

# Decision Notice 068/2022

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## Monitoring Officer's investigation

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**Applicant: The Applicant**

**Public authority: City of Edinburgh Council**

**Case Ref: 201902016**



Scottish Information  
Commissioner

## Summary

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The Council was asked whether an investigation into a complaint was commissioned by the Council's Monitoring Officer. The Council stated that the information was otherwise accessible to the Applicant. The Commissioner accepted that information was accessible to the Applicant, but that the Council was wrong to refer the Applicant to the content of one letter in response to the requests.

## Relevant statutory provisions

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Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) and (6) (General entitlement); 2(1)(a) and (2)(a) (Effect of exemptions); 11(1) and (2)(b) (Means of providing information); 15(1) Duty to provide advice and assistance); 25(1) (Information otherwise accessible)

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 20 August 2019, the Applicant made the following request for information to the City of Edinburgh Council (the Council).

*I refer to the investigation conducted by Chris Phillips which reported in December 2015. Please could you answer the following yes/no questions (under FOISA if necessary)*

- *Was this investigation commissioned by the Council's Monitoring Officer?*
- *Was this investigation a Monitoring Officer's investigation?*
- *Was the report issued a Monitoring Officer's Report?*

2. The Council responded on 16 September 2019. It relied on the exemption in section 25(1) of FOISA, stating that the information requested was already reasonably obtainable by the Applicant. The Council referred to a letter sent to the Applicant on 31 December 2015 which outlined the Council's actions in relation to the complaint which had led to the investigation referred to in the request. The Council explained that this letter stated who had commissioned the investigation and also outlined the outcome of the investigation.
3. The Council also said that the exemptions in sections 30 (Prejudice to effective conduct of public affairs) and sections 38(1)(a) and (b) (Personal information) of FOISA were relevant to the request. To assist, the Council referred to its previous response to an information request by the Applicant: that response (which referred back to a previous response to another request by the Applicant) had explained what constituted a report by a Monitoring Officer, and how that term was used in the Council's correspondence.
4. Later the same day, the Applicant wrote to the Council requesting a review of its decision. He disagreed that he could reasonably obtain the information. The Applicant said that the letter of 31 December 2015 identified the person who had commissioned the work, but other Council documentation stated - or implied - something different. The Applicant said:

*You [the Council] have claimed that the information is already obtainable by me. However this is not the case. The letter you refer to identifies the person who commissioned the work, but other council documentation states or implies something different. There is no way for me to know which information is correct. Therefore, the information is not otherwise available to*

*me and it is reasonable for me to request to definitive information (sic) from the council if it is held.*

5. The Council notified the Applicant of the outcome of its review on 9 October 2019. The Council confirmed its view that the information requested was obtainable by the Applicant as it was in the letter (of 31 December 2015) sent to him. The Council said that, although the Applicant may dispute the veracity of the information in that letter, the information to answer his request was available to him.
6. The Council repeated its reference to sections 30 and 38 of FOISA, although it made clear that - given its reliance on section 25 of FOISA - these exemptions were secondary. The Council believed it had complied with section 15 of FOISA (the duty to provide advice and assistance), but acknowledged that reference to its previous response may have been better put as an explanation itself. The Council apologised for this.
7. On 2 November 2019, the Applicant wrote to the Commissioner. The Applicant applied to the Commissioner for a decision in terms of section 47(1) of FOISA. The Applicant stated he was dissatisfied with the outcome of the Council's review because he did not accept that section 25 of FOISA applied to his request. The Applicant's dissatisfaction is set out in detail in the rest of this decision.

## **Investigation**

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8. 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.
9. 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 whether the information requested by the Applicant's request was information which the Applicant can reasonably obtain other than by requesting it under section 1(1) of FOISA.
10. Both the Applicant and the Council provided comments to the Commissioner during the investigation.

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

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11. In coming to a decision on this matter, the Commissioner considered all 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.

### **Section 25(1) of FOISA - Information otherwise accessible**

12. Under section 25(1) of FOISA, information which a requester can reasonably obtain, other than by requesting it under section 1(1) of FOISA, is exempt information. The exemption in section 25 is absolute, in that it is not subject to the public interest test in section 2(1)(b) of FOISA.
13. The information requested by the Applicant was a yes/no response to three questions about the investigation conducted by Chris Phillips, which reported in December 2015: was this investigation commissioned by the Council's Monitoring Officer; was it a Monitoring Officer's investigation; and was the report issued a Monitoring Officer's Report.

