

# The Scottish Information Commissioner's investigations

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**A guide for Scottish public authorities**

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Scottish Information  
Commissioner

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# Glossary and abbreviations

<b>Term used</b>	<b>Explanation</b>
<b>The Commissioner</b>	The Scottish Information Commissioner
<b>EIRS</b>	Environmental Information (Scotland) Regulations 2004
<b>FOISA</b>	Freedom of Information (Scotland) Act 2002
<b>SIC</b>	The Scottish Information Commissioner, staff of SIC (depends on context)

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# Overview

1. This guidance has been prepared by the Scottish Information Commissioner to provide public authorities with information on what to expect during an investigation carried out under Part 4 of the Freedom of Information (Scotland) Act 2002 (FOISA).
2. Part 4 also covers investigations carried out under the Environmental Information (Scotland) Regulations 2004 (the EIRs); references have been added, where relevant, to the provisions in the EIRs.
3. Under section 47(1) of FOISA, any person who is dissatisfied with the way in which a Scottish public authority has dealt with their request for review has the right to make an application for decision to the Commissioner. On receipt of a valid application, the Commissioner will conduct an investigation and, as part of this investigation, will provide the public authority with an opportunity to comment on the matters raised by the application.
4. This purpose of this guidance is to provide public authorities with detailed information on each stage of the investigation process, in order to ensure that the applications received by the Commissioner can be dealt with swiftly and appropriately and, wherever possible, within the four months envisaged by FOISA.
5. We hope that this guidance will address many of the questions you may have about the investigation process, while also supplying you with vital information about your role in the process.
6. The guidance is divided into the following sections:
  - (i) Part 1: The Investigation Process
    - (a) The First Stage - Supplying the withheld information
    - (b) The Second Stage – Providing comments on the application
    - (c) The Third Stage - The ongoing investigation
    - (d) The Fourth Stage - The Commissioner’s decision
  - (ii) Part 2: What We Need From You
    - (a) Refusal on the grounds of an exemption
    - (b) Refusal on the grounds of excessive cost
    - (c) Dissatisfaction with a Fees Notice
    - (d) Refusal on the grounds of a vexatious or repeated request
    - (e) Refusal on the grounds that you do not hold the information (or further information)
  - (iii) Part 3: Further Information
    - (a) Where to find additional information
    - (b) Contacting the Commissioner for further information

# Part 1: The Investigation Process

## Supplying the withheld information

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7. When a valid application is made to the Commissioner, you will be notified of the application. Where information has been withheld from the applicant, you will usually be asked to supply the Commissioner with a copy of that information. The information will help us to conduct an initial assessment of the case before assigning it to an Investigating Officer.
8. If the application does not relate to the use of an exemption/ exception, you will be notified of the application only at this first stage. In these circumstances, see **Providing comments on the application** below for information on the next steps. Here we answer some of the common questions raised by authorities when being asked to supply information to the Commissioner.

### Supplying withheld information: your questions answered

*What is the best way to send the information?*

9. Wherever possible, withheld information should be emailed to the Commissioner (but please let us know in advance if the information is in excess of 10MB). The Commissioner can also accept information in hard copy (paper) or other electronic format (scanned and written to CD/ data stick). If you want to send us information in a different format, please contact us before doing so to make suitable arrangements. Hard copies of information or CDs can be sent by post. For security and accountability reasons, if you are sending information in hard copy, please use recorded or registered mail.

*Should we send the original documents?*

10. We strongly suggest that you provide copies of information rather than original material, although we will accept original documents if there are very good reasons why they can't be copied. Any original information sent to us must be clearly marked as such. If you choose to send us original documentation, you must be absolutely certain that you will not need to access this during the investigation. Again, for security and accountability reasons please use recorded or registered mail.

*Can the information be viewed in situ?*

11. In certain limited circumstances, the Commissioner's staff can arrange to visit and view and assess the information on an authority's premises. These circumstances include those where there is a large volume of information to consider, where the evidence you wish to submit is unusual (such as an historical document) or where it is excessively costly to mail. Please bear in mind that even after doing this, we may still have to obtain copies of documents from you.

