

FOISA Guidance

Section 17: Information not held



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Glossary and abbreviations

Term used	Explanation
Commissioner/SIC	The Scottish Information Commissioner, staff of SIC (depends on context)
FOISA	Freedom of Information (Scotland) Act 2002
FOIA	(UK) Freedom of Information Act 2000
Information	Information recorded in any form
Minister of the Crown	The holder of an office in HM Government in the UK, including the Treasury, the Board of Trade and the Defence Council

Section 17

The main points

1. Under section 1(1) of the Freedom of Information (Scotland) Act 2002 (FOISA), a person who requests information from a Scottish public authority which holds it is entitled to be given the information by the authority.
2. The definition of “information” in FOISA is wide. It means information recorded in any form.¹
3. The information to be given to a requester is the information which the authority holds at the time the request is received (section 1(4) of FOISA).²
4. However, some information which an authority has in its possession may not be “held” by it for the purposes of FOISA. This applies to:
 - (i) information which the authority holds on behalf of another person (section 3(2)(a)(i) of FOISA) and
 - (ii) information which was supplied by a Minister of the Crown or a department of the UK Government and is held in confidence by the authority (section 3(2)(a)(ii) of FOISA).
5. Information which another person holds on behalf of the authority is “held” by the authority (section 3(2)(b) of FOISA).
6. Good records management is required in order to be sure what information is held within an authority.

Information held on behalf of another person

7. Scottish public authorities may have information on their premises or in their systems which they do not hold in their own right, but on behalf of another person. When information is present within an authority's premises and systems only because it is held on behalf of another person, the information is not held by the authority for the purposes of FOISA.
8. For example, councillors and MSPs are not public authorities in their own right, and do not hold information for the purposes of FOISA. However, information about their activities is often created and stored by the Council or Parliament. Where this relates to constituency and party political activities, the information is held on behalf of the elected member.
9. Where the information relates to activities which the elected member has undertaken on behalf of the authority in connection with its corporate functions, or where the information is intended to represent the authority's views and interests, it is held by the authority in its own right.
10. It may be difficult to be sure whether an individual or organisation is truly “another person”, separate from the Scottish public authority to whom the request was made.

¹ In very limited circumstances, the definition includes *unrecorded* information. For example, the Commissioner can require authorities to provide him with unrecorded information in response to an information notice under section 50 of FOISA.

² Although planned deletions may be made if it is not reasonably practicable to prevent destruction – see paragraph 52 below.

11. Some of the situations on which the Commissioner has been asked to decide include:
 - (i) whether local authorities hold councillors' correspondence on behalf of the councillors?
 - (ii) whether information about elections is held on behalf of the Returning Officer?
 - (iii) if an employee or elected member serves on a separate board, is information about those activities held on their behalf?
 - (iv) does a public authority hold information on a mobile phone it has provided to an employee?
12. See **Appendix 1: Resources** for links to the Commissioner's decisions on these – and similar – cases.

Matters to take into account when deciding if an authority holds information

13. How can you be sure whether an authority holds information in its own right, or on behalf of someone else? This is not always straightforward: the Commissioner has sometimes investigated cases where two authorities both claim that the other holds the information. Each case must be considered individually, but there are some general factors which often indicate that information is held on behalf of another person.

Evidence of separate identity

14. The Interpretation Act 1978 (which applied to the interpretation of Acts of the Scottish Parliament when FOISA was enacted) states that the definition of "person" includes "a body of persons corporate or unincorporated". The definition of "person" in the Interpretation and Legislative Reform (Scotland) Act 2010 is in the same terms. It may be possible to show that the information belongs to a completely separate organisation.

Control

15. If an authority holds information on behalf of another person or organisation, it will not control that information in the same way as it would if it held the information in its own right. The authority may not have power to delete or amend the information without the owner's consent, or to apply its own policies and procedures to the information. It might have restricted access to the information.
16. Although control of the information is a factor, it is not a conclusive test. There may be situations in which an authority cannot amend or process information, or is limited (e.g. by contract) in what it can do with information, but still holds it in its own right. This may include information obtained from a third party.

