

# Decision Notice

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**Decision 094/2018: Mr Brian Gourlay and West Dunbartonshire Council**

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**Whether request was vexatious**

Reference No: 201800068

Decision Date: 28 June 2018



Scottish Information  
Commissioner

## Summary

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The Council was asked about the legal costs it had incurred in an Employment Tribunal case. The Council refused to comply with the request because it considered it to be vexatious.

Taking into account the history of the requester's dealings with the Council, the Commissioner agreed that the request was vexatious. However, he also found that the Council had failed to comply with the technical requirements for notifying the requester.

## Relevant statutory provisions

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Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) and (6) (general entitlement); 14(1) (Vexatious or repeated requests); 21(1), (8)(b) and (9) (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 Appendices form part of this decision.

## Background

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1. On 12 October 2017, Mr Gourlay made a request for information to the Council. The request ran to six points, relating to previous information requests and the legal costs incurred by the Council in connection with an Employment Tribunal case. The request is reproduced in full in Appendix 2.
2. The Council responded to Mr Gourlay's request on 17 October 2017, informing him that it considered his request to be vexatious and therefore refusing to comply with the request, in terms of section 14(1) of FOISA.
3. On 4 December 2017, Mr Gourlay asked the Council to carry out a review. He was unhappy he had not received a substantive response to his request.
4. The Council responded to Mr Gourlay's review request on 9 January 2018. It confirmed that it considered his request to be vexatious. The Council referred to behaviours it considered Mr Gourlay to have indulged in on this and previous occasions, in particular intimidatory, abusive and defamatory statements about Council staff.
5. On 10 January 2018, Mr Gourlay wrote to the Commissioner and applied for a decision in terms of section 47(1) of FOISA. He stated he was dissatisfied with the Council's application of section 14(1) of FOISA. He also questioned whether the Council had complied with the timescales for responding to him.

## Investigation

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6. The application was accepted as valid. The Commissioner confirmed that Mr Gourlay 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 29 January 2018, the Council was notified in writing that Mr Gourlay had made a valid application. The case was then 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, focusing on its reliance on section 14(1) of FOISA.
9. Mr Gourlay was also invited to provide any comments he wished to make in support of his position.
10. Both Mr Gourlay and the Council provided submissions to the investigating officer.
11. The Council invited the Commissioner to consider whether Mr Gourlay's application to the Commissioner should itself be considered frivolous or vexatious, in terms of section 49(1)(a) of FOISA. While each case will be considered on its own merits, on this occasion the Commissioner has not found it appropriate to take this course of action.

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

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12. In coming to a decision on this matter, the Commissioner considered the relevant submissions, or parts of submissions, made to him by both Mr Gourlay and the Council. He is satisfied that no matter of relevance has been overlooked.

### **Timescales for responding and other technical requirements**

#### *Response to request*

13. Mr Gourlay stated in his application to the Commissioner that he had not received a response to his request of 12 October 2017. However, with his application he provided the Commissioner with a letter from the Council dated 17 October 2017. Amongst other things, this responds to Mr Gourlay's request of 12 October 2017, on the basis that the request is considered vexatious and section 14(1) of FOISA is therefore being applied. The Commissioner acknowledges that this might have been clearer if the Council had not included this notification within an eleven-page letter addressing Mr Gourlay's conduct more generally, but nevertheless he is satisfied that the letter contains a response, in those terms, to the request of 12 October 2017.
14. The Commissioner therefore finds that the Council provided a timeous response to Mr Gourlay's request of 12 October 2017.

#### *Response to review requirement*

15. Mr Gourlay was also of the view that the Council was late in issuing a response to his review requirement.
16. Section 21(8)(b) of FOISA provides that a Scottish public authority is not obliged to comply with a requirement for review if, by virtue of section 14, it was not obliged to comply with the request. Section 21(9) of FOISA goes on to provide that a public authority which intends to rely on section 28(1)(b) (and, as such, does not intend to issue a substantive review response due to the application of section 14(1) of FOISA) must give the requester notice of this within 20 working days.
17. The Commissioner is satisfied that the Council's letter of 9 January 2018 (although, again, not ideally worded) met the requirements of section 21(9) in conveying that the Council still considered the request vexatious. It could not, however, be said to meet those requirements fully, as it failed to convey with sufficient clarity that the Council was refusing to carry out a review for that reason.

