

# Decision Notice

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**Decision 027/2017: Mr D and Dundee City Council**

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**Retention period for anti-social behaviour cautions**

Reference No: 201602025

Decision Date: 2 March 2017



Scottish Information  
Commissioner

## Summary

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Dundee City Council was asked for information concerning the minimum period before anti-social behaviour cautions were destroyed and deleted in a specified period.

The Council provided some information, stating it would be excessively costly to check all the cautions issued during the period specified.

The Commissioner investigated and found that the Council had failed to correctly determine the scope of the request, which had resulted in an incorrect response being issued.

By the end of the investigation, the Council had issued a further response confirming it did not hold the information requested. The Commissioner agreed with this position and did not require the Council to take any further action.

## Relevant statutory provisions

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Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1), (3), and (4) (General entitlement); 15(1) (Duty to provide advice and assistance); 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 29 June 2016, Mr D made a request for information to Dundee City Council (the Council). The information requested was the number of persons issued with a caution (for anti-social behaviour) by the Council from 1 January 2011 until 1 November 2015, and the minimum period before any such caution was destroyed and deleted.
2. The Council responded on 18 July 2016, providing the information sought in the first part of the request.
3. On 29 July 2016, Mr D wrote to the Council, requesting a review of its decision on the basis that it had failed to provide a response to the second part of his request.
4. Having received no response to his requirement for review, Mr D wrote to the Commissioner's office on 7 September 2016, applying to the Commissioner for a decision in terms of section 47(1) of FOISA.
5. The Council wrote to Mr D on 15 September 2016 informing him that to check all anti-social behaviour (ASB) cautions for the period stated would be excessively costly in terms of section 12(1) of FOISA, and therefore it was not obliged to respond. It explained its retention schedule indicated that such cautions would normally be destroyed after six years.
6. Following this, Mr D wrote to the Commissioner's office on 20 September 2016, stating he had previously been informed by the Council that the period for deletion was six months after a case was closed. Mr D believed the Council could state its "policy of period between the two dates, and give an accurate minimum period within the prescribed amount".

7. On 10 October 2016, the Council notified Mr D of the outcome of its review. It explained it was Council practice to destroy hard copy ASB caution information after six months, and electronic information after six years. The Council upheld its original decision that it would be excessively costly to check all ASB cautions issued in the period stated, and apologised for its original response being late and incomplete.
8. The Commissioner subsequently issued *Decision 223/2016 Mr D and Dundee City Council*<sup>1</sup>, finding that the Council had breached Part 1 of FOISA in failing to respond to the requirement for review on time. As the Council had, by then, responded to Mr D's requirement for review, the Commissioner did not require the Council to take any action.
9. Mr D wrote to the Commissioner's office again on 20 October 2016. Having received the Council's review response, he was dissatisfied that it had still not "stated or confirmed the electronic retention period after a case was closed, including the minimum during the stated dates".
10. On 2 November 2016, Mr D wrote to the Commissioner, applying to the Commissioner for a decision in terms of section 47(1) of FOISA. Mr D stated he was dissatisfied with the outcome of the Council's review because, in his view, it had not provided the information sought in the second part of his request.

## Investigation

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11. The application was accepted as valid. The Commissioner confirmed that Mr D 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.
12. On 29 November 2016, the Council was notified in writing that Mr D had made a valid application and the case was allocated to an investigating officer.
13. On initial examination of the case, it was evident to the investigating officer that Mr D's request was open to interpretation. On 30 November 2016, the investigating officer wrote to Mr D, asking him to clarify the nature of the information he had expected the Council to provide in response to the second part of his request.
14. Mr D responded on 7 December 2016, clarifying that the information he required was the standard minimum period (for example, as designated under the Council's policy or procedures) for which information concerning cautions was retained by the Council prior to destruction or deletion (whether held in paper format or electronically), i.e. the Council's retention policy between the dates stated in his request.
15. Mr D explained that he was previously informed by the Council that when a case is closed, paper and electronic files were destroyed after six months. He went to say this period was changed to six years following involvement by the Information Commissioner's Office (ICO) in connection with a data protection complaint. Mr D stated that the Council had refused to clarify the inconsistency to him.
16. Section 49(3)(a) of FOISA requires the Commissioner to give public authorities an opportunity to provide comments on an application. The investigating officer informed the Council of Mr D's clarification, and it was invited to comment on his application and answer specific questions. These focused on the steps taken by the Council to ascertain what

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<sup>1</sup> <http://www.itspublicknowledge.info/ApplicationsandDecisions/Decisions/2016/201601659.aspx>

information Mr D was seeking in the second part of his request, and the searches carried out to identify and locate that information.