*What information should we send?*

12. Where it has been requested, you must include **all** information withheld from the applicant. If there has been partial disclosure of any of the information requested, two copies of that information should be provided:
  - (i) one unedited/ unredacted, and
  - (ii) one showing what was disclosed.

13. Along with the information, you should include:
  - (i) a clear indication of the SIC case reference number (detailed at the top of correspondence issued by the Commissioner's office); and
  - (ii) a schedule of documents, clearly listing and numbering all documents submitted for consideration, and specifying which exemption(s) have been applied to which information.

*The information is extremely sensitive, will it be secure?*

14. Under section 45 of FOISA it is a criminal offence for the Commissioner or any member of his staff to disclose information which they have obtained without lawful authority. Any information you provide during the course of an investigation will be held safely and securely. We have secure, safe storage facilities onsite, and we control access to sensitive information. Everyone working for the Commissioner has been security vetted.
15. Decisions published by the Commissioner do not disclose the content of the information as this would usually be a breach of section 45 of FOISA.
16. In very limited circumstances, it may be possible to arrange for an investigator to collect sensitive information directly from your authority. Please notify the Commissioner's office as soon as possible if you feel this would be appropriate.

*Should we be sending personal data?*

17. The Data Protection Act 1998 (DPA) permits personal data (including sensitive personal data) to be supplied to the Commissioner where it is needed in order to carry out an investigation under FOISA/the EIRs. As a result, disclosing personal data to the Commissioner will not breach the DPA.

*How much time do we have to provide the information?*

18. You will normally have two weeks to supply withheld information and this deadline will be clearly indicated in the letter you receive. The deadline may be extended in complex cases or cases involving a lot of information. If you have any concerns about your authority's ability to meet the deadline, it is essential that you contact the validation officer immediately.

*What will happen if we don't provide the information?*

19. Under section 50 of FOISA, the Commissioner may issue a formal Information Notice requiring a Scottish public authority to provide information required for the purposes of determining whether it is complying with FOISA/the EIRs. Failure to comply with an Information Notice can be referred to the Court of Session by the Commissioner and the Court may treat the failure as contempt of court.
20. Information notices issued as a result of a failure by an authority to provide information are detailed in the Commissioner's Annual Report to Parliament. Where a public authority continually delays in providing the Commissioner with withheld information, the Commissioner may also choose to carry out an assessment of the authority's practice in line with the Commissioner's Enforcement Strategy.

## **Providing comments on the application**

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21. Once the case has been assigned to an investigating officer, they will write to you to provide you with an opportunity to comment on the application. At the same time, the investigating officer is likely to ask you a number of specific questions on the application, particularly if,

e.g., your authority's response to the applicant (or response to the request for review) was not very detailed or did not address all of the tests required for a particular exemption.

22. It is important for public authorities to remember that it is their responsibility to satisfy the Commissioner that an exemption applies, or that an information request is vexatious, etc.
23. Therefore, while there is no legal requirement on the public authority to comment on the application or to respond to questions posed by the investigating officer, it will clearly benefit the public authority to give clear, accurate and comprehensive submissions, which fully address all of the relevant issues. Failure to do so is likely to lead to the Commissioner ordering information to be disclosed, or ordering an authority to respond to a request which it has deemed vexatious, on the basis that the public authority has failed to provide sufficient evidence to support its case.