18. In addition, the response of 9 January 2018 was not issued within the required 20 working day period, and so failed to comply with section 21(9) of FOISA in that respect also. Christmas and New Year holidays fell within the period for responding to the request, but the public holidays which can be discounted for these purposes do not account for all of the delay in responding.

### **Section 14(1) – vexatious requests**

19. In terms of section 14(1) of FOISA, a Scottish public authority is not obliged to comply with a request for information made under section 1(1) if the request is vexatious.
20. FOISA does not define the word "vexatious". The Commissioner's general interpretation, as set out in his guidance<sup>1</sup> on section 14(1), is that the following factors are relevant when considering whether a request is vexatious:
- (i) it would impose a significant burden on the public body;
  - (ii) it does not have a serious purpose or value;
  - (iii) it is designed to cause disruption or annoyance to the public authority;
  - (iv) it has the effect of harassing the public authority;
  - (v) it would otherwise, in the opinion of a reasonable person, be considered manifestly unreasonable or disproportionate.
21. It is important to remember that this is not an exhaustive list. Depending on the circumstances, other factors may be relevant, provided the impact on the authority can be supported by evidence. The Commissioner recognises that each case must be considered on its merits, taking all the circumstances into account.
22. While the Commissioner's view is that "vexatious" must be applied to the request and not the requester, he acknowledges that the applicant's identity, and the history of their dealings with a public authority, may be relevant in considering the nature and effect of a request and its surrounding circumstances. It may be reasonable, for example, for the authority to conclude that a request represents a continuation of a pattern of behaviour it has deemed vexatious in another context.

#### *Submissions from the Council*

##### Background

23. The Council explained that it had received voluminous correspondence from Mr Gourlay in relation to his past employment with the Council and related Employment Tribunal claims. The Council stated that Mr Gourlay had written numerous times to express his feelings about various members of Council staff, in a manner which it considered defamatory, threatening and accusatory.

##### Does Mr Gourlay's request impose a significant burden on the Council?

24. The Council stated that Mr Gourlay's correspondence with it ran to thousands of pages, all stemming from his former employment with the Council and subsequent proceedings. Over 26 months, he had submitted 706 information requests and 133 subject access requests, along with approximately 100 other items of correspondence relating to the Employment

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<sup>1</sup> [http://www.itspublicknowledge.info/Law/FOISA-EIRsGuidance/Section14/Vexatious\\_or\\_repeated\\_requests.aspx](http://www.itspublicknowledge.info/Law/FOISA-EIRsGuidance/Section14/Vexatious_or_repeated_requests.aspx)

Tribunal and his pursuit of various related complaints. The Council provided the Commissioner with evidence of the volume of correspondence received on this matter.

25. The Council also highlighted the challenges of handling the individual requests, given their complexity and repetitive nature. They needed to be checked for their relevance to other current or past information requests. The Council stated that many thousands of hours of staff time and tens of thousands of pounds of public money had been channelled into dealing with Mr Gourlay's requests and other correspondence.

Does the request have a serious purpose or value?

26. The Council's view was that Mr Gourlay's requests were not serious attempts to seek information, but rather were primarily designed as a weapon to campaign against the authority.
27. The Council submitted that the present request and related allegations centred on his Employment Tribunal case and the associated claim for expenses, both of which had been determined in the Council's favour. In other words, these were matters determined in the appropriate forum. The Council explained that expenses were only awarded in extreme circumstances and in this case recognised Mr Gourlay's continued pursuit of his case where he had no reasonable prospect of winning.

Is the request designed to cause disruption or annoyance to the authority?

28. The Council submitted that Mr Gourlay's requests were regularly of such an insulting, defamatory and derogatory nature, and so repetitive, complex and voluminous, as to give the impression there were designed primarily to cause it disruption and annoyance.

Does the request have the effect of harassing the authority?

