

# Decision Notice

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**Decision 206/2018: Mr M and Aberdeenshire Council**

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**Provision of local election services**

Reference No: 201801007

Decision Date: 18 December 2018



Scottish Information  
Commissioner

## Summary

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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).

The applicant remained dissatisfied and applied to the Commissioner for a decision.

During the investigation, the Council changed its position and agreed it held some information for its own purposes, but not the remainder, which it still maintained it held on behalf of the Returning Officer. The Commissioner agreed and found that the Council had partially failed to respond to the request in accordance with Part 1 of FOISA. He did not require the Council to take any action.

## Relevant statutory provisions

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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

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1. On 28 January 2018, 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 VATGPB8680<sup>1</sup> 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 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. Mr M provided arguments to support his view that the Council held the information requested, pertaining to local elections, for its own purposes. He 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 1994<sup>2</sup> ("the VATA").

## Investigation

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6. 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.
7. 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.

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

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

8. 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.
9. Both the Council and Mr M provided the Commissioner with submissions in support of their respective viewpoints.
10. During the investigation, the Council changed its position in respect of the invoices and purchase orders pertaining to local elections (parts 2-4 of Mr M's request). The Council now 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.

## **Commissioner's analysis and findings**

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11. 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**

12. 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).
13. 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.
14. 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.
15. 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*

16. 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.

17. 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 1973<sup>3</sup> ("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.
18. 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.
19. 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.
20. 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).
21. 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*

22. During the 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 1983<sup>4</sup> ("the 1983 Act") and that it reclaimed the associated VAT in terms of the relevant tax rules.
23. 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.
24. 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

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<sup>3</sup> <http://www.legislation.gov.uk/ukpga/1973/65/contents>

<sup>4</sup> <http://www.legislation.gov.uk/ukpga/1983/2/contents>

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.

25. 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.
26. In respect of the call-off contracts themselves (part 1 of the request), the Council maintained that it did not hold this information in its own right.
27. 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 Commission<sup>56</sup>.
28. 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.
29. 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.
30. 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.
31. 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

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<sup>5</sup> [https://www.electoralcommission.org.uk/\\_data/assets/pdf\\_file/0019/214408/SLG-Part-A-Returning-Officer-role-and-responsibilities.pdf](https://www.electoralcommission.org.uk/_data/assets/pdf_file/0019/214408/SLG-Part-A-Returning-Officer-role-and-responsibilities.pdf)

<sup>6</sup> [http://www.electoralcommission.org.uk/\\_data/assets/pdf\\_file/0020/214409/SLG-Part-B-Planning-and-organisation.pdf](http://www.electoralcommission.org.uk/_data/assets/pdf_file/0020/214409/SLG-Part-B-Planning-and-organisation.pdf)

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.

32. 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.

#### *The Commissioner's view*

33. As in previous Commissioner's decisions which considered information held by the Council on behalf of the Returning Officer - namely *Decision 083/2017: Dr Ian Graham and Aberdeen City Council*<sup>7</sup> and *Decision 208/2017: Dr Ian Graham and Aberdeen City Council*<sup>8</sup> - 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 Mr M 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).
34. 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 investigation, where it now accepts it holds 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 investigation, the Council provided Mr M with the information now identified as being held by it, he does not require the Council to take any further action in this regard.
35. In respect of the remaining information (the call-off contracts), the Commissioner has considered all of the submissions provided by Mr M and the Council, including the legislation referred to therein and the Electoral Commission guidance.
36. The Commissioner has taken account of section 41(1) and (2) of the 1983 Act, relating to Returning Officers in Scottish local elections. This provides that every local authority in Scotland shall appoint one of its officers to be the Returning Officer for local Council elections, and that the Returning Officer may appoint one or more persons to discharge all or any of his functions.

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<sup>7</sup> <http://www.itspublicknowledge.info/ApplicationsandDecisions/Decisions/2017/201602319.aspx>

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[http://www.itspublicknowledge.info/ApplicationsandDecisions/Decisions/2017/201701410\\_201701569\\_201701570.aspx](http://www.itspublicknowledge.info/ApplicationsandDecisions/Decisions/2017/201701410_201701569_201701570.aspx)

