

# Decision Notice



Decision 109/2011 Mr Tom Taylor and East Renfrewshire Council

Correspondence between named Council officers

Reference No: 201100033  
Decision Date: 1 June 2011

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**Kevin Dunion**  
Scottish Information Commissioner

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## Summary

Mr Tom Taylor requested from East Renfrewshire Council (the Council) all correspondence held by the Council on a range of topics, with particular reference to correspondence held by five named Council officers. The Council responded by advising Mr Taylor that, as his request was very broad (and would require extensive searching of Council files), it was not required to comply with the request in terms of section 12(1) of FOISA. However, the Council advised that it had contacted the five named Council officers regarding his request and they held no information of relevance. Mr Taylor requested a review, noting that he had recently received copies of emails which suggested that the Council did hold relevant information. Following its review, the Council acknowledged that it did hold certain relevant emails, but stated that these had not been supplied because they had been made available to Mr Taylor in response to a previous request. Mr Taylor remained dissatisfied and applied to the Commissioner for a decision.

Following an investigation, the Commissioner found that the Council had failed to supply the information which fell within the scope of Mr Taylor's request, or to notify him that the information was considered exempt from disclosure, or the Council was for any other reason not obliged to provide it. In so doing, the Council failed to deal with the request in accordance with Part 1 and in particular section 1(1) of FOISA. Given that the Council provided a copy of this information to Mr Taylor during the investigation, and the Commissioner was satisfied that no further relevant information was held, he did not require the Council to take any action in response to this decision.

## Relevant statutory provisions and other sources

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Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1), (4) and (6) (General entitlement) and 17(1) (Notice that information is not held)

The full text of each of the statutory provisions cited above is reproduced in the Appendix to this decision. The Appendix forms part of this decision.



## Background

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1. On 7 November 2010, Mr Taylor wrote to East Renfrewshire Council (the Council) requesting all correspondence held by the Council (in electronic or print form) regarding three specified subjects that was generated between 27 July 2010 and 7 November 2010. He indicated that he was particularly interested in any correspondence to or from five named Council officers.
2. The Council responded on 24 November 2010. It advised Mr Taylor that if it were to comply with his request in full, it would have to conduct extensive searches of all of its records and that such a global search was likely to be refused on cost grounds, as specified under section 12 of FOISA. However, the Council noted that it had contacted the five named Council officers regarding his request, but none of them held any relevant information.
3. On 26 November 2010, Mr Taylor wrote to the Council, requesting a review of its decision. In particular, Mr Taylor drew the Council's attention to the fact that he had received copies of emails between the five named individuals on 5 November 2010, in response to another freedom of information request, and he queried how these emails were no longer held on 7 November, when he submitted this current request. Mr Taylor attached a copy of these emails to his request for review. In submitting his request for review, Mr Taylor made it clear that he did not expect the Council to conduct global searches for correspondence, but was limiting his request to correspondence involving the five named Council officers.
4. The Council notified Mr Taylor of the outcome of its review on 13 December 2010. It informed him that it had contacted the five named Council officers and one of the officers had confirmed that she still held a copy of the email chain referred to, but that she held no other related or further correspondence. The Council apologised for not providing Mr Taylor with a copy of this email chain, but it explained that it had not done so because it was aware that Mr Taylor had already received this document in response to a prior request. The Council stated that none of the other officers had retained copies of the emails, and all had confirmed that they held no further emails following on from this chain, and no further information relating to Mr Taylor's request.
5. On 29 December 2010, Mr Taylor wrote to the Commissioner, stating that he was dissatisfied with the outcome of the Council's review and applying for a decision in terms of section 47(1) of FOISA.
6. The application was validated by establishing that Mr Taylor had made a request for information to a Scottish public authority and had applied to the Commissioner for a decision only after asking the authority to review its response to that request. The case was then allocated to an investigating officer.



## Investigation

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7. The investigating officer subsequently contacted the Council, giving it an opportunity to provide comments on the application (as required by section 49(3)(a) of FOISA) and asking it to respond to specific questions. In particular, the Council was asked for details of the searches it had undertaken to find the information requested by Mr Taylor, and it was also asked to justify its reliance on any provisions of FOISA it considered applicable to the information requested.
8. The Council responded to this letter on 21 February 2011. All submissions received from both the Council and Mr Taylor, insofar as relevant, will be considered fully in the Commissioner's analysis and findings below.

## Commissioner's analysis and findings

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9. In coming to a decision on this matter, the Commissioner has considered all of the withheld information and the submissions made to him by both Mr Taylor and the Council and is satisfied that no matter of relevance has been overlooked.

### Section 1(1) (general entitlement) and section 17(1) (Information not held)

10. Section 1(1) of FOISA creates a general right of access to recorded information held by a public authority, except where that right is disapplied by the application of one of the exemptions in Part 2 of FOISA, or another provision in Part 1 of FOISA.
11. Section 1(4) makes clear that the information to be given by an authority is that which is held at the time where the request is received,
12. Where a Scottish public authority receives a request for information which it does not hold, it must, in accordance with section 17(1) of FOISA, give the applicant notice in writing that it does not hold the information.
13. In its initial response, the Council notified Mr Taylor that no correspondence was held by the five named Council officers on the subjects specified by Mr Taylor. However, following its review, the Council acknowledged that one of its officers did in fact hold a copy of the email chain referred to by Mr Taylor, but it explained that it had not provided it to Mr Taylor on the basis that he already had a copy of the same document (as a result of a prior request). During the investigation, the Council provided Mr Taylor with a further copy of this email chain.



