

Decision Notice



Decision 025/2013 Councillor Brian McCabe and Falkirk Council

Information held on a mobile device

Reference No: 201300085

Decision Date: 21 February 2013

www.itspublicknowledge.info

Rosemary Agnew

Scottish Information Commissioner

Kinburn Castle
Doubledykes Road
St Andrews KY16 9DS
Tel: 01334 464610



Summary

Councillor McCabe asked Falkirk Council (the Council) for a transcript of text and email messages on a named employee's mobile device between specified time periods. The Council disclosed all of the information to Councillor McCabe that it considered fell within the scope of his request.

Following an investigation, the Commissioner was satisfied that the Council had disclosed all information covered by the request. However, the Commissioner also found that the Council had failed to respond to the request within 20 working days.

Relevant statutory provisions

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) (General entitlement); 10(1)(a) (Time for compliance)

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.

Scottish Ministers' Code of Practice on the Discharge of Functions by Scottish Public Authorities under the Freedom of Information (Scotland) Act 2002 and the Environmental Information (Scotland) Regulations 2004 (the Section 60 Code)

Background

1. On 12 October 2012, Councillor McCabe wrote to the Council requesting "a transcript of the messages (text/email) of (named employee's) mobile device, specifically from 2.00 pm until 2.15 pm on 5 September 2012." For the purposes of this decision, the employee will be referred to throughout as "Employee A". The Council received this request on 15 October 2012.
2. On 16 October 2012, Councillor McCabe resubmitted the request on the Council's "Freedom of Information Request Form". This reiterated the terms of the request submitted on 12 October, clarifying that he was seeking a transcript of any email or text messages sent from, or received by, the device between the previously stated times. On the form, Councillor McCabe also stated: "Very specifically, I am looking for details of Council related business only. Any items of a personal nature may be redacted".



3. Councillor McCabe did not receive a response to his request. On 16 November 2012, he wrote to the Council requesting a review of its failure to respond.
4. The Council notified Councillor McCabe of the outcome of its review on 4 January 2013. The Council advised Councillor McCabe that it had identified one email falling within the scope of the request. The transcript of this email was disclosed.
5. On 6 January 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. The investigating officer subsequently contacted the Council, 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. The Council was asked to explain the searches that had been undertaken in order to retrieve any relevant information falling within the scope of Councillor McCabe's request.
8. The Council responded on 12 February 2013, providing submissions to support its position that it had provided Councillor McCabe with all relevant information that it held which fell within the scope of his request.

Commissioner's analysis and findings

9. In coming to a decision on this matter, the Commissioner has considered all of the submissions made to her by both Councillor McCabe and the Council and is satisfied that no matter of relevance has been overlooked.

The scope of the request

10. In his application to the Commissioner, Councillor McCabe indicated that he was seeking a transcript of all transactions on the specified mobile device during the periods in question, both business and personal.



11. In its submissions, the Council pointed out that Councillor McCabe's original request had been contained in a letter of 12 October 2012, which had been followed up with a Freedom of Information Request Form dated 16 October 2012. The Council explained that it had treated these as the same request, with the latter communication serving to clarify the former.
12. In the Council's view, Councillor McCabe's statement on 16 October 2012 that: "Very specifically, I am looking for details of Council related business only. Any items of a personal nature may be redacted" clearly and explicitly excludes personal information from the scope of the request. The Council submitted that it was not open to Councillor McCabe to now seek to change his request to include personal information at this stage.
13. The Commissioner notes that Councillor McCabe's request of 12 October 2012 did not differentiate between personal and business transactions. However, the Commissioner agrees with the Council that the statement on the request form submitted on 16 October 2012 plainly excludes personal information from the scope of the request and states that Councillor McCabe was seeking Council related business only. Given the proximity of Councillor McCabe's submission of the request form to the submission of the original request, the Commissioner considers it was reasonable for the Council to consider it to be a clarification of the request. Consequently, the Commissioner is satisfied that the Council was correct in interpreting the request as seeking information about Council business, not personal texts and emails.

Section 1(1) of FOISA – General entitlement

14. Section 1(1) of FOISA creates a general entitlement to access information held by a Scottish public authority, subject to the application of exemptions in Part 2 of FOISA, and to any other relevant provision in Part 1. The information to be given is that held by the authority at the time the request is received, subject to qualifications which are not relevant here.
15. In order to comply with section 1(1), therefore, an authority must take reasonable steps to identify and locate all information it holds and which falls within the scope of the request, and (in the absence of an applicable exemption or other relevant provision of Part 1 of FOISA) provide it to the applicant.
16. The Council stated that Employee A had started to compose an email which concerned Council business (in addition to the one disclosed to Councillor McCabe) during the period in question. However, this email was not completed and was discarded at the time.
17. The Council explained that Employee A had checked their phone and computer; the only information falling within the scope of the request was the email disclosed to Councillor McCabe.
18. The Council explained that its Information, Communications and Technology Division had also searched their records and back-up tapes for relevant texts and emails sent or received during the defined periods and, similarly, the only information identified as falling within the scope of the request was the email disclosed to Councillor McCabe.



19. The Commissioner has considered the submissions made by both Councillor McCabe and the Council. Having considered the steps and searches undertaken by the Council, the Commissioner is satisfied that the Council carried out adequate searches to allow it to identify, retrieve and disclose all information falling within the scope of the request. The Commissioner accepts, therefore, that the Council does not hold any further information which falls within the scope of Councillor McCabe's request.
20. In the circumstances, the Commissioner considers that the information provided by the Council in response to Councillor McCabe's request was the only information held by the Council which would address its terms. In this respect, she finds that the Council complied with Part 1, and in particular section 1(1), of FOISA in responding to Councillor McCabe's request.

Compliance with timescales

21. In his application to the Commissioner, Councillor McCabe expressed dissatisfaction with the Council's failure to respond to his request for information.
22. Section 10(1) of FOISA gives Scottish public authorities a maximum of 20 working days following the date of receipt of the request to comply with a request for information, subject to certain exceptions which are not relevant in this case.
23. In this case, the Council did not respond to Councillor McCabe's request within 20 working days. The Council's position is that its Chief Executive had previously had a conversation with Councillor McCabe, as a result of which she had understood that Councillor McCabe did not wish to pursue his request under FOISA. Councillor McCabe, however, was clear that his position was unchanged and that he continued to require the information that he had requested.
24. The Commissioner is not in a position to comment on any discussion that may have taken place between the Council's Chief Executive and Councillor McCabe. However, given Councillor McCabe's strenuous denial that he had given any indication of withdrawing his request and, in the absence of any written withdrawal of the request, the Commissioner has concluded that the request was not withdrawn. As the Council failed to provide a response to Councillor McCabe's request for information within the statutory timescale, the Commissioner finds that it failed to comply with section 10(1) of FOISA.
25. Given that the Council has now responded to Councillor McCabe's requirement for review, the Commissioner does not require the Council to take any action in response to this failure on this occasion.



Additional matters raised in Councillor McCabe's application

26. In his application, Councillor McCabe expressed concern at certain aspects of the Council's handling of his request for information. In particular, Councillor McCabe was unhappy that his review request was not dealt with by the Officer to whom the initial request had been allocated. Additionally, he expressed disquiet that the review was dealt with by a senior solicitor within the Council.
27. In relation to Councillor McCabe's dissatisfaction with the fact that a different Officer dealt with his review request, the Commissioner has considered the guidance on reviews contained within the Section 60 Code¹. Paragraph 5.4 of the Section 60 Code states that any review of an authority's original decision in regard to a request for information should, where practicable, be handled by staff who were not involved in the original decision. The Commissioner regards this to be good practice, which ensures that the review process is carried out impartially and fairly by an independent person within the public authority. However, the Section 60 Code also states (at paragraph 5.5) that where a request for review has been submitted on the basis that there has been no response to the original request, the authority may consider it appropriate for the original case-handler to continue dealing with the request and issue the review response.
28. In the Commissioner's view, the wording of paragraphs 5.4 and 5.5 of the Section 60 Code gives authorities discretion to either allow the original case-handler to conduct the review, or to appoint another Officer to do so. In this particular case, the Commissioner finds nothing untoward in the Council's decision to assign a different Officer to conduct the review; indeed, in the particular circumstances of this case, she considers it was appropriate to do so.
29. In relation to Councillor McCabe's comments regarding the fact that the review request was handled by a senior solicitor, the Commissioner would note that it is a matter for the authority how and who it chooses to handle reviews under FOISA. The Commissioner does not find it unusual that the Council should elect to have a senior solicitor conducting such reviews; this is common practice in many Scottish public authorities.

¹ <http://www.scotland.gov.uk/Resource/Doc/933/0109425.pdf>



DECISION

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

The Commissioner finds that by identifying and disclosing all of the information falling within the scope of the request, the Council complied with Part 1 of FOISA.

However, the Commissioner finds that the Council failed to comply with Part 1 of FOISA by failing to respond to the request for information within the timescale laid down by section 10(1) of FOISA.

Given that a response has now been provided to Councillor McCabe's requirement for review, the Commissioner does not require the Council to take any action in respect of this failure in response to Councillor McCabe's application.

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 notice.

Margaret Keyse
Head of Enforcement
21 February 2013



Appendix

Relevant statutory provisions

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.

...

10 Time for compliance

- (1) Subject to subsections (2) and (3), a Scottish public authority receiving a request which requires it to comply with section 1(1) must comply promptly; and in any event by not later than the twentieth working day after-
- (a) in a case other than that mentioned in paragraph (b), the receipt by the authority of the request; or

...