

Decision Notice



Decision 129/2008 Dr Gordon Macdonald and North Lanarkshire Council

Emails exchanged between named Councillors

Reference No: 200801064

Decision Date: 30 September 2008

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Kevin Dunion

Scottish Information Commissioner

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Summary

Dr Gordon Macdonald (Dr Macdonald) asked North Lanarkshire Council (the Council) to provide copies of all email correspondence between one of its Councillors and a named Councillor from South Lanarkshire Council, during a specified period.

The Council advised Dr Macdonald that such emails are held by the Council on behalf of the Councillor, and as such are not held for the purposes of FOISA.

Dr Macdonald was dissatisfied with this response and asked the Council to review its decision. The Council carried out a review, which upheld its decision. Dr Macdonald remained dissatisfied with the Council's response and applied to the Commissioner for a decision.

After investigation, the Commissioner accepted that searches had revealed no trace of any relevant communications, and found that the Council had complied with Part 1 of FOISA in notifying Dr Macdonald that the information he had asked for was not held.

Relevant statutory provisions and other sources

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) and (6) (General entitlement); section 3(2)(a)(i) (Scottish public authorities) and section 17 (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 April 2008, Dr Gordon Macdonald wrote to the Council requesting copies of all emails either sent from, or received by, a named Councillor's email account to or from the email account of a named Councillor of South Lanarkshire Council during the period 19 June 2006 until 31 August 2006.



2. A similar information request was submitted to South Lanarkshire Council on the same day, which is the subject of a separate decision notice¹.
3. At this point it should be explained that although Dr Macdonald's request did not specify the subject matter of the correspondence in question, it was known from the context provided by other information requests and correspondence that he wished to obtain emails exchanged by the two Councillors in their capacity as members of Strathclyde Fire Board (the Board). The Council's responsibilities as a fire authority are delegated to the Board, which is a joint board serving as the fire authority for twelve local authorities and which is a Scottish public authority for the purposes of FOISA. Councillors from the twelve constituent local authorities are appointed to serve on the Board.
4. On 11 June 2008, Dr Macdonald sent another email to the Council to ask if his request was being dealt with, and asking for a review of any decision to ignore his request.
5. On 12 June 2008, the Council replied to Dr Macdonald by email. It apologised for failing to respond within the statutory deadline in FOISA. It advised Dr Macdonald that under section 3(2) of FOISA, information is held by a Scottish public authority if it is held otherwise than on behalf of another person. The Council explained that correspondence in the possession of the Council in relation to the individual activities of an elected member is deemed not held by the Council on its own behalf, but held on behalf of the individual elected member. Accordingly, in terms of section 17 of FOISA, the Council advised Dr Macdonald that the information he had requested was not held.
6. Dr Macdonald immediately requested a review of this decision (letter of 12 June 2008). He challenged the Council's view that the information he sought was not held by the Council for the purposes of FOISA. His reasons included the following:

the Councillor did not sit on the Board as a private individual or representative of his ward, but was appointed by the Council to serve the whole community of North Lanarkshire and the community of the wider Fire Board area.

- the Councillor acting as a private individual had no right to use Council IT facilities.
- the email correspondence was unlikely to have arisen through matters raised by a constituent, and even if this was the case, information could be redacted to protect the identity of the individual concerned.
- another Council had already released email correspondence from a substitute member of the Board, suggesting a different interpretation of FOISA.

¹ Decision 127/2008 Dr Gordon Macdonald and South Lanarkshire Council



7. On 9 July 2008, the Council notified Dr Macdonald that it had reviewed its response to his request, taking note of the points raised in his letter of 12 June. The Council explained in more detail why any correspondence covered by Dr Macdonald's request would, in its view, not be held by the Council for the purposes of FOISA. It accepted that the equipment on which such information would be held is owned by the Council and made available to elected members to assist them in the conduct of their business as Councillors. However, it argued that the records of emails sent or received are the property of the individual elected member and merely held by the Council on his or her behalf. In support of this position the Council noted that a Councillor is not covered by the Council's Data Protection registration but requires a separate individual registration.
8. The Council agreed that the email facilities made available to elected members should be used by them only in connection with their Council duties, but did not accept that this altered the basis on which the information is held.
9. The Council stated that a Councillor appointed to the Board is, as a member of that Board, entitled to avail himself of the facilities made available by the Council, but is not an agent of the Council: his actions and decisions are those of an individual member of the Board and not of an agent of the Council to which he was elected.
10. On 17 July 2008, Dr Macdonald 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.
11. Dr Macdonald reiterated some of the arguments he had put forward in his request for review, and challenged the Council's argument that the separate registration required for individual Councillors under the DPA should imply that their correspondence is not held by the Council for the purposes of FOISA. Dr Macdonald argued that, when sitting on the Board, the Councillor was acting as a member of at least one public body and therefore any relevant information should be covered by FOISA. He believed the information should be released either by the Board or by the Council, and complained that the Council had neither accepted that it held the information nor approached the Board to ask if the relevant information, if it existed, could be released. Finally, Dr Macdonald complained that the Council had not conducted a full search to establish whether any relevant information existed.
12. The application was validated by establishing that Dr Macdonald 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

