

# Decision Notice 201/2021

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## Wording of investigation objective

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**Applicant: The Applicant**

**Public authority: City of Edinburgh Council**

**Case Ref: 202100495**



## Summary

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The Council was asked for the date when a specifically worded investigation objective first appeared in any Council documentation.

The Council partially disclosed the information requested. The Applicant was dissatisfied that the information had not been disclosed in full, and that the Council's review outcome was not compliant with the timescales or notice requirements set out in FOISA.

The Commissioner investigated and found that the Council had not only failed to handle the request under FOISA, but had also failed to fully disclose the information requested and had issued a late review outcome which did not contain the requisite notice requirements.

## Relevant statutory provisions

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Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) and (4) (General entitlement); 21(1) and (10) (Review by Scottish public authority)

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 28 September 2020, the Applicant made a request for information to City of Edinburgh Council (the Council). It may be helpful to explain that the request was included in wider correspondence which related to an investigation conducted by the Council and a corresponding ongoing complaint (matters which are not captured by the scope of the Commissioner's investigation). The information requested was as follows:

*It was stated in the notes I received that the investigation objective for this part of your investigation was:*

***“Investigation objective - impact of discovery of the earlier version of the April 2013 MO report and supporting documentation - does identification of the earlier email correspondence and earlier versions of the report change the conclusion of the final April 2013 MO report issued on 12 April 2013?”***

*Please could you let me know on what date this investigation objective, in these words, first appeared in any Council documentation? Perhaps I am mistaken, but it wasn't a question that I recognised as having been set out ... at the start of the investigation.*

2. The Council responded on 27 November 2020, in an email which also covered other matters. The Council informed the Applicant that the wording was included in the Terms of Reference for the investigation agreed by the Chief Internal Auditor and the Chief Executive in June 2019, and that the Applicant had been provided with details of the high-level scope in an email on 22 May 2019. It noted that this would be its final engagement on Phase 1 of the investigation and that any further questions or queries should be directed to the Scottish Public Services Ombudsman (SPSO). It also referred to a planned mediation process.
3. On 6 December 2020, the Applicant wrote to the Council, requesting a review of its decision on the basis that the Council's response was incomplete, as it had only provided the month. He asked the Council to provide the date.

4. Having received no response to his requirement for review within statutory timescales, the Applicant wrote to the Council with reminders, on 22 January 2021 and again on 14 February 2021.
5. The Council responded on 18 February 2021, apologising for its late response. It explained that it had been consulting with staff in the Information Governance Unit to understand how his complaint had been treated, and that it would respond by the end of the following week at the latest.
6. Having received no response, the Applicant wrote to the Council on 1 March 2021, asking if its response was ready. He failed to see why consultation with the Information Governance Unit was necessary to answer his question, since it concerned the date when the wording of the quoted investigation objective was decided.
7. The Council responded later that day. It explained it was waiting on confirmation from its Legal Team as to whether it was appropriate to disclose the exact date when the quoted investigation objective first appeared in any Council documentation, as this related to a legally privileged Terms of Reference for the corresponding investigation. The Council stated that, once this was confirmed, it would provide either the date or an explanation as to why it could not be provided.
8. On 15 March 2021, the Applicant wrote to the Council. He again referred to its failure to respond and asked it to clarify, for information considered “legally privileged”, whether the Council was not allowed to disclose the information (even if wanted to) or whether it had the right to withhold the information (even though it could disclose it if it wanted to). He also asked the Council how long it had been waiting for the Legal Team’s response (referred to in its previous email).
9. The Council responded to the Applicant’s requirement for review on 25 March 2021. Having received the Legal Team’s advice, the Council referred the Applicant to its response of 27 November 2020, which advised that this would be the Council’s final engagement on Phase 1 of the investigation and that any further questions or queries should be referred to the SPSO as previously advised. The Council also stated it would revert separately on the questions relating to legal privilege.
10. On 19 April 2021, the Applicant wrote to the Commissioner, applying 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:
  - The Council failed to provide the full date requested (only the month), or give any reasons for not doing so. Further, the review outcome simply referred to the initial response, and a statement therein that the Council would not engage further.
  - The Council’s review outcome was not provided within statutory timescales, and did not contain details of the requisite rights of appeal to the Commissioner.
  - Correspondence dated 1 March 2021 indicated that the Council might try to claim the date was “legally privileged”, and that it would either disclose the date or explain why it could not be provided. However, neither had happened and the review outcome did not clarify whether or not “legal privilege“ was being claimed.