29. The Council submitted that its staff were harassed not only by the volume of Mr Gourlay's continuous communications, but also by its tone and content. Accusations of perjury had been transmitted along with this request and the statements which accompanied his requests were frequently defamatory, threatening and accusatory. It provided evidence of correspondence it considered abusive, which had been appended to the request under consideration here, along with submissions on Mr Gourlay's history of expressing himself in this manner.
30. The Council submitted that the appended correspondence had no purpose other than to re-expose his accusations against certain Council officers to public gaze. It did not consider statements of the kind he had made here, and in other requests, to have any role in the context of a legitimate request for information. In addition, it did not wish to give any suggestion that it accepted the underlying pretexts of such statements. It submitted, with examples, that the focus of his abuse had widened over time, as further individuals had failed to respond to him in the way he wished and were threatened with being reported to professional or other regulatory bodies. It provided examples of ways in which his statements could be considered provocative.

Would the request, in the opinion of a reasonable person, be considered manifestly unreasonable or disproportionate?

31. The Council submitted that the volume and tone of requests received from Mr Gourlay were part of a repeated pattern of behaviour (as described above) and, while it had initially attempted to provide responses to Mr Gourlay, with related advice and guidance, it was now at the stage where it believed his requests were abusing the right to information.

### *Submissions from Mr Gourlay*

32. Mr Gourlay did not consider himself to have been vexatious. He referred to a number of public interest disclosures (PIDs) he considered he had been pursuing in relation to the Council, submitting that these were a consideration in the Council “resorting” to the use section 14(1) of FOISA as a means of avoiding answering him.
33. Mr Gourlay submitted that he was campaigning in furtherance of legitimate concerns and that such campaigning was an appropriate activity in a democratic society. He argued that public authorities should not deal with a campaign as potentially vexatious simply because it is a campaign. Apart from general reference to his PIDs, however, with no real reference to any substance they might have or how his information requests might contribute to their furtherance, Mr Gourlay failed to explain what these legitimate concerns might be.
34. Mr Gourlay also suggested that the Council’s actions might have contributed to the situation. He referred to the examples of such actions highlighted in the Commissioner’s guidance, but his only direct comment on the Council’s own actions, in this context, was to comment (without details) that he disputed the veracity of statements in one letter from the Council.
35. Mr Gourlay submitted that his requests would not impose a significant burden on the Council, if the Council responded “expediently and transparently”. He also submitted that the Council had dedicated, competent and trained staff to deal with information requests (although this appears to be at odds with his frequent comments challenging the competence, integrity and honesty of the Council’s staff). He submitted that if his requests were causing annoyance and disruption to the Council, then the Council’s system for processing requests must be seriously flawed.
36. He argued that his correspondence with the Council on the matter in question did have a serious purpose and value, insofar as it was intended to prove that members of Council staff had knowingly provided false information to his Employment Tribunal. Any suggestion that his request had the effect of harassing the Council had to be weighed against the legitimate purposes he was pursuing.
37. Mr Gourlay stated that he believed disclosure of the information he was seeking would be in the public interest, as there was much more to his requests – and the Council’s responses – “than met the eye”. He stated that his requests were not vexatious but were simply persistent, resolute and focused.

### *The Commissioner’s findings*

38. The Commissioner acknowledges that the conduct and outcomes of the employment processes he has been through are of concern to Mr Gourlay. The PIDs he has raised also appear to relate to matters of concern to him, although it is difficult for the Commissioner to comment on these on the basis of the limited detail provided by Mr Gourlay.
39. In neither case is it apparent how Mr Gourlay can reasonably expect his concerns to be advanced by compliance with the current request, or the many others he has made to the Council. If these are matters of genuine concern, they need to be pursued through other channels, beyond the Council. It is not clear, and Mr Gourlay has not explained, how their resolution might be advanced through continual and voluminous dialogue with the Council, including the very large number of information requests he has made over the past two years or so.
40. There is nothing to suggest that the requests are being (or are intended to be) used to pursue any particular avenue to address Mr Gourlay’s concerns. He refers to (or threatens)

taking matters up with relevant professional and other regulatory bodies, but there is no evidence that he ever actually does so: even if he really intended to, it is not clear why this would need all the information he has been seeking.