### **Making your initial submission: your questions answered**

*What sort of submission is likely to be requested?*

24. The investigation focuses on the matter or matters which gave rise to the applicant's dissatisfaction. This will vary from application to application, but may include:
  - (i) dissatisfaction with the exemptions the authority has applied;
  - (ii) dissatisfaction or disagreement as to where the balance of the public interest lies when considering whether or not to disclose information;
  - (iii) evaluation of the authority's consideration of the substantial prejudice test ('the harm test');
  - (iv) dissatisfaction with a claim that a request is not valid, is vexatious or is repeated;
  - (v) dissatisfaction with a fee which has been charged;
  - (vi) dissatisfaction with a claim that the information requested is not held, or that no further relevant information is held.
25. Other applicants may be unhappy that your authority did not fulfil its statutory obligations under FOISA. Investigators may therefore also assess technical compliance with FOISA, such as:
  - (i) were time-frames adhered to?
  - (ii) were applicants advised of their right to request a review?
  - (iii) were applicants advised of their right of application to the Commissioner?
  - (iv) was the review carried out in a fair and independent manner?
  - (v) did your authority provide reasonable advice and assistance in terms of section 15 of FOISA?
26. The investigating officer will request submissions to facilitate an accurate and objective assessment of the issues which gave rise to the applicant's dissatisfaction. The extent of the submissions sought will very much depend on what information the investigating officer has before them. For example, fewer questions are likely to be asked where a public authority has already provided a detailed response to a request or to the request for review. In all



cases, however, you will be given an opportunity to comment on any aspect of the application, and not just on those questions specifically put to you by the investigating officer.

*What information should we send?*

27. Part 2 of this guidance provides further details of the information which is likely to be required, depending on the circumstances of individual applications. You should review the relevant section of Part 2 of this guidance when preparing any submission to the Commissioner.
28. It may also be helpful for you to include:
- (i) the name, job title and contact details of the officers within your public authority who dealt with the request and request for review;
  - (ii) information about the context of the request, and the part played by any officers or individuals named within the actual information at issue;
  - (iii) copies of documents that evidence the points made in the submission;
  - (iv) background information about the information under consideration that will help us understand its context and sensitivity;
  - (v) any legal advice you have received that may help your authority's arguments (although you are not obliged to provide this type of legal advice to the Commissioner);
  - (vi) your view on whether it might be possible to disclose the information in a redacted version;
  - (vii) your view on whether the case may be open to informal resolution, e.g. whether you would now be willing to disclose some – or all – of the information to the applicant or whether there is some other action you could take which would satisfy the applicant.

*How much time do we have to send our submissions?*

29. You will normally have two weeks to make your submissions. This deadline will be clearly indicated in the letter requesting additional details.

*What will happen if we don't provide a submission in time?*

30. The deadline will only be extended in exceptional circumstances. If you have any concerns about your authority's ability to meet the deadline, it is essential that you contact the investigating officer immediately, and do not leave it until the end of the period for making submissions to make contact.
31. Remember that FOISA expects the Commissioner to issue decisions within 4 months and that it is the responsibility of the public authority to satisfy the Commissioner that information should not be disclosed, etc. While the Commissioner understands that there may be other work pressures on a particular officer in a public authority at certain times (e.g. around holidays), it is up to the public authority to ensure that it has arrangements in place which will allow it to co-operate with the Commissioner in a timely manner, even in the absence of key members of staff.

*What will happen if we don't provide a submission?*

32. In these cases, the Commissioner will, wherever possible, move to a decision, based on the information held.

## The ongoing investigation

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33. Your investigating officer will be your point of contact throughout the course of the investigation. Once the investigating officer has received your submissions, these will be examined and considered. Depending on the circumstances of the application, the investigating officer may consider:
- (i) the exemptions that have been applied and whether they have been applied correctly;
  - (ii) the factors the authority considered in gauging the public interest in the information;
  - (iii) where the “harm test” applies, what, if any, potential harm there would be in disclosing the information;
  - (iv) where the “harm test” applies, whether that harm is substantial enough to prevent the disclosure of the information;
  - (v) where relevant, what searches the authority has undertaken to determine that the information is not held (or that no further information is held);
  - (vi) where relevant, the basis for refusing a request on the basis that it is not valid, is vexatious or is repeated;
  - (vii) where relevant, the accuracy of any cost estimates produced.
34. The investigation officer will take into account case law, legislative requirements, developing precedent, and may involve looking at the practice in other freedom of information jurisdictions, along with any other relevant guidance. In some cases, additional comments and submissions will be sought from applicants during the investigation. In such circumstances, the investigating officer will be careful not to disclose information to the applicant in breach of section 45 of FOISA.