## Investigation

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11. The application was accepted as valid. The Commissioner confirmed that the Applicant had 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.
12. On 21 April 2021, the Council was notified in writing that the Applicant had made a valid application and the case was subsequently allocated to an investigating officer.
13. 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 focused on:
  - whether the Council held any further information falling within the scope of the Applicant's request (i.e. the full date requested),
  - whether the Council breached section 21(1) and (10) (Review by Scottish public authority) of FOISA, by failing to respond to the Applicant's request for review within 20 working days and failing to provide him with information on his right to make an application to the Commissioner if dissatisfied with its review outcome,
  - whether, in refusing to engage further with the Applicant (as set out in its initial response), the Council believed it was not obliged to respond to his request for review, and
  - why the Council did not either provide the Applicant with the information he requested in full, or with a response explaining why some of that information was not being provided, in terms of any provision or exemption in Part 1 or 2 of FOISA, in line with section 1 of FOISA.
14. Both parties provided submissions to the Commissioner during the investigation.

### *Council's further disclosure – 15 June 2021*

15. The Council subsequently confirmed it had changed its position and, on 15 June 2021, it disclosed the full date to the Applicant. In doing so, it explained that this investigation objective, relating to an assessment of the decision-making process and any impact the discovered information had on the legitimacy of the basis of decisions, was included within the draft Terms of Reference prepared on 12 June 2019. The investigation objective was not, however, at that time, expressed in the exact words which appeared in the notes the Applicant had received. The Council stated the exact phrase quoted in his request first appeared on 4 November 2019 and was included within the draft report [the Draft Investigation Report].
16. The Council further explained that:
  - the investigation referred to was legally privileged and, while it considered legal privilege applied in this context to the information requested, it was willing to waive privilege on this occasion, but only to the limited extent that would allow it to respond to the request.
  - the Applicant's correspondence was, at that time, being handled as a "business as usual" matter, on the basis that his enquiries were linked to the Chief Internal Auditor's investigations and referred to the proposed mediation process to address the continuing complaint. While acknowledging there was no obligation for the Applicant

to identify an information request as such, and that it would always try to identify these within correspondence when this had not been made clear, the Council urged the Applicant to alert its Information Governance Unit to any dissatisfaction with a response to an information request, to allow redress under FOISA.

17. The Applicant wrote to the Council on the same day, making reference to the Council's initial response of 27 November 2020 (where it had stated the date was "June 2019"). He asked if the Council now wished to withdraw that statement, and commented on various aspects of the Council's handling of his request, in particular its decision to respond on a "business as usual" basis.
18. The Applicant also wrote to the Commissioner, stating that he wished to include in his application his dissatisfaction that the limited information provided in the Council's initial response was not true. He submitted that he was clearly unable to include this issue at an earlier stage as he was not aware, at that time, that he had been provided with untrue information.

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

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19. In coming to a decision on this matter, the Commissioner has considered all of the 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.
20. The Commissioner would emphasize that he can only consider the Applicant's submissions to the extent that they relate to the Council's handling of this request under FOISA (as opposed to any wider issues the Applicant may have with the Council).

### **Handling of request**

21. As stated above, in light of the Applicant's stated reasons of dissatisfaction, the Council was asked to provide submissions in relation to its handling of the Applicant's request.

#### *FOISA or "business as usual"?*

22. In its submissions to the Commissioner, the Council explained that the request was included in the Applicant's email of 28 September 2020 which posed a number of questions relating to the concluded Phase 1 investigation conducted by the Chief Internal Auditor.
23. The Council accepted it had not handled the Applicant's request in accordance with FOISA, but instead had treated it as "business as usual" in the context of a complex and unique complaint situation, which was live at the time.
24. The Council acknowledged that information requests should generally be approached from an "applicant blind" position, but felt it necessary, in order to understand its approach to this correspondence, to view it within the wider context of the Applicant's correspondence with the Council.
25. The Council described its history of correspondence with the Applicant, which stretched back over 11 years. It submitted that, despite repeatedly attempting to address the Applicant's concerns in a proportionate manner, in the hope of reaching resolution, closure had not been achieved and the Applicant continued to correspond with the Council, Councillors and regulators on a regular basis. The views of regulators, and also representations made by elected members, had influenced its ongoing management of the situation. The Council explained that, in June 2020, general agreement had been reached, following completion of

the Chief Internal Auditor's Phase 1 and Phase 2 investigations, that a mediation route would be pursued to try and resolve the situation.

26. In the Council's view, this, together with the manner of the Applicant's correspondence, had made dealing with the correspondence an incredibly intense and complex experience for its staff. As a result, it was not possible for the Council to deal adequately with the demands placed upon it by the Applicant under any of the Council's standard processes. In the Council's view, the history and context had influenced its ongoing management of the Applicant's correspondence.
27. The Council's assessment was that this particular correspondence fell more within the complaints process rather than freedom of information, a view influenced by the intrinsic and repeated emphasis which the Applicant had placed on a response being linked to his intended proposal for resolution of the overall complaint situation.
28. Accepting the principle that all requests for information should be considered as such, the Council commented that this was not always in keeping with the expectations of applicants, or in the broader context of a particular correspondence trail. In the Council's view, the "business as usual" approach did not appear to be outwith the Applicant's expectations at the time, and he did not reference FOISA or the review process in any correspondence relating to his request.
29. The Council highlighted that, at no point in his correspondence, prior to making his application to the Commissioner, did the Applicant clearly demonstrate an expectation that his request should be dealt with under FOISA. This, the Council submitted, was in contrast to other correspondence, where the Applicant had made clear he was requesting information under this statutory right and wished the Council to review its handling of other requests made (whether responded to under "business or usual" or FOISA).
30. The Council acknowledged that applicants are not obliged to reference FOISA when making a request for information. It submitted, however, that the Applicant chose to correspond with the Council via a number of routes and, in its view, was well-versed in his statutory rights. In the Council's experience, the Applicant would make it known when he expected a matter to be handled under FOISA, and had criticised the Council for doing so when he had not made it clear that it was his intention to use FOISA. In the Council's view, this confusing situation placed it between "a rock and a hard place" when attempting to respond in a proportionate, effective way.

*Why did the Council inform the Applicant it would not be engaging with him further?*

31. The Council was asked to explain why it informed the Applicant that it would not be engaging with him further and whether, by so doing, it believed it was not obliged to respond to his request for review in line with FOISA.
32. In response, the Council reiterated that the Applicant's correspondence had been handled as "business as usual", on the grounds that the request was included within correspondence relating to the ongoing complaint and potential resolution.
33. The Council submitted that its advice, that it would not respond to further questions regarding the Phase 1 investigation, was initially made in the context of the ongoing complaint and not the Council's freedom of information process. It explained it had taken this decision as a proportionate response to repeated follow-up enquiries from the Applicant, and in recognition that the investigation had concluded and the Applicant had been advised of the outcome (and to refer any dissatisfaction to the SPSO). In this context, the Council believed it was

necessary to draw a line under continuing correspondence on the subject, as not doing so would have a detrimental impact on the Chief Internal Auditor's ability to pursue other matters.

34. The Council commented that, in future, it would be more mindful to ensure the Applicant's correspondence was dealt with under FOISA where it included a request for information.

*Why did the Council consider the information (the date) to be legally privileged?*

35. The Council was asked to explain why it considered the information (the date) to be legally privileged.
36. In response, the Council confirmed it considered the information requested by the Applicant to be legally privileged, as it related to specific wording contained within the Terms of Reference of a confidential investigation conducted by the Chief Internal Auditor. The Council considered both the Terms of Reference document and the investigation records to be privileged in this case. In the Council's view, as the request sought the date when specific wording appeared within Council documentation, any disclosure inferred detail of the drafting process which, the Council believed, attracted privilege in the circumstances of the case. Notwithstanding this, the Council submitted, it had decided to waive legal privilege to the extent which allowed it to respond to the request.
37. The Council was asked to explain why it had failed to provide the Applicant with the information in full when responding to his initial request and request for review or, alternatively, with a response setting out why the information was not being provided in terms of any provision or exemption in FOISA.
38. In response, the Council submitted that its handling of the request was influenced by the context of the Applicant's correspondence which, it emphasised, was unique in terms of volume, complexity and resources required to manage it. The Council accepted that the Commissioner might, in isolation, deem that the request was not handled in accordance with FOISA, but believed that such a determination should not be viewed as a general reflection of its handling of information requests.

*The Commissioner's views on the Council's handling of the request*

39. The Commissioner has fully considered the Council's submissions and the circumstances surrounding its history of correspondence with the Applicant. He accepts that, to some extent, the Council was placed into a somewhat confusing position. However, the fact remains that the Applicant requested recorded information (which, by default, is a request for information under FOISA) and subsequently raised dissatisfaction with the handling of that request (i.e. he made a requirement for review).
40. The Commissioner would stress that FOISA does not oblige an applicant to formally state, in either a request for information or a subsequent requirement for review, that either is being made under that legislation. He notes that, in this case, all other requirements for the request and the requirement for review being valid appear to have been met (and the Council has not, in fact, suggested otherwise).
41. While the Commissioner acknowledges the Council's concerns in relation to its stated ongoing difficulties, confusion and demands associated with responding to the Applicant's correspondence, he is aware that it is one of the largest local authorities in Scotland and is much experienced in freedom of information practice. Whatever the nature of the surrounding correspondence, it should have recognised the Applicant's request and requirement for review as what they were. In any case, in the Commissioner's view, there

was nothing to preclude the Council from engaging with the Applicant at an early stage, to ask whether he wished to pursue his request under FOISA, given that he was clearly seeking recorded information.

42. While the Applicant could have made it clear to the Council, at the outset, how he wished it to handle his request, he was under no obligation to do so. That he did not do so, in the context explained by the Council, may, to some extent, explain the Council's failures in handling the request under FOISA, but this does not excuse it. The fact remains that the Applicant made a valid request and a valid requirement for review. In the Commissioner's view, any previous specification by him as to how he wished his other requests to be handled cannot be taken as setting a precedent for any future requests he might make.
43. The Commissioner welcomes that the Council recognises the principle that all information requests "default" to FOI and that requests should generally be approached from an "applicant blind" position. While it is not always obvious whether an individual is intending to make a request under FOISA, particularly where there is ongoing correspondence (and particularly relating to a complaint), the Commissioner notes that there was nothing in the Applicant's email of 28 September 2020 (or his subsequent correspondence raising dissatisfaction with the Council's failure to respond) that suggested he did not intend it to be treated under FOISA.
44. Turning to the Council's explanation that its stated refusal to engage further with the Applicant did not relate to the FOI process, but rather to the complaint situation concerning the completed investigation, the Commissioner is satisfied that the Council recognises its obligations when handling FOI requests in terms of its requirement to respond, regardless of any other restrictions it wishes to impose in any other avenues of correspondence. The various concerns expressed by the Council may, quite properly, affect the way in which a request is dealt with under FOISA, but they would not excuse a Scottish public authority from engaging with FOISA's processes altogether.
45. In considering the Council's submissions on why it believed the information requested to be legally privileged (which, it stated, it had waived to allow it to respond to the Applicant's request), the Commissioner notes that the Council appeared to have had no issue with disclosing (pre-request) the actual wording of the investigation objective, and further (in response to the request) the month and year. As such, the Commissioner questions whether the exact date could correctly be deemed to be legally privileged, were he formally required to consider this aspect (which, in this case, he is not, given the Council did not formally apply any FOISA exemption to that information).
46. In conclusion, the Commissioner has no option other than to find that the Council ought to have appropriately dealt with the request under FOISA, either providing the information requested or explaining why (in terms of any relevant provision or exemption in FOISA) it could not be provided. By not doing so, the Commissioner finds that the Council failed to comply with section 1(1) of FOISA.

