



SECOND DIVISION, INNER HOUSE, COURT OF SESSION

[2019] CSIH 57
XA3/19

Lord Justice Clerk
Lord Malcolm
Lord Glennie

OPINION OF THE COURT

delivered by LORD GLENNIE

in the appeal under

section 56 of the Freedom of Information (Scotland) Act 2002

by

DR IAN GRAHAM

against

Appellant

THE SCOTTISH INFORMATION COMMISSIONER

Respondent

**Appellant: John MacGregor; TC Young, Solicitors
Respondent): Johnston QC; Anderson Strathern**

3 December 2019

Introduction

[1] In January 2018 the appellant, Dr Graham, made a request to Aberdeenshire Council (“the Council”) for certain information relating to the conduct of local elections in the Aberdeenshire area. Part of the request was for the Council to provide a list of the contracts

called off by it from a Framework Agreement. The Council refused that part of the request on the basis that it did not “hold” that information within the meaning of the Freedom of Information (Scotland) Act 2002 (“FOISA”). The appellant applied to the Scottish Information Commissioner (“the Information Commissioner”). By Decision Notice 206/2018 dated 18 December 2018 the Information Commissioner upheld the Council’s decision. The appellant now appeals to the Court of Session under section 56 of FOISA, which allows an appeal to be taken on a point of law. The issue is whether the Council is correct in its contention, upheld by the Information Commissioner, that it does not “hold” this information.

Relevant provisions of FOISA

[2] The relevant provisions of FOISA are to be found in sections 1 and 3. Those sections provide, so far as is material, as follows:

“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.

...

3 Scottish public authorities

...

(2) For the purposes of this Act but subject to sub-section (4), information is held by an authority if it is held –

(a) by the authority otherwise than –

(i) on behalf of another person; or

(ii) in confidence ...

(b) by a person other than the authority, on behalf of the authority.”

Section 3 goes on to mention certain exceptions or qualifications which are not in issue in this case. There is no issue here about whether or not the information is held in confidence.

The underlying facts and contractual arrangements

[3] For local elections in Scotland, every local authority is required to appoint a returning officer of the authority to be the returning officer for each election of councillors for the authority: Representation of the People Act 1983, section 41(1). Section 41(2) of that Act provides that a returning officer may appoint one or more persons to discharge all or any of his functions. This is obviously necessary, because in order to carry out his functions, a returning officer will have to procure the use of appropriate premises and equipment and the assistance of a large number of people (hereafter collectively called “electoral services”). Electoral services of this type are commonly provided by the local authority. In the present case electoral services were to be provided to the returning officer by the Aberdeen City Council (the “City Council”) and the Aberdeenshire Council (the “Council”). Those Councils invited tenders from third party suppliers for the provision of such services.

The Invitation to Tender (“ITT”)

[4] The City Council issued an Invitation to Tender (“ITT”) in August 2013. In the Introduction to the ITT it stated that it was acting

“... as a central purchasing authority for the purpose of procuring a number of suppliers to be appointed to a framework agreement to provide electoral services for the Returning Officers for itself and [the Council]. Each Council will enter into separate call-off contracts with the successful suppliers as and when any Services are required.”

It was explained in the ITT that references therein to the “Councils” meant the City Council and the Council. Although the ITT and the Framework Agreement are issued in the name of the City Council, it is clear that in all such documents the City Council is acting on behalf of itself and the Council. To avoid constant repetition, we shall refer hereafter simply to “the Council”.

[5] The ITT gives a brief description of the two councils before going on to explain in Part 1.2 that the purpose of the document is to invite tenders for the provision of various electoral services (“the Services”) for the returning officer in accordance with certain requirements. Under the heading “Framework Agreement” it is explained that the Services are divided into a number of Lots (such as printing and issuing poll cards, postal vote management, electronic voting and electronic counting) and that there was a requirement to set up a Framework Agreement with up to four suppliers per Lot. Successful tenderers would be appointed to a Framework Agreement. It goes on to say that the provision of Services will be requisitioned during the term of the Framework Agreement on a “call off” basis as and when required; and it describes a process by which, when Services are required, suppliers from the appropriate Lot will be contacted and there will be a “mini-competition” between them to be awarded the call-off contract for the provision of those Services.

[6] The detailed provisions of the ITT are not of direct relevance to the issue in this appeal; but it is worth noticing that the ITT specifies the information to be supplied by tenderers in their tender, and gives the Council the right to decide on whether a tender complies with such requirements, whether tenderers meet the selection and award criteria and, ultimately, which tenderers are successful in their bid to be appointed to the

Framework Agreement. Appended to the ITT are the Terms and Conditions representing “the basis upon which the Council is prepared to contract for the provision of the Services”.

The Framework Agreement

[7] The Framework Agreement is an agreement between the Council and the particular supplier selected for inclusion as Supplier under the Agreement. The nature of the Framework Agreement and its place in the contractual structure appears clearly from the Preamble:

“WHEREAS

- (A) The Council issued the ITT seeking responses from suppliers for the provision of various electoral services to Contracting Bodies [a term which includes the Council] under a framework agreement;
- (B) The Supplier submitted its Response in which it offered to provide certain of the Services to Contracting Bodies;
- (C) The Council selected the Supplier to enter a multi-supplