

# Decision Notice

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**Decision 069/2017: Mr Alan Stewart and Argyll and Bute Council**

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## **Costs relating to a complaint**

Reference No: 201700089  
Decision Date: 8 May 2017



Scottish Information  
Commissioner

## Summary

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The Council was asked for the costs incurred by the Council in relation to a complaint made by senior officers about a named Councillor.

The Council stated that it did not hold the requested information. The Commissioner accepted this, but found that the Council failed to provide sufficient advice and assistance to the requester.

## Relevant statutory provisions

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Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) and (4) (General entitlement); 15(1) (Duty to provide advice and assistance); 17(1) (Notice that information is not held)

All references in this decision to "the Commissioner" are to Margaret Keyse, who has been appointed by the Scottish Parliamentary Corporate Body to discharge the functions of the Commissioner under section 42(8) of FOISA.

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 19 October 2016, Mr Stewart made a request for information to Argyll and Bute Council (the Council). The information he asked for related to a complaint lodged by (named) senior council officers over the actions of a named Councillor, which resulted in a report by the Commissioner for Ethical Standards in Public Life in Scotland (the Commissioner for Ethical Standards). Mr Stewart asked for:
  - The cost of the officers' time, based on their salary at the time, for the period used to compile "this lengthy complaint".
  - The total time spent by these officers meeting and having telephone conversations with the Commissioner for Ethical Standards and associated staff.
  - This time translated as a financial sum as per the above request.
  - The cost of all external advice taken in compiling the complaint, meeting with the various parties, and representation at hearings.
  - The amount of anticipated compensation for the named Councillor.
2. The Council responded on 16 November 2016. In line with section 17 of FOISA, it gave notice that it did not hold the requested information. The Council advised that there was no cost to the Council in the officers progressing their complaint to the Commissioner for Ethical Standards.
3. On 18 November 2016, Mr Stewart emailed the Council requesting a review of its decision. He explained why he considered it likely that the Council would have recorded the information covered by his request. As the complaint was compiled on Council property and the officers used Council equipment, he believed that costs would have been incurred by the Council.

4. The Council notified Mr Stewart of the outcome of its review on 19 December 2016. It upheld its initial response without modification.
5. On 15 January 2017, Mr Stewart applied to the Commissioner for a decision in terms of section 47(1) of FOISA. Mr Stewart provided details of what he knew of the Council officers' activities and attendance at meetings in relation to the complaint and submitted that the Council must hold the requested information.

## **Investigation**

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6. The application was accepted as valid. The Commissioner confirmed that Mr Stewart 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 9 February 2017, the Council was notified in writing that Mr Stewart had made a valid application and the case was allocated to an investigating officer.
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. The Council was asked to describe, in detail, the searches it had undertaken to establish whether it held any information covered by Mr Stewart's request.
9. During the investigation, the Council was asked to clarify aspects of its submissions.

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

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10. 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 Stewart and the Council. She is satisfied that no matter of relevance has been overlooked.

### *The Council's submissions*

11. The Council explained that the complaint was submitted by a group of four Council officers, not by the Council itself.
12. The Council submitted that there is a clear distinction between the complainant's role and the interest of the Council in keeping abreast of the complaint made against a Councillor. The Council considered that it regularly incurs officer time responding to investigations by the Commissioner for Ethical Standards (e.g. following complaints from members of the public), and "it would be incorrect to suggest that such time is spent in progressing/pursuing the complaint". The Council has a duty to respond to enquiries from the Commissioner for Ethical Standards and to cooperate with them, but it did not accept that in doing so, it could be said to be progressing/pursuing a complaint.
13. The Council explained that three of the four named officers were initially asked for verbal confirmation whether they held any information relating to time spent on this complaint. (The fourth officer no longer worked for the Council at the date of Mr Stewart's request.) They had confirmed that both they and any administrative staff who may have been involved in preparing the complaint for submission (typing, etc.) were not required to time-record activities that they were involved in.

