

Decision Notice



Decision 197/2013 Councillor Brian McCabe and Falkirk Council

Information held on a mobile device

Reference No: 201301078

Decision Date: 10 September 2013

www.itspublicknowledge.info

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Summary

On 25 February 2013, Councillor Brian McCabe (Councillor McCabe) asked Falkirk Council (the Council) for a transcript of text and email messages of a named employee's mobile device for a specified time period. The Council refused Councillor McCabe's request, arguing that business texts and emails had already been provided to him (which he accepted) and that personal texts and emails were held on behalf of the employee and so not held for the purposes of FOISA.

Following an investigation, the Commissioner found that the Council had dealt with Councillor McCabe's request for information in accordance with Part 1 of FOISA.

Relevant statutory provisions

Freedom of Information (Scotland) Act 2002 (FOISA) section 1(1) (General entitlement); section 3(2)(a)(i) (Scottish public authorities); section 17(1) (Notice that information is not held)

The full text of each of the statutory provisions cited above is reproduced in the Appendix to this decision. The Appendix forms part of this decision.

Background

1. On 25 February 2013, Councillor McCabe asked the Council for "a transcript of ALL transactions on the mobile device of [a named employee], specifically from 2.00 pm until 2.15 pm on 5 September 2012. This transcript will identify any email or text message sent from, or received by, including business related to Council or personal use".
2. On 15 March 2013, the Council responded to Councillor McCabe's request. It advised him that it considered his request for a transcript of business emails and texts to be a repeated request in line with section 14(2) of FOISA, and gave notice that it did not hold a transcript of personal emails or texts, in line with section 17(1) of FOISA.
3. On 25 March 2013, Councillor McCabe wrote to the Council requesting a review of its decision. He accepted that he had been provided with a copy of the business emails and texts in response to a previous request, but he did not accept that the Council had never held the details of personal emails at any time.



4. The Council notified Councillor McCabe of the outcome of its review on 22 April 2013. It upheld its previous response without amendment. In relation to the question of whether it had ever held details of the personal emails and texts, the Council explained that it did not hold this information for the purposes of FOISA (in line with section 3(2)(a)(i) of FOISA), and even if it did, it would be exempt under section 38 of FOISA (Personal information).
5. On 30 April 2013, Councillor McCabe wrote to the Commissioner, stating that he was dissatisfied with the outcome of the Council's review and applying to the Commissioner for a decision in terms of section 47(1) of FOISA.
6. The application was validated by establishing that Councillor McCabe had made a request for information to a Scottish public authority and had applied to the Commissioner for a decision only after asking the authority to review its response to that request. The case was then allocated to an investigating officer.

Investigation

7. On 4 June 2013, the Council was notified in writing that an application had been received from Councillor McCabe and was asked to provide comments on the application (as required by section 49(3)(a) of FOISA). The Council was also asked to respond to specific questions and to justify its reliance on any exemptions of FOISA.
8. The Council responded on 26 June 2013, providing its submissions as to why it considered it did not hold the personal emails and texts for the purposes of FOISA, in line with section 3(2)(a)(i). In further correspondence, the Council advised that it considered the information sought by Councillor McCabe regarding the business emails and texts was otherwise accessible to him, and was therefore exempt from disclosure under section 25(1) of FOISA.
9. Councillor McCabe confirmed that he had a copy of the business emails and texts and did not require the Commissioner to issue a decision on this matter.

Commissioner's analysis and findings

10. 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 Councillor McCabe and the Council. She is satisfied that no matter of relevance has been overlooked.
11. In this decision, the Commissioner will consider whether the Council holds private emails and texts on behalf of the named individual, and in so doing will consider whether the information is held for the purposes of FOISA.



