

Decision Notice

Decision 208/2017: Dr Ian Graham and Aberdeen City Council

Whether information held by a Scottish public authority

Reference Nos: 201701410, 201701569, 201701570

Decision Date: 12 December 2017



Scottish Information
Commissioner

Summary

The Council was asked for information relating to the provision of Electoral Services for the Returning Officer. The Council stated that it held the information on behalf of the Returning Officer (and therefore did not hold it for the purposes of FOISA).

The Commissioner found that the information was not held by the Council for the purposes of FOISA, being held on behalf of the Returning Officer.

Relevant statutory provisions

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) and (4) (General entitlement); 3(2)(a)(i) (Scottish public authorities); 17(1) (Notice that information is not held)

The full text of each of the statutory provisions cited above is reproduced in Appendix 1 to this decision. Both Appendices form part of this decision.

Background

1. On 7 June 2017 (request 1), 28 June 2017 (request 2) and 14 August 2017 (request 3), Dr Graham made requests for information to Aberdeen City Council (the Council). The information requests are reproduced in Appendix 2.
2. The Council responded to request 1 on 10 July 2017, to request 2 on 24 July 2017 and to request 3 on 23 August 2017. In each case the Council cited section 17(1) of FOISA, on the basis that the information was held on behalf of the Returning Officer and so was not held by the Council for the purposes of FOISA.
3. With regard to request 2, the Council explained that it had (by way of advice and assistance) contacted the Depute Returning Officer, who was willing to provide the framework agreement and the Idox terms and conditions, with a call-off order and information on payments made. This information was provided to Dr Graham.
4. Dr Graham wrote to the Council requesting a review of its decisions on 24 July 2017 (request 2) and 25 August 2017 (requests 1 and 3), on the basis that he did not believe the information was held solely on behalf of the Returning Officer and therefore contended that section 3(2)(a)(i) of FOISA did not apply in these cases. In support of his position, he also argued that:
 - (i) while the legal risk of compliance with election law lay with the Returning Officer, the commercial risk of contracts called off from the framework remained with the Council; and
 - (ii) in some cases at least, the information was subject to the Council's audit and document retention responsibilities.
5. The Council notified Dr Graham of the outcome of its reviews on 31 August 2017 (request 1), 10 August 2017 (request 2) and 31 August 2017 (request 3). The Council upheld its original decision in all three cases.

6. On 2 September 2017 (for requests 1 and 3) and on 14 August 2017 (for request 2), Dr Graham wrote to the Commissioner. In each case, he applied to the Commissioner for a decision in terms of section 47(1) of FOISA, because he was dissatisfied with the outcome of the Council's reviews in relation to his requests 1 (part 2 only), 2 and 3. He believed the information was not held solely on behalf of the Returning Officer but was also held by the Council in its own right (and therefore was held by the Council for the purposes of FOISA).

Investigation

7. The applications were accepted as valid. The Commissioner confirmed that Dr Graham made requests for information to a Scottish public authority and asked the authority to review its responses to those requests before applying to him for a decision.
8. On 3 October 2017 (requests 1 and 3) and 7 September 2017 (request 2) the Council was notified in writing that Dr Graham had made a valid application. The case was allocated to an investigating officer.
9. Section 49(3)(a) of FOISA requires the Commissioner to give public authorities an opportunity to provide comments on an application. The Council was invited to comment on this application and was asked specific questions, with a view to explaining why it did not consider it held the information for the purposes of FOISA.
10. Dr Graham was also invited to provide any comments he wished to make.
11. Both the Council and Dr Graham provided the Commissioner with submissions in support of their respective viewpoints. Given that each party has advanced essentially the same argument for their position across all three applications, the Commissioner has decided that the applications should be conjoined into a single decision.

Commissioner's analysis and findings

12. In coming to a decision on this matter, the Commissioner considered the relevant submissions, or parts of submissions, made to him by both Dr Graham and the Council. He is satisfied that no matter of relevance has been overlooked.