### *Submissions from the Council*

14. The Council commented that the Applicant's dissatisfaction seemed more suited to being pursued through the Council's complaint process, and was not an indication that the Council had handled the information request improperly.
15. The Council explained the context of the Applicant's ongoing complaint: the Applicant is unhappy that certain investigations and reports have been referred to in correspondence with him and regulators as "Monitoring Officer investigations or reports" when, in his view, they have not merited such a description. The Council commented:

*...there is no standard and agreed definition, within legislation or elsewhere that the Council is aware of, which specifically outlines the scenarios which would absolutely describe a Monitoring Officer investigation or report. It is a semantic description rather than a definitive term.*

16. The Council suggested that the difficulty with this request was that the Applicant and the Council have different understandings of what can fairly be included within such a description, particularly within the context of the Applicant's complaint. From the Council's understanding of the Applicant's general complaint, the Council stated it would appear that the Applicant was applying a definition of a Monitoring Officer investigation or report to be either:
  - a) an investigation or report which has resulted in a formal report being produced by the Monitoring Officer in accordance with their responsibilities under section 5 of the Local Government and Housing Act 1989, or
  - b) an investigation or report which has been commissioned by the Monitoring Officer in order to inform their view as to whether (a) is necessary.
17. The Council said that, in the context of the general correspondence with the Applicant and regulators, the Council has, in addition to the above, also defined, in certain contexts, a Monitoring Officer's report/investigation to include investigations or reports which enable the Monitoring Officer to understand whether any action requires to be taken in accordance with their section 5 responsibilities. Investigations and/or reports which require assessment by the Monitoring Officer, the Council submitted, will not always be generated by them – it would be impractical, and a significant duplication of effort, if they were.
18. The Applicant's main concern, the Council said, would appear to be whether or not it has been reasonable for the Council to use the term "Monitoring Officer investigation or report" to describe the investigation and report resulting from the Applicant's complaints. The Council did not think that was "something which freedom of information legislation is equipped to adequately answer for him".
19. The Council was asked by the investigating officer to confirm whether it wished to rely on section 25 of FOISA and, if so, to quote the text in the letter of 31 December 2015 that answered each of the Applicant's three questions. The Council replied that it did consider section 25 relevant in the particular context and circumstances of the request.
20. The Council said that for question 1 ("Was this investigation commissioned by the Council's Monitoring Officer?"), the letter of 31 December 2015 stated in the first sentence:

*With reference to the complaints you submitted on the 15th, 17th and 27th September and the 4th November 2015, I have now had the opportunity to consider the report on these*

*which I commissioned from Chris Phillips. (Emphasis added by the Council in its submission to the Commissioner.)*

21. The Council stated that the letter clearly indicated that the letter's author, the Council's Chief Executive, commissioned the report. Consequently, the Council continued to consider section 25 of FOISA to be applicable.
22. For the other two questions ("Was this investigation a Monitoring Officer's investigation?" and "Was the report issued a Monitoring Officer's Report?") the Council stated that the letter of 31 December 2015 stated the process followed by the investigator and the outcomes of the investigation:

*Mr Phillips has been through your complaints in considerable detail using a similar approach to that used in preparing the October Report for the Deputy Chief Executive and Monitoring Officer. The current enquiry has involved over 200 hours of further work including further interviews at some length, with [named person] and you. Following this enquiry, his conclusion is not to uphold to any significant degree the substantive complaints made by you against [named person].*

23. The Council's letter of 31 December 2015 concluded:

*I appreciate that you may feel disappointed at this outcome but I can confirm that a very thorough investigation of all your recent complaints has now been done. I now therefore consider this an end to matters within the Council. Naturally, should you feel the need to refer these findings to the SPSO and they consider it appropriate to deal with them, I will offer them every assistance.*