41. The Commissioner is familiar with the form and style of Mr Gourlay's communications, and has considered this request carefully, in that context. Generally, and in this particular case, his correspondence lacks either focus or coherence. It is often, as the Council has submitted, repetitive. The present request appears to relate to the handling of a previous request for information. Beyond that, while its roots may lie in the Employment Tribunal and its award of expenses, its focus is not clear. From the submissions received from the Council, the Commissioner is satisfied that it has to be viewed in the context of a series of requests, on the same relatively narrow subject matter but similarly lacking in real focus, which have clearly created a very significant burden for the Council.
42. Given their lack of clarity and apparent point, the Commissioner can understand why an objective observer would consider Mr Gourlay's requests – including this one – to be lacking in serious purpose or value and designed simply to cause disruption or annoyance, even if that was not his intention. Viewed objectively, taking account of the tone of the requests and their evident impact on a number of members of the Council's staff, the Commissioner is satisfied that any reasonable person would regard this request, taken in its wider context, as having the effect of harassing the Council and its staff. He has taken account of the correspondence appended to Mr Gourlay's request of 12 October 2017, which would appear to have been sent with no purpose other than to prolong a dispute and cause upset, along with the Council's submissions on other abusive content received in the course of Mr Gourlay's voluminous correspondence.
43. In all the circumstances discussed above, the request would appear to be focused on prolonging an argument with the Council – in an accusatory and at times abusive manner – rather than extracting information. This is not the kind of conduct a public authority should have any reason to expect in discharging its duties under FOISA. Whatever higher purpose might be in Mr Gourlay's mind, his actual pursuit of this and related requests (which he does not appear to deny) is, in the Commissioner's view, manifestly unreasonable and disproportionate.
44. Mr Gourlay has referred to the contribution made to the present situation, in his view, by the Council's own actions. The Commissioner acknowledges that the Council could, at times, have expressed itself more succinctly. However, the Council's purpose has been clear enough. It has been trying to manage a challenging series of requests effectively, while continuing to discharge its own functions.
45. The Council has, for example in its letter of 17 October 2017 (responding to this request), made considerable efforts to give Mr Gourlay guidance on making his requests. At other times, it has tried to set clear boundaries, in terms of acceptable forms of expression. There would appear to be no evidence that Mr Gourlay has heeded advice he has been given, to any material extent.
46. In all the circumstances, the Commissioner cannot, reasonably, characterise the Council's approach as contributing in any significant respect to the protracted course of dealings between Mr Gourlay and itself.
47. On balance, the Commissioner accepts that Mr Gourlay's request of 12 October 2017, viewed in the context of his previous correspondence with the Council, should be considered

vexatious, with the result that the Council was correct in responding under section 14(1) of FOISA.

## **Decision**

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The Commissioner finds that West Dunbartonshire Council partially complied with Part 1 of the Freedom of Information (Scotland) Act 2002 in responding to the information request made by Mr Gourlay. While it was entitled to refuse to comply with the request under section 14(1) of FOISA, it failed to meet the requirements of section 21(9) of FOISA fully in respect of the giving of notice within the required timescale.

## **Appeal**

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Should either Mr Gourlay 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**

**28 June 2018**



### 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.

...

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

#### **14 Vexatious or repeated requests**

- (1) Section 1(1) does not oblige a Scottish public authority to comply with a request for information if the request is vexatious.

...

#### **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.

...

- (8) Subsection (1) does not oblige a Scottish public authority to comply with a requirement for review if-

...

- (b) the request for information to which the requirement for review relates was one with which, by virtue of section 14, the authority was not obliged to comply.

- (9) Where the authority considers that paragraph (a) or (b) of subsection (8) applies, it must give the applicant who made the requirement for review notice in writing, within the time allowed by subsection (1) for complying with that requirement, that it so claims.

## Appendix 2: Request for information

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“Subject: 251 - FOISA submitted to the respondent's Monitoring Officer cc Officers whom were evidently aware of, among other things, Costs at 24 April 2015.

Importance: High Thursday, 12 October 2017

Dear Mr Hessett,

Further to a previous FOISA enquiry regarding attached PDF titled, ANGELA WILSON 2015 05 29 - BG Letter – “neither the determination”.

The outcome being –

On 25 July 2017 SIC made a decision in regard an FOI Gourlay to WDC dated 11 January 2017.