14. In this case, it is clear that on 7 November 2010 (the date on which Mr Taylor submitted his request for information), the Council did in fact hold information (the email chain) falling within the scope of Mr Taylor's request. Therefore, the Council's initial response incorrectly gave Mr Taylor notice (in terms of section 17(1) of FOISA) that it held no information of relevance to his request. This error was corrected by the Council's review, following which the Council confirmed that one member of staff did still hold these emails.
15. Since the Council did hold information falling within the scope of Mr Taylor's request, it should have either supplied it to Mr Taylor in compliance with section 1(1) of FOISA, or issued a notice explaining why the right in section 1(1) did not apply in this case (if it so claimed).
16. Since the relevant information was clearly already in Mr Taylor's possession, one option open to the Council was to issue a refusal notice stating that it was not obliged to disclose that information because it was already reasonably accessible to Mr Taylor, and so exempt from disclosure in terms of section 25(1) of FOISA.
17. However, the Council did not issue a refusal in such terms, or issue any notice indicating that Mr Taylor's right in terms of section 1(1) was disapplied in this case.
18. Therefore, the Commissioner must find that by failing to provide the information which it did hold and which fell within the scope of Mr Taylor's information request, the Council failed to deal with the request in accordance with section 1(1) of FOISA.
19. However, the Council rectified this breach by disclosing the information that it had identified that it did hold during the investigation.

### **Adequacy of searches**

20. In his application to the Commissioner, Mr Taylor expressed concern that only one of the five Council officers who had received the email chain had retained a copy of the correspondence. Mr Taylor noted that he had made previous FOI requests which had led to the disclosure of emails which were more than 12 months old. In the circumstances, Mr Taylor queried why Council staff were now deleting emails that were much more recent.
21. Mr Taylor also queried the Council's position that it held no further emails or correspondence (relating to the email chain). Mr Taylor referred to the last email in the chain which featured a comment by one of the named officers, who indicated that she will take (the issue) up with another Council employee to see if/how she wants to respond. Mr Taylor asked why there is no record of this further communication.
22. Mr Taylor indicated that it was his understanding that deleted material remains on the Council server and can be accessed by members of the Council's IT section at any time, and that Council policy would appear to be that such material is retained for 12 months. In light of this, Mr Taylor queried why none of the other named officers have a record of the email chain.



23. In its submissions, the Council stated that there is no set procedure for the retention of emails. It noted that Council practice is not standardised (and will vary from officer to officer), but that records (in whatever form) are generally retained for as long as required for the effective conduct of business. In this case, the Council submitted that the named officers simply actioned the relevant emails to the extent their particular role/position demanded and thereafter deleted them once any practical requirement to retain them had elapsed. The Council provided responses from four of the five named officers which indicated that at least two of the officers had a personal policy of deleting emails they considered to be low priority.
24. The Council also explained that the sole officer who had retained a copy of the email chain in this case was the same officer who had responsibility for collating and issuing a response to Mr Taylor's previous information request (which predates this current request). The Council submit that the other four named council officers had no reason to retain the emails, as the Council's policy only requires the departmental officer who collates the FOI response to retain a copy of material disclosed; officers who are not responsible for the response to an FOI request have no obligation to retain copies of such information.
25. The Council confirmed that the email folders (including deleted items folders) of all five named officers had been searched and that no further information (other than the email chain retained by one of the officers) was found. The Council noted that there had been some follow up correspondence to the original email chain (as indicated in the text of the last email referred to by Mr Taylor), but this was no longer held by the Council.
26. The Council submitted that one of the named officers had telephoned another Council employee regarding this email chain, and she had received an email response to this telephone call that had advised her not to get involved in the matters it raised. The named Council officer subsequently deleted this email shortly after its receipt, having concluded that, as she was not required to undertake any further work in response to the email, she had no need to retain it. The Council submitted that this was the only correspondence generated by the email chain and that it was no longer held.
27. The Council also provided the Commissioner with a copy of a report from its IT department which answered questions put by the investigating officer regarding the Council's ability to retrieve deleted email files. The report advised that the email and calendar software used by the Council automatically stores emails deleted by users for 60 days (in a storage area called a 'dumpster') from the date of deletion. During that time, these emails can be retrieved easily until they are permanently deleted from the 'dumpster' after the 60 days have expired.
28. The report noted that it is possible to determine when emails were deleted as long as they were not deleted more than 60 days ago. However, the IT manager advised that, once items have been deleted from the 'dumpster,' they were deleted permanently and cannot be retrieved, and it is therefore not possible to determine when they were deleted.
29. In its submissions, the Council also provided the Commissioner with a copy of its records management guidance note for email (which addresses issues such as file retention, email management and storage) as well as its internal procedures for handling FOI requests.





30. The Commissioner has considered the submissions provided by the Council and the points of dissatisfaction raised by Mr Taylor and while he finds that the Council failed to provide certain relevant information when responding to Mr Taylor's initial request and request for review (as discussed above), overall he accepts that (during the course of his investigation) the Council has conducted adequate searches of its files. He finds on balance of probabilities that the Council holds no further information that falls within the scope of Mr Taylor's request.

## DECISION

The Commissioner finds that East Renfrewshire 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 Mr Taylor. In particular, the Commissioner considers that since the Council's review recognised that relevant information was held, but neither supplied this nor gave any notice to suggest that the right in section 1(1) of FOISA was disapplied in this case, the Council failed to comply with section 1(1) of FOISA.

Given that the Council has since provided Mr Taylor with a copy of this information, and that the Commissioner is satisfied that the Council does not hold any further information that falls within the scope of Mr Taylor's request, he does not require the Council to take any action in response to this failure.

## Appeal

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Should either Mr Taylor or the Council wish to appeal against this decision, there is an 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 notice.

**Margaret Keyse**  
**Head of Enforcement**  
**1 June 2011**



## Appendix

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### Relevant statutory provisions

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

##### 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.