

# Decision Notice



Decision 068/2014 Mr Roy Mackay and Scottish Borders Council

Curator ad litem and reporting officer appointments

Reference No: 201302799, 201302802, 201302804

Decision Date: 20 March 2014

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**Rosemary Agnew**

Scottish Information Commissioner

Kinburn Castle  
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## Summary

On 26 February 2013, 18 April 2013 and 3 September 2013, Mr Mackay asked Scottish Borders Council (the Council) for information relating to appointments under the Curators ad Litem and Reporting Officers (Panels) (Scotland) Regulations 2001 (CROR). The Council failed to respond to two of Mr Mackay's requests, but provided some information following a requirement for review. The Commissioner carried out an investigation and found that the Council had failed to provide Mr Mackay with all of the relevant information it held.

Given that the information held has now been provided to Mr Mackay, the Commissioner does not require the Council to take any action.

## Relevant statutory provisions

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Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) and (4) (General entitlement)

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

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### Request 1

1. On 26 February 2013, Mr Mackay wrote to the Council and asked for information which included:
  - What income do (CROR) panel members generate, and from how many cases, as a result of their panel membership and how is this information reported, monitored and audited?
  - Details of the current panel membership with end of service dates, total length of service even if membership has not been continuous, appropriate qualifications and training record of each panel member, and number of complaints received about each.
2. On 1 April 2013, Mr Mackay wrote to the Council, requesting a review on the basis that it had failed to respond.



3. The Council failed to respond to the requirement for review and, on 6 May 2013, Mr Mackay made an application to the Commissioner. This resulted in the Commissioner issuing *Decision 125/2013 Mr Roy Mackay and Scottish Borders Council*, finding that the Council had failed to respond within the time allowed.
4. As a result of the application to the Commissioner, the Council responded to Mr Mackay's requirement for review on 26 June 2013. It provided information on fees paid to panel members and the process for payment. It also provided Mr Mackay with a list of eight solicitors, who it stated had served on the panel since at least 2008.
5. Further correspondence followed between Mr Mackay and the Council, with Mr Mackay questioning the accuracy and completeness of the information provided. The Council provided a replacement spreadsheet for the one provided earlier.

### Request 2

6. On 18 April 2013, Mr Mackay wrote to the Council, seeking further information in relation to the Council's performance and operation of its obligations, duties and responsibilities under CROR. This included records of how the Council fulfilled its obligations under specified regulations.
7. On 23 May 2013, the Council responded in terms of section 17(1) of FOISA, giving Mr Mackay notice that it did not hold any information falling within the scope of this request.
8. On 10 July 2013, Mr Mackay wrote to the Council requesting a review of its decision. He asked the Council to make it clear if it could not provide the information because it had not complied with the relevant regulations.
9. On 8 August 2013, the Council responded to Mr Mackay's requirement for review. The Council noted that Mr Mackay had already been provided with a copy of the panel list and provided him with copies of two pro-forma letters.

### Request 3

10. On 3 September 2013, Mr Mackay wrote to the Council again in relation to the CROR, seeking information which included the following:
  - Records of the total number of members of the current panel(s)
  - Records of the date(s) of current members' appointment or reappointment to the current panel(s).
11. On 19 September 2013, the Council responded. It informed Mr Mackay that the first part of the request was a repeat of the second part of request 1, so section 14(2) of FOISA applied. It also informed him that it held no information for the second part of the request.



12. On 20 September 2013, Mr Mackay wrote to the Council requesting a review of its decision. He accepted that he had been provided with information in response to the second part of request 1, but pointed out that this was a request in relation to the position as at a later date (i.e. 3 September 2013). He referred to changes in panel membership, and stated that he did not consider it possible to determine the number of panel members as at that later date, from the information he had been provided with earlier.
13. In relation to dates of appointment or reappointment, Mr Mackay referred to the Council's obligations under CROR and questioned its response that it held no relevant information.
14. On 1 October 2013, the Council wrote to Mr Mackay stating that its response to his request for review would be delayed and asked that he agree to a delayed response time of 25 October 2013. Mr Mackay accepted that the response would be delayed until that date.
15. On 30 October 2013, Mr Mackay wrote to the Commissioner, making an application regarding the Council's failure to respond to his requirement for review. As a result of this application, the Commissioner issued *Decision Notice 255/2013 Mr Roy Mackay and Scottish Borders Council*, finding that the Council had failed to respond within the time allowed.
16. On 6 November 2013, the Council responded to Mr Mackay's requirement for review. The Council maintained that the information on panel membership remained unchanged between the two requests.
17. In relation to dates of appointment or reappointment, the Council stated that it had carried out a further search and provided Mr Mackay with a copy of one letter. It also stated that other information retrieved from that search confirmed that it did not hold the dates.
18. On 25 November 2013, Mr Mackay wrote to the Commissioner, stating that he was dissatisfied with the outcome of each of the Council's reviews and applying to the Commissioner for a decision in terms of section 47(1) of FOISA.
19. The application was validated by establishing that Mr Mackay made requests for information to a Scottish public authority and applied to the Commissioner for a decision only after asking the authority to review its response to those requests. The case was then allocated to an investigating officer.

