

# Decision Notice

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**Decision 105/2016: Mr Alastair Tibbitt and North Ayrshire Council**

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**“Prevent” duty guidance and related information**

Reference No: 201502015

Decision Date: 05 May 2016



Scottish Information  
Commissioner

## Summary

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On 30 August 2015, Mr Tibbitt asked North Ayrshire Council (the Council) for information relating to the “Prevent” duty guidance for Scotland.

The Council informed Mr Tibbitt that the information was exempt from disclosure in terms of section 30(c) of FOISA. During the investigation, the Council submitted that it did not hold this information but continued to maintain that it was exempt from disclosure under section 30(c).

The Commissioner investigated and found that the Council did not hold the information requested. During the Commissioner’s investigation the Council argued that the fact the information was not held was itself information, and exempt from disclosure.

The Commissioner found that the Council was not entitled to apply an exemption to information it did not hold. She also did not accept that the exemption applied to the fact the Council did not hold the requested information. The Council should either have given Mr Tibbitt due notice that the information was not held, or have applied section 18 to neither confirm nor deny whether the information existed or was held.

## 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); 73 (Interpretation) (definition of “information”)

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 30 August 2015, Mr Tibbitt made a request for information to the Council. The request concerned the “Prevent” duty guidance for Scotland<sup>1</sup>. This guidance provides advice for specified Scottish authorities on their duties under the Counter-Terrorism and Security Act 2015<sup>2</sup>.
2. The information requested was as follows:
  - 2 *Please supply me with all training materials distributed to Council staff in support of the local authority obligation to ensure front line staff are aware of “Prevent” and of “available programmes to deal with any individual who is vulnerable to being drawn into terrorism”.*
  - 3 *Please confirm how many staff have received these training materials in the last 36 months.*

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<sup>1</sup>

[https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/445978/3799\\_Revised\\_Prevent\\_Duty\\_Guidance\\_Scotland\\_V2.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/445978/3799_Revised_Prevent_Duty_Guidance_Scotland_V2.pdf)

<sup>2</sup> <http://www.legislation.gov.uk/ukpga/2015/6/contents/enacted>

- 4 *Please confirm how many individuals have been referred by Council staff into the Prevent Professional Concerns process as described in the above guidance in the last 36 months.*
- 5 *Please supply all monitoring and/or evaluation reports provided to the local Multi-Agency CONTEST [Counter-Terrorism Strategy] group, or the Scottish Government in the last 36 months.*
- 6 *Please supply a copy of the Council's current CONTEST and/or "Prevent" action plan, and any previous plans.*
- 7 *Please confirm whether the Council has received any funding from any other public body in Scotland in order to implement any CONTEST or Prevent activities. If so, how much has been received to date and what activity has been funded?*

Mr Tibbitt also requested other information which is not the subject of this Decision Notice.

3. The Council responded on 8 September 2015. The Council informed Mr Tibbitt that the information was exempt from disclosure in terms of section 30(c) of FOISA. This was on the basis that its disclosure would, or would be likely to, prejudice substantially the effective conduct of public affairs.
4. On 8 September 2015, Mr Tibbitt wrote to the Council requiring a review of its decision. Mr Tibbitt stated that other local authorities to whom he had submitted the same request had disclosed information to him. He also believed the public interest favoured disclosing the information.
5. The Council notified Mr Tibbitt of the outcome of its review on 26 October 2015, upholding its previous decision without modification.
6. On 31 October 2015, Mr Tibbitt wrote to the Commissioner. He applied to the Commissioner for a decision in terms of section 47(1) of FOISA. He stated he was dissatisfied with the outcome of the Council's review as he believed the exemption had been applied in a blanket fashion and the public interest test had been applied incorrectly.

## **Investigation**

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7. The application was accepted as valid. The Commissioner confirmed that Mr Tibbitt 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.
8. On 13 November 2015, the Council was notified in writing that Mr Tibbitt had made a valid application. The Council was asked to send the Commissioner the information withheld from him.
9. In response, the Council submitted that it did not actually hold any recorded information falling within the scope of these parts of Mr Tibbitt's request. The case was then allocated to an investigating officer.
10. 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, in particular, to explain how an exemption could apply to information it did not hold.

