

Decision Notice 206/2018

Provision of local election services

Applicant: Mr M

Public authority: Aberdeenshire Council

Case Ref: 201801007



Scottish Information
Commissioner

Summary

The Council was asked for information on the provision of local election services, procured under a local framework agreement.

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). Following an application to the Commissioner, the Commissioner issued a decision on 18 December 2018. He found that the Council did not hold the information for the purposes of FOISA.

The Applicant (Mr M) appealed the Commissioner's decision to the Court of Session. On 3 December 2019, the Court found that the Council did hold the information for the purposes of FOISA and remitted the matter to the Commissioner for reconsideration.

During the subsequent investigation, and in light of the Court of Session Opinion, the Council agreed that it did hold the information for the purposes of FOISA. The Council disclosed this information to Mr M, with personal data redacted.

This decision replaces the decision issued by the Commissioner in December 2018.

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. The Appendix forms part of this decision.

Background

1. On 28 January 2018, the Applicant (Mr M) made a request for information to Aberdeenshire Council (the Council). The request read as follows:

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) *a list of the contracts called off by Aberdeenshire Council from this framework agreement;*
- 2) *for each of these contracts a copy of the order and a copy of the invoice;*
- 3) *confirmation whether Aberdeenshire Council paid the invoice;*
- 4) *if Aberdeenshire Council paid the invoice, whether Aberdeenshire Council reclaimed the input VAT on the invoice.*

2. The Council responded on 20 February 2018, stating that the information requested was held by the Council on behalf of the Returning Officer, and so the Council was deemed not to hold this information in terms of section 3(2)(a)(i) of FOISA. The Council informed Mr M that the Returning Officer was happy to clarify the position for parts 3 and 4 of the request, and provided a response to those parts.
3. On 26 March 2018, Mr M wrote to the Council, requesting a review of its decision on the basis that section 3(2)(a)(i) of FOISA did not apply. He did not believe the information relating to local elections was held by the Council solely on behalf of the Returning Officer. In support of his position, he argued that:
 - The Returning Officer in local elections was a Council Officer, not independent of the Council.
 - It is on this basis that the Council reclaimed VAT on local election expenses.
 - HMRC internal manual VATGPB8680¹ summarised the basis for local authorities reclaiming VAT on local election expenditure: in his view, this indicated that Returning Officers in local elections were Council Officers, not legally separate from Councils, and in reclaiming VAT on local election expenses the Council was concurring with this view.
 - If local election Returning Officers were Council Officers, not separate from the Council, then they were subject to FOISA for activities relating to local elections, which included the part of his request relating to contracts called off from the framework for local elections and local by-elections.
4. The Council notified Mr M of the outcome of its review on 29 March 2018, upholding its original decision. The Council took the view that the information requested would belong to the Returning Officer, who acts independently of the Council when carrying out this distinct and separate role. The Council explained it had obtained the Returning Officer's consent to disclose the information in respect of the VAT position (parts 3 and 4 of the request), in order to be transparent and to provide Mr M with a better understanding of the position. The Council further submitted that the right to reclaim VAT stems from the statutory obligation placed upon it to appoint the Returning Officer in respect of elections: this did not change either the status of the Returning Officer as a distinct and separate role, or the manner in which information held by the Council on behalf of the Returning Officer should be treated in terms of FOISA.
5. On 30 July 2018, Mr M wrote to the Commissioner, applying for a decision in terms of section 47(1) of FOISA. He acknowledged that the office of Returning Officer was a distinct and separate one. Mr M stated he was dissatisfied with the outcome of the Council's review, as he believed that information held in a public authority's accounts must be held for the purposes of FOISA. He provided arguments to support his view that the Council held the information requested, pertaining to local elections, for its own purposes. Mr M believed that if the Council, and not the Returning Officer, recovered the VAT associated with local election expenses, the documents associated with these transactions were held by the Council within its own accounts, and must be held for six years in terms of paragraph 6(3) in Schedule 11 to the Value Added Tax Act 1994² ("the VATA").