Decision 116/2017: Mr Brian Gourlay and West Dunbartonshire Council

Queries regarding correspondence from the Council: failure to respond within statutory timescales  
Reference No: 201701041

Decision Date: 25 July

2017 Summary

On 11 January 2017, West Dunbartonshire Council (the Council) was asked for information which would clarify aspects of its correspondence. This decision finds that the Council failed to respond to the requirement for review within the timescale set down by Freedom of Information (Scotland) Act 2002 (FOISA).

<http://www.itspublicknowledge.info/ApplicationsandDecisions/Decisions/2017/201701041.aspx>

At 12/10/2017:

In regard Brian Gourlay’s letter to Angela Wilson – see attached PDF titled, “*Angela Wilson submitted 24 April 2015*”. In Brian Gourlay’s letter to Angela Wilson of 24 April 2015 it states/asks/requests under FOISA:

Excerpt:

- Under FOI: please advise me the cost to WDC of this matter of Gourlay v WDC i.e. what has the Gourlay v WDC case cost the Council to date in terms of money and time?
- Under FOI: please advise me the anticipated cost to WDC of this matter of Gourlay v WDC i.e. the forthcoming 4 week hearing i.e. anticipated cost to the Council in terms of money and time?

Brian Gourlay received a response at 23 June 2015 which stated, “West Dunbartonshire Council do not hold the information that you have requested at this time”.

On or about 12 August 2016 Gavin Walsh provided, by email, a Word document titled, “Respondent's Legal Costs for Defending Claims 12 08 16” to Employment Tribunals Glasgow seeking costs of £20k from Brian Gourlay.

Word document titled, “Respondent's Legal Costs for Defending Claims 12 08 16”

This Word document titled, “Respondent's Legal Costs for Defending Claims 12 08 16” did provide in house legal costs of £124,046.00 and noted numerous persons involved throughout the process.

- The range of these “Respondent’s Legal Costs for Defending Claims 12 08 16” cover period 29/01/2014 through to 03/06/2016.

This Word document very evidently, covering period 29/01/2014 through to 03/06/2016, did include the requested “timeframe” up to 24 April 2015 i.e. “cost to WDC of this matter of Gourlay v WDC i.e. what has the Gourlay v WDC case cost the Council to date in terms of money and time”.

Thursday, 12 October

2017 Under FOISA:

1. Please confirm and detail for me
  - a. whom provided the information,
  - b. what information was provided,
  - c. when the information was provided to whomever wrote the response –
 

that resulted in the response provided to Brian Gourlay, by WDC, on 23 June 2015 – see attached PDF titled, “Costs to WDC FOI 23 June 2015 - Scan0046” i.e. “West Dunbartonshire Council do not hold the information that you have requested at this time”.
2. Please confirm if anyone in WDC Legal Department was aware of this exchange of information in regard the answer at 23 June 2015 i.e. the answer “West Dunbartonshire Council do not hold the information that you have requested at this time”.
3. Please confirm if Joyce White, Angela Wilson, Stephen West, Vicki Rogers were aware or were not aware of the answer provided to Brian Gourlay of “West Dunbartonshire Council do not hold the information that you have requested at this time”.
4. Please confirm if Joyce White, Angela Wilson, Stephen West, Vicki Rogers were aware of the answer provided to Brian Gourlay of “West Dunbartonshire Council do not hold the information that you have requested at this time” of when were they made aware and detail how they (Joyce White, Angela Wilson, Stephen West, Vicki Rogers) were made aware.
5. Please provide copies of the correspondence relating to this subject provided to, as he then was, Cllr George Black and confirm and detail the contents of said correspondence on Costs to Cllr Black.
6. Please provide copies of the correspondence relating to this subject provided to, as he then was, Cllr George Black and confirm and detail the contents of said correspondence on Costs to any other person at WDC i.e. whom else was made aware, when made aware and by what means made aware of Cllr Blacks enquiry and the formulation of the response from Alan Douglas.

I look forward to hearing from WDC.

Should there be any clarification required please do not hesitate to contact me.

I take this opportunity to respectfully advise WDC that, under FOISA, WDC have a legal duty to assist Brian Gourlay with this FOISA request.”

**Scottish Information Commissioner**

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