Whether the information is held by the Council

13. 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, subject to qualifications which are not relevant in this case. The information to be given is that held by the authority at the time the request is received. If the authority does not hold the information, it is required to give the applicant notice in writing to that effect (section 17(1) of FOISA).
14. Section 3(2)(a)(i) of FOISA states that if a Scottish public authority holds the information on behalf of another person (e.g. it is present within the authority's premises and systems only because it is held on behalf of that other person), then the information is not held by that authority for the purposes of FOISA. Consequently, if the information requested in any given case is held on behalf of another person, the authority must give the applicant notice under section 17(1) of FOISA.
15. If an authority holds information on behalf of another person, it will not control that information in the same way as it would if it held information in its own right. The authority

would not have the power to delete or amend that information without the owner's consent, nor would it be able to apply its own policies and procedures to it without the owner's consent.

16. In this case, the Council gave notice in terms of section 17(1) of FOISA that it did not hold the requested information, on the basis that it held the information on behalf of the Returning Officer. Dr Graham does not dispute that the Returning Officer is a distinct person in law from the Council.

Dr Graham's submissions

17. In relation to all three of his requests, Dr Graham argued that the information he was seeking was not held solely on behalf of the Returning Officer. He emphasised that his request related to a framework agreement where the Council was the central purchasing authority and to contracts called off the framework by the Council. He was of the view that the call-off contracts being on behalf of the Returning Officer did not remove the need for the information to also be held by the Council in its own right, for contract monitoring and because the Council carried the commercial risk of the contract. In some correspondence, he appeared to question whether the relevant contracts were in fact concluded on behalf of the Returning Officer (or, as the case may be, the Counting Officer).
18. Dr Graham considered the claim that the information was held solely for the Returning Officer to be most tenuous in relation to request 3, given that the information sought related to the VAT treatment of an invoice paid by the Council in relation to a contract between the Council and the service provider.

The Council's submissions

19. The Council's position was that the information requested was held on behalf of the Returning Officer.
20. The Council stated that it was acting as a contracting authority on behalf of the Returning Officer, purchasing election management software and services under a framework agreement. All of these actions were taken on the instructions of the Returning Officer, for the purposes of managing electoral proceedings. Any contracts were concluded on the Returning Officer's behalf (it provided evidence of this) and the Council did not accept that it held any related information independently for records management or audit purposes.
21. The management of election proceedings, the Council continued, was the function of the Returning Officer and not of the Council. It was the Returning Officer's responsibility, under the Representation of the People Act 1983 (the RPA) to ensure that elections were administered effectively, including the conduct of the poll and the processes for counting the votes. Ancillary to these functions, in the Council's view, was the review and maintenance of systems required for the effective conduct of an election, including the maintenance of election software and procedures and of any associated contracts.
22. None of this, the Council argued, was something for which it held any statutory remit. The Council acknowledged that it was required to support the returning officer in the discharge of these functions, but in this regard highlighted the terms of section 25(2) (Returning officers: Scotland) of the RPA:

Every local authority shall place at the disposal of the returning officer for a constituency wholly or partly situated within their area, for the purposes of assisting the returning officer in the discharge of any functions conferred on him in relation to a parliamentary election in that constituency, the services of officers employed by the authority.

It also referred to parallel provisions in the Scottish Independence Referendum Act 2013. There, counting officers (i.e. local returning officers) were required to discharge functions conferred by that Act, under the overall direction of the Chief Counting Officer (responsible for the proper and effective conduct of the Referendum). Section 7(9) (Functions of the Chief Counting Officer and other counting officers) required that:

The council for the local government area for which a counting officer is appointed must provide, or ensure the provision of, such property, staff and services as may be required by the counting officer for the carrying out of the counting officer's functions.