24. In the context of this case and the Applicant's personal knowledge and experience as the complainer, the Council concluded that, taken as a whole, the letter provided the Applicant with the answers to his questions. Therefore, "a section 25 response", together with some advice and assistance around definitions applied by the Council around Monitoring Officer investigation and reports, appeared to the Council to be the most appropriate response in the particular circumstances of this case.
25. Having further reflected on the Commissioner's guidance on "Responding to requests for a yes/no answer" contained within his [guidance on section 17 of FOISA](#)<sup>1</sup>, the Council recognised that the letter of 31 December 2015 does not definitively refer to the status of the investigation and report as a Monitoring Officer investigation/report or not. The Council considered that the answers to the second and third questions could be reasonably inferred by the Applicant from the information provided in the letter, which stated who commissioned the report and that the complaints were not being upheld. The Council said:

*Given our experience of the Applicant's history of complaint, the Council continues to believe that it is reasonable that the Applicant, or indeed anyone in receipt of such a letter in similar circumstances, would be able to reasonably access the answers to the questions posed in this request from it.*

### *Submissions from the Applicant*

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<sup>1</sup> <https://www.itspublicknowledge.info/Law/FOISA-EIRsGuidance/Informationnoheld/InformationnoheldFOISA.aspx>

26. The Applicant believed that the Commissioner needed to consider whether the Council's responses to his request were:

*...deliberately designed to obfuscate the fact that the investigation asked about was not commissioned by the Council's Monitoring Officer, was not a Monitoring Officer's Investigation, and did not produce a Monitoring Officer's report.*

27. The Applicant said that his request for assistance, to try to get an idea about what information in formal Council documents was "anecdotal", as the Council had put it, and what was more reliable, was not responded to adequately. He said that where formal documents and submissions give different versions of information, some indication of the relative reliability is required to decide which information already accessible to him is to be believed.

28. He commented that the letter referred to by the Council gave the identity of the person who commissioned the report as the author of the letter i.e. the Council's Chief Executive. However, a more recent letter of 11 April 2019, which the Applicant said was more formal as it was a legal response under FOISA, stated (in response to two questions about the Commissioner's investigation) that the people instructing the work had since left the Council. Since this was a formal response under FOISA, and since the Chief Executive had not left the Council, the information available to him is that the person commissioning the work could not have been the Chief Executive. The Applicant said that he would have:

*expected a formal response under FOISA to be more authoritative than a letter from the Chief Executive but cannot be sure of this, which is why I asked for further advice and assistance.*

29. The Applicant referred to other correspondence, including a letter from the Council to the Scottish Public Services Ombudsman (SPSO) on 10 June 2016, which stated:

*This has involved initiating three major independent investigations by the Council's Monitoring Officer: one internal investigation undertaken by a senior member of Council staff in 2011 and two external investigations undertaken by an independent external solicitor during 2015.*

30. Additionally, a letter from the Council to the SPSO on 16 October 2016 stated:

*In conclusion, the Council would take the opportunity to reiterate the extensive resources that have been devoted to the family's concerns. including three investigations commissioned by the Council's Monitoring Officer, Alex McGuigan, a senior officer in the Council who was external to Children & Families, spent in excess of 250 hours investigating the family's concerns. This included reviewing the 1200 pages of evidence and 24 hours of face to face interviews. Latterly, Chris Phillips conducted two further investigations, which also required an extensive document review and the interviewing of several witnesses.*

31. The Applicant said that the direct claims to the SPSO that the investigation was by, or commissioned by, the Council's Monitoring Officer, does seem an authoritative source, but is information available to him that is directly opposed to the information in the Chief Executive's letter.

32. The Applicant commented that, while the Council argues that the information is within the letter from the Chief Executive, the Applicant was sure that information to answer the second and third questions was not there. He said:

*I don't know if the Chief Executive really instructed the work, since he has not left the council, but if he did then I would guess that this would mean that the investigation was not a*

*Monitoring Officer's investigation and the report issued was not a Monitoring Officer's report. However, copious other formal documentation that it is available to me states that it was a Monitoring Officer's investigation and that a Monitoring Officer's report was produced.*

