

# Decision Notice

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**Decision 230/2014: Mr Jonathan and Mrs Carol Flynn and Perth and Kinross Council**

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**Action taken against an employee**

Reference No: 201402197

Decision Date: 3 November 2014



Scottish Information  
Commissioner

## Summary

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On 3 August 2014, Mr and Mrs Flynn asked Perth and Kinross Council (the Council) for information about the steps and sanctions taken against a named Council employee. The Council refused to confirm or deny whether it held relevant recorded information, or whether such information existed. Following investigation, the Commissioner found that the Council was entitled to do this.

## Relevant statutory provisions

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Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) and (6) (General entitlement); 2(1)(a) and (2)(e)(ii) (Effect of exemptions); 18(1) (Further provisions as respects responses to request); 38(1)(b), (2)(a)(i), (2)(b) and (5) (definitions of "the data protection principles", "data subject" and "personal data") (Personal information)

Data Protection Act 1998 (the DPA) sections 1(1) (Basic interpretative provisions) (definition of personal data); Schedules 1 (The data protection principles) (the first data protection principle) and 2 (Conditions relevant for the purposes of the first principle: processing of any personal data) (condition 6)

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 3 August 2014, Mr and Mrs Flynn made a request for information to the Council. This included a request for specific information regarding the steps and sanctions taken against a named Council employee.
2. The Council responded on 4 August 2014. It informed Mr and Mrs Flynn that in line with section 18(1) of FOISA, it could neither confirm nor deny whether it held the information requested or whether that information existed. It further explained that if the information was held it would be exempt from disclosure under section 38(1)(b) of FOISA.
3. On 4 August 2014, Mr and Mrs Flynn wrote to the Council requesting a review of its decision, arguing that by law the public had a right to access all information held by the Council.
4. The Council notified Mr and Mrs Flynn of the outcome of its review on 22 August 2014. The Council upheld its original response.
5. On 2 September 2014, Mr and Mrs Flynn wrote to the Commissioner. They applied to the Commissioner for a decision in terms of section 47(1) of FOISA. Mr and Mrs Flynn stated they were dissatisfied with the outcome of the Council's review because they believed the Council had a legal duty to provide the information requested.

## Investigation

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6. The application was accepted as valid. The Commissioner confirmed that Mr and Mrs Flynn 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. The case was then allocated to an investigating officer.

7. On 23 September 2014, the investigating officer notified the Council in writing that an application had been received from Mr and Mrs Flynn, giving it an opportunity to provide comments on the application (as required by section 49(3)(a) of FOISA) and asking it to respond to specific questions. In particular, the Council was asked to justify its reliance on any provisions of FOISA it considered applicable to the information requested, with specific reference to the provisions of sections 18 and 38(1)(b) of FOISA.
8. The Council responded on 1 October 2014, indicating that it was relying upon section 18 of FOISA, on the basis that (if held) the information requested would be exempt in terms of section 38(1)(b) of FOISA. It provided reasons for this position.
9. Mr and Mrs Flynn were invited to provide their comments on this case, and in particular on any legitimate interest they might have which would allow disclosure of the information without breaching the DPA (assuming the information they sought existed and was held by Council). They did not respond.

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

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

### **Section 18(1) of FOISA – “neither confirm nor deny”**

11. As mentioned above, the Council refused to confirm or deny whether it held any information falling within the scope of Mr and Mrs Flynn's request, or whether that information existed. It adhered to this position in its submissions to the Commissioner.
12. Section 18(1) allows public authorities to refuse to confirm or deny whether they hold information in the following limited circumstances:
  - a request has been made to the authority for information which may or may not be held by it;
  - if the information were held by the authority (and it need not be), it could give a refusal notice under section 16(1) of FOISA, on the basis that the information was exempt information by virtue of any of the exemptions in sections 28 to 35, 38, 39(1) or 41 of FOISA
  - the authority considers that to reveal whether the information exists or is held by it would be contrary to the public interest.
13. Where a public authority has chosen to rely on section 18(1) of FOISA, the Commissioner must establish whether the authority is justified in stating that to reveal whether the information exists or is held would be contrary to the public interest. She must also establish whether, if the information existed and was held by the public authority, the authority would be justified in refusing to disclose the information by virtue of any of the exemptions provided for by sections 28 to 35, 38, 39(1) or 41 of FOISA.
14. While doing this, the Commissioner must ensure that her decision notice does not confirm one way or the other whether the information requested actually exists or is held by the authority. This means that she is unable to comment in any depth on the reliance by the

public authority on any of the exemptions listed in section 18(1), or on other matters which could have the effect of indicating whether the information existed or was held by the authority.

15. It is not sufficient to claim that one or more of the relevant exemptions applies. Section 18(1) makes it clear that the authority must be able to give a refusal notice under section 16(1), on the basis that any relevant information it held would be exempt information under one or more of the listed exemptions. Where the exemption is subject to the public interest test in section 2(1)(b) of FOISA, the authority must also be able to satisfy the Commissioner that the public interest in maintaining the exemption outweighs any public interest there would be in releasing any relevant information it held.
16. In this case, the Council submitted that if it did hold any information falling within the scope of Mr and Mrs Flynn's request, it could be withheld under section 38(1)(b) of FOISA. This particular exemption is not subject to the public interest test.
17. The Commissioner must first consider whether the Council could have given a refusal notice under section 16(1) of FOISA in relation to the information in question, if it existed and was held.

### **Section 38(1)(b)**

18. The Council stated that if it held the requested information, it would (and could) apply the exemption in section 38(1)(b) of FOISA to that information. Section 38(1)(b), read in conjunction with section 38(2)(a)(i) or, as appropriate, section 38(2)(b), exempts information from disclosure if it is "personal data", as defined in section 1(1) of the DPA, and its disclosure would contravene one or more of the data protection principles set out in Schedule 1 to the DPA.
19. In order to rely on this exemption, the Council must show, firstly, that any such information would be personal data for the purposes of the DPA, and secondly that disclosure of that information into the public domain (which is the effect of disclosure under FOISA) would contravene one or more of the data protection principles to be found in Schedule 1. In this case, the Council submitted that if the information was held, disclosure would be in breach of the First and Second data protection principles.

#### *Is the information personal data?*

20. "Personal data" are defined in section 1(1) of the DPA as data which relate to a living individual who can be identified a) from those data, or b) from those data and other information which is in the possession of, or is likely to come into the possession of, the data controller (the full definition is set out in the Appendix).
21. The Council stated that any information of the kind requested by Mr and Mrs Flynn would be the personal data of the individual referred to in the request. The information, by definition, would relate to the individual and identify them. Having considered the type of information Mr and Mrs Flynn are seeking, the Commissioner accepts this.

#### *Would disclosure contravene the first data protection principle?*

22. In its submissions, the Council argued that disclosure of the information, if it existed and was held, would contravene the first data protection principle. It submitted that it did not consider any of the conditions of Schedule 2 of the DPA could be satisfied in relation to disclosure of the information and disclosure would, therefore, be unlawful and in breach of the first principle.

23. The first data protection principle states that personal data shall be processed fairly and lawfully. The processing in this case would be disclosure of the information into the public domain in response to Mr and Mrs Flynn's request. The first principle also states that personal data shall not be processed unless at least one of the conditions in Schedule 2 to the DPA is met. In the case of sensitive personal data, as defined in section 2 of the DPA, at least one of the conditions in schedule 3 to the DPA must also be met: having considered the request, the Commissioner does not believe the information Mr and Mrs Flynn are seeking could fall into any of the categories of sensitive personal data in section 2 of the DPA.
24. The Commissioner will now consider whether there are any conditions in Schedule 2 which would permit the requested information to be disclosed, if it existed and was held. If any of these conditions can be met, she must then consider whether such disclosure would be fair and lawful.
25. There are three separate aspects to the first data protection principle: (i) fairness, (ii) lawfulness and (iii) the conditions in the schedules. These three aspects are interlinked. For example, if there is a specific condition in Schedule 2 which permits disclosure, it is likely that disclosure will also be fair and lawful.

