

# Decision Notice

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**Decision 093/2017: Mr T and the City of Edinburgh Council**

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**Report on whistleblowing allegation**

Reference No: 201700436

Decision Date: 6 June 2017



Scottish Information  
Commissioner

## Summary

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The Council was asked for an investigation report produced following whistle-blowing allegations. The Council refused to disclose the information, which it considered to be exempt under various provisions in FOISA.

The Commissioner found that the Council had correctly withheld the information, and so did not require the Council to take any action.

## Relevant statutory provisions

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Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) and (6) (General entitlement); 2(1)(b) (Effect of exemptions); 30(c) (Prejudice to effective conduct of public affairs)

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.

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.

## Background

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1. On 29 November 2016 Mr T made a request for information to City of Edinburgh Council (the Council). The information requested was:  
  
"Report produced by Monica Patterson, Deputy Chief Executive, East Lothian Council, following whistleblowing allegation from [name], for the Chief Executive, which was received by Andrew Kerr on 19 August, and which contains references to me, and to which he has not responded"
2. The Council responded on 28 December 2016, informing Mr T why it was refusing his request. It considered disclosure of the report would prejudice the effective conduct of public affairs and applied section 30(c) of FOISA. It also explained that some of the data within the report were the personal data of either Mr T or others. It considered these to be exempt under, respectively, sections 38(1)(a) and (b) of FOISA.
3. On 28 December 2016 Mr T wrote to the Council, requesting a review of its decision.
4. The Council asked Mr T (on 4 January 2017) what his reasons were for being dissatisfied with its original decision. Mr T gave his reasons later that day, explaining why he believed the report should be disclosed to him.
5. The Council notified Mr T of the outcome of its review on 1 February 2017. It upheld its original response without modification, noting that any personal data belonging to Mr T had been provided to him outwith FOISA, under section 7 of the Data Protection Act 1998 (the DPA).
6. On 7 March 2017 Mr T wrote to the Commissioner. He applied to the Commissioner for a decision in terms of section 47(1) of FOISA. Mr T stated he was dissatisfied with the

outcome of the Council's review for the same reasons he had raised at review; he did not accept that the information in the report was exempt under FOISA and explained why he considered disclosure to be in the public interest.

## **Investigation**

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7. The application was accepted as valid. The Commissioner confirmed that Mr T 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 17 March 2017, the Council was notified in writing that Mr T had made a valid application. The Council was asked to send the Commissioner the information withheld from Mr T. The Council provided the information and the case was allocated to an investigating officer.
9. 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. These focused on the exemptions applied by the Council when responding to Mr T.

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

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10. In coming to a decision on this matter, the Commissioner considered all of the withheld information and the relevant submissions, or parts of submissions, made to her by both Mr T and the Council. She is satisfied that no matter of relevance has been overlooked.

### **Section 30(c) – Prejudice to effective conduct of public affairs**

11. Section 30(c) of FOISA exempts information if its disclosure “would otherwise prejudice substantially, or be likely to prejudice substantially, the effective conduct of public affairs”. The word “otherwise” distinguishes the harm required from that envisaged by the exemptions in section 30(a) and (b). This is a broad exemption and the Commissioner expects any public authority applying it to show what specific harm would (or would be likely to) be caused to the conduct of public affairs by disclosure of the information, and how that harm would be expected to follow from disclosure. The exemption (if found to be engaged) is also subject to the public interest test in section 2(1)(b) of FOISA.
12. As noted in previous decisions, there is a high threshold to be crossed in applying the tests contained in the section 30(c) exemption. The prejudice must be substantial, and therefore of real and demonstrable significance. The Commissioner expects authorities to demonstrate a real risk or likelihood of substantial prejudice at some time in the near (certainly foreseeable) future, not simply that such prejudice is a remote or hypothetical possibility. Each request should be considered on a case-by-case basis, taking into account the actual content of the information and all other relevant circumstances (which may include the timing of the request).
13. In his application, Mr T claimed he had been the subject of unfounded malicious allegations, which he submitted had resulted in misconduct proceedings against him and, in turn, to his dismissal. As a result, he made the whistleblowing allegation which led to the report under consideration here. He was unhappy with how little of the report had been communicated to him and believed he required more from it, in order to be able to respond effectively to the allegations made against him.