23. In each case, the Council submitted, the Returning or Counting Officer could call on any officer working for the local authority to undertake work in relation to the effective conduct of elections (or, as the case may be, the Referendum). That officer would then be acting at the disposal of the Returning/Counting Officer, discharging the Returning/Counting Officer's functions, and any information relating to the discharge of those functions would be held on behalf of the Returning/Counting Officer. It could identify no known basis on which the functions in question could be considered to be those of the Council.
24. In support of its position, the Council made reference to the Commissioner's *Decision 083/2017: Dr Ian Graham and Aberdeen City Council*¹. There, the Council noted, there was no consideration of any implied use of the word "solely", to which Dr Graham attached some importance. It further noted that section 3(2)(a)(i) makes no reference to this word: as the Commissioner had not sought to import it in the most recent decision on a very similar matter, the Council concluded that there could be no implied "solely" in section 3(2)(a)(i) of FOISA.
25. On being asked by the Commissioner to elaborate on its position regarding any commercial risk involved in election services contracts, the Council confirmed that it would initially bear any commercial risk, as a contracting body acting on behalf of the Returning Officer. However, it reiterated its view that it considered any information held for the purposes of fulfilling the Returning Officer's duties was held on behalf of the Returning Officer and so was not held by the Council for the purposes of FOISA.
26. The Council explained that it was the Returning Officer who was allocated funding for running a poll and maintained insurance for that purpose. Caveats were placed in the name of the Returning Officer, who was personally liable for non-compliance with voting procedures. Should there be a major incident, which incurred commercial risk, the Returning Officer's insurance policies would be used and any costs would be claimed back from Central Government.

The Commissioner's view

27. The Commissioner is satisfied that the Returning Officer is a distinct legal entity, separate from the Council. In this case, he must consider whether the information sought by Dr Graham can properly be said to be held by the Council in its own right, or whether it is information held on behalf of the Returning Officer (and, therefore, by virtue of section 3(2)(a)(i) of FOISA, not information held by the Council for the purposes of FOISA).
28. The Commissioner will not repeat here the conclusions reached by his predecessor as laid out in paragraphs 29 to 31 of Decision 083/2017, other than to confirm that he takes the same view in this case on the underlying issues. The functions under consideration here are

¹ <http://www.itspublicknowledge.info/ApplicationsandDecisions/Decisions/2017/201602319.aspx>

functions of the Returning Officer (or the Counting Officer, again legally distinct from the Council, for the purposes of the 2014 Referendum), with the result that information held for the purposes of these functions will be held on behalf of the Returning (or Counting) Officer.

29. The matter of commercial risk was not an issue explored in the previous case. There are the related issues of whether the contracts in question were concluded on behalf of the Returning Officer (or the Counting Officer) or by the Council in its own right. The Commissioner has considered these questions here.
30. Having considered the submissions provided by Dr Graham and the Council, the Commissioner is satisfied – on the balance of probabilities – that the intention in making and implementing all of these contractual arrangements, and any associated payments, was that the Council was acting on behalf of the Returning Officer (or, insofar as they related to the 2014 Referendum, the Counting Officer). That was clearly the intention of Parliament, there being no provision for the Council performing any of these functions independently, and the Commissioner does not accept that this should be vitiated by any failure to implement the intended position less than perfectly in the actual arrangements which were put in place. Given that the Returning Officer and the Counting Officer were, in practice if not in strict law, one and the same, the Commissioner would consider that conclusion to extend to the absence of any specific arrangements in place for the latter.
31. The Commissioner is therefore of the view that the information sought by Dr Graham was held by the Council on behalf of the Returning Officer (or, insofar as it related to the 2014 Referendum, the Counting Officer). He acknowledges that there might be an argument to be considered if information was not held solely on behalf of another person, but that issue does not arise here. The information was not, and could not be, held by the Council for any other purpose. Any contract monitoring, records management and audit purposes for which it was held could only be ancillary to the primary purpose for which it was held – the conduct of elections by the Returning Officer (or the conduct of the Referendum by the Counting Officer): the Commissioner is not persuaded that the Council would need to hold the information independently for any of the former purposes.
32. The Commissioner appreciates the tenacity with which Dr Graham is pursuing this matter, but he must bear in mind that the Scottish Parliament has not designated Returning Officers as Scottish public authorities for the purposes of FOISA. In relation to the conduct of United Kingdom Parliamentary elections or the 2014 Referendum (and, therefore, in relation to the functions of Counting Officers), it would not be within the Scottish Parliament's powers to do so, these being reserved matters. The Commissioner must, therefore, be wary of finding ways of allowing access to information held for such purposes: doing so would be going beyond the intention (and, to some extent, the competency) of the legislation under which he has been established.
33. In this case, in all the circumstances, the Commissioner must conclude that – by virtue of section 3(2)(a)(i) of FOISA – the requested information is not (and was not, at the time the Council dealt with these requests and requirements for review) held by the Council for the purposes of FOISA. Accordingly, the Commissioner is satisfied that the Council was correct to notify Dr Graham, in line with section 17(1) of FOISA, that it did not hold the information.