*Can any of the conditions in Schedule 2 be met?*

26. In the circumstances, it appears to the Commissioner that condition 6 in Schedule 2 is the only one which might permit disclosure of the information, if held. In any event, neither Mr and Mrs Flynn or the Council has argued that any other condition would be relevant. Condition 6 allows personal data to be processed if the processing is necessary for the purposes of legitimate interests pursued by the data controller or by the third party or parties to whom the data are disclosed, except where the processing is unwarranted in any particular case by reason of prejudice to the rights and freedoms or legitimate interests of the data subject (the individual(s) to whom the data relate).
27. There are, therefore, a number of different tests which must be satisfied before condition 6 can be met. These are:
  - a. Are Mr and Mr Flynn pursuing a legitimate interest or interests?
  - b. If yes, is the processing involved necessary for the purposes of those interests? In other words, is the processing proportionate as a means and fairly balanced as to ends, or could these interests be achieved by means which interfere less with the privacy of the data subject?
  - c. Even if the processing is necessary for Mr and Mrs Flynn's legitimate interests, is that processing nevertheless unwarranted in this case by reason of prejudice to the rights and freedoms or legitimate interests of the data subject?
28. There is no presumption in favour of the disclosure of personal data under the general obligation laid down by section 1(1) of FOISA. Accordingly, the legitimate interests of Mr and Mrs Flynn must outweigh the rights and freedoms or legitimate interests of the data subject before condition 6 will permit disclosure. If the two are evenly balanced, the Commissioner must find that the Council would be able to refuse to disclose the requested information (if held) to Mr and Mrs Flynn.

*Are Mr and Mrs Flynn pursuing a legitimate interest or interests?*

29. Having considered all relevant submissions she has received on this point, the Commissioner does not accept that Mr and Mrs Flynn could be said to be pursuing a

legitimate interest in this case. They may have their personal concerns as to how they were treated by the Council or as to the processes followed by the Council, but the Commissioner does not accept that it follows that they would be pursuing a legitimate interest in seeking the information they have requested.

30. Given this conclusion, the Commissioner finds that there is no condition in Schedule 2 which would permit disclosure of the requested information, if it existed and was held by the Council.
31. In the absence of a condition permitting disclosure, that disclosure would be unlawful. Consequently, the Commissioner finds that disclosure of the information, if it existed and was held, would breach the first data protection principle. The information would therefore be exempt from disclosure (and properly withheld) under section 38(1)(b) of FOISA.
32. Having accepted that disclosure of the information, if it existed and was held, would be in breach of the first data protection principle, the Commissioner is not required to consider whether such disclosure would also be in breach of the second data protection principle (as claimed by the Council).
33. Having accepted that the Council could have given a refusal notice under section 16(1) of FOISA on the basis that any relevant information, if it existed and was held, would be exempt information by virtue of section 38(1)(b) of FOISA, the Commissioner is required by section 18(1) to consider whether the Council was entitled to conclude that it would be contrary to the public interest to reveal whether the information existed or was held.

#### **The public interest - section 18(1)**

34. Mr and Mrs Flynn explained to the Commissioner why they believed the information requested, if it existed and was held, should be disclosed.
35. The Council recognised a clear, general public interest in providing public access to information held by a Scottish public authority. It acknowledged that disclosing actions it had taken in response to a complaint could provide assurance that it had appropriate procedures in place.
36. Conversely, the Council submitted that there was a strong public interest in ensuring that it handled any and all personal data it held in compliance with the DPA. It believed its application of section 18(1) in this case illustrated its compliance with the DPA, giving assurance that it took its obligations under the DPA seriously.
37. On balance, therefore, the Council was of the view that the public interest was best met by applying Section 18(1).
38. Having considered the submissions of both parties, the Commissioner is satisfied, in all the circumstances of this case, that it would have been contrary to the public interest for the Council to reveal whether the information requested by Mr and Mrs Flynn existed or was held by it.
39. As a result, the Commissioner is satisfied that the Council was entitled to refuse to confirm or deny, in line with section 18(1) of FOISA, whether it held the information requested by Mr and Mrs Flynn, or whether such information existed.