### **The information held by the Council**

47. In terms of section 1(4) of FOISA, the information to be provided in response to a request under section 1(1) is that falling within the scope of the request and held by the authority at the time the request is received.
48. The standard of proof to determine whether a Scottish public authority holds information is the civil standard of the balance of probabilities. In determining where the balance of

probabilities lies, the Commissioner considers the scope, quality, thoroughness and results of the searches carried out by the public authority. He 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.

49. As set out above, the Applicant raised dissatisfaction, in his requirement for review and in his application to the Commissioner, with the Council's failure to provide the full date. Following the Council's disclosure on 15 June 2021 (at the start of the Commissioner's investigation) of a full date, the Applicant raised further dissatisfaction that the information now disclosed did not represent the true date, when compared with the information disclosed in the Council's initial response of 27 November 2020.
50. While the Commissioner cannot investigate the accuracy of information held by a Scottish public authority, he must be satisfied, in this case, as to the information actually held by the Council that falls within the scope of the Applicant's request.
51. In its submissions to the Commissioner, the Council explained that the information requested was held by the Chief Internal Auditor and Legal Services, who were responsible for drafting the Terms of Reference associated with the investigation. It confirmed that the exact date had been disclosed to the Applicant on 15 June 2021 and that it held no further information falling within the scope of the request.
52. As mentioned previously, in disclosing this information to the Applicant, the Council explained that the investigation objective first appeared in the Terms of Reference prepared on 12 June 2019, but was not expressed in the exact words cited in his information request. The Council also informed the Applicant that the exact phrase, as referenced in his request, first appeared on 4 November 2019, within the Draft Investigation Report. In light of the subsequent dissatisfaction raised by the Applicant that the information now disclosed was "not true", the Council was asked to provide the Commissioner with copies of these documents, showing the actual wording recorded in each of the versions corresponding to the dates cited (i.e. 12 June 2019 and 4 November 2019).
53. The Council duly provided the information to the Commissioner. On examination of the information, it became evident to the Investigating Officer that the exact wording quoted in the request did not appear anywhere in the Terms of Reference document, and only appeared in part in the Draft Investigation Report. This point was raised with the Council.
54. The Council accepted that the exact wording did not appear in the Terms of Reference document, and only appeared in part in the Draft Investigation Report. Notwithstanding this, the Council explained, the investigation objective was set out in both documents, albeit described using different wording, and was therefore always "present" in these documents in terms of intention and purpose. The Council stated it had attempted to explain this to the Applicant when disclosing the full date.
55. Noting the Council's interpretation, but given the specificity of the request (in that it sought the date when the investigation objective first appeared "in these words"), the Council was asked to carry out further searches to establish when the investigation objective first appeared in any Council documentation, in the wording quoted in the request.