¹ <https://www.gov.uk/hmrc-internal-manuals/vat-government-and-public-bodies/vatgpb8680>

² <https://www.legislation.gov.uk/ukpga/1994/23/contents>

6. The Commissioner subsequently issued *Decision 206/2018* on 18 December 2018, finding that the Council had partially failed to respond to the request in accordance with Part 1 of FOISA. While he found that the Council was entitled to inform Mr M that it held some information (relating to part 1 of the request) on behalf of the Returning Officer (and so did not hold that information itself for the purposes of FOISA), he also found that the remainder (relating to parts 2 to 4 of the request) was held by the Council for its own purposes (and was therefore held for the purposes of FOISA).
7. Mr M appealed the decision to the Court of Session under section 56(b)(i) of FOISA. He argued against the Commissioner's finding that the Council did not hold the call-off contracts (sought in part 1 of the request) for the purposes of FOISA.
8. On 3 December 2019, the Court of Session issued its Opinion³, which found that the information sought was clearly held by the Council within the meaning of FOISA. The appeal was allowed and the Commissioner was required to conduct a fresh investigation in respect of part 1 of the request.

Investigation (pre-appeal)

9. The application was accepted as valid. The Commissioner confirmed that Mr M made a request for information to a Scottish public authority and asked the authority to review its response to that request before applying to him for a decision.
10. On 9 August 2018, the Council was notified in writing that Mr M had made a valid application and the case was allocated to an investigating officer.
11. 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 answer specific questions. These focused on the Council's justification for concluding that it did not hold the information for the purposes of FOISA.
12. Both the Council and Mr M provided the Commissioner with submissions in support of their respective viewpoints.
13. During the original investigation, the Council changed its position in respect of the invoices and purchase orders pertaining to local elections (parts 2-4 of the request). The Council accepted that that it held this information for its own purposes (and therefore for the purposes of FOISA). On 12 October 2018 and on 12 November 2018, the Council provided Mr M with this information in respect of contracts called off under the local framework agreement referred to in his information request.

Investigation (post-appeal)

14. During the second investigation (following the issue of the Court of Session Opinion), the Council changed its position in respect of the call-off contracts (part 1 of the request). The Council now no longer sought to rely on section 3(2)(a)(i) of FOISA, accepting that it also held this information for its own purposes (and therefore for the purposes of FOISA). On 20 February 2020, the Council provided Mr M with a list of the contracts called off, as requested in part 1 of the request.

³ <https://www.scotcourts.gov.uk/docs/default-source/cos-general-docs/pdf-docs-for-opinions/2019csih57.pdf?sfvrsn=0>

Commissioner's analysis and findings

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

Whether the information is held by the Council

16. 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).
17. 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 is held on behalf of another person, the authority must give the applicant notice under section 17(1) of FOISA.
18. If an authority holds information on behalf of another person, it will not control that information in the same way as it would if the information was held 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 such consent.
19. In this case, the Council gave notice (in its initial response and review outcome), in line with the requirements in section 17(1) of FOISA, that it did not hold the information requested, on the basis that it was held on behalf of the Returning Officer.

Mr M's submissions

20. In his application to the Commissioner, Mr M accepted the Council's position, set out in its review outcome, that the local election Returning Officer was distinct and separate, but also that the Council had recovered VAT against the invoices pertaining to local election services. On that basis, Mr M argued that if the Council, and not the Returning Officer, recovered the VAT on these invoices, the documents associated with these transactions would be held by the Council within its accounts.
21. Mr M believed that if these transactions were recorded in the Council's accounts, the information requested would have been available in the Council's unaudited accounts, available for public inspection under section 101 of the Local Government (Scotland) Act 1973⁴ ("the LGSA"). In that regard, he contended that the associated invoices, orders and contracts must be held by the Council for six years, in terms of paragraph 6(3) in Schedule 11 to the VATA. On that basis, Mr M believed the information was "held" by the Council for the purposes of FOISA.