11. The Council confirmed, with explanation, that it did not hold any recorded information falling within the scope of parts 2 to 7 of Mr Tibbitt's request.
12. Following subsequent correspondence with the investigating officer, the Council confirmed that its position remained unchanged from that contained in its review response to Mr Tibbitt. It considered the information sought by Mr Tibbitt to be exempt from disclosure in terms of section 30(c) of FOISA. The Council submitted that, although the information did not exist, that in itself was "information".

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

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13. 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 Tibbitt and the Council. She is satisfied that no matter of relevance has been overlooked.

### **Does the Council hold any information for the purposes of FOISA?**

#### *Interpretation of "information"*

14. Section 73 of FOISA defines "information" (subject to conditions that are not relevant here) as meaning information recorded in any form.
15. The Council submitted that, although it held no recorded information falling within the scope of parts 2 to 7 of Mr Tibbitt's request, this in itself was "information". The Council considered this fact to be exempt from disclosure under section 30(c) of FOISA.
16. The Commissioner disagrees with the Council's interpretation. In her view, the definition of information contained in section 73 of FOISA is unequivocal; it can apply only to information that is held in recorded form. She does not accept that the absence of information comprises "information" for the purposes of FOISA (as the Council has argued).
17. Consequently, the Commissioner does not accept that the Council can apply an exemption to information which is not recorded. She has therefore gone on to consider the Council's explanation of why the information requested is not held.

#### *Was information held?*

18. In its submissions to the Commissioner, the Council explained that it had contacted its Head of Democratic Services, who was the Council officer responsible for the "Prevent" strategy. Additionally, this officer had convened the relevant multi-service working group and as a result had an overview of the whole area. They also attended the multi-agency CONTEST group and therefore is aware of all of the information which might be held by the Council. As a result of these enquiries, the Council established that it did not hold any recorded information falling within the scope of parts 2 to 7 of the request.
19. The Commissioner has considered the Council's submissions and its explanation of why it does not hold any information falling within the scope of these parts of Mr Tibbitt's request. Having done so, she is satisfied that, by the end of the investigation, the Council had made reasonable, proportionate enquiries to establish whether it held any relevant information. She accepts that any information falling within the scope of parts 2 to 7 of the request would have been identified as a result of these enquiries.
20. The Commissioner is satisfied therefore, on the balance of probabilities, that the Council did not (on receiving the request) hold the information sought in parts 2 to 7 of Mr Tibbitt's request. In such circumstances, the appropriate response from the Council should have

been either to give notice to this effect, as required by section 17(1) of FOISA), or to have applied section 18 to say that it was not in the public interest to either confirm or deny whether the information existed and was held. By failing to do so, the Commissioner finds that the Council failed to comply with Part 1 (in particular section 1(1)) of FOISA.

21. The Commissioner would remind the Council (and other Scottish public authorities) that they cannot say they are withholding information under exemptions in Part 2 of FOISA, and serve notice to this effect, if they do not hold it. Exemptions can only be applied, and notice given, in accordance with section 16, which requires that the public authority discloses that it holds the information in question.

## Decision

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The Commissioner finds that North Ayrshire 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 Tibbitt.

The Commissioner accepts that the Council did not hold this information. The Commissioner finds that the Council failed to give an appropriate response: either to give notice, in terms of section 17(1) of FOISA, that it did not hold the information requested, or, in terms of section 18 of FOISA, that it was not in the public interest to reveal whether the information existed or was held by the Council.

## Appeal

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Should either Mr Tibbitt or North Ayrshire 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.

**Rosemary Agnew**  
**Scottish Information Commissioner**

**05 May 2016**

### 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.

...

#### 73 Interpretation

In this Act, unless the context requires a different interpretation –

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“information” (subject to sections 50(9) and 64(2)) means information recorded in any form;

...

**Scottish Information Commissioner**

Kinburn Castle  
Doubledykes Road  
St Andrews, Fife  
KY16 9DS

t 01334 464610

f 01334 464611

[enquiries@itspublicknowledge.info](mailto:enquiries@itspublicknowledge.info)

**[www.itspublicknowledge.info](http://www.itspublicknowledge.info)**