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

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17. In coming to a decision on this matter, the Commissioner has considered all of the relevant submissions, or parts of submissions, made to her by both Mr D and the Council. She is satisfied that no matter of relevance has been overlooked.
18. In its submissions to the Commissioner, the Council confirmed that, in light of the clarification now obtained from Mr D, it no longer wished to rely on section 12(1) of FOISA in response to the second part of his request. Its remaining submissions focused on whether it held the information and the steps taken to establish that.

### **Whether the Council held any information**

19. Under 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.
20. Under section 17(1) of FOISA, where an authority receives a request for information it does not hold, it must give the applicant notice in writing to that effect. In this case, the Council did not notify the applicant, either in its initial response or in its review outcome, that it did not hold the information requested.
21. The standard proof to determine whether a Scottish public authority holds information is the civil standard of the balance of probabilities. In determining where the balance of probabilities lies, the Commissioner considers the scope, quality, thoroughness and results of the searches carried out by the public authority. She also considers, where appropriate, any reason offered by the public authority to explain why it does not hold the information. While it may be relevant as part of this exercise to explore expectations about what information the authority should hold, ultimately the Commissioner's role is to determine what relevant recorded information is (or was, at the time the request was received) actually held by the public authority.
22. In its initial submissions to the Commissioner, the Council stated it held no specific policy on the minimum period for the retention of cautions. It explained that retention schedule periods were maximum and no information existed for minimum periods.
23. In its later submissions to the Commissioner, the Council explained it had adopted the Scottish Council on Archives Records Retention Schedule (SCARRS).
24. The Council submitted that the only relevant information identified as a result of the searches and enquiries carried out during the investigation, was that contained in SCARRS, plus the Council's Management Team Minute adopting this Schedule, neither of which contained any recorded information falling within the scope of Mr D's request.
25. The Council provided the Commissioner with a copy of SCARRS, highlighting the section relating to Community Safety and Emergencies. As could be evidenced from this document, the Council submitted that SCARRS contained no provision relating directly to cautions. This, the Council explained, was because a "caution" did not have a statutory basis and was not used universally across Scotland.

26. The Council explained that the retention of this type of information had come to light as an issue prior to Mr D's FOISA request. Mr D had previously been in contact with the ICO regarding the Council's retention of information relating to a caution. Following this, the Council's Legal Section had confirmed that a retention period would be required, and a period of six years was suggested and agreed for the relevant electronic information. The Council explained, however, that this was never written down.
27. The Council further explained that, in an effort to become paperless and taking account of storage limitations, it was the Council's practice to destroy hard copy caution information after six months. The Council confirmed this was accepted as normal practice but not recorded as such.
28. The Council confirmed it was not withholding any information and, as it held no recorded information falling within the scope of Mr D's request, it wished to apply section 17(1) of FOISA. The Council also explained that it was reviewing the retention of this category of information.
29. The Council stated it was willing to provide a copy of the relevant section of SCARRS to Mr D, together with an explanation of how the Council intended to approach the matter, plus any further clarification that might be required.
30. On 26 January 2017, the Council wrote to Mr D in the terms outlined above. The Council informed Mr D that, as there was no written policy on the retention of cautions, it did not hold the information he had requested. The Council explained the normal practice it had adopted concerning the retention and destruction of caution information, and apologised for any confusion previously caused.
31. Having considered all the relevant submissions, supporting evidence and the terms of the request, the Commissioner is satisfied that, by the end of the investigation, the Council had taken adequate, proportionate steps to establish whether it held any information falling within the scope of Mr D's request (as clarified during the investigation). This resulted in Mr D being given notice in terms of section 17(1) of FOISA.
32. The Commissioner accepts that, while it appears to be normal Council practice to destroy caution information in line with the timescales described above, the Council does not have a formally recorded retention policy specific to this type of information. This is supported by the documentary evidence provided by the Council.
33. The Commissioner can only consider what recorded information is actually held by the Council, and not information it should hold, or what an applicant believes it should hold. She considers it unfortunate that the Council's response dated 15 September 2016 would have led any reasonable person to believe the Council did hold recorded information answering the second part of Mr D's request. However, on the balance of probabilities, she is satisfied that the Council does not (and did not, on receiving the request) hold the requested information.
34. The Commissioner notes Mr D's dissatisfaction that the Council did not explain any inconsistencies in the information previously provided to him. However, the Commissioner can only consider the recorded information held by the public authority at the time of the request, and has no remit to investigate the accuracy of any information held by the Council.
35. The Commissioner concludes that the Council was entitled to apply section 17(1) of FOISA in this case. To comply with section 17(1), however, the Council had a duty to issue a notice in writing to the effect that it did not hold the information. In failing to do so, in responding to

Mr D's information request or his request for review, the Council failed to comply with section 17(1) of FOISA.