56. In response, the Council submitted that a further search of records by the Chief Internal Auditor identified that the whole text appeared for the first time within the first draft of a “Summary of Outcomes” document, initially created on 24 June 2020. The Council provided the Commissioner with a copy of this document, together with evidence of its creation date. As the investigation was considered legally privileged and therefore those involved, and the circulation of documentation, were very limited within the Council, it was satisfied that this represented a reasonable search in the circumstances.
57. The Council explained the investigation objective quoted in the request was extracted from this Summary of Outcomes document, which had been prepared for, and shared with the Applicant following conclusion of, the Chief Internal Auditor’s investigation. As the Council considered the investigation report to be legally privileged, the Outcomes document had been created to share the findings with the Applicant.
58. In explaining its interpretation of the request, and noting the concern that the information disclosed did not meet the terms of the request (which referenced precise wording), the Council submitted that it considered that the Applicant’s email of 28 September 2020 expressed a broader context to his request, which had influenced its approach. In the Council’s view, the Applicant’s enquiry appeared to focus on the investigation objective in question not having been set out at the start of the investigation. Therefore, the Council considered the purpose of the information request was to understand when the investigation objective was included within the matters to be investigated, rather than focussing upon the particular manner in which that investigation objective was expressed. This, the Council explained, was why its original response referenced the investigation’s Terms of Reference. The Council believed focusing its interpretation purely on precise language, when it knew the specific document where the quote came from, would not have been a fair interpretation of the general concern raised.
59. The Council explained that, when disclosing the information to the Applicant on 15 June 2021, its reference to “exact phrase” was intended to be a reference to the investigation objective title *Impact of discovery of the earlier version of the April 2013 MO report* rather than the explanatory text that followed. It accepted that the full wording of the quoted investigation objective was not included in the Draft Investigation Report and so “exact” could be seen to have been an overstatement.
60. The Council emphasised that its approach had focused on the origin of the quoted investigation objective in Council documentation, rather than the precise wording set out in the request as, in its view, that seemed to be the nub of the Applicant’s concern. Taking into account that the same information would commonly be expressed in different ways when records were created for different purposes and audiences, and that the Applicant’s concern seemed to focus on the investigation objective not being included at the start of the investigation, the Council submitted it simply had not interpreted the request so absolutely as the Commissioner.
61. In conclusion, the Council acknowledged the Commissioner’s concern that its interpretation did not satisfy the precise nature of the request, and contended that it generally endeavoured to interpret requests in the full context in which they were made. In this case, the Applicant had expressed a general concern that the investigation objective in the Outcomes document was not part of the original investigation, and so the Council’s response sought to answer that concern, rather than focusing on the specific language of the request (which was, in the Council’s view, a natural result of and a simple reference to the Outcomes document).

*Council's further disclosure – 30 August 2021*

62. On 30 August 2021, following a suggestion by the Investigating Officer, the Council disclosed to the Applicant the date when the investigation objective, in the wording quoted in his request, first appeared in Council documentation (i.e. in the first draft of the Outcomes document prepared by the Chief Internal Auditor on 24 June 2020, to inform him of the findings and outcome of her investigation).
63. In that response, the Council explained to the Applicant that the same information would commonly be expressed using slightly different narrative when records were created for different purposes and audiences, which was why it understood the focus of his request to be confirmation of when this general investigation objective first appeared. By concentrating on the general investigation objective (rather than exact wording) the Council stated it was trying to be helpful, by providing assurance around the investigation objective's history in a manner that a strict response on precise wording would not have done fairly. The Council noted that the Commissioner was of the view that this approach did not satisfy the terms of the request, and apologised if it had misunderstood the information sought.

*The Commissioner's views on the information held by the Council*

64. The Commissioner has fully considered the Council's submissions, along with its reasons for interpreting the request in the manner it did. He recognises that these have, to some extent, influenced the Council's handling of the request and the information disclosed at the start of the investigation.
65. In the Commissioner's view, however, the Council's interpretation (i.e. not to focus on the precise language of the request) was not the correct approach, as the request appears to be perfectly clear in describing the information sought. At the very least, the Commissioner considers the Council ought to have addressed the request as it stood, in the clear and precise terms used by the Applicant. Attempting to second-guess the Applicant's underlying purpose in seeking the information does not appear to have been helpful in this instance – and is not, generally, an effective substitute for giving a clearly-expressed request its plain meaning. In any case, there was nothing to stop the Council also engaging with the Applicant, to explore any alternative interpretation, or adding, as additional context to its response, any alternative explanation by way of advice and assistance: this would have covered all possible interpretations.
66. In light of the Council's submissions and supporting evidence explaining the searches undertaken and the information identified, the Commissioner is satisfied, on the balance of probabilities, that (by the end of his investigation) the Council had taken adequate, proportionate steps to establish the information it held which met the terms of the Applicant's request (namely the date of the Outcomes document which contained the investigation objective as worded in the request).
67. However, by failing to identify and disclose this information to the Applicant in response to his initial information request or his requirement for review, the Commissioner finds that the Council failed to comply with section 1(1) of FOISA.
68. As the Council has now disclosed this information to the Applicant, he does not require it to take any further action in response to this failure. However, he would comment that he considers the Council's interpretation of the request led to a prolonged investigation and a delay in the Applicant being provided with the information to which he was entitled. In his view, this falls short of good practice, and he would strongly recommend the Council to liaise with applicants, at an early stage, should interpretation of a request fall into question.