## **Decision**

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The Commissioner finds that Perth and Kinross Council complied with Part 1 of the Freedom of Information (Scotland) Act 2002 in responding to the information request made by Mr and Mrs Flynn.

## **Appeal**

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Should either Mr and Mrs Flynn or the 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**

**3 November 2014**

### Freedom of Information (Scotland) Act 2002

#### 1 General entitlement

- (1) A person who requests information from a Scottish public authority which holds it is entitled to be given it by the authority.

...

- (6) This section is subject to sections 2, 9, 12 and 14.

#### 2 Effect of exemptions

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

- (a) the provision does not confer absolute exemption; and

...

- (2) For the purposes of paragraph (a) of subsection 1, the following provisions of Part 2 (and no others) are to be regarded as conferring absolute exemption –

...

- (e) in subsection (1) of section 38 –

...

- (ii) paragraph (b) where the first condition referred to in that paragraph is satisfied by virtue of subsection (2)(a)(i) or (b) of that section.

#### 18 Further provision as respects responses to request

- (1) Where, if information existed and was held by a Scottish public authority, the authority could give a refusal notice under section 16(1) on the basis that the information was exempt information by virtue of any of sections 28 to 35, 39(1) or 41 but the authority considers that to reveal whether the information exists or is so held would be contrary to the public interest, it may (whether or not the information does exist and is held by it) give the applicant a refusal notice by virtue of this section.

...

#### 38 Personal information

- (1) Information is exempt information if it constitutes-

...

- (b) personal data and either the condition mentioned in subsection (2) (the "first condition") or that mentioned in subsection (3) (the "second condition") is satisfied;

...

- (2) The first condition is-



(a) in a case where the information falls within any of paragraphs (a) to (d) of the definition of "data" in section 1(1) of the Data Protection Act 1998 (c.29), that the disclosure of the information to a member of the public otherwise than under this Act would contravene-

(i) any of the data protection principles; or

...

(b) in any other case, that such disclosure would contravene any of the data protection principles if the exemptions in section 33A(1) of that Act (which relate to manual data held) were disregarded.

(5) In this section-

"the data protection principles" means the principles set out in Part I of Schedule 1 to that Act, as read subject to Part II of that Schedule and to section 27(1) of that Act;

"data subject" and "personal data" have the meanings respectively assigned to those terms by section 1(1) of that Act;

...

## **Data Protection Act 1998**

### **1 Basic interpretative provisions**

(1) In this Act, unless the context otherwise requires –

...

"personal data" means data which relate to a living individual who can be identified –

(a) from those data, or

(b) from those data and other information which is in the possession of, or is likely to come into the possession of, the data controller,

and includes any expression of opinion about the individual and any indication of the intentions of the data controller or any other person in respect of the individual;

...

## **Schedule 1 – The data protection principles**

### **Part I – The principles**

1. Personal data shall be processed fairly and lawfully and, in particular, shall not be processed unless –

(a) at least one of the conditions in Schedule 2 is met, and

...

## **Schedule 2 – Conditions relevant for purposes of the first principle: processing of any personal data**

...

6. (1) The processing is necessary for the purposes of legitimate interests pursued by the data controller or by the third party or parties to whom the data are disclosed, except where the processing is unwarranted in any particular case by reason of prejudice to the rights and freedoms or legitimate interests of the data subject.

**Scottish Information Commissioner**

Kinburn Castle  
Doubledykes Road  
St Andrews, Fife  
KY16 9DS

t 01334 464610

f 01334 464611

[enquiries@itspublicknowledge.info](mailto:enquiries@itspublicknowledge.info)

**[www.itspublicknowledge.info](http://www.itspublicknowledge.info)**