### The ongoing investigation: your questions answered

*Will you keep us updated during the investigation?*

35. Investigators will keep both the public authority and the applicant updated about any significant developments as the case progresses.

*Can we change the exemptions or provisions we have relied on?*

36. The Commissioner expects public authorities to use the review process to substitute one decision with another, if required (for example, by deciding that an exemption which was originally applied does not in fact apply and substituting a different exemption).
37. We will *consider* new exemptions which are applied for the first time during the investigation. Similarly, we will *consider* other provisions in FOISA which have not been addressed before by the authority (such as whether the information request is vexatious or repeated). However, a public authority which wishes to change the basis for withholding information must provide a full explanation as to why the new exemption or provision applies, in line with the tests set out in the Commissioner’s briefings ([www.itspublicknowledge.info/briefings/](http://www.itspublicknowledge.info/briefings/))
38. If new exemptions or provisions are applied, we will let the applicant know and seek their comments on the changes.
39. It is the authority’s responsibility to satisfy the Commissioner that the new exemption or provision applies, and the Commissioner will endeavour wherever possible to make a

decision based on your submissions without seeking further comments. If the authority fails to satisfy the Commissioner that the newly cited provision(s) apply, it is likely your authority will be ordered to disclose the withheld information.

*Will you visit us to interview our staff?*

40. It is not normally necessary for investigators to visit public authorities or to interview staff. Sometimes we find it helpful to arrange a meeting to clarify points in the investigation. Whether we do this depends, for example, on the complexity of the case and the volume or sensitivity of the information in question. Investigators will be happy to discuss on-site visits where your authority feels this is appropriate.

*It would cost more than £600 for us to respond to the request but we haven't raised this previously, will this affect the investigation?*

41. Under section 12(1) of FOISA, public authorities are not obliged to comply with an information request that would cost more than £600 to deal with. In these cases, the Commissioner cannot order authorities to disclose the information, provided the matter is raised by the authority before a decision is issued. If you can satisfy the Commissioner that the cost of complying with the request would exceed £600, the Commissioner will only consider the fees aspect in the decision. It is therefore important to establish at the outset of an investigation whether excessive costs apply.
42. Normally, this should be considered when an initial request is received and the Commissioner may ask you to justify why you did not apply section 12(1) at request or review.

*Should we discuss the applicant's case with them? Can we continue to deal with other matters as normal?*

43. While we are dealing with an investigation it would be appropriate to refer the applicant to us if they have any queries about the investigation. However, there is nothing to prevent you discussing the case with the applicant, especially where this is likely to lead to the case being resolved informally.
44. New information requests made by the applicant, even if they are connected to the case under investigation, must still be dealt with in line with FOISA/the EIRs.

*We are thinking of disclosing information to the applicant. Can we go ahead?*

45. If you consider that there is any scope for full or partial settlement of the case, please notify the investigating officer at the earliest opportunity as they may be able to help facilitate resolution. Don't delay in sending the information to the applicant; remember it is the authority's decision to disclose at any time before the Commissioner issues a decision so you do not need the Commissioner's approval.
46. Full settlement would normally mean that the application to the Commissioner is withdrawn and so would not require the Commissioner to issue a formal Decision Notice. (The Commissioner must issue a Decision unless the applicant withdraws or abandons the application or unless the Commissioner determines that the application is frivolous or vexatious. Even where you disclose some or all of the information to the applicant during an investigation, it is possible that the applicant will still want a decision to be issued.)
47. If you settle a case without our involvement, please let us know as soon as possible.