14. Subsequently, the Council confirmed that these individuals had been asked for written confirmation of their verbal responses. These written responses were provided to the Commissioner.
15. The Council reiterated that the original enquiry sought to ascertain what costs had been incurred by the Council in progressing the complaint. The Council submitted that it is not possible to ascertain information on cost from diary entries, given that no cost recording takes place for those senior officers. It submitted that to try and identify a notional cost would require the Council to create information which it does not hold.
16. The investigating officer discussed with the Council the possibility of obtaining telephone records for the officers involved, so that any telephone calls (and possible costs) of contacting the Commissioner for Ethical Standards could be identified. The Council submitted that even if any telephone calls to the Commissioner for Ethical Standards were identified, it could not be confirmed whether these telephone calls related to the complaint that had been lodged.
17. The Council confirmed that a Council officer attended the Hearing Panel of the Standards Commission for Scotland in Edinburgh at which the officers' complaint was considered. The Council told the Commissioner that the officer who attended the hearing was not involved in the complaint, and simply attended the meeting as part of their professional development. The Council did not consider that the costs associated with this individual's attendance at the hearing were relevant in relation to Mr Stewart's request "because the Council was not pursuing the complaint but needed to be aware of the progress and outcome".

#### *The Commissioner's findings*

18. In this case, the Commissioner must decide whether the Council holds the information requested by Mr Stewart.
19. The standard of proof to apply in determining whether a public authority holds the requested information (or, as in this case, whether it holds any information) is the civil standard of the balance of probabilities. In deciding where the balance lies, the Commissioner will consider the scope, quality, thoroughness and results of the steps taken by the public authority to identify and locate the information in question. She will also consider, where appropriate, any other reason offered by the public authority to explain why it does not hold information. While it may be relevant as part of this exercise to explore expectations as to what information the authority should hold, ultimately the Commissioner's role is to determine what relevant information is actually held by the public authority (or was, at the time it received the request).
20. The Commissioner has considered all the relevant submissions, including the explanations provided by the Council. She is satisfied that the Council has comprehensively answered the questions raised in the investigation.
21. The Commissioner notes that one of the named officers no longer worked for the Council at the date of Mr Stewart's request. The Commissioner is satisfied that the Council's searches encompassed a search of this individual's records, as well as of records created by the other three officers.
22. The Commissioner accepts that the named officers are not required to record the time they work on a particular task, and did not record anything in their diaries about the submission of their complaint.

23. The Commissioner also accepts the Council's argument that it would be impossible to confirm categorically whether, if a telephone call was made to the Commissioner for Ethical Standards, it was about the complaint in question.
24. The Council was asked for further submissions about the officer who attended the hearing and why they attended. The Commissioner accepts the officer was there to observe proceedings, and was not otherwise involved in the hearing. She accepts that information about the costs incurred by this officer attending the hearing falls outwith the scope of Mr Stewart's request.
25. It is clear that Mr Stewart expected the Council officers to record information about their activities which would allow the cost of lodging the complaint to be calculated. However, the Commissioner accepts that it would be unusual for Council officials to time-record each action they take. On the basis of the responses provided by the Council, she is satisfied that it does not hold any information falling within the scope of Mr Stewart's request.
26. The Commissioner concludes that the Council was correct to inform Mr Stewart that it did not hold the requested information, in line with section 17(1) of FOISA.

*Section 15(1) of FOISA – duty to advise and assist*

27. Having considered the responses provided by the Council to Mr Stewart, the Commissioner has concluded that it would have been reasonable to expect the Council to have provided further assistance to Mr Stewart by explaining in more detail what it routinely records and does not record about the actions and activities of its officers. This would have helped him to understand why the Council did not hold information covered by his request.
28. As an explanation of the Council's time-recording practices has been included in this decision, the Commissioner does not require the Council to take any action with respect to this failure.

## **Decision**

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The Commissioner finds that the Council complied with Part 1 of the Freedom of Information (Scotland) Act 2002 (FOISA) in responding to the information request made by Mr Stewart, by giving notice that it did not hold the requested information, in line with section 17(1) of FOISA.

However, the Commissioner finds that the Council failed to provide reasonable advice and assistance to Mr Stewart and in doing so, failed to comply with section 15(1) of FOISA. The Commissioner does not require the Council to take any action with respect to this failure, for the reason explained in the decision notice.

## **Appeal**

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Should either Mr Stewart or the Council wish to appeal against this decision, they have the right to appeal to the Court of Session on a point of law only. Any such appeal must be made within 42 days after the date of intimation of this decision.

**Margaret Keyse**  
**Acting Scottish Information Commissioner**

**8 May 2017**

## 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.

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- (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.

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#### 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.

...

#### 17 Notice that information is not held

- (1) Where-
- (a) a Scottish public authority receives a request which would require it either-
- (i) to comply with section 1(1); or
- (ii) to determine any question arising by virtue of paragraph (a) or (b) of section 2(1),

if it held the information to which the request relates; but

- (b) the authority does not hold that information,

it must, within the time allowed by or by virtue of section 10 for complying with the request, give the applicant notice in writing that it does not hold it.

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