## Investigation

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20. On 6 December 2013, the investigating officer notified the Council in writing that an application had been received from Mr Mackay regarding each of his three requests, giving it an opportunity to provide comments on the application (as required by section 49(3)(a) of FOISA) and asking it to respond to specific questions. The Council was asked to justify its reliance on any provisions of FOISA it considered applicable, and in particular to explain the steps it had taken to identify and locate the information requested.



21. During the investigation, Mr Mackay informed the Commissioner that, on 3 December 2013, he had made a further request for information. He stated that this had produced information which he believed should have been provided in response to the requests under consideration here. The Council provided a copy of this information and was asked to comment on Mr Mackay's submissions.
22. The Council responded to the effect that it had now provided all of the information it held and falling within the scope of Mr Mackay's requests. The Council provided submissions to support its position that it did not hold any further information.
23. The Council accepted that some of the information provided to Mr Mackay in response to his request of 3 December 2013 could be construed as falling within the scope of the requests under consideration here. The Council apologised if its interpretation of the earlier requests made it necessary for Mr Mackay to make further requests.

## Commissioner's analysis and findings

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24. 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.

### Information held by the Council

25. 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 certain 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.
26. 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.
27. The Commissioner notes the submissions provided by Mr Mackay, in which he provided reasons why he considered the Council should hold further detailed information. Generally, these relate to the Council's obligations under CROR: while the Commissioner has taken these into account in considering the adequacy of the steps taken by the Council to establish what relevant information it held, she would emphasise that it is not her role to reach a definitive view on the interpretation of CROR. She has also taken into account Mr Mackay's opinion that some of the information provided in response to the later request, of 3 December 2013, should have been provided in response to the requests under consideration here.



28. In its submissions to the Commissioner, in relation to the first part of request 1, the Council initially stated that the Panel members are paid in accordance with their Fees Notes as provided to Mr Mackay, explaining that that they do not generate income (i.e. for the Council). It was explained to the Council that Mr Mackay's request should be interpreted as information held regarding income generated by (or paid to) the members of the Panel and not generated by (or paid to) the Council.
29. Whilst noting the above point, the Council submitted that, taken in context, it was not wholly unreasonable for it to have interpreted the request to be for income generated (i.e. produced) for the Council. However, this is not a position the Commissioner can accept; it is apparent in context that Mr Mackay wished information regarding payments made to members of the panels in question.
30. Having considered the information provided in response to Mr Mackay's request of 3 December 2013, and the terms and context of the requests under consideration here, the Commissioner is satisfied that it would be reasonable to interpret this information, at least in part, as falling within the scope of the requests under consideration here (as the Council has acknowledged). The relevant information was held at the time these earlier requests were received and should have been identified and located in response to them, had the Council interpreted the requests appropriately and undertaken adequate searches.
31. The Commissioner notes that the Council has identified an issue of interpretation in relation to the income generated by panel members. While the Council dealt with this initially on the basis that Mr Mackay was seeking information on income generated for the Council, the more reasonable approach (in context) would have been to interpret this part of the request as relating to income received by panel members in performance of their duties.
32. During the investigation, the Council explained the searches and enquiries it undertook to ascertain whether it held further information falling within the scope of Mr Mackay's requests. It provided evidence of the outcomes of these, explaining that matters covered by the requests were frequently the subject of verbal communication only, given the nature of its office accommodation and the small number of staff involved.
33. Having considered all relevant submissions and the terms of the requests, the Commissioner accepts that (by the conclusion of the investigation) the Council carried out adequate, proportionate searches to ascertain whether it held any further relevant information. She is also satisfied that any relevant information it held has now been provided to Mr Mackay.
34. Taking account of all the circumstances, however, the Commissioner concludes that (in responding to Mr Mackay) the Council failed to comply with Part 1 of FOISA, and in particular section 1(1), by failing to identify, locate and provide all the information it held and which fell within the scope of Mr Mackay's requests.



## **DECISION**

The Commissioner finds that Scottish Borders Council failed to comply with Part 1 of the Freedom of Information (Scotland) Act 2002 (in particular, section 1(1)) in responding to the information requests made by Mr Mackay.

Given that any information held has now been provided to Mr Mackay, the Commissioner does not require the Council to take any action in respect of these failures, in response to Mr Mackay's application.

## **Appeal**

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Should either Mr Mackay or Scottish Borders 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**  
**20 March 2014**



## Appendix

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### 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.  
...
- (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.  
...