Core functions

17. A more important question is whether the information relates to the functions and core business activities of the authority: if it does, then it is likely that the information is held by the public authority in its own right.

Connection between the information and the authority

18. The (English and Welsh) Court of Appeal applied this test when determining whether the Department of Health (DoH) held the diaries of former Health Minister, Andrew Lansley under the (UK) Freedom of Information Act 2000. (See **Appendix 1: Resources** for a link to the judgment). The Appeal Court was clear that the Ministerial diary was held by the DoH even if the diary entries included personal and constituency matters for Mr Lansley. The diary was set up and maintained by DoH staff and concerned matters relating to government

policy, etc. The Appeal Court judgment confirmed that there must be an appropriate connection between the information and the authority for the information to be held for the purposes of FOI.

19. This test is also relevant where personal and business information are held together: for example, where the same mobile phone is used to create and send both personal emails and emails relating to the business of the public authority.

Duplication of information

20. It's important to consider whether information held on behalf of another organisation is duplicated in information which the public authority holds in its own right: for example, where the public authority is involved or has an interest in the activities of the other organisation. An example of such a case can be found in Appendix 1: Resources.

Information supplied by the UK Government and held in confidence

21. Information is not held for the purposes of FOISA if it was supplied by a Minister of the Crown or a department of the UK Government and is held in confidence by the authority.
22. This is most likely to apply to information held by the Scottish Government, but there may be cases where other Scottish public authorities hold information or have been supplied with confidential information from a UK Government department or a Minister of the Crown.

23. There are three points to consider when determining whether section 3(2)(a)(ii) applies:

- (i) **Was the information provided in circumstances giving rise to (or at least implying) a specific obligation to keep it confidential?**

In most cases, there should be a clear indication that information was intended to be treated as confidential, for example with a protective marking ("restricted", "secret" or "top secret") or some other express statement.

- (ii) **Is the information still confidential at the time of the request?**

This will depend on the nature of the information. In order to be confidential, it needs to have a necessary quality of confidence – the information must not be common knowledge or otherwise publicly available. For example, a document supplied to a public authority may subsequently have been published, in which case it is no longer confidential.

- (iii) **Would any damage result from the disclosure of the information?**

In general, if no damage would follow from disclosure, there is no need to keep information confidential.

24. See **Appendix 1: Resources** for a link to some of the Commissioner's decisions on when information has been supplied in confidence.

Advice and assistance

25. If section 3(2)(a)(ii) applies, public authorities should, under their duty to give advice and assistance to requesters (section 15 of FOISA) advise requesters to make a new request, this time under the Freedom of Information Act 2000, to the UK Government department that supplied the information

26. The authority should therefore issue a notice:
- (i) stating that it does not hold the information (this is required by section 17 of FOISA);
 - (ii) advising the requester that this information is covered by the (UK) Freedom of Information Act 2000; and
 - (iii) referring the requester to the relevant UK Government Department.
27. If section 3(2)(a)(ii) does not apply, for example because the information is no longer confidential, the public authority may wish to consider the exemption in section 28 of FOISA (Relations within the United Kingdom). See the **Appendix 1: Resources** for a link to the Commissioner's guidance on this exemption.

Information held on behalf of the authority

28. Information which is held by another person or body on behalf of the public authority is held by the authority for the purposes of FOISA, even though it may not be physically within its control. Examples of the situations which the Commissioner has considered include information held by a law firm on behalf of its public authority client; and information which one public authority held on behalf of another for the purposes of a procurement exercise.
29. In some situations, it will be clear that information is held on behalf of the authority: for example, where the authority has stored documents with a commercial storage company. Where information is held by a third party as a result of contractual arrangements, the contract may (and should) indicate whether or not the contractor holds information on behalf of the contracting public authority.
30. However, the question of ownership is not always straightforward. Issues relating to control and business relevance have been considered above. Some other factors to consider are listed below. **Appendix 1: Resources** contains links to decisions issued by the Commissioner on this point.

