

# Decision Notice

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## Decision 157/2016: Mr Roy Mackay and Scottish Borders Council

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### Whether request was vexatious

Reference No: 201600077

Decision Date: 12 July 2016



Scottish Information  
Commissioner

## Summary

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On 25 May 2015, Mr Mackay asked Scottish Borders Council (the Council) for information relating to a report commissioned by the Council on its obligations under the Curators ad Litem and Reporting Officers (Panels) (Scotland) Regulations 2001.

The Council did not respond to the request. Following a review, the Council informed Mr Mackay that is considered his request to be vexatious. Mr Mackay remained dissatisfied and applied to the Commissioner for a decision.

The Commissioner investigated and found that the Council had partially failed to respond to Mr Mackay's request for information in accordance with Part 1 of FOISA. She accepted that part, but not all, of the request was vexatious. As the Council had provided information relating to this part of the request during her investigation, she did 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 (6) (General entitlement); 14(1) (Vexatious or repeated requests)

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 25 May 2015, Mr Mackay made a request for information to the Council. He made reference to a report the Council had commissioned from City of Edinburgh Council relating to the Council's obligations under the Curators ad Litem and Report Officers (Panels) (Scotland) Regulations 2001 (the Regulations), and asked for the following information:
  - (i) All information held by the Council relating to the fees and costs of the investigation and report.
  - (ii) All information held by the Council about the individuals to whom any part of the report has been disclosed, including numbers, positions held and names.
  - (iii) All information held by the Council relating to anyone who had requested that any part of the report be disclosed to them.
2. The Council did not respond to this request.
3. On 23 June 2015, Mr Mackay wrote to the Council requesting a review of its decision on the basis that it had failed to respond to his request.
4. The Council notified Mr Mackay of the outcome of its review on 13 July 2015. The Council considered Mr Mackay's request to be vexatious in terms of section 14(1) of FOISA, and concluded that it was not required to comply with the request.

5. On 12 January 2016, Mr Mackay applied to the Commissioner for a decision in terms of section 47(1) of FOISA. He was dissatisfied with the outcome of the Council's review, because he did not consider his request to be vexatious.

## Investigation

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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.
7. On 3 February 2016, the Council was notified in writing that Mr Mackay had made a valid application.
8. 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 answer specific questions including justifying its reliance on any provisions of FOISA it considered applicable to the information requested.

## Commissioner's analysis and findings

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9. 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.
10. Under section 14(1) of FOISA, a Scottish public authority is not obliged to comply with a request for information if the request is vexatious.
11. The Commissioner has published guidance on the application of section 14(1)<sup>1</sup> of FOISA. This states:

*There is no definition of "vexatious" in FOISA. The Scottish Parliament acknowledged that the term "vexatious" was well-established in law and opted to give the Commissioner latitude to interpret that term in accordance with this background, in order that the interpretation might evolve over time in light of experience and precedent.*
12. In the Commissioner's view, there is no single formula or definitive set of criteria that allows a formulaic approach to determining whether a request is vexatious, and each request must be considered on the merits of the case, supported by evidence and clear evaluation and reasoning. In its submissions, the Council referred to the factors that the Commissioner considers to be relevant to a finding that a request (which may be the latest in a series of requests or other related correspondence) is vexatious. These are documented within the Commissioner's briefing on section 14 of FOISA, so she will not repeat them here.
13. While the Commissioner's view is that the term "vexatious" must be applied to the request and not the requester, she also acknowledges that the applicant's identity, and the history of their dealings with a public authority, may be relevant in considering whether a request is vexatious.

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<sup>1</sup> <http://www.itspublicknowledge.info/Law/FOISA-EIRsGuidance/Section14/Section14Overview.aspx>

## **The Council's submissions**

14. The Council stated that the issue of its compliance with the Regulations and other related issues had been exhaustively explored as a result of Mr Mackay's previous requests, complaints and by an investigation commissioned by the Council. It was the Council's view that his requests are primarily a means of extending the dialogue about these issues and have the effect of harassing the Council and its staff.
15. The Council provided the Commissioner with a detailed history of its dealing with Mr Mackay in relation to the subject matter of his requests. It explained that Mr Mackay had an underlying complaint with the Council, ongoing since 2013. The Council described how it had attempted to address Mr Mackay's longstanding concerns that its practice, in relation to Curators ad Litem, did not comply with the corresponding Regulations.
16. Each part of Mr Mackay's request will be considered below.

### *Part (i) of the request*

17. The Council stated that some information about fees charged for the investigation was initially requested by Mr Mackay on 19 October 2014, at which point he was advised that the Council did not hold the information. Mr Mackay requested the information again on 25 May 2015 (the request currently under consideration, which was refused as vexatious).
18. The Council stated that Mr Mackay had since made a further request for the fees. On 17 March 2016, it provided Mr Mackay with a copy of the invoice received from City of Edinburgh Council for the independent investigation it had carried out; this invoice was dated 28 May 2015.
19. The Council acknowledged that it had applied section 14(1) to the entirety of Mr Mackay's request but during this investigation it accepted that the information should be disclosed, and sent him the information. The Council did not supply the Commissioner with submissions with regard to its reliance on section 14(1) in relation to part (i) of this request.
20. In light of the circumstances described above, the Commissioner cannot accept the Council's reliance on section 14(1) in relation to this part of the request. The Commissioner does not require any action on the part of the Council as a result of this failure, as the information was disclosed to Mr Mackay during this investigation.