## The Commissioner's decision

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48. Once the investigation has been concluded, and if settlement has not been reached, the investigating officer will draft a Decision Notice, taking into account any direction or advice from the Commissioner. Depending on the case, this may be approved by the Commissioner or, under delegated authority, by the Head of Enforcement or one of the Deputy Heads of Enforcement.
49. The Decision Notice will set out the Commissioner's final decision in relation to the application. Both your authority and the applicant will receive a copy of this Notice.
50. Should the Commissioner find that your authority has failed to comply with FOISA/the EIRs, the decision will state this and, where relevant, confirm what steps your authority is required to take to comply. Should the Commissioner decide that the authority has met its obligations under FOISA/the EIRs, the Decision Notice will state this.
51. Neither FOISA nor the EIRs give the Commissioner the power to withdraw or amend a Decision Notice once it has been issued.

### The Commissioner's decision: your questions answered

#### *How will we receive the Commissioner's decision?*

52. Decision Notices will be sent recorded delivery, to your Chief Executive (or equivalent). A copy will also normally be emailed to the freedom of information contact in the authority on the day the decision is issued.

#### *Will there be an opportunity to comment on the draft decision?*

53. Although the investigating officer may verify facts with your authority, it is not the Commissioner's practice to provide draft decisions to authorities or applicants for comment.

#### *What happens if we don't comply with a Decision Notice?*

54. If your public authority should fail to take the steps specified the Commissioner's Decision Notice within the time frame stipulated (usually a minimum of 45 days, depending on the amount of information to be disclosed), the Commissioner has the right to certify to the Court of Session that your public authority has failed to comply. The Court has the right to inquire into the matter and may deal with your authority as if it had committed a contempt of court.

#### *Can we appeal against the Commissioner's decision?*

55. Should either the authority or the applicant wish to contest the Commissioner's findings, there is a right to appeal to the Court of Session on a point of law only. Any such appeal must be made within 42 calendar days of the date of intimation of the Decision Notice you wish to contest.

#### *What happens to the information we sent to the Commissioner?*

56. At the end of the investigation, it is usual practice for us to securely destroy all information supplied by a public authority (with the exception of original documents). **You must notify your investigating officer if you require any information to be returned to you.**
57. If you have not requested its return within the period of 3 months from the date of the Commissioner's decision, information will normally be destroyed.
58. Information will be retained beyond this time where an appeal has been made to the Court of Session, pending the outcome of the appeal. On occasion, the Commissioner may also

securely retain some information retention is necessary for the discharge of the Commissioner's statutory functions: for example, to assist understanding of decisions or determinations. Information is only retained in a tiny proportion of cases and, where it is retained, the public authority will be told in advance. Any information which is retained will be reviewed annually.

*What happens if the Commissioner receives an information request for the information, or the authority's submissions, during or following the investigation?*

59. Occasionally, the Commissioner receives information requests for information or submissions which have been made during an investigation, either during the investigation or once the case has been closed.
60. The Commissioner is subject to FOISA and has a duty to respond to information requests. In dealing with such information requests the Commissioner must take account of the criminal offence under section 45 of FOISA. The Commissioner will normally seek comments from you if such an information request is received.

# Part 2: What We Need From You

## Introduction

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61. All authorities are expected to justify their refusal to disclose information to the Commissioner, and this part of the guidance provides examples of the type of evidence that the Commissioner would normally expect to receive.
62. This part identifies five circumstances where an application may be made to the Commissioner, and sets out, in relation to each circumstance, the information that your authority will be required to provide in order to justify its position. These circumstances are:
  - (i) refusal on the grounds of an exemption/ exception;
  - (ii) refusal on the grounds of excessive cost;
  - (iii) dissatisfaction with a Fees Notice;
  - (iv) refusal on the grounds of a vexatious or repeated request;
  - (v) refusal on the grounds that the information is not held (or that further information is not held).
63. Remember that **the Commissioner may order the disclosure of the information if your submissions are inadequate and fail to justify your refusal of a request.**

## Refusal on the grounds of an exemption

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64. Section 16(1) of FOISA requires authorities to give the applicant a notice stating why they are withholding information. In making a submission to the Commissioner, the onus is on the authority to demonstrate that it has properly applied an exemption. The advice below sets out the standard of evidence and argument the Commissioner expects from you.