14. The Council submitted that this report was produced and intended to be a confidential internal document. It was detailed and frank, to enable it to take appropriate action as necessary.
15. In its response to Mr T (28 December 2016) it reminded him that disclosure under FOISA would result in the report is being placed into the public domain. The Council informed Mr T of its view that even a redacted version of this report would breach the assurances of confidentiality given to individuals who provided information to the investigation. It said that given its “specific and targeted nature”, it would not be appropriate to disclose such a report under FOISA.
16. During the investigation, the Council was asked to comment on the confidentiality of the report, by confirming who had accessed it. The Council confirmed that the findings of this report had not been generally disclosed to employees or to members of the public. Relevant elected members had been provided with a verbal briefing on the outcome of the investigation, but had not been given access to the content of the report. That had been restricted to the Chief Executive and a very restricted number of officers, and (in the context of his information request) those officers directly responsible for handling the request.
17. The Council acknowledged that Mr T’s circumstances had received a degree of attention within the local press, but was not aware of this extending to his own whistleblowing allegations and the resulting report.
18. In responding to Mr T and its submissions to the Commissioner, the Council concluded that disclosure would (in the circumstances described above) seriously inhibit its future ability to conduct full and thorough investigations into relevant allegations. Disclosure would prevent future whistleblowers from raising concerns, if there was the possibility of public disclosure. As a result, its ability to meet the statutory requirements of the Public Interest Disclosure Act 1998 (PIDA – which underpinned its whistleblowing policy) would be substantially impaired.
19. The Commissioner has considered the content of the report, together with both the Council’s and Mr T’s submissions on this exemption. As in previous decisions, including *Decision 181/2016: Mr T and City of Edinburgh Council*<sup>1</sup> and *Decision 060/2017: Mr T and City of Edinburgh Council*<sup>2</sup>, she remains satisfied that the whistleblowing process relies for its effectiveness on the assurance of confidentiality. She is satisfied that the information under consideration here retains the quality of confidence, which is clearly relevant in the circumstances. As in these earlier decisions, the Commissioner is satisfied that disclosure of the withheld information would breach that inherent expectation of confidentiality.
20. The Commissioner is satisfied that the exemption under section 30(c) of FOISA is engaged here and that it has been correctly applied by the Council to the content of this report. Although the report is clearly important to Mr T, its disclosure under FOISA would not just be to Mr T but to the public. Any such report, once disclosed, would lose its confidentiality. Given the whistleblowing element here, the Commissioner is satisfied that disclosure would substantially prejudice the future conduct of public affairs: assurances of confidentiality were given to those who participated in the investigation as witnesses and are essential to the effectiveness of the whistleblowing process. Those concerned would have no reasonable expectation that this report would be made public in the circumstances, certainly not within the timeframe of this request.

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<sup>1</sup> <http://www.itspublicknowledge.info/ApplicationsandDecisions/Decisions/2016/201600324.aspx>

<sup>2</sup> <http://www.itspublicknowledge.info/ApplicationsandDecisions/Decisions/2017/201602186.aspx>

21. The Commissioner must now consider whether, in all the circumstances of the case, the public interest in disclosing the withheld information is outweighed by that in maintaining the exemption.

*The public interest*

22. In his application, Mr T challenged the Council's assessment of where the public interest lay, linking his comments to two earlier decisions of the Commissioner (referred to in paragraph 19 above, both concerning a different whistleblowing report but the same set of circumstances). He considered both reports to relate to "false and malicious" allegations against him. Mr T was concerned that there should be no "cover up" in relation to them. He believed it important to know the substance of the allegations made against him and the evidence the Council considered it had in relation to them. He submitted that withholding the report defeated the ends of natural justice and that openness, transparency and fairness demanded its disclosure.
23. The Council recognised that Mr T had a personal interest in this report but commented that it responded to his allegations appropriately and according to policy. To ensure that independence was achieved, this had been done by a senior external local government officer. By doing this, the Council submitted that it has met the general public interest associated in achieving scrutiny of its actions. The Council did not believe there was a significant outstanding public interest favouring disclosure of the report under FOISA, because (as narrated above):
- disclosure would seriously inhibit Council's ability in future to conduct full and thorough investigations into relevant allegations; and
  - this would undermine its ability to meet its statutory duties under PIDA.
24. The Council also noted that it provided Mr T with an extract of his own personal data (5 January 2017) under section 7 of the DPA. He had been informed of the outcome and it was unclear how further disclosure from the report would assist him in pursuing his concerns. It considered Mr T's personal interest in terms of transparency has been served as far as it is possible to do, without breaching the information rights of third parties, or generally undermining the Council's obligations (under its whistleblowing policy and PIDA). On balance, therefore, it considered the public interest favoured maintaining the exemption in section 30(c).
25. The Commissioner has considered carefully where the balance of the public interest lies here. She has taken into account the submissions made by both parties, and also the withheld information in the report. The Commissioner accepts there is a general public interest in transparency and accountability, particularly involving holders of public office and how they conduct themselves in carrying out their public duties. Balanced against this is the strong public interest in maintaining confidentiality and the privacy of individuals who participate, to ensure whistleblowing processes are effective.
26. On balance, the Commissioner finds that the public interest arguments for withholding this information outweigh those for its disclosure. As stated above, the report has been produced by an independent investigator. Mr T has been informed of the report and its conclusions, in line with his rights under the DPA. She is satisfied that these measures go a reasonable way towards addressing the public interest in scrutiny and transparency here, without undermining the effectiveness of the whistleblowing process.

27. The Commissioner therefore finds that the Council was entitled to withhold this information under section 30(c) of FOISA.
28. The Commissioner notes that the Council identified information in the report which it wished to withhold under section 38 of FOISA. However, the Council applied section 30(c) to the whole report. Given her findings above, the Commissioner is not required to consider the application of section 38 to the information identified as being personal data within this report.

## **Decision**

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The Commissioner finds that City of Edinburgh Council complied with Part 1 of the Freedom of Information (Scotland) Act 2002 in responding to the information request made by Mr T.

## **Appeal**

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Should either Mr T or City of Edinburgh 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**

**6 June 2017**

### 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.

#### 2 Effect of exemptions

- (1) To information which is exempt information by virtue of any provision of Part 2, section 1 applies only to the extent that –

...

- (b) in all the circumstances of the case, the public interest in disclosing the information is not outweighed by that in maintaining the exemption.

...

#### 30 Prejudice to effective conduct of public affairs

Information is exempt information if its disclosure under this Act-

...

- (c) would otherwise prejudice substantially, or be likely to prejudice substantially, the effective conduct of public affairs.

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