37. The Commissioner has also taken account of section 3 of the Electoral Commission's published Guidance for Returning Officers for Council Elections in Scotland on 4 May 2017, in particular Part A – Returning Officer role and responsibilities. Section 3 reflects the provisions set out in section 41(1) and (2) of the 1983 Act and goes on to state, in section 3.6, that:
- Your duties as RO are separate from your duties as a council officer. As RO you are not responsible to the Council but are directly accountable to the courts as an independent statutory office holder.*
38. In the Commissioner's view, this endorses the Council's position that, in respect of their responsibility for delivering local elections, the Returning Officer fulfils that role independently of the Council, and in doing so they may employ staff and/or outsource aspects of that function.
39. Section 5 of Part B – Planning and organisation – of the Electoral Commission guidance for the Scottish 2017 local elections covers the management of contractors and suppliers. This section provides that Returning Officers can outsource particular work required to deliver the election, but not the responsibility for ensuring compliance with the legislation. It gives advice on procurement procedures, suggesting Returning Officers take advice from relevant local authority staff on such matters and document all stages of the procurement process.
40. The Electoral Commission has also published a "Contract development and management checklist for Returning Officers"<sup>9</sup>, which sets out the key points to be considered by Returning Officers during procurement procedures.
41. The Commissioner has also taken cognisance of the introductory paragraph in the Invitation to Tender document for the framework agreement, which sets out that Aberdeen City Council was acting as a central purchasing body for the purposes of procuring a number of suppliers to provide electoral services for the Returning Officers of both councils.
42. In the Commissioner's view, all of these provisions and points clearly indicate that procurement for local authority elections is a function of the Returning Officer, and not of the local authority. The Commissioner can see nothing therein that infers that the local authority would have any requirement to hold records pertaining to procurement or contracts for local authority elections, for its own purposes. It is clear that Returning Officers in local authority elections are independent of Councils, and are not themselves subject to FOISA.
43. That said, the Commissioner has taken cognisance of the provisions in section 42 of the 1983 Act, which provide that:
- All expenditure properly incurred by a returning officer in relation to the holding of an election of a councillor to a local authority shall be paid by the council of that authority, but only (in cases where there is a scale fixed for the purposes of this section by that council) in so far as it does not exceed that scale. (Section 42(5))*
- Before a poll is taken at an election for a councillor for a local government area in Scotland, the council for that area shall, at the request of the returning officer or of any person acting as returning officer, advance to him such reasonable sum in respect of his expenses at the election as he may require. (Section 42(6))*

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<sup>9</sup> [http://www.electoralcommission.org.uk/\\_data/assets/pdf\\_file/0004/141718/Contract-development-checklist-generic.pdf](http://www.electoralcommission.org.uk/_data/assets/pdf_file/0004/141718/Contract-development-checklist-generic.pdf)

44. In the Commissioner's view, these provisions clearly indicate that Councils are required to pay expenses incurred in respect of local elections. Given that requirement, the Commissioner considers that Councils would have to hold the necessary information required to enable them to make such payments (including the reclaiming of any VAT). The Council has provided clear explanation of the level of information it requires to hold to enable it to do so, which extends to purchase orders, proof of receipt of goods and services, and invoices. It is clear, from the Council's submissions, that it has no requirement to hold the call-off contracts themselves to allow these payments to be effected.
45. Turning to the explanation provided by the Council when disclosing information to Mr M on 12 October 2018, the Commissioner considers it unfortunate that the Council told Mr M that it held the invoices "for the purpose of reclaiming VAT". Regardless of whether the Council reclaims VAT or not, it is evident to the Commissioner that the Council requires to hold a certain level of information (including the invoices themselves) to allow it to pay the invoices for local election expenses.
46. The Commissioner therefore concludes that, by virtue of section 3(2)(a)(i) of FOISA, the Council does not (and did not, at the time it responded to Mr M's information request and requirement for review) hold the call-off contracts for the purposes of FOISA, and that it held these on behalf of the Returning Officer. Accordingly, the Commissioner is satisfied that the Council was correct to notify Mr M, in line with the requirements in section 17(1) of FOISA, that it did not hold this information (i.e. the call-off contracts).

## Decision

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The Commissioner finds that Aberdeenshire 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 Mr M.

The Commissioner finds that the Council was entitled to inform Mr M that it held some information on behalf of the Returning Officer, and so did not hold that information itself for the purposes of FOISA. In this regard, the Council complied with Part 1.

However, the Commissioner finds that the Council was not entitled to inform Mr M that it held the remainder of the information on behalf of the Returning Officer, and that this information was held by the Council for its own purposes (and therefore was held for the purposes of FOISA). In this respect, the Council failed to comply with section 1(1) of FOISA.

Given that, during the investigation, the Council disclosed to Mr M the information it identified as being held for its own purposes, the Commissioner does not require the Council to take any action in respect of this failure, in response to Mr M's application.

## **Appeal**

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Should either Mr M or Aberdeenshire 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**

**18 December 2018**

### 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.

...

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