

Decision Notice



Decision 267/2013 Mr Jonathan Flynn and Perth and Kinross Council

Court Order

Reference No: 201301818

Decision Date: 26 November 2013

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Rosemary Agnew

Scottish Information Commissioner

Kinburn Castle
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Summary

On 29 March 2013, Mr Flynn asked Perth and Kinross Council (the Council) for a copy of a court order and the grounds for obtaining the order. The Council responded by notifying Mr Flynn that it did not hold the requested information. Following an investigation, the Commissioner accepted that the Council did not hold any relevant recorded information.

Relevant statutory provisions

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) and (4) (General entitlement); 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 29 March 2013, Mr Flynn asked the Council for a copy of the Court Order obtained by the Council to allow a Council employee to put him under surveillance, and the grounds for obtaining this Court Order for use on 13 March 2013.
2. The Council responded on 8 April 2013. The Council stated that it had not obtained, or attempted to obtain, any such court order. It gave notice, in terms of section 17(1) of FOISA, that it did not hold the information requested by Mr Flynn.
3. On 13 April 2013, Mr Flynn wrote to the Council requesting a review of its decision.
4. The Council notified Mr Flynn of the outcome of its review on 25 April 2013, upholding its previous decision without amendment.
5. On 1 August 2013, Mr Flynn 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 Mr Flynn made a request for information to a Scottish public authority and 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 contacted the Council on 11 September 2013, 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 why it was satisfied that it had not obtained a court order permitting surveillance of Mr Flynn, and that it held no information about a decision to obtain a court order. The Council was also asked for details of the searches that it had undertaken to identify information covered by Mr Flynn's request.
8. The Council responded on 7 October 2013, providing confirmation of the searches that had been undertaken and explaining why the Council considered that it did not hold any information covered by the request.
9. In a telephone call with the Flynn family on 10 October 2013, the investigating officer was told by Mr Flynn (senior) that the Council's Housing Officers had discussed the taping of a meeting with him and his family on 13 March 2013; this was also noted in information disclosed to him by the Council. This issue was included in the investigation of Mr Flynn's application.

Commissioner's analysis and findings

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 Flynn and the Council. She is satisfied that no matter of relevance has been overlooked.
11. Section 1(1) of FOISA provides that a person who requests information from a Scottish public authority which holds it is entitled to be given that information by the authority. This is subject to certain qualifying provisions which do not apply here. The information to be given is that held by the authority at the time the request is received, as defined in section 1(4). If the authority does not hold any information covered by the request, it is required to give the applicant notice in writing to that effect, under section 17(1) of FOISA.
12. The Council has confirmed that a Council employee made a tape recording of a meeting with Mr Flynn (senior) and his family on 13 March 2013. The Commissioner understands that Mr Jonathan Flynn is trying to ascertain whether the Council obtained a court order for this surveillance, and the Council's reasons for obtaining the court order.



13. The Council explained that it is required to maintain a register of all surveillance authorised under the Regulatory Investigatory Powers (Scotland) Act (RIPSA), and this is held in the central filing system of the Council's Legal Service department.
14. The Council explained that a court order is not required in order to conduct surveillance under RIPSA, although a court order is required under the comparable UK legislation (which only applies in Scotland to the interception of electronic communications).
15. The Council confirmed that it did not hold a court order, as described by Mr Flynn in his request. It had searched the records of relevant staff members and had not identified any information falling in scope. It accepted that the meeting with the Flynn family had been recorded, but provided evidence to show that the decision to record the meeting with the Flynns had been taken by the officer attending the meeting, who has been told that the recording should not have taken place.
16. After reviewing the information which the Council provided to Mr Flynn (senior), the Commissioner investigated the possibility that minutes of Housing Officer team meetings might contain a reference to a court order, in relation to this case. However, the Council has confirmed that no such minutes exist, as there are no team meetings for Housing Officers.
17. The Commissioner has considered the Council's submissions and accepts that the Council has taken adequate, proportionate steps to establish that it does not hold any information falling within the scope of the request. She accepts that the Council did not obtain a court order for the surveillance, and that no "surveillance" (under RIPSA) took place. She notes that even if the Council had carried out surveillance under RIPSA, it would not have been required to obtain a court order. Although Mr Flynn is convinced that the tape-recording was authorised and that the Council was therefore required to obtain a court order, the Commissioner has found no evidence to support this conclusion.
18. On the basis of the evidence provided, following investigation, the Commissioner is satisfied that the Council does not hold any information falling within the scope of Mr Flynn's request, and that it correctly gave him notice of this, in line with section 17(1) of FOISA.

DECISION

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 Johnathan Flynn.



Appeal

Should either Mr Jonathan Flynn or Perth and Kinross 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
26 November 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.
- ...
- (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.
- ...

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.
- ...