

Decision Notice

Decision 083/2017: Dr Ian Graham and Aberdeen City Council

Postal vote opening procedures

Reference No: 201602319

Decision Date: 24 May 2017



Scottish Information
Commissioner

Summary

The Council was asked about the opening of postal vote ballot papers. The Council refused the request on the basis that any information it held was held on behalf of the Returning Officer rather than in its own right. The Commissioner accepted that the Returning Officer was a separate entity from the Council. This meant that the Council did not hold the information for the purposes of FOISA.

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.

All references to “the Commissioner” in this decision are to Margaret Keyse, who has been appointed by the Scottish Parliamentary Corporate Body to discharge the functions of the Commissioner under section 42(8) of FOISA.

Background

1. On 3 November 2016, Dr Graham made a request for information to Aberdeen City Council (the Council). The information requested related to a message sent to Scottish Returning Officers by the Electoral Management Board concerning possible non-compliance with regulations 85A and 86 of the Representation of the People (Scotland) Regulations 2001 (the 2001 Regulations). These provisions concern the opening of postal votes.
2. The information requested was as follows:
“... details of any action taken within Aberdeen Council’s Election Unit or the office of the Chief Executive in response to this communication from EMB of 14th September, and in response to any other related communications concerning RPR 2001 non-compliance, including any plans or actions to amend postal vote opening procedures, any plans or actions to modify the IT system used at postal vote openings, and any communications between the Council and the suppliers of postal vote management software/services.”
3. The Council responded on 16 November 2016, informing Dr Graham that it did not hold the information requested. The Council explained that the information was held by the Returning Officer rather than the Council.
4. On 16 November 2016, Dr Graham wrote to the Council requesting a review of its decision. In his view, reviewing systems and procedures between elections was not a responsibility of Returning Officers. If the information did not relate to the legally defined responsibilities of the Returning Officer, in his view, it was held by the Council.
5. The Council notified Dr Graham of the outcome of its review on 5 December 2016. The Council upheld its original decision without modification.
6. On 21 December 2016, Dr Graham wrote to the Commissioner. He applied to the Commissioner for a decision in terms of section 47(1) of FOISA. Dr Graham stated he was

dissatisfied with the outcome of the Council's review as he considered the information requested was held by the Council rather than the Returning Officer.

Investigation

7. The application was accepted as valid. The Commissioner confirmed that Dr Graham made a request for information to a Scottish public authority and asked the authority to review its response to that request before applying to her for a decision.
8. On 31 January 2017, the Council was notified in writing that Dr Graham had made a valid application. The case was then 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 answer specific questions, relating to the role of the Council's Election unit and the reasons why Dr Graham believed the information to be held by the Council.
10. The Council responded, further explaining why it had concluded it did not hold the information requested.

Commissioner's analysis and findings

11. In coming to a decision on this matter, the Commissioner considered all of the relevant submissions, or parts of submissions, made to her by both Dr Graham and the Council. She 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, 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.
14. In this case, the Council gave notice in terms of section 17(1) of FOISA that it did not hold the requested information, in its initial response to Dr Graham on 16 November 2016.
15. The word "held", in relation to information requested under FOISA, has a specific meaning in section 3(2)(a)(i) of FOISA. When information is present within a Scottish public authority's premises and systems only because it is held on behalf of another person (in the legal sense, i.e. including another organisation), that information is not held by the authority itself for the purposes of FOISA.
16. If an authority holds information on behalf of another person or organisation, 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.

Dr Graham's submissions

17. In his requirement for review to the Council on 16 November 2016, Dr Graham stated that Schedule 1 to the Representation of the People Act 1983 (the 1983 Act) specified the roles and the responsibilities of Returning Officers. He further stated that reviewing the system and procedures between elections was not defined as a responsibility of the Returning Officer. Therefore, in his view, neither the Returning Officer nor the Council could claim that the requested information was held solely in relation to the Returning Officer's responsibilities as Returning Officer.
18. Also in his requirement for review, Dr Graham contended that, given the lack of a legislatively defined responsibility for the Returning Officer, the maintenance of election software and election procedures was a responsibility of the Election Unit (of the Council). In his view, this was then provided as a service to the Returning Officer during the period of an election.
19. Dr Graham further submitted that any information held by the Council's Chief Executive or Election Unit which was not held as part of the legally defined responsibilities of the Returning Officer was subject to FOISA.
20. In his application to the Commissioner, Dr Graham submitted that his request related to a contract between the Council and a service supplier, so could not be held solely for the Returning Officer. In his view, there was a clear public interest in electors knowing whether election management in Aberdeen was compliant with statute and, if not, what actions had been taken by the Council to rectify this.

