

Decision Notice 129/2020

Provision of election services

Applicant: The Applicant

Public authority: Aberdeenshire Council

Case Ref: 201900936



Scottish Information
Commissioner

Summary

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

The Council stated that it held the information on behalf of the Returning Officer or Counting Officer (and therefore did not hold it for the purposes of FOISA).

During the Commissioner's investigation (following a decision in the Court of Session on a related case), the Council changed its position, and agreed that it did hold the information on its own behalf. The Council disclosed this information to the Applicant, with some personal data redacted.

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 20 October 2018, the Applicant made a request for information to Aberdeenshire Council (the Council). The request read as follows:

This request repeats part of a request I submitted earlier which the Council refused and I did not request a review of because I was not certain that the requested information was in the Council's accounts as defined by section 96 of the Local Government (Scotland) Act 1973. I now know that the requested information is in the Council's accounts.

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 for Westminster elections, Scottish Parliament elections, the Scottish independence referendum and the EU referendum:

- 1) *a list of the contracts called off by Aberdeenshire Council from this framework agreement, including the contractor and the services supplied;*
- 2) *for each of these contracts a copy of the order and a copy of the invoice.*

I am claiming that the information requested is held in the Council's accounts as defined by section 96 of the Local Government (Scotland) Act 1973 and so is therefore held in terms of section 3(2) of the Freedom of Information (Scotland) Act 2002.

2. The Council responded on 19 November 2018, stating that the information requested was held by the Council on behalf of the Returning Officer / Counting Officer (RO/CO), and so in terms of section 3(2)(a)(i) of FOISA, the Council did not hold the information.

3. The Council stated that the RO/CO were distinct legal entities to the Council and elections fell outwith the Council's statutory remit. The Council explained that the framework in question (where the Council acted as the RO/CO's contracting authority) was entered into by the RO/CO to procure services relating to the management and delivery of elections and referenda, which fell within the RO/CO's statutory functions. While the Council had a duty to provide support to the RO/CO in delivering their statutory functions, in doing so Council staff acted on behalf of the RO/CO, discharging election (not Council) functions. Any corresponding information relating to the delivery of elections was therefore held by the RO/CO and not by the Council.
4. On 28 December 2018, the Applicant 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 that the information requested, relating to elections and referenda, was held by the Council solely on behalf of the RO/CO.
5. To support his view, he submitted a number of arguments, including:
 - The RO/CO is not a contracting authority as defined by regulation 3¹ of the Public Contracts (Scotland) Regulations 2012 (PC(S)R 2012), and so is not eligible to be the principal in a call-off contract from a public procurement framework.
 - The published terms and conditions assigned no legal rights or obligations to any RO/CO. They do not mention any RO/CO but make reference to the supply being to a Council, not to the RO/CO.
 - The Council is the contract principal on whose behalf call-off contracts are signed. The specimen order form defines the customer as the Council as principal, not the RO/CO, and it is the Council that places the order, receives the services and accepts and pays the invoices.
 - As principal, any alleged contract breach would require the Council to have access to the information, therefore it is held by the Council not only to support the RO/CO, but also to defend the Council's legal position as contract principal.
 - While the Council will supply the RO/CO with copies of invoices to allow him to reclaim expenditure, the orders and invoices are owned by the Council, held within its accounting system, and held due to the requirements of the Council's financial records retention policy.
 - An inspection (by the Applicant) of the purchase ledger for the 2017 General Election in Aberdeenshire showed General Election expenditure incurred and reimbursed by the Council.
6. The Council notified the Applicant of the outcome of its review on 28 January 2019, fully upholding its original decision.
7. On 6 June 2019, the Applicant wrote to the Commissioner, applying for a decision in terms of section 47(1) of FOISA. The Applicant stated he was dissatisfied with the outcome of the Council's review of 28 January 2019. The Applicant believed that the information held within the Council's statutory accounts to comply with financial regulations and records retention schedules was held by the Council.