33. The Applicant submitted that a Monitoring Officer's Investigation is a formal legal process, and a Monitoring Officer's report is a formal legal report. It would therefore seem completely reasonable to answer simple questions with a "yes" or "no".
34. The Applicant gave other examples – saying that "there are possibly many more" - of the formal documents available to him that "imply a different answer to the one implied by the Chief Executive's letter". These examples include quotations from the following:
  - Briefing Note supplied to the Commissioner as evidence for an application.
  - Letter from the Council to the SPSO of 16 October 2016
  - A letter from the Council to the Applicant dated 22 February 2019
  - Letter from the Council to the Commissioner of 13 September 2018
  - The Council's Internal Briefing Version 0.3 Issued 28 June 2016.
  - Email from the Council to the UK Information Commissioner (the ICO) of 28 October 2016
  - Internal Data Protection Breach Preliminary Report – REF IB16016 – Disclosure of Complaint Letter
  - Letter from the Council to the ICO of 8 November 2017
  - Email from the Council to the ICO of 15 December 2017
35. The Applicant supplied other examples.

*The Commissioner's conclusions*

36. Section 25(1) is one of the few provisions in FOISA that is not "applicant blind": whether the exemption in section 25(1) applies depends on the ability of the individual requester to be able to obtain the information other than under section 1(1) of FOISA.
37. The Applicant requested information related to complaints he had initiated. The Applicant's request asked about a specific piece of information (the investigation conducted by Chris Phillips, which reported in December 2015) - by seeking a yes/no response. The Applicant believes the answer to these questions must be 'no', but has pointed to communications from the Council that suggest the answer is 'yes'.
38. As stated in a previous decision ([Decision 048/2021](#)<sup>2</sup>) involving the Applicant and the Council, it is not within the Commissioner's remit to determine whether a report or investigation is properly classified as a Monitoring Officer's report.
39. Section 11(2)(b) of FOISA (Means of providing information) makes it clear that a requester has the right to ask for a digest or summary of information. An authority must comply with that request so far as is reasonably practicable. Depending on the request, a yes/no response or a statement of position can be a suitable digest or summary. Requests which

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<sup>2</sup> <http://www.itspublicknowledge.info/ApplicationsandDecisions/Decisions/2021/201901654.aspx>

expect a yes/no answer under FOISA are not always straightforward for authorities to deal with, particularly when the situation may be more nuanced than a yes/no answer would suggest.

40. It is not within the Commissioner's remit to determine the answer to each of the three questions posed by the Applicant. The Commissioner's role is to determine whether the Council holds information which indicates the status of the report and investigation in question and, if so, whether this information is reasonably accessible to the Applicant. Although the requests were formulated as closed questions, where the situation is more nuanced than a yes/no answer would suggest, it is the Commissioner's view that it may not be reasonably practicable for an authority to provide a digest or summary in that form.
41. The Commissioner's determination as to whether information is held and whether it is reasonably accessible to an applicant is not affected where the substantive content of the information held by the public authority is viewed as conflicting.

*Was this investigation commissioned by the Council's Monitoring Officer?*

42. The letter of 31 December 2015 – which was sent to the Applicant as complainant at that time – stated that the investigation was commissioned by the Chief Executive of the Council. The letter says:

*With reference to the complaints you submitted on the 15th, 17th and 27th September and the 4th November 2015, I [the Council's Chief Executive] have now had the opportunity to consider the report on these which I commissioned from Chris Phillips.*

43. This information falls within the terms of question 1: it tells the Applicant who commissioned the investigation. The information is recorded in a letter to the Applicant. The Applicant has this letter and is aware of the information within it. On the face of it, this information would therefore appear to be exempt from disclosure under section 25 of FOISA as it is information which is otherwise accessible to the Applicant. However, the Applicant has quoted other pieces of information obtained from the Council, that are different from the information contained in the letter of 31 December 2015 about whether the investigation was commissioned by the Council's Monitoring Officer.
44. As the letter of 31 December does not contain information relating to those differing references, the Commissioner finds that in responding to this part of the request, the Council was incorrect to refer solely to that letter as the basis of its reliance on section 25 of FOISA.
45. However, in his submissions the Applicant has provided a substantial amount of recorded information to the Commissioner that contains information relevant to whether the investigation was commissioned by the Council's Monitoring Officer. The Commissioner is therefore satisfied that the Applicant had, at the time he made his request, access to recorded information held by the Council which would answer this request.
46. Although acknowledging that the information the Applicant has does not provide him with the binary answer sought, the Commissioner's remit extends only to whether the Council complied with Part 1 of FOISA in responding to the Applicant's request. The Commissioner cannot adjudicate on whether the Council or the Applicant is correct in what constitutes a Monitoring Officer's report or investigation, or how the expression should be used.
47. The Commissioner is satisfied that, although the Council was wrong to refer solely to the letter of 31 December 2015, it has clearly provided information to the Applicant, or the Applicant already has in his possession, information which falls within the scope of this part

of the request. It is not within the Commissioner's remit to comment on or come to a view on whether that information is accurate. The Commissioner is accordingly satisfied that the Council was entitled to rely on section 25 of FOISA in responding to this request.

