

# Decision Notice 069/2020

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## Clerk of Works minutes

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**Applicant: The Applicant**

**Public authority: Fife Council**

**Case Ref: 201900772**



Scottish Information  
Commissioner

## Summary

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The Council was asked for copies of agenda and minutes for Clerk of Works meetings from 2017 to 2018. The Council supplied handwritten notes from several meetings, but said that it did not hold notes from other meetings.

The Commissioner investigated and found that the Council had partially breached FOISA in responding to the request. The Commissioner found that the Council was not entitled to withhold the information that was supplied to the Applicant during the investigation, but accepted that the Council held no further information falling within the request.

The Commissioner also found that the Council had initially responded to the request under the wrong access regime.

## Relevant statutory provisions

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Freedom of Information (Scotland) Act 2002 (FOISA) sections 1 (1) and (4) (General entitlement); 17(1) (Notice that information is not held)

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 24 July 2018, the Applicant made a request for information to Fife Council (the Council). The Applicant requested:  
*Copies of Meeting Agenda and Minutes for Clerk of Works Meetings held over Years 2017 to date (2018).*
2. On 10 October 2018, the Applicant wrote to the Council requesting a review on the basis that the Council had not responded.
3. The Council notified the Applicant of the outcome of its review on 7 November 2018. The Council explained that no formal minutes or agendas of the meetings were held, but provided handwritten notes of some of the meetings subject to the redaction of personal data. The Council informed the Applicant that it held no information for the other meetings, and therefore it applied regulation 10(4)(a) of the Environmental Information (Scotland) Regulations 2004 (the EIRs). The Council also apologised that it had not responded to the request within the statutory timescale.
4. On 8 May 2019, the Applicant wrote to the Commissioner. The Applicant applied to the Commissioner for a decision in terms of section 47(1) of FOISA. By virtue of regulation 17 of the EIRs, Part 4 of FOISA applies to the enforcement of the EIRs as it applies to the enforcement of FOISA, subject to specified modifications.
5. The Applicant was dissatisfied with the outcome of the Council's review because he wanted typewritten minutes and agendas, which he believed were held by the Council. He also believed more information falling within his request was held by the Council.

## Investigation

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6. 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.
7. On 7 July 2019, the Council was notified in writing that the Applicant had made a valid application. The Council was asked to send the Commissioner the information withheld from the Applicant. The Council provided the information 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 to answer specific questions. These questions related to how the Council had established what information it held that fell within the Applicant's request and also why some information had been withheld. The Council replied on 19 November 2019.
9. During the investigation, the Council was also supplied with a sample of the information held by the Applicant which indicated that more information was held. The Council was subsequently asked to conduct further searches. The Council conducted further searches and responded to the Commissioner on 20 December 2019 and again on 13 February 2020.
10. During the investigation, the Applicant argued that one of the redacted documents had dates withheld, which he did not consider to be personal data. The Applicant queried why the dates were withheld.
11. The Council agreed to supply the redacted dates to the Applicant, and did so on 2 March 2020. The Applicant accepted the redaction of the remaining personal data (signatures/telephone numbers).
12. In its submissions, the Council submitted that it had erroneously referred to provisions from the EIRs in its review response and that its review was conducted under FOISA. Therefore, it was seeking to rely on sections 17(1) and 38(1)(b) (Personal information) of FOISA in response to this request. These provisions are broadly similar to regulations 10(4)(a) and 11(2) of the EIRs respectively.

## Commissioner's analysis and findings

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

### FOISA or the EIRs?

14. "Environmental information" is defined in regulation 2(1) of the EIRs. Where information falls within the scope of this definition, a person has a right to access the information under the EIRs, subject to qualifications and exceptions in the EIRs. The Council responded to the Applicant's request under the EIRs. However, the Council explained that the exceptions from the EIRs were applied in error. The Council explained that its review was considered under FOISA, and section 38(1)(b) and 17 were found to apply.
15. Although the Applicant did not challenge the Council's use of the EIRs in his application to the Commissioner, the Commissioner agrees that the Council should have dealt with the request under FOISA, rather than the EIRs. The Commissioner therefore finds that the

Council failed to comply with Part 1 of FOISA in this respect inasmuch as its review referred to the EIRs rather than FOISA.

16. The Commissioner will now consider whether the Council located all information falling within the Applicant's request.