### *Parts (ii) and (iii) of the request*

21. In relation to parts (ii) and (iii) of the request, the Council emphasised that its staff act as officers of the Council and questioned the purpose or value there would be in Mr Mackay knowing their particular identities. In addition, the Council explained that a number of staff to whom the report has been disclosed do not occupy senior positions.
22. The Council submitted that over that last 2-3 years, Mr Mackay has a history of pursuing individual Council employees and solicitors based in the Scottish Borders. The Council stated that he has made enquiries and complaints about a number of legal professionals. As his contact with the Council and his FOI requests progressed, he made complaints about individual officers and he continued to pursue his complaints against at least one individual council officer after the independent investigation had concluded.
23. The Council explained that the pattern of Mr Mackay's behaviour, and his continuing requests and correspondence about the Regulations, has placed an unreasonable burden on the Council's Information Management Team and senior officers.

24. The Council stated that the correspondence from Mr Mackay continues to burden and harass officers whose practices have already been subject to an investigation and officers who are required to progress the Council's responses to Mr Mackay. The Council argued that, if details were to be disclosed, it is possible that Mr Mackay would use them to contact the officers or members of the public and try to reopen exhausted dialogue.
25. In the context of the history of its correspondence and contact with Mr Mackay, the Council concluded that Mr Mackay now has an on-going grievance with the Council and is conducting an extended campaign to try to expose what he perceives as wrongdoing, to the point that his behaviour can (in the Council's view) be described as obsessive.
26. The Council considered the submissions made above apply equally to parts (ii) and (iii) of Mr Mackay's request.

### **Submissions from Mr Mackay**

27. Mr Mackay explained that the purpose of his request was to establish who had seen and/or requested the report. In the interests of transparency and democracy, he was keen to establish if the report had been shared with any of the Council's elected members. He stated that it was his intention to use any relevant information disclosed to raise the issue that elected members had, in his view, been misled by the Council's report of 26 May 2015 and make them aware of the existence of the City of Edinburgh Council's investigation report.

### **The Commissioner's findings**

28. FOISA does not require the requester to state why they want information. However, there are occasions where the intention behind a request cannot, in the whole circumstances of the case, be disregarded. If the intention behind a request is evidently to cause disruption or annoyance to the authority, rather than to access the information that is the subject of the request, the request may be vexatious. To that end, the history of the requester's dealings with an authority may be relevant.
29. An authority could reasonably conclude that a particular request represents the continuation of a pattern of behaviours which it has deemed vexatious in another context. This may arise where a requester has an on-going grievance against a public authority, or could be described as conducting an extended campaign (for example, to expose wrongdoing), to the point that his or her behaviour can be described as obsessive.
30. Requests might also be deemed vexatious if:
  - (i) There is no additional information that can be provided because all relevant information has already been disclosed; or
  - (ii) It is unlikely that the additional information would shed light on, or alter the requester's situation (because the subject in question has already been thoroughly addressed through the relevant complaints or appeals procedure).
31. Even if a requester did not intend to cause inconvenience or expense, if the request has the effect of harassing the public authority and/or its staff, it may be deemed vexatious when considered from the perspective of a reasonable person.
32. The Commissioner has considered in detail the arguments and explanations presented by both parties.

33. The Commissioner has also taken into account the history of the dealings between these parties and the ongoing nature of Mr Mackay's complaints and requests. She concludes that, in the circumstances, it is reasonable for the Council to take account of the history of its dealings with the requester when reaching a conclusion about whether a request should be regarded as vexatious.
34. By making the request currently under consideration, Mr Mackay was trying to establish the circulation of the report of the investigation commissioned by the Council. The Commissioner recognises that there may be lessons for the Council to learn from this report, and learning whether these lessons have been acted upon should be a matter around which there is transparency. However, it is also clear to the Commissioner that the Council has already considered and reviewed its practices with regard to the appointment of panel members under the Regulations<sup>2</sup>.
35. Ultimately, taking account of the history between the parties, it is the Commissioner's view that this request was designed to further Mr Mackay's aim of revealing wrongdoing on the part of the Council and to pursue an ongoing grievance which the Council has gone to some lengths to try to resolve.
36. It is the Commissioner's view that the cumulative effect of the correspondence has been such that parts (ii) and (iii) of the request had the effect of harassing the Council and its staff. The Commissioner has not reached this conclusion lightly and acknowledges that this may not have been Mr Mackay's specific intention in making the request. However, the context created by Mr Mackay's previous correspondence with the Council suggests strongly that he is now repeatedly pursuing his original concerns on the same matter, to a point where his information request has become unreasonable.
37. The Commissioner therefore finds that parts (ii) and (iii) of Mr Mackay's request were vexatious in terms of section 14(1) of FOISA, and the Council was not obliged to comply with these parts of the request.

## Decision

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The Commissioner finds that Scottish Borders 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 Mr Mackay.

The Commissioner finds that the Council:

- (i) was not correct to conclude part (i) of his request was vexatious
- (ii) was correct to conclude that parts (ii) and (iii) of Mr Mackay's request were vexatious in line with section 14(1) of FOISA.

Given that the Council responded and provided information in response to part (i) of Mr Mackay's request during the investigation, the Commissioner does not require the Council to take any action in respect of this failure.

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<sup>2</sup> <http://scottishborders.moderngov.co.uk/documents/s2009/Item%20No.%2011-%20Final%20Curator%20Report.pdf>

## **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.

**Rosemary Agnew**  
**Scottish Information Commissioner**

**12 July 2016**

### 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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(6) This section is subject to sections 2, 9, 12 and 14.

#### **14 Vexatious or repeated requests**

(1) Section 1(1) does not oblige a Scottish public authority to comply with a request for information if the request is vexatious.

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**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)**