¹ <http://www.legislation.gov.uk/ssi/2012/88/regulation/3/made>

Investigation

8. The application was accepted as valid. The Commissioner confirmed that the Applicant 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.
9. On 18 July 2019, the Council was notified in writing that the Applicant had made a valid application and the case was allocated to an investigating officer.
10. 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 to answer specific questions. These focussed on the Council's justification for concluding that it did not hold the information for the purposes of FOISA.
11. Both the Council and the Applicant provided the Commissioner with submissions in support of their respective viewpoints.
12. Also relevant to this case is the Commissioner's *Decision 206/2018*² which considers a similar request for information. This decision was appealed to the Court of Session on a point of law.
13. In light of the similarity between the appeal to the Court of Session and the present application (both related to the proper interpretation of section 3(2)(a)(i) of FOISA in the context of a local authority and a Returning Officer), the present application (relating to the request of 28 October 2018 for call-off contract information concerning specific elections and referenda) was sisted by the Commissioner to await the decision of the Court of Session.
14. On 3 December 2019, the Court of Session issued its Opinion³ in the appeal against *Decision 206/2018*. The Court upheld the appeal, finding that Aberdeenshire Council did hold the information for which it had cited section 3(2)(a)(i) of FOISA. The Court remitted that case back to the Commissioner for further consideration.
15. The investigating officer contacted the Council on 11 December 2019 and drew its attention to the Court of Session's Opinion. The Council was invited to comment and answer specific questions, including justifying its reliance on any provisions of FOISA it considered applicable to the information requested.
16. On 15 January 2020, the Council informed the Commissioner that while it remained of the view that there was merit in the position it had previously adopted, it confirmed that, given the Opinion of the Court of Session, it no longer wished to rely on section 3(2)(a)(i) of FOISA.
17. Subsequently, on 20 and 21 February 2020, the Council disclosed to the Applicant the information it held which fell within the scope of the request, with the redaction of some personal data in terms of section 38(1)(b) (Personal information) of FOISA.
18. The Applicant confirmed receipt of the information, and confirmed he had no dissatisfaction in respect of the redaction of the personal data.

² <http://www.itspublicknowledge.info/ApplicationsandDecisions/Decisions/2018/201801007.aspx>

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

19. 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 the Applicant and the Council. He is satisfied that no matter of relevance has been overlooked.

Whether the information was held by the Council

20. As stated above, following consideration of the Court of Session Opinion, the Council accepted that it held the information requested by the Council for the purposes of FOISA. The Council supplied the information to the Applicant, subject to the redaction of personal data.
21. The Commissioner finds that the Council was wrong to state that it did not hold the information requested at the time of the Applicant's request. In reaching this finding, the Commissioner acknowledges that the view initially taken by the Council reflected the view of the Commissioner in *Decision 206/2018* and others, but which the Court of Session subsequently found to be incorrect.

Information held

22. In order to ascertain whether all relevant information had been identified, the Council was asked to explain the steps it took to establish what information it held and which fell within the terms of the Applicant's request. The Council described the searches carried out to identify the information falling within scope.
23. The Council submitted that, upon receipt, the Council assessed the request and discussed it with the relevant teams, 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 these invoices.
 - Elections Team – due to role in the administration of these elections on behalf of the RO/CO.
24. The Council explained that these teams carried out their own searches for the information which included seeking copies of the contracts in question, in order to compile the list sought in Part 1 of the request, and to identify and locate copies of the invoices and purchase orders requested in Part 2:
- The CP&SS Team checked records held in respect of the framework and confirmed it held no information concerning the contracts, invoices or purchase orders, only the Framework Agreement. This was not a concern to the Council given that Team's minimal involvement (if any) 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 the table. A "purchase order ledger report" was also run, using appropriate references allocated to the suppliers, following which the invoices identified were matched to the purchase orders, which were then extracted and detailed on the table.