Decision

The Commissioner finds that Aberdeen City Council complied with Part 1 of the Freedom of Information (Scotland) Act 2002 in responding to the information requests made by Dr Graham.

Appeal

Should either Dr Graham 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

12 December 2017

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.

...

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.

...

Appendix 2: Information requests

Request 1 made on 7 June 2017

“FOI-16-1614 referred to a contract between 2012 and the current date between Idox and the City Council to supply a service for the management of postal votes in Aberdeen.

I would like to see in relation to this contract(s):

1. any excerpt from the contract terms in place at the time of the 2014 Scottish Independence Referendum specifying any requirement on Idox to provide a service compliant with election laws, statutes and regulations;
2. any documentation describing the workflow for the processing of returned postal ballot packs, including the receipt of postal votes, the checking of postal voting statements and the removal of ballot papers associated with failed PVS, as in place during the 2014 Scottish Independence Referendum;
3. details of the payments made by Aberdeen City Council on behalf of the Counting Officer to Idox for provision of postal vote management services for Aberdeen in the 2014 Scottish Independence Referendum;
4. confirmation whether the contract(s) fall within the oversight of the Accounts Commission/Audit Scotland.”

Request 2 made on 28 June 2017

“On 23/08/2013 Aberdeen City Council published in the European Journal a call for tenders for a four year framework agreement with Aberdeenshire Council for the **Provision of Electoral Services for the Returning Officers** in the two councils’ areas.

I would like to see:

1. Whether the Aberdeen City Returning Officer has been a Contracting Body for any call off contracts against this framework, including details of the election and the lot number;
2. The number of operators listed for Lot 2a;
3. The number of operators listed for Lot 2B;
4. Confirmation of the dates of commencement and termination (or planned termination) of this framework agreement;
5. Confirmation that either Lot 2A or Lot 2B were used by Aberdeen City Council for a call-off contract covering the Scottish Independence Referendum;
6. Whether the mini-competition for the call off contract to supply postal vote management services/postal identifier verification for the Scottish Independence Referendum included both Lot 2A and Lot 2B;
7. The following sections of the Framework Terms and Conditions as applied to call off contracts within this framework in the Scottish Independence Referendum:

- (i) Contract Performance (originally section 3 in T & C published as Appendix to ITT);
 - (ii) Freedom of Information (originally section 21 in T & C published as Appendix to ITT);
8. The Review of Performance for any contracts under lots 2A/2B in the Scottish Independence Referendum.”

Request 3 made on 14 August 2017

“On 26/09/2014 Idox Software Ltd invoiced Aberdeen City Council for £31,890 excl. VAT, £38,268.12 inclusive of VAT, for delivery of Postal Vote Managed Service for the Scottish Independence Referendum (pdf copy of invoice attached)

Can you confirm that this invoice was paid inclusive of VAT?

Can you confirm whether this invoice was classified as a business or non-business expense?

If the invoice was paid inclusive of VAT, can you confirm whether ACC recovered from HMRC the VAT paid on this invoice?

Can you provide me with copies of any discussion within ACC about the handling of VAT on contracts between ACC and Idox Software for provision of postal vote services called off by ACC from the joint procurement framework agreement with Aberdeenshire Council.”

Scottish Information Commissioner

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