⁴ <http://www.legislation.gov.uk/ukpga/1973/65/contents>

22. In his submissions to the Commissioner, Mr M argued that all the information requested (pertaining to local elections) was held statutorily by the Council within its accounts, and that information so held under local government finance legislation, must be held by the Council in terms of FOISA.
23. Mr M informed the Commissioner that the requested information was in the Council's accounts, open for public inspection earlier in 2018 under section 101 of the LGSA. He argued that, in making a VAT reclaim in respect of local election expenses, the Council was asserting that the Returning Officer was a Council Officer. He contended that a reclaim of VAT under section 33 of the VATA had to be made by the Council and could not be made by an independent Returning Officer.
24. Mr M explained he had narrowed his request for review to cover local election information only, on the basis that, if the information existed in the Council's accounts, it must be "held" by the Council (i.e. for its own purposes).
25. Referring to the disclosure of information by the Council on 12 October 2018, Mr M disputed the Council's statement, in that response, that it held the information "for the purposes of reclaiming VAT". In his view, this was a tactical step by the Council to prevent the underlying legal issue being addressed, namely that information that must be held in a Council's accounts under the LGSA and associated tax, finance and public accountability legislation must, therefore, be held by the public authority for the purposes of FOISA.

The Council's submissions – parts 2-4 of the request

26. During the original investigation, the Council changed its position in respect of the invoices and purchase orders pertaining to local elections raised under the call-off contracts in the local framework agreement (part 2 of the request). The Council admitted it failed to take into account the different position regarding local election expenses. It confirmed that it was bound to pay such expenses in terms of section 42(5) and (6) of the Representation of the People Act 1983⁵ ("the 1983 Act") and that it reclaimed the associated VAT in terms of the relevant tax rules.
27. The Council also noted that, on 27 July 2018, Mr M had attended at its offices and had examined the invoices under his rights to inspect the Council's unaudited accounts in terms of section 101 of the LGSA.
28. The Council confirmed that it held the invoices and purchase orders in question for these purposes and that this information was not held by the Council solely on behalf of the Returning Officer. Recognising that this information could have been provided to Mr M at the outset, the Council provided him with the relevant invoices and purchase orders on 12 October 2018 and 12 November 2018, together with an explanation of its change of position and an apology.
29. In respect of parts 3 and 4 of Mr M's request, the Council conceded that its original response could have been managed with a greater degree of transparency. As the information sought in those parts of the request related to the Council's payment of the invoices, and whether it had reclaimed the associated VAT, the Council confirmed that the consent of the Returning Officer would not have been required to provide the information requested. The Council accepted that the statement in its initial response (relating to the Returning Officer's consent to disclosure) was somewhat misleading.

⁵ <http://www.legislation.gov.uk/ukpga/1983/2/contents>

The Commissioner's view – parts 2-4 of the request

30. In respect of the invoices and purchase orders pertaining to local election expenses, the payment of those invoices and the reclaiming of any VAT, the Commissioner notes the Council's change of position, during the original investigation, where it accepted it held this information in its own right for the purposes of FOISA. In respect of that information, the Commissioner can only conclude that the Council was not entitled to inform Mr M that it held this information on behalf of the Returning Officer, and so failed to comply with section 1(1) of FOISA. Given that, during the original investigation, the Council provided Mr M with the information identified as being held by it, he does not require the Council to take any further action in this regard.