The relationship between the parties

31. The relationship between two bodies may not be immediately obvious, but may determine whether information is held on behalf of the public authority. For example, a public authority may be represented on a board or committee, or may have formed a consortium or partnership with other public authorities for a particular purpose. It may have outsourced some of its functions to a separate organisation. Sometimes it will be necessary to look at the terms on which a body was set up, to establish whether it is a separate organisation holding information on its own behalf, or is wholly-owned by a public authority.

Existing agreements

32. It is good practice for contracts to include provisions about the ownership of information, and for tendering authorities to make sure that bidders or suppliers understand the extent to which their information may be disclosed in response to a request. Sometimes the provisions about information ownership in contracts leave unanswered questions: for example, they may not cover a situation where the contractor has sub-contracted work to another body. Where possible, such situations should be anticipated and covered in the agreement about ownership of information relating to the contract.
33. Similarly, when more than one public authority is involved in a partnership or consortium which is not a public authority in its own right, each authority needs to be sure what

information is held on behalf of the other partner(s) or member(s). This is particularly so when each participant holds copies of the same documents. It is good practice to have agreements in place about information ownership and arrangements for responding to information requests.

Purpose for which information created

34. Information which is generated in a private email account in the course of conducting public authority business is held by the account owner on behalf of the authority. It is the purpose of the communication which matters, not the method by which it was created or delivered, or where it is stored. For example, councillors may hold information on behalf of a local authority in their personal email accounts, if it relates to the business of the local authority and not to the councillor's political or constituency business.
35. It is therefore important for authorities and their staff to observe good records management practice, to ensure that they are able to comply with their obligations under FOISA. It is easier to comply with requests for information which is held elsewhere, on behalf of the authority, if the authority knows what the information is and has arrangements in place to allow it to retrieve the information.

Information held at the time the request is received

36. The information to be given by the authority is that held by it at the time the request is received. (Planned deletions may be made if it is not reasonably practicable to prevent destruction – see paragraph 52 below.)
37. “Information” is defined in FOISA as “information recorded in any form”, so an authority should identify and consider all recorded information covered by a request when responding.³
38. The information does not have to be complete, accurate or comprehensive before it can be disclosed. If recorded information is covered by the terms of the request, it must be considered for disclosure, whatever its status. Authorities may choose to provide a commentary which places the information in context or explains its limitations.
39. Requesters don't have the right to be given unrecorded information. So, if a requester wants to know someone's opinion or wants advice on a particular matter, they only have the right to be given the opinion or advice if it already exists.
40. Information will also be unrecorded if it can only be inferred by the absence of recorded information. For example, if an authority is asked how many complaints it has received and it has no records of having received any complaints, the correct response is to tell the requester that it doesn't hold the information. (In situations like this, it is also good practice to explain, under the duty to advise and assist, that the answer is in fact zero.)
41. Of course, unrecorded information can be provided outwith the FOI process. Authorities providing unrecorded information in response to an information request must make sure that they notify the requester that no recorded information is held.

³ In very limited circumstances, the definition includes *unrecorded* information. For example, the Commissioner can require authorities to provide him with unrecorded information in response to an information notice under section 50 of FOISA.

42. Public authorities are not required to create information in order to answer a request. There's a distinction between creating new information, and compiling information. Where a request can be answered by compiling information from readily-available resources held by the public authority, this is not the same as creating new information. However, if collation of the information would require skill and complex judgement, the information is not held. (See **Appendix 1: Resources** for details of cases which consider this point.)
43. Whether a public authority *should* hold information which it doesn't hold is not a matter for the Commissioner to decide.