13. On 22 July 2008 the investigating officer contacted the Council, providing it with a copy of Dr Macdonald's application to the Commissioner and inviting comments on the application as required by section 49(3)(a) of FOISA.
14. The Council was asked whether it would consider carrying out a search which would establish whether any relevant information existed, regardless of the ownership issues raised in the Council's correspondence with Dr Macdonald: this would allow the Commissioner to address the actual circumstances of the case.
15. The Council agreed to this course of action and on 26 August 2008 sent a letter with details of the search carried out.
16. The Council advised that it was the Councillor's habit to delete his emails on a regular basis, and no emails from before 2008 had been traced in his mailbox folders. The Council had investigated whether it might be possible to retrieve deleted emails, but found that this facility was limited to 30 days, after which the disc space was liable to be overwritten. The Council advised that the disk space occupied by emails sent or received in 2006 would have been overwritten several times by now. The only other potential way in which files from that period could be recovered would be from a previous back-up of data, but the back-up cycle operated by the Council meant that the back-up files held by the Council did not go back far enough.
17. The Council advised that the Councillor clearly recollected he had not had any exchange of emails with the named Councillor from South Lanarkshire.
18. The Council also provided information about the basis on which email facilities are made available to elected members.

Commissioner's analysis and findings

19. The Commissioner accepts that the searches carried out by the Council were sufficient to have identified any relevant information covered by the terms of Dr Macdonald's request. This is to some extent confirmed by other public authorities' failure to find evidence of related correspondence in similar searches².

² See Decision 127/2008 Dr Gordon Macdonald and South Lanarkshire Council and Decision 128/2008 Dr Gordon Macdonald and Strathclyde Fire Board



20. In a previous decision (Decision 132/2006 *John Egan and West Dunbartonshire Council*) the Commissioner has commented on information created or stored on Council systems by Councillors. He said:

“Many councils are likely to hold information on behalf of a councillor. For example, a council may allow a councillor to use its IT system for writing and storing correspondence with and on behalf of constituents. Some councils provide councillors with administrative support.

There do not appear to be any set rules on when a councillor is and is not acting on behalf of a council, although the Councillors’ Code of Conduct from the Standards Commission for Scotland draws a clear distinction between Council duties and party political or campaigning activities. I have taken the view that information relating to a Councillor’s party political activities or constituency business is not held by the Council for the purposes of FOISA; only information relating to activities in which the Councillor is acting on behalf of the Council is covered by the legislation. In coming to this view I have taken account of the Information Commissioner’s guidance on the implications of the Data Protection Act for Councillors. This guidance appears to suggest that that only when the Councillor is acting as a member of the Council (i.e. in pursuance of its corporate functions) are they part of the Council.”

21. Given that no relevant information is held in any sense, the Commissioner does not find it necessary on this occasion to consider in detail the issues of ownership in order to reach a decision on whether the Council complied with FOISA in responding to Dr Macdonald’s request. The Commissioner finds that the Council complied with part 1 of FOISA in advising Dr Macdonald that the information he requested was not held by the Council, in terms of section 17.
22. The Commissioner does not find it necessary to consider, in relation to this decision, whether the type of information requested by Dr Macdonald would have been held by the Council in its own right, on behalf of the Councillor or on behalf of the Board. Such issues are complex in the circumstances of the current case, given the relationships between the parties concerned and the absence of any prior agreement about the status and ownership of the type of information involved.
23. The Commissioner appreciates that his approach leaves some of the questions in Dr Macdonald’s application unanswered at present, but finds that in terms of Dr Macdonald’s right of access to information, as provided in section 1(1) of FOISA, the searches carried out by the public authorities involved in his series of related information requests have provided sufficient evidence to show that the information he asked for is not held, in any capacity, by any of the public authorities.



DECISION

The Commissioner finds that North Lanarkshire Council acted in accordance with Part 1 of the Freedom of Information (Scotland) Act 2002 in responding to the information request made by Dr Gordon Macdonald.

Appeal

Should either Dr Macdonald or the 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 Investigations
30 September 2008



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.

...

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; or

...

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.