### **Section 17 - Notice that information is not held**

17. 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, subject to certain qualifications which are not applicable in this case. Under section 17(1) of FOISA, where an authority receives a request for information it does not hold, it must give an applicant notice in writing to that effect.
18. The Applicant, an employee of the Council, believed a department of the Council had sent numerous documents by email that fell within the terms of his request, but that the Council had not supplied these documents to him in responding to his request. He explained that he had the majority of the documents, but not all: he therefore wanted a full set of the Agendas and Minutes, hence his request to the Council.
19. The Applicant was concerned that he was raising issues at these meetings which were not being recorded. He was also concerned that the documents supplied did not accurately reflect the documents that he held and that the Council had only searched for handwritten notes.
20. The Applicant supplied the Commissioner with a series of internal Council emails that sought items for the agendas of the meetings or referred to minutes.
21. On the basis of the Applicant's information, the Council was asked to explain how it had established what information was covered by the Applicant's request.
22. The Council explained that it had checked with all attendees of the meetings referred to in the request to establish if any further information was held by them in note books, etc. The outcome was that only one person (the Applicant) had identified further information. The Council confirmed that information was sought from the chair of the meetings that the request related to.
23. The Council explained that there were no formal recorded agenda or notes of the meetings during the timescales requested. The Council said that it had confirmed this with the chair of the meetings, who said that he had spoken to all attendees of the meetings and confirmed that the only other information held was the information from the Applicant.
24. The Council confirmed that it held no typewritten agenda or minutes for the meetings that fell within the Applicant's request (with exception of the information from August 2018 that the Council supplied).
25. The Council supplied the Commissioner with emails showing internal discussions that took place to identify where any information would be held and why electronic notes and agendas were not held. The Council explained that no formal agenda and minutes were held as the meetings were considered to be general and it was unusual for attendees to ask to have an item added to the agenda for discussion.
26. On 6 December 2019, the investigating officer asked the Council to explain the typewritten minutes that had been provided by the Applicant. The Council was also asked to confirm whether all information was identified by the Council – or whether more typewritten

information was actually held, given that it might suggest that more typewritten information (agenda and minutes) was or is held. To assist the Council, the Applicant agreed that the information he held could be forwarded to the Council.

27. The Council responded on 20 December 2019 that it had  
“... received further clarification from the relevant service that we [the Council] do not [have] copies of typed, or any other form of notes, minutes, agendas. There is not an official destruction date available for any information that may have been previously held. However, we have received complete clarity from the Service that there is no further information held, other than what has already been provided by us in previous communications.”
28. The Applicant explained that the information he had supplied was retrieved from emails and retained hard paper copies issued at the meetings. The Applicant believed that the Council’s Property Service Department had filed these documents and the Clerk of Works Co-ordinator, who was creator and author of these documents, kept back-up copies. The Applicant confirmed that he did not have access to all the Council’s files.
29. The Council confirmed on 13 February 2020 that:  
“Searches were requested by each member of the group. They were requested to search:  
Email accounts  
Network Drives both shared and personal  
...there is no recorded information showing when or why the original documents were destroyed. However, the chair of the group advised that these meetings did not require to be formally recorded and therefore any notes that had been written previously would not have been kept.”
30. The standard of proof to determine whether a Scottish public authority holds information is the civil standard of the balance of probabilities. In determining this, the Commissioner will consider the scope, quality, thoroughness and results of the searches carried out by the public authority. He will also consider, where appropriate, any reason offered by the public authority to explain why the information is not held.
31. It must be noted that the Applicant held relevant information in his personal capacity. His concern was not to obtain that information from the Council, but to obtain any remaining typewritten agenda and minutes. As he held some such information, he expected similar typewritten information to be held by the Council. This was a reasonable expectation. Also, the information he held suggested that other information may be held, for example emails that suggested the exchange agenda and minutes for the next meeting.
32. The Commissioner accepts that the Council has fully searched their systems and hard copy files for the information and that the searches now appear to him to be adequate and proportionate, and capable of identifying any information held which fell within the scope of the Applicant’s request. The officials involved in searching for the information had experience and knowledge of the subject matter of the request and, accordingly, there was less likelihood of error and misunderstanding in locating the information requested. The Council had asked those attending the meetings to check the information held and the chair of the meeting.
33. Also, the Applicant has supplied relevant information which the Commissioner supplied to the Council to enable it to verify if it held similar information.

34. The searches of the Council originally located information - handwritten notes - that fell within the request. This shows that the searches were capable of locating and retrieving relevant information. Also, the Council explained why it did not hold typewritten agenda and minutes.
35. The Commissioner is satisfied, on the balance of probabilities, that the Council does not hold any further information falling within the Applicant's request. In the light of the above investigation, the Commissioner accepts that the Council did not, at the time of the request, hold similar typewritten minutes.
36. The Commissioner recognises the reasonable expectations held by the Applicant in this case, but he is restricted to considering what information was held by the Council at the time of the request. Although accepting, on the balance of probabilities, that no further information is held, the Commissioner considers it to be unusual for the Council not to have retained minutes of such meetings. The Commissioner understands that the Council now formally records a minute for the meetings in question.

## Decision

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The Commissioner finds that Fife Council partially complied with Part 1 of the Freedom of Information (Scotland) Act 2002 (FOISA) in responding to the information request made by the Applicant.

In initially failing to disclose the information provided during the course of the investigation, the Commissioner finds the Council failed to comply with section 1(1) of FOISA. However, he also finds that no further information is held by the Council.

## 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.

**Margaret Keyse**  
**Head of Enforcement**

**18 May 2020**

## 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.

...

#### 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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