### Citing of Exemptions

65. We must be able to identify the exact section of FOISA under which an exemption has been claimed and locate the specific information your authority has claimed as exempt. You must therefore:
  - (i) cite the specific exemption you are claiming. For example, if you are claiming an exemption on the basis that the information is confidential, we need to know whether you consider the information to be exempt under section 36(1) or 36(2);
  - (ii) specify the precise information to which it is considered an exemption applies. Exemptions will normally be applied only to specific information, and not to the entire document which may contain that information (e.g. “the figures quoted in paragraph xx are considered to be exempt under section 33(1)(b) of FOISA”).

### Justification of Exemptions

66. We need to be satisfied that the exemption has been correctly applied. It may be useful to refer to the Commissioner’s exemption briefings ([www.itspublicknowledge.info/briefings/](http://www.itspublicknowledge.info/briefings/)) and to the searchable decisions database on the website ([www.itspublicknowledge.info/decisions/](http://www.itspublicknowledge.info/decisions/)).

67. Explain why you think the exemption applies; e.g. for section 33(1)(b) of FOISA (commercial interests), it might be useful to set out:
- (i) why the interest is considered to be “commercial” as opposed to merely financial;
  - (ii) whose commercial interests would be prejudiced;
  - (iii) whether the commercial activity is carried out in a competitive environment;
  - (iv) whether any of the information is already publicly available.
68. Submit evidence and/or arguments which support your explanation e.g., in relation to section 33(1)(b):
- (i) In what way would the commercial interests be substantially prejudiced?
  - (ii) Are tenders still out?
  - (iii) Are negotiations ongoing?
  - (iv) Can evidence be provided which demonstrates that harm was caused by the disclosure of similar information in the past?

### **Substantial Prejudice Test (the Harm Test)**

69. Many exemptions apply only if substantial prejudice or inhibition would, or would be likely to, occur as a result of disclosure. If you cannot demonstrate that harm would, or would be likely to, occur then the exemption cannot be applied. We must be satisfied that the disclosure of the information would, or would be likely to, cause the harm stated in the exemption.
70. In considering whether the effect of disclosure would, or would be likely to, be substantially prejudicial you should be able to provide some evidence to support the view that the harm:
- (i) is specific and definable;
  - (ii) can be directly linked to the disclosure of the information;
  - (iii) is real or very likely, not hypothetical;
  - (iv) is significant, not marginal;
  - (v) would it occur in the near future; not at some distant point in the future?

### **Public Interest Test**

71. The public interest **must** be considered in relation to all exemptions which are not absolute exemptions (see section 2(2) of FOISA). The public interest test requires that exempt information should only be withheld where the public interest in withholding the information outweighs the public interest in disclosing it.
72. We must be satisfied that your authority has made a balanced assessment of the public interest. However, it is ultimately the Commissioner who decides where the balance of public interest lies and so must be convinced by the arguments your authority makes. It may be useful to refer to the Commissioner’s briefings and decisions for further advice on the public interest.

73. Your authority should:

- (i) describe the factors considered by your authority in deciding where the public interest in maintaining the exemption or disclosing the information lies (e.g. financial accountability; ensuring best value; public debate; transparency of decision-making etc.). You must show that you have considered both the public interest in favour of disclosure and the public interest in favour of maintaining the exemption and that you have weighed the two;
- (ii) explain your authority's reason(s) for claiming that the public interest in maintaining the exemption outweighs the public interest in disclosure;
- (iii) submit, where possible, evidence which supports your authority's public interest assessment.

### **Refusal on the grounds of excessive cost**

74. If you refuse a request on excessive cost grounds, section 16(4) of FOISA requires your authority to have given the applicant notice in writing that the cost of complying with the request would exceed the £600 threshold. Your authority's submissions should include:-

- (i) a description of what your authority is claiming excessive cost for (e.g. staff time, redaction, photocopying / paper, consumables etc);
- (ii) a calculation of the costs involved with complying with the request (e.g. the grade and hourly rate of staff involved (including overheads); the cost per unit for photocopying / paper / consumables);
- (iii) details of the amount or volume of work your authority has estimated would be required to complete the request in detail (e.g. the number of files or documents considered relevant; the amount of staff hours);
- (iv) samples or extrapolations of the work undertaken to estimate the total cost of complying with the request;
- (v) evidence that your authority has taken reasonable steps to try to assist the applicant in reducing the cost of complying with the request by offering appropriate advice and assistance under section 15 of FOISA.