Identifying the information an authority holds

44. In order to respond to a request, a public authority must be able to identify all relevant information which it holds. This includes any recorded information covered by the request, from key documents to informal emails, from formal reports to handwritten notes.
45. When answering requests, it can be just as important to be sure what information isn't held, as what is. This underlines the importance of having good records management policies and procedures in place, including a records retention schedule. Understanding what information *should* be held can be helpful when establishing what is actually held.
46. It's also good practice to have procedures in place for carrying out the searches and enquiries which will establish what information is held, when dealing with a request. Authorities should keep a record of these searches, in case the requester seeks a review or appeals to the Commissioner.
47. The searches required to identify relevant recorded information will vary from request to request. In all cases, authorities should take adequate and proportionate steps to establish what information is held (or isn't held). They should be able to explain, if challenged, why the searches they carried out were reasonable and likely to identify all relevant information.
48. Where an authority has told a requester that it doesn't hold information, requesters can ask the Commissioner to investigate whether this is, in fact, the case. The Commissioner will come to a view, based on the balance of probabilities. Evidence of the authority's searches will usually be a key consideration during the investigation. As a minimum, authorities should be able to provide the Commissioner with the following information:
 - (i) details of the records or locations which were searched;
 - (ii) why these were the relevant records and locations;
 - (iii) the keywords used;
 - (iv) which staff were involved and why they were considered relevant;
 - (v) the outcome of the searches;
 - (vi) evidence that the searches have been carried out, including the outcome of the searches.

See **Appendix 1: Resources** for a link to some of the Commissioner's decisions on this point.

Other common questions about whether information is held

Responding to requests for a yes/no answer

49. Sometimes a public authority will receive an information request which can be answered with a yes/no – for example, “Did you contact X before you did Y?” These sorts of requests are valid under FOISA, so long as it’s clear what information is being asked for and provided the answer is clear from recorded information held by the public authority.
50. See **Appendix 1: Resources** for a link to some of the Commissioner’s decisions on this point.

Is deleted information still held by a public authority?

51. Information which has been deleted but which can be restored is held by a Scottish public authority for the purposes of FOISA. Searches should therefore include folders for deleted emails, or the “recycling bin” on the computer. However, the excessive costs provisions may come into play if, for example, IT support is needed to restore the information. See **Appendix 1: Resources** for a link to the Commissioner’s guidance on excessive costs.

Deletions or amendments following the receipt of a request

52. Section 1(4) of FOISA concerns information which would have been deleted or amended, regardless of the receipt of the request, between the time when the request was received and the time when the authority provides the information. It says that the amendment or deletion can be made in these circumstances. However, section 1(5) makes it clear that the information is not to be destroyed before it can be given, unless this is not reasonably practicable. An example of a case which considers this is found in **Appendix 1: Resources**.
53. Public authorities must remember that, after an information request has been made, altering, blocking, erasing, destroying or concealing information with the intention of preventing its disclosure is a criminal offence under section 65 of FOISA.

Appendices

Appendix 1: Resources

SIC Decisions

Paragraph	Decision number	Parties	Summary
8	032/2015	Ruth Thomas and South Lanarkshire Council	Emails from a Councillor were held on his behalf: he was not acting as the Council's representative when serving on the board of another Scottish public authority.
8	174/2014	Bob Doris MSP and Glasgow City Council	We found some correspondence from Councillors was not held on their behalf, but by the Council in its own right. It concerned the Council's corporate functions and represented the Council's views and interests.
12	270/2016	Jason Rose and East Lothian Council	The Council was asked for the minutes of the Musselburgh Joint Racing Committee (MJRC). The Council argued that it held the minutes on behalf of MJRC rather than on its own behalf. We accepted that MJRC is a separate body from the Council and that the Council did not hold the minutes in its own right.
12	158/2013	Sandy Longmuir and the Scottish Ministers	We accepted that the Ministers held information on behalf of the Commission for Delivery of Rural Education, not in their own right.
12	138/2016	Mr X and East Lothian Council	We accepted that some information was held on behalf of the Scottish Ministers: under a Service Level Agreement, the Council carried out a range of processing and payment functions on the Ministers' behalf.
12	197/2013	Councillor Brian McCabe and Falkirk Council	The request was for a transcript of texts and emails messaged on the mobile phone provided by the Council to one of its staff. We accepted that any personal information on the phone was held on behalf of the employee.
15	010/2011	Keith Knowles and the Scottish Court Service	Recordings of a Fatal Accident Inquiry were held for the purposes of FOISA (although we accepted the information was exempt from disclosure). The decision sets out that the ability to amend, delete or disclose is not a conclusive test.