## **Section 21 – Review by Scottish public authority**

69. Section 21(1) of FOISA gives Scottish public authorities a maximum of 20 working days following receipt of the requirement to comply with a requirement for review. This is subject to qualifications which are not relevant in this case.
70. Section 21(10) of FOISA provides that the review outcome must contain particulars about the right of application to the Commissioner and the subsequent right of appeal (to the Court of Session) conferred by sections 47(1) and 56 of the Act.
71. In his application to the Commissioner, the Applicant was dissatisfied that the Council had failed to provide him with a review outcome within the statutory timescale allowed for doing so, and that the review outcome did not contain details of the requisite right of application to the Commissioner.
72. In its submissions to the Commissioner, the Council accepted that it had not responded to the Applicant's correspondence within the timescales set out in FOISA. It further accepted that it had failed to provide him with the requisite notice as set out in section 21(10) of FOISA.
73. The Council explained that it had handled the Applicant's correspondence as a "business as usual" matter. It submitted that, had it handled the Applicant's correspondence under FOISA, and had he formally requested a review under FOISA (either through formal reference or engagement with the Information Governance Unit), it would have issued a review outcome within statutory timescales, which would have included such notice.

### *The Commissioner's views on the Council's handling of the requirement for review*

74. The Commissioner has considered the submissions from both parties.
75. As set out previously, the Commissioner accepts that the Applicant made a valid request for information under FOISA and, having received the Council's response on 27 November 2020, then made a valid requirement for review to the Council.
76. It is a matter of fact that the Council failed to respond to the Applicant's requirement for review dated 6 December 2020 within the statutory timescale set out in section 21(1) of FOISA.
77. It is also clear that the review outcome issued by the Council did not contain particulars of the requester's rights of application to the Commissioner and of appeal to the Court of Session, as required by section 21(10) of FOISA.
78. The Commissioner must conclude, therefore, that by failing to respond to the Applicant's requirement for review within 20 working days, and by failing to include in its review outcome details of the Applicant's rights of application to him, and of appeal to the Court of Session, the Council failed to comply with section 21(1) and (10) of FOISA.
79. Given that the Council issued its review outcome on 25 March 2021, and that the Applicant was able to submit a valid application to the Commissioner, the Commissioner does not require the Council to take any action in response to these failures. However, he has noted the Council's handling of the review outcome, in these respects, in his case management system.

## Decision

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The Commissioner finds that City of Edinburgh Council (the Council) failed to comply with Part 1 of the Freedom of Information (Scotland) Act 2002 (FOISA) in responding to the information request made by the Applicant. The Commissioner finds that:

- i) in failing to handle the Applicant's request under FOISA, by either providing the information requested or explaining why (in terms of any relevant provision or exemption in FOISA) it could not be provided, the Council failed to comply with section 1(1) of FOISA;
- ii) by failing to identify and fully disclose the information requested in response to the Applicant's initial request or request for review, the Council failed to comply with section 1(1) of FOISA;
- iii) by failing to respond to the Applicant's requirement for review within 20 working days, and by failing to include in its review outcome details of the Applicant's rights of application to the Commissioner, and of appeal to the Court of Session, the Council failed to comply with section 21(1) and (10) of FOISA.

For the reasons set out in the decision notice, the Commissioner does not require the Council to take any action in respect of these failures, in response to the Applicant's application.

## 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**

**17 December 2021**

## 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.

...

- (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.

...

#### 21 Review by Scottish public authority

- (1) Subject to subsection (2), a Scottish public authority receiving a requirement for review must (unless that requirement is withdrawn or is as mentioned in subsection (8)) comply promptly; and in any event by not later than the twentieth working day after receipt by it of the requirement.

...

- (10) A notice under subsection (5) or (9) must contain particulars about the rights of application to the Commissioner and of appeal conferred by sections 47(1) and 56.

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