The Council's submissions

21. In this case, the Council's position is that the information requested is held by the Returning Officer, or otherwise held by the Council on behalf of the Returning Officer in terms of section 3(2)(a)(i) of FOISA.
22. The Council referred to regulations 85A and 86 of the 2001 Regulations. The Council noted that these place duties on the Returning Officer in relation to postal voting statements, personal identifier verification and the opening of ballot papers.
23. The Council referred also to section 63 of the 1983 Act (Breach of official duty). The Council submitted that these provisions were such that, if there was non-compliance with postal vote opening procedures, the Returning Officer would be personally liable under section 63.
24. The Council submitted also that the Returning Officer had a general duty to review systems and processes between elections. The Council submitted that this included the maintenance of election software and procedures. In the Council's view, its officers carrying out work in connection with this duty were acting in the role of Deputy Returning Officers.
25. The Council argued that the 1983 Act did not contain an exhaustive list of the Returning Officer's duties. It also referred to the standards expected of Returning Officers in connection with the administration of elections, as set by the Electoral Commission under the Political Parties, Elections and Referendums Act 2000, which included evaluating the conduct of elections and to identifying any improvements for future electoral events.
26. The Council submitted that any election management software and services was purchased to fulfil the responsibilities of the Returning Officer and any information held in this respect (by the Council) was held on behalf of the Returning Officer.

The Commissioner's view

27. The Commissioner has considered carefully the submissions provided by Dr Graham and the Council.
28. The Commissioner acknowledges that the Returning Officer is a distinct legal entity, separate from the Council. In this case, she must consider whether the information sought by Dr Graham can properly be said to be held by the Council in its own right. If not, it would be information held on behalf of the Returning Officer and, therefore, by virtue of section 3(2)(a)(i), would not be information held by the Council for the purposes of FOISA.
29. The Commissioner notes Dr Graham's position that the Returning Officer's responsibilities are specified within Schedule 1 to the 1983 Act and his view that the specific topic which is the subject of his request for information is not contained therein. She also notes the Council's view that the 1983 Act does not contain an exhaustive list of these responsibilities.
30. The Commissioner notes that it is the Returning Officer's responsibility to ensure that elections are administered effectively. This includes the conduct of the poll and the process of counting the votes. It would not be unreasonable to regard the review and maintenance of systems and procedures required for the effective conduct of an election (include ensuring that electronic vote counting software is fit for purpose) as ancillary to these functions. In any event, it is not for the Commissioner to determine definitively whether the Returning Officer is acting within his or her statutory powers: if he or she is not, it does not follow that a Scottish public authority providing services understood to be in support of the Returning Officer's functions will automatically fall to hold information relating to those services.
31. In the Commissioner's view, the information requested by Dr Graham relates wholly to the management of elections. She is unaware of any basis on which that can be considered to be the function of the Council, except in support of the Returning Officer. Consequently, she is satisfied that the information can only be held by the Council on behalf of the Returning Officer.
32. The Commissioner must therefore conclude that, by virtue of section 3(2)(a)(i) of FOISA, the information is not held by the Council for the purposes of FOISA.
33. As the Commissioner is satisfied that the Council does not (and did not, at the time it dealt with the request and requirement for review) hold any information falling within the scope of Dr Graham's request, she has concluded that it was correct to notify Dr Graham, in line with section 17(1) of FOISA, that it did not hold the information requested.

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 request made by Dr Graham.

Appeal

Should either Dr Graham or Aberdeen City 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
Acting Scottish Information Commissioner

24 May 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.

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