- At the same time, this information was passed to the Elections Team who took this into account in its searches. It conducted checks of all ledgers and claim forms submitted by the RO/CO to the Cabinet Office/Scottish Government, checks of emails sent and received to suppliers, election co-ordinators and the Finance Team, and a search of the Council's ORACLE system using the details found to obtain copies of the purchase orders raised, following which the information was extracted and added to the table.
25. The Council explained that all relevant invoices and purchase orders were identified, and any available and not in storage were scanned.
 26. Along with copies of the documents retrieved, the Council provided the Commissioner with a table listing the information identified relevant to the request, which had been compiled following a full and thorough search of its financial records, and those held by its Election Team for each election. The Council took the view that the table fulfilled Part 1 of the request, as it provided a list of the contracts called-off under the framework, together with details of the supplier and the products/services procured to support delivery of the elections.
 27. For Part 2 of the request, the Council took the view that the Applicant was simply seeking copy documentation which, it believed, he had no entitlement to under FOISA. The Council's position was that the relevant information in these documents had been included in the table it had compiled. As such, the Council believed there was no requirement to provide copies of the actual documents, and the information in the table fulfilled Part 2 of the request.
 28. On examination of the information identified by the Council, it appeared to the Investigating Officer to be incomplete: one invoice and some purchase orders were listed as not having been traced, and other purchase orders listed plus one call-off contract had not been included in the information provided. The Council was asked to explain the actions/searches carried out which led to this conclusion, and to confirm whether it held signed copies of the call-offs.
 29. The Council submitted that, during the investigation, these searches were repeated and the missing invoice was located, which had been misfiled. For the missing purchase orders, the Council explained that further examination had established the following:
 - (i) For certain invoices relating to the UK General Election 2017, separate purchase orders had not been raised for each invoice and the expenditure was included under one purchase order, a copy of which had already been provided. The Council also identified the remaining missing purchase order for this election. The Council updated the table and provided the relevant documentation, apologising for this oversight.
 - (ii) For other invoices (where no purchase order was detailed in the table), further checks identified that no record was held of purchase orders having been raised, and so the Council did not hold the information. The Council submitted that a lack of a purchase order would not have prevented payment being made following receipt of the invoices and goods/services, although it recognised that this was not best practice at that time and in line with its financial regulations.
 30. The Council confirmed it had been unable to trace a call-off contract relating to the UK General Election 2017, or any signed copies of the call-off contracts. It submitted it held no information explaining why these documents had not been retained, acknowledging this would have been best practice.

31. For the missing purchase orders identified but not previously provided, the Council subsequently provided the Commissioner with copies of these, apologising for this error.

Commissioner's conclusions on the information held

32. 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.
33. 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.
34. Having considered all the relevant submissions and the terms of the request, the Commissioner is satisfied that, by the end of the investigation, the Council had taken adequate, proportionate steps to establish the extent of information held that was relevant to the request.
35. The Commissioner accepts the Council's final position on what it did and did not hold. He is satisfied that the Council has sufficiently explained why it did not hold all of the information falling within the scope of the request.
36. 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, including the contractor and the services supplied.
37. The Commissioner notes the Council's position that, while it agreed to disclose to the Applicant copies of the invoices and purchase orders sought in Part 2 of the request, it did not believe it was under any requirement to provide copies of these documents, as the obligation under FOISA was on provision of *information*.
38. The Commissioner would comment that, while there is no obligation on authorities to provide copies of documents, doing so is commonly the easiest way to provide the information requested. Paragraph 17 of the Commissioner's guidance on "Information or Documents"⁴ advises:
- "...where a requester has asked for a copy of a document and it is reasonably clear that it is the information recorded in the document which the requester wants, the public authority should respond to the request as a request properly made under FOISA".*
39. Given the request here clearly explained it was seeking purchase orders and invoices relating to particular call-off contracts, which the Council was relatively easily able to identify, it was, in the Commissioner's view, evident that that the request sufficiently described the information being sought.

⁴ http://itspublicknowledge.info/Law/FOISA-EIRsGuidance/Information_or_documents/Information_or_documents.aspx

40. Notwithstanding the above, the Commissioner notes that in response to an earlier information request seeking the same information for local council elections (which was the subject of the Court of Session Opinion referred to above), the Council disclosed redacted copies of the relevant purchase orders and invoices. Given the similarity of both requests, the Commissioner does not consider it unreasonable to expect that the Council would have taken the same position in relation to disclosure of the purchase orders and invoices requested in this case.
41. The Commissioner is concerned, however, that it took a number of attempts during the investigation for the Council to identify and clarify what it did and did not hold in relation to the request. Given that this was not resolved definitively until during the investigation, during which further information was identified, it is clear that the Council failed to initially take adequate steps to identify and locate all the relevant information. In this respect, the Commissioner finds that the Council failed to comply with section 1(1) of FOISA.

Decision

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

The Commissioner also finds that, by failing to fully identify all information falling within the scope of the request until during his investigation, the Council breached section 1(1) of FOISA.

Given that the Council has disclosed the information to the Applicant (with some personal data redacted), the Commissioner does not require the Council to take any action in response to these failures.

Appeal

Should either the Applicant 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

12 October 2020

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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