The Council's submissions – part 1 of the request

Original investigation

31. During the original investigation, the Council maintained that it did not hold this information (the call-off contracts themselves) in its own right.
32. The Council explained that it appoints the Returning Officer in terms of section 41 of the 1983 Act, who then fulfils this role independently of the Council, as confirmed in various sections within the guidance issued to Returning Officers by the Electoral Commission⁶⁷.
33. Referring to Parts A and B of that guidance, the Council submitted that, while the Returning Officer was accountable for delivering the election within their area, this did not mean they must undertake this alone: they may employ staff and outsource elements of work (e.g. printing of voting slips). This, the Council explained, was permitted both in terms of the 1983 Act and in line with the provisions in the Electoral Commission Guidance, and did not diminish the Returning Officer's accountability or responsibility to deliver the election.
34. The Council argued that the framework agreement referred to in Mr M's request represented the Returning Officer's instructions to the Council to set up a framework and seek tenders for the provision of electoral services. It contended that the relationship between the parties was made clear in the Invitation to Tender Document, which states (in the introductory paragraph) *"Aberdeen City Council is acting as a central purchasing body for the purposes of procuring a number of suppliers to be appointed to a framework agreement to provide electoral services for the Returning Officers of itself and Aberdeenshire Council"*. While this arrangement allowed the Returning Officer to draw on the knowledge and expertise of the Council's procurement staff, the Council submitted that any decisions in terms of the contracts entered into lay with the Returning Officer as part of their duty and accountability to deliver the election.
35. The Council confirmed that, in terms of the framework, while all call-off contracts were handled and signed off by the local authority, the Council was simply acting as a contracting authority for the Returning Officer as a legal entity. The staff involved in signing off these contracts were doing so on behalf of the Returning Officer and not the Council as an authority, as could be seen from the wording of the legislation and the Electoral Commission Guidance documents.

⁶ https://www.electoralcommission.org.uk/_data/assets/pdf_file/0019/214408/SLG-Part-A-Returning-Officer-role-and-responsibilities.pdf

⁷ http://www.electoralcommission.org.uk/_data/assets/pdf_file/0020/214409/SLG-Part-B-Planning-and-organisation.pdf

36. In terms the 1983 Act, the Council acknowledged it was responsible for settling the invoices and, in order to reclaim any associated VAT, it was required to maintain records of these invoices. However, the Council maintained its view that this did not extend to retaining the call-off contracts themselves in respect of the various arrangements, confirming that it did not hold this information. In support of its position, the Council contended that its right to reclaim VAT stemmed from the actual sums paid in terms of section 33 of the VATA, and not from the contract terms. The Council deemed these were solely for the Returning Officer to consider and act on, whether as an individual or through the use of other staff employed by him for that purpose, and this information was not held by the Council.
37. The Council explained that it followed the same process for the payment of invoices for local election expenses, as it did for normal Council expenditure. It confirmed it could not pay an invoice based solely on the existence of the invoice itself. It explained that, in order to be able to pay invoices raised, it was required to hold the invoice alongside proof that the goods or services ordered had been received or delivered. This three-way check verified the invoice against the order and receipt of goods/services and, where all three matched, the invoice would be processed for payment. Any variances would be investigated prior to approving the invoice for payment.

Second investigation

38. As set out above, following the issue of the Court of Session Opinion, the Commissioner undertook a fresh investigation in relation to part 1 of the request. He sought and obtained additional comments from the Council.
39. During the second investigation, the Council noted the Court of Session's decision and confirmed that, while it was disappointed with the decision, it no longer wished to rely on section 3(2)(a)(i) of FOISA for this (or any) part of the request under consideration here.
40. The Council explained that, following thorough searches of its records by both its Finance Section and Elections Team, it had been unable to trace the call-off contracts. The Council understood, from the wording of part 1 of the request, that Mr M required a list of the contracts called off which, the Council believed, could be ascertained from the information already disclosed (for part 2 of the request).
41. The Council further submitted that, despite the decision of the Court of Session, it took the view that no assumption could be made that it would disclose all information relating to election expenditure, and this would be assessed on a case-by-case basis in line with legislation.
42. Noting that, in the course of searches being carried out in relation to a separate investigation for a similar request, the Council had identified a call-off contract for a local election, the Investigating Officer queried this with the Council and asked it to provide full submissions on the searches carried out which led the Council to conclude that the call-off contracts were not held.
43. In response, the Council described the searches carried out to identify the information falling within part 1 of the request. It submitted that, upon receipt, the Council assessed the request and contacted the relevant teams that would potentially hold the information sought, namely:
 - Commercial and Procurement Shared Services (CP&SS) – due to involvement in setting up the framework and specialist knowledge of the procurement process.
 - Finance – due to knowledge of handling and processing the invoices.