36. Given that, during the investigation, the Council provided Mr D with a further response in terms of section 17(1) of FOISA, the Commissioner does not require the Council to take any further action in this case.

### **Section 15 of FOISA: duty to advise and assist**

37. Section 15(1) of FOISA requires a Scottish public authority, so far as it is reasonable to expect it to do so, to provide advice and assistance to a person who has made, or proposes to make, a request for information to it.
38. As rehearsed above, upon initial examination of Mr D's application, it was clear to the investigating officer that his request was open to interpretation. To allow the investigation to progress, it was necessary for the investigating officer to obtain clarification from Mr D, which he duly provided.
39. The Council was asked to explain the steps it had taken to ascertain what information Mr D was seeking.
40. In response, the Council explained that it had received dozens of letters regarding this matter from Mr D. The Council took the view that his primary concern was the retention of a particular caution record, rather than a more general policy issue.
41. The Commissioner acknowledges that there is a history of correspondence between the Council and Mr D on this matter. She acknowledges that, in the circumstances, this may have clouded the Council's judgement when responding to Mr D's request.
42. However, given that Mr D's request was clearly open to interpretation, the Council had a duty to ensure it understood what information being sought, in order that that a correct response could be given.
43. In cases where a request may be open to interpretation, section 1(3) of FOISA allows a public authority to seek clarification from an applicant, to enable it to identify and locate the information being requested. Depending on the circumstances, particularly where there is a risk of the request being misinterpreted (and the applicant thus being disadvantaged in the exercise of his or her rights under FOISA), there may also be a duty to seek such clarification, in line with section 15(1). Applicants cannot always be expected to understand a public authority's processes fully, and may at times express themselves in ways that are clearer to them than to the authority. Guidance on this is provided in the Scottish Ministers' Code of Practice on the discharge of functions under FOISA and the Environmental Information (Scotland) Regulations 2004<sup>2</sup>, which must be taken into account by Scottish public authorities in determining what is required to meet the section 15(1) duty.
44. In this case, there is no evidence to show that the Council made any attempt to clarify the terms of Mr D's request. The request remained ambiguous and this confused the Council's response.
45. In the absence of any further submissions from the Council to explain the steps it took to clarify the information requested, resulting in the Council issuing an incorrect response in

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<sup>2</sup> <http://www.gov.scot/Resource/0051/00510851.pdf>

terms of section 12(1) of FOISA, the Commissioner concludes that the Council failed to comply with its duty under section 15(1) of FOISA to provide advice and assistance to Mr D.

46. The Commissioner would urge the Council, when considering future information requests, to ensure it is clear about what information is being sought and, where there is any possibility that a request is open to interpretation, to take steps to clarify the request with the applicant, as provided for in section 1(3) of FOISA.

## Decision

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The Commissioner finds that Dundee City 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 D.

In failing to take reasonable steps to determine the scope of Mr D's request, the Council failed to comply with section 15(1) of FOISA.

In failing to give notice that it did not hold the information requested in the second part of Mr D's request, the Council failed to comply with section 17(1) of FOISA.

Given that, during the investigation, the Council provided a further response to Mr D in terms of section 17(1) of FOISA, apologising for any confusion caused, the Commissioner does not require it to take any action in respect of these failures, in response to Mr D's application.

## Appeal

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Should either Mr D or Dundee City 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**

**2 March 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.

...

- (3) If the authority –
- (a) requires further information in order to identify and locate the requested information; and
  - (b) has told the applicant so (specifying what the requirement for further information is),

then provided that the requirement is reasonable, the authority is not obliged to give the requested information until it has the further information.

- (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.

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#### 15 Duty to provide advice and assistance

- (1) A Scottish public authority must, so far as it is reasonable to expect it to do so, provide advice and assistance to a person who proposes to make, or has made, a request for information to it.

...

#### 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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