of concerns relating to the handling of Mr Mackay's request, and in particular the fact that the Council has intimated that – at the time it responded to the request and requirement for review – it did not keep a record of searches carried out. She is further concerned that – at the time of responding to Mr Mackay's requirement for review – it had located and retrieved information falling within the scope of the request, yet a response was issued in terms of section 17(1) of FOISA. The Council cannot provide any explanation as to why this happened.
22. It is evident that there is no formal record of the relevant searches carried out at the time the Council responded to Mr Mackay's requirement for review. It is further evident that having located information at that time, the Council gave Mr Mackay an incorrect review outcome: it informed him that no information was held. If full searches had been conducted and recorded at the time of the request, and the information located actually provided, this might have satisfied Mr Mackay and he might not have found the need to apply to the Commissioner.
23. While the Commissioner notes that relevant staff members have since left the Council, it is the Council's duty to ensure that its processes for recording and retrieving relevant information are resilient and can withstand changes in key personnel. In this regard, she draws attention to the fact that, in 2010, the Council was subject to a Practice Assessment<sup>1</sup> by the Commissioner. As a result, an Action Plan was drawn up and agreed, to improve the Council's performance in relation to its handling of requests under FOISA and the EIRs.

---

<sup>1</sup> [http://www.itspublicknowledge.info/ScottishPublicAuthorities/Self-AssessmentToolkit/Practice\\_Assessment\\_Reports.aspx](http://www.itspublicknowledge.info/ScottishPublicAuthorities/Self-AssessmentToolkit/Practice_Assessment_Reports.aspx)

24. In relation to the concerns identified above, the Commissioner notes that the 2010 Action Plan included two specific recommendations:

Recommendation 1: *The Council puts in place procedures to ensure resilience and adequacy of administration arrangements both in relation to staff and data storage/retrieval.*

and

Recommendation 9: *It is recommended that records of searches which have been undertaken when identifying information falling within the scope of a request should be maintained. It is also recommended that guidance should be provided for staff carrying out searches.*

25. In November 2010, in response to that Practice Assessment Report and Action Plan, the Council confirmed that the above recommendations had been acted upon. In relation to recommendation 9, the Council stated that: "Guidance and templates have been developed which will provide a more consistent and reliable approach to searches." At that time, the Council also confirmed that a template had been created for recording searches.
26. During the investigation, Mr Mackay also provided the Commissioner with a copy of the Council's *FOI Procedures for FOI Co-ordinators at Scottish Borders Council v1.0 - November, 2010*, which included a *Template 1 - Record of information searches* for completion by relevant staff in dealing with requests for information. This reflected the submissions made by the Council in November 2010, as indicated above.
27. The Commissioner is disappointed by the Council's submissions that failed to keep proper records of searches. This appears in stark contrast to the initial improvements noted following the Commissioner's Assessment in 2010.
28. Whilst the Commissioner notes that the Council has undergone a change in staff and has reviewed the way in which it handles requests for information, she is disappointed that it failed to maintain its initial progress in recording searches carried out.
29. The Commissioner will be monitoring the situation to ensure the Council has robust and effective systems in place to deal with requests received.

## Decision

---

The Commissioner finds that Scottish Borders Council (the Council) failed to comply with Part 1 of the Freedom of Information (Scotland) Act 2002 in responding to the information request made by Mr Mackay. She finds that by incorrectly providing him with notice that it did not hold any information falling within the scope of his request, the Council failed to comply with section 1(1) of FOISA.

Given that the Council provided Mr Mackay with a response otherwise in terms of section 17(1) of FOISA during the investigation, the Commissioner does not require the Council to take any action regarding this failure, in response to Mr Mackay's application.

## **Appeal**

---

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.

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

**31 March 2015**

### Freedom of Information (Scotland) Act 2002

#### 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.

...

##### 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.

...

**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)**