Paragraph	Decision number	Parties	Summary
20	051/2016	Katherine Alexander and South Lanarkshire Council	Ms Alexander asked for the dates when a particular case was discussed at the South Lanarkshire Adult Protection Committee (APC). We accepted that the APC was a separate body, but, given the Council was likely to have records of its meetings for Council purposes, we found it should have searched its own records for the information.
24	036/2009	Rob Edwards and the Scottish Ministers	The Ministers claimed that the contents of a file included documents provided in confidence by the UK Government. We accepted this for some documents, but found that some information originated within the Scottish Government. We also found there was nothing to show that some of the information had been provided in confidence.
24	186/2007	Richard Haley and the Chief Constable of Tayside Police	This decision sets out the purpose of section 3(2)(a)(ii), and notes that it only applies to information which was supplied in confidence and is now held in confidence, and where harm would result from disclosure.
24	174/2006	Christine Grahame and Scottish Ministers	We accepted that some of the communications about the detention of children at Dungavel fell under section 3(2)(a)(ii). The Ministers failed to give notice that it didn't hold the information in its own right, or to provide details of the UK Government department to which a request could be made.
24	163/2017	Mr A and the Scottish Ministers	This involved a request for a feasibility study carried out by the UK Department of Work and Pensions. The Ministers told the requester that, in line with section 3(2)(a)(ii) of FOISA, they didn't hold the information. We checked the information and realised that not all of the information had come from the DWP – the Ministers held that information in their own right.
30	179/2006	Gordon Ross (Western Ferries) and Caledonian MacBrayne Ltd.	Mr Ross asked about the departure of three Directors of Caledonian MacBrayne. Some of the information was in the keeping of Caledonian MacBrayne's solicitors. We accepted that some documents may held by a solicitor on behalf of their public authority client, but that this does not apply in relation to

Paragraph	Decision number	Parties	Summary
			documents which are ordinarily owned by the solicitor. Decision refers to the Law Society guidelines on who owns what in files (updated in May 2018: https://www.lawscot.org.uk/rules-and-guidance/section-e-general-guidance/division-b-the-management-of-files,-papers-and-information/guidance/the-ownership-and-destruction-of-files/).
30	094/2013	Maxine Campbell and East Dunbartonshire Council	Risk assessments about cold weather conditions and the spreading of grit at a school were found to be held by a contractor on behalf of the Council. The Council could not contract out of its duty to maintain safe premises, so the documentation was held by the contractor on its behalf.
42	210/2013	Alan Laing and the Scottish Ministers	<p>Mr Laing asked for the number of reports held about the independence referendum. The Ministers said they did not hold this information.</p> <p>In line with the (UK) Information Tribunal Decision <i>Michael Leo Johnson v the Information Commissioner and the Ministry of Justice</i> (details below), we considered whether the Ministers held the building blocks required to generate this information and found that they did. However, we accepted that a significant level of skill and judgement would be required to identify the documents falling within scope of the request, and therefore agreed that the Ministers didn't hold the information.</p>
42	066/2005	Peter MacMahon and the Common Services Agency	The request was for the mortality rates of surgeons. The CSA argued that it didn't routinely carry out this analysis and wasn't required to generate information to respond to the request. We didn't accept this – compilation of existing data to produce information for a new purpose is simply presenting it in a particular format, as provided for in section 11 of FOISA.
42	107/2017	Dorothy King and Christopher Wybrew and Transport	This was a request for traffic survey data in a particular format (i.e. a summary or digest). In this case, we found that Transport Scotland didn't hold the information in the required