- Elections Team – due to role in the administration of these elections on behalf of the Returning Officer.
44. The Council explained that these teams carried out searches for the information which included a search for the contracts themselves, to compile the list sought in part 1, and the corresponding purchase orders requested in part 2:
- The CP&SS Team searched its records but held no contracts, invoices or purchase orders, only the framework and initial paperwork. This was not a concern to the Council given that Team's minimal (if any) involvement in the administration of the elections.
 - While the Finance and Election Teams carried out separate searches, there was some collaborative working. The Finance Team ran a "payables ledger report" for the cost centres allocated to "elections", the results of which were used to conduct searches for the relevant invoices using "invoice number" and "supplier name". Those identified were extracted and detailed on a table. A "purchase order ledger report" was also run, using appropriate references allocated to the suppliers identified, following which the purchase orders and invoices identified were matched and added to the table, and any purchase orders identified were extracted.
 - The Elections Team also conducted searches of its records, including a check of all ledgers and claim forms relating to the relevant elections, checks of emails sent to and received from suppliers, the election co-ordinator and the Finance Team, and a search of the Council's ORACLE system to find the purchase orders identified. This information was then extracted and details added to the table.
45. The Council confirmed these searches were repeated following receipt of Mr M's appeal, concluding that a comprehensive search of its records had been carried out.
46. In relation to the call-off contracts themselves, the Council clarified that it was not saying these never existed, but that, following a thorough search of records by the relevant teams, it no longer held these documents, and was unable to confirm why they had not been retained. This, the Council submitted, was with the exception of the call-off contract traced during the separate investigation for a similar request (referred to above).
47. The Council reiterated that, as part 1 of the request did not seek copies of documents, but rather a "list" of the contracts called off, it took the view that the table and the information previously disclosed in this case satisfied part 1 of the request.
48. On 20 February 2020, the Council disclosed to Mr M the information previously released to him (for part 2 of the request), along with the table of information updated to include additional information in respect of the contracts which were called-off.

The Commissioner's view – part 1 of the request

49. Under section 1(4) of FOISA, the information to be provided in response to a request under section 1(1) is that falling within the scope of the request and held by the authority at the time the request is received.
50. The standard of proof to determine whether a Scottish public authority holds information is the civil standard of the balance of probabilities. In determining where the balance of probabilities lies, the Commissioner considers the scope, quality, thoroughness and results of the searches carried out by the public authority. He also considers, where appropriate, any reason offered by the public authority to explain why it does not hold the information.

51. Having considered all the relevant submissions and the terms of the request, the Commissioner is satisfied that, by the end of the second investigation, the Council had taken adequate, proportionate steps to establish the extent of information held that was relevant to part 1 of the request. This was not something the Commissioner was in a position to comment on at the end of the previous investigation, given his acceptance of section 3(2)(a)(i) of FOISA for part 1 of the request, at that point.
52. The Commissioner accepts the Council's final position on what it did and did not hold for part 1.
53. The Commissioner is also satisfied that the information listed in the table, compiled by the Council, satisfies part 1 of the request, given this seeks a "list" of the contracts called-off.
54. In respect of the list of call-off contracts pertaining to local elections, the Commissioner notes the Council's change of position, during the second investigation, where it accepted it held this information in its own right for the purposes of FOISA. In respect of that information, the Commissioner can only conclude that the Council was not entitled to inform Mr M that it held this information on behalf of the Returning Officer, and so failed to comply with section 1(1) of FOISA. Given that, during the second investigation, the Council provided Mr M with the information identified as being held by it, he does not require the Council to take any further action in this regard.

Decision

The Commissioner finds that Aberdeenshire Council (the Council) failed to comply with Part 1 of the Freedom of Information (Scotland) Act 2002 in responding to the information request made by Mr M in terms of section 1(1).

Given that the Council has disclosed the information to Mr M, the Commissioner does not require the Council to take any action in response to this failure.

Appeal

Should either Mr M 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.

Daren Fitzhenry
Scottish Information Commissioner

17 September 2020

Appendix 1: 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.

...

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 Mr M notice in writing that it does not hold it.

...

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