### **Dissatisfaction with a Fees Notice**

75. Section 9(1) of FOISA enables you to issue a fees notice, within the 20 working day period for compliance, informing the applicant that a fee is required and specifying the amount. Where an applicant has applied to the Commissioner for a decision on the basis of dissatisfaction with a fees notice, the Commissioner will require from your authority full details of:-

- (i) what your authority is charging the applicant for (e.g. staff time, photocopying / paper, consumables etc);
- (ii) the calculation of the costs involved in arriving at the specified fee (e.g. the grade and hourly rate of staff involved; the cost per unit for photocopying / paper / consumables);
- (iii) the amount or volume of work your authority is charging the applicant for in detail (e.g. the number of files or documents considered relevant; the amount of staff hours).



## **Refusal on the grounds of a vexatious or repeated request**

76. Where your authority claims that section 14 of FOISA (vexatious or repeated requests) applies, section 16(5) requires your authority to provide the applicant with a written notice, within the 20 working day period for compliance, stating that it believes the request is vexatious or repeated.
77. Such a notice need not be given if a notice has already been given under this section in relation to an identical or substantially similar request, and it would not be reasonable to expect a further notice to be served.
78. Where an applicant has applied to the Commissioner for a decision on the basis of a notice from you refusing to deal with the request on the basis that it is vexatious, we will require from you full details of:
  - (i) why your authority believes the request to be vexatious;
  - (ii) evidence that the request would impose a significant burden on your authority;
  - (iii) submissions as to why your authority considers the request to be manifestly unreasonable or disproportionate.
79. Again, it may be useful to refer to the Commissioner's briefings, [www.itspublicknowledge.info/briefings/](http://www.itspublicknowledge.info/briefings/) and to the searchable decisions database, [www.itspublicknowledge.info/decisions/](http://www.itspublicknowledge.info/decisions/).

## **Refusal on the grounds that the authority does not hold the information (or does not hold further information)**

80. Where your authority claims that it does not hold the information the applicant has asked for, you must issue a notice, in terms of section 17 of FOISA, confirming that the information is not held.
81. Where an applicant has asked the Commissioner to investigate whether you actually do hold the information (or hold more information than you have disclosed to them), the Commissioner is required to come to a determination, based on a balance of probabilities, as to whether the information is held or not. In order to come to such a determination, we will need to know matters such as:
  - (i) what steps your authority took to establish that it did not hold the information;
  - (ii) what searches were carried out for the information relating to the request and who carried them out;
  - (iii) whether the public authority ever held the information;
  - (iv) whether it is possible to retrieve the information from (for instance) back-ups;
  - (v) if you have access to the information but believe you do not "hold" it, can you provide evidence that it is held in confidence, having been provided by a Minister of the Crown or by a department of the Government of the United Kingdom or that it is held on behalf of another person (if so, which other person).
82. In cases such as these, the investigating officer may want to visit you to supervise searches being carried out.

## Part 3: Further Information

83. Further information is available on our website at [www.itspublicknowledge.info](http://www.itspublicknowledge.info) .
84. Relevant information includes copies of the Commissioner's Briefings on the FOISA exemptions, a searchable database of previously published Decision Notices, and a page of 'Frequently-Asked-Questions' specifically aimed at Scottish public authorities.
85. You can also discuss any issues or outstanding queries with the investigator who has been assigned to your case during our office hours of 9.00 a.m. until 5.00 p.m. Monday to Friday.
86. Contact details for your investigating officer can be found on the correspondence that you have been sent, and they should be your first point of contact to discuss any issue relating to an ongoing investigation.



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