Section 3(2)(a)(i) - Information held by the Council on behalf of the named individual

12. Section 1(1) of FOISA states that a person who requests information from a Scottish public authority which holds it is entitled to be given it by the authority. However, section 3(2)(a)(i) of FOISA makes it clear that if the authority holds the information on behalf of another person, then the information is not held by the authority for the purposes of FOISA.
13. In its submissions, the Council stated that if the correspondence was held, it would have been sent and received in a private capacity and was therefore held on behalf of another person (i.e. an employee), rather than held by the Council. The Council referred to *Decision 050/2007 Mr Andrew Graham-Stewart and the Scottish Environment Protection Agency*¹, where the Commissioner had found that private emails sent by an employee of SEPA were not held by SEPA for the purposes of FOISA.
14. The Council explained that employees are given a mobile device if their manager requests it, and are required to sign a declaration that they have read and understood the Acceptable Use Policy and have agreed to comply with it. This policy states that limited personal use is permitted, although there are restrictions such as premium rate numbers being barred, and all personal calls and texts have to be identified and paid for personally by the employee.
15. The Council provided a copy of its Acceptable Use Policy which applies to both members and employees. The Council explained that reasonable personal use of its computers, laptops, telephones, internet and email is permitted by the policy, which states:

"In general, the Council respects users' privacy and autonomy in electronic communications".

The Council went on to explain that if an investigation is required into a user's email use:

"personal emails will generally be excluded from investigation".
16. The Council argued that there is therefore a high expectation among its employees that personal emails will not be monitored or read, or disclosed under FOISA. The Council commented further that, in its view, this would include disclosing whether or not a personal email or text message was sent or received in the first place, as well as the actual content of such messages.
17. The question for the Commissioner to consider here is whether the information about personal emails or texts is held by the Council for the purposes of FOISA. The word "held" has a specific meaning in section 3(2) of FOISA that is not simply determined by the presence of information within the premises or information systems of a public authority. When information is present within a public authority's premises and systems only because it is held on behalf of another person, that information is not held by the public authority for the purposes of FOISA.

¹ <http://www.itspublicknowledge.info/applicationsanddecisions/Decisions/2007/200600788.aspx>



18. The Commissioner considers that the Council has explained, in adequate detail, why any information covered by Councillor McCabe's request was held on behalf of the named employee. The Council's Acceptable Use Policy makes it clear that limited personal use of mobile devices is permitted.
19. As noted above, the Council submitted that *Decision 050/2007* is relevant in this case. In that case, the information sought was personal emails sent via the individual's work email account. Although the devices used for the requested correspondence are different (a computer and a mobile device) the same principles apply in that the request was for personal correspondence sent or received during working hours.
20. The Commissioner considers that the same conclusions apply in relation to Councillor McCabe's request as applied in *Decision 050/2007*: that if any such personal correspondence was in the Council's possession, it would be held on behalf of the employee who had sent or received it. The Commissioner accepts in this case that as long as the employee complied with the policy, which the Council confirmed the employee had, by signing an agreement to comply with it, the details of these personal transactions fall outside the scope of Council business. Personal transactions are therefore held on behalf of the employee, rather than by the Council in its own right.
21. Consequently, the Commissioner has concluded that any information covered by the terms of Councillor McCabe's request would be held on behalf of the named employee, in line with section 3(2)(a)(i) of FOISA, and not held for the purposes of FOISA.
22. As the Commissioner is satisfied that the Council does not (and did not, at the time it dealt with the request and requirement for review) hold any information falling within the scope of Councillor McCabe's request, she has concluded that it was correct to notify Councillor McCabe, in line with section 17(1) of FOISA, that it did not hold the information requested.



DECISION

The Commissioner finds that Falkirk Council complied with Part 1 of the Freedom of Information (Scotland) Act 2002 (FOISA) in responding to the information request made by Councillor Brian McCabe.

Appeal

Should either Councillor McCabe or Falkirk Council wish to appeal against this decision, there is an 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.

Rosemary Agnew
Scottish Information Commissioner
10 September 2013



Appendix

Relevant statutory provisions

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 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;
- ...

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.