Paragraph	Decision number	Parties	Summary
		Scotland	format and wasn't required to convert it because of the high costs involved.
48	046/2015	Roy Mackay and Scottish Borders Council	The Council told Mr Mackay it didn't hold the information he'd asked for. During our investigation, it located and provided the information. The Council could offer no formal record of searches carried out at the time it responded to Mr Mackay's request for review. The Council had guidance and templates in place which should have ensured a consistent and reliable search process: however, this guidance had not been followed.
48	200/2016	Mark McLaughlin and the Scottish Police Authority	Mr McLaughlin made similar requests to Police Scotland and the Scottish Police Authority (SPA). Police Scotland provided considerably more information in response. The SPA was asked to carry out more searches, and located many more documents. However, these didn't include some of the information from Police Scotland which the SPA should have held in its own right. The Commissioner ordered the SPA to carry out further searches.
48	257/2013	Mr N and Perth and Kinross Council	The Council stated that it didn't hold additional information covered by Mr N's request. We asked for details of its searches. As the Council didn't provide sufficient evidence, it was required to carry out more searches.
48	108/2012	Mr G and the Scottish Prison Service	The decision points to the need to understand the way in which information is held, including relevant records management arrangements. Otherwise, there is a risk that responses will be inaccurate.
50	043/2013	Global Alliance Against Industrial Aquaculture and the Scottish Ministers	The request was for information about the deletion of sea lice data. The Ministers said that they did not hold the information. We found that they held data from which it could be inferred that sea lice data had been deleted, but accepted that this was not the same as holding the requested information.
52	014/2015	Mr N and the Scottish Prison Service	Newspapers are delivered daily to the prison with a list of the recipients. The request was for the list received that day. The information had been destroyed before the request was

Paragraph	Decision number	Parties	Summary
			acted upon. No breach of section 1(5) was identified.

All of the Commissioner's decisions are available on the Commissioner's website. To view a decision, go to www.itspublicknowledge.info/decisions and enter the relevant decision number (e.g. 032/2014) in the "Search" bar.

If you do not have access to the internet, contact our office to request a copy of any of the Commissioner's briefings or decisions. Our contact details are on the final page.

Other resources

Paragraph	Resource	Link
15	<i>Department of Health v Information Commissioner & Lewis</i> [2017] EWCA Civ 374	https://1woyw921roz71aldxk2unpkv-wpengine.netdna-ssl.com/wp-content/uploads/sites/2/2017/05/Approved-Judgment-rhd-Department-of-Health-v-Information-Commissioner.pdf
20	Information about the Freedom of Information Act 2000 can be found on the (UK) Information Commissioner's website.	https://ico.org.uk/
21	Commissioner's guidance on section 28 of FOISA: Relations within the United Kingdom	http://www.itspublicknowledge.info/Law/FOISA-EIRsGuidance/section28/Section28.aspx
51	Commissioner's guidance charging a fee or refusing to comply with a request on excessive costs grounds	http://www.itspublicknowledge.info/Law/FOISA-EIRsGuidance/Fees_and_charging/ChargingFOISA.aspx

Appendix 2: The provisions

Section 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.
- (5) The requested information is not, by virtue of subsection (4), to be destroyed before it can be given (unless the circumstances are such that it is not reasonably practicable to prevent such destruction from occurring).
- ...

Section 3: Scottish public authorities

- ...
- (2) For the purposes of this Act but subject to subsection (4), information is held by an authority if it is held –
 - (a) by the authority otherwise than –
 - (i) on behalf of another person; or
 - (ii) in confidence, having been supplied by a Minister of the Crown or by a department of the Government of the United Kingdom; or
 - (b) by a person other than the authority, on behalf of the authority.
- ...
- (4) Information is not held by the Keeper of the Records of Scotland if it is contained in a record transferred to the Keeper by a public authority within the meaning of the Freedom of Information Act 2000 (c.36) unless it is information –
 - (a) to which subsections (2) to (5) of section 22 apply by virtue of subsection (6) of that section; or
 - (b) designated by that authority as open information for the purposes of this subsection.
- ...

Section 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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