*Was this investigation a Monitoring Officer's investigation?*

*Was the report issued a Monitoring Officer's Report?*

48. The letter of 31 December 2015 does not include any recorded information that answers these questions. It does not matter how one interprets "Monitoring Officer's investigation/report" – whether the interpretation favoured by the Council or that of the Applicant – the letter does not answer either question. The previous response by the Council to the Applicant, referred to in the Council's review, also does not answer these questions.
49. The Applicant is aware of the background to the investigation. The Council referred to this in its submissions by stating that, given the Applicant's personal knowledge and experience as the complainer, taken as a whole, the letter provided the Applicant with the answers to his questions.
50. The Applicant has quoted numerous pieces of information, some from the Council, that do indicate answers to these questions. These pieces of recorded information are different from those referred to by the Council i.e. the letter of December 2015 and the explanations given in a previous response to the Applicant about how the Council used the term 'Monitoring Officer'.
51. The Commissioner is unable to accept that the Council has shown that section 25 applies insofar as the information is contained in the letter cited by it, or the previous response it mentions. He therefore finds that in responding to these parts of the request, the Council was incorrect to refer solely to the letter of 31 December 2015 in response to this request.
52. However, during the investigation, the Applicant has supplied recorded information to the Commissioner that provides information in response to these requests which he obtained from the Council. The Commissioner is therefore satisfied that the Applicant had, at the time he made his request, access to recorded information held by the Council which would answer these requests.
53. As previously stated, the Commissioner's remit extends only to whether the Council complied with Part 1 of FOISA in responding to the Applicant's request. The Commissioner cannot adjudicate on whether the Council or the Applicant is correct in what constitutes a Monitoring Officer's report or investigation, or how the expression should be used.
54. The Commissioner is satisfied that, although the Council did not provide a binary response to these requests, it has clearly provided information to the Applicant, or the Applicant already has in his possession, information which falls within the scope of these requests. It is not within the Commissioner's remit to comment on or come to a view on whether that information is accurate. The Commissioner is satisfied that the Council was entitled to rely on section 25 of FOISA in responding to these requests.

### **Other exemptions**

55. In the circumstances, the Commissioner is not required to – and will not go on to – consider the exemptions in section 30 and 38, despite being invited to do so by the Applicant.

## **Decision**

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The Commissioner finds that, while the City of Edinburgh Council (the Council) was wrong to refer the Applicant to the content of one letter in response to his requests, the Council complied with Part 1 of the Freedom of Information (Scotland) Act 2002 in responding to the information requests made by the Applicant. He does not require the Council to take any action.

## **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.

**Daren Fitzhenry**  
**Scottish Information Commissioner**

**15 June 2022**

## 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.

...

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

#### 2 Effect of exemptions

- (1) To information which is exempt information by virtue of any provision of Part 2, section 1 applies only to the extent that –

- (a) the provision does not confer absolute exemption; and

...

- (2) For the purposes of paragraph (a) of subsection 1, the following provisions of Part 2 (and no others) are to be regarded as conferring absolute exemption –

- (a) section 25;

...

#### 11 Means of providing information

- (1) Where, in requesting information from a Scottish public authority, the applicant expresses a preference for receiving it by any one or more of the means mentioned in subsection (2), the authority must, so far as is reasonably practicable, give effect to that preference.

- (2) The means are-

...

- (b) such provision to the applicant of a digest or summary of the information; and

...

#### 15 Duty to provide advice and assistance

- (1) A Scottish public authority must, so far as it is reasonable to expect it to do so, provide advice and assistance to a person who proposes to make, or has made, a request for information to it.

...

## **25 Information otherwise accessible**

- (1) Information which the applicant can reasonably obtain other than by requesting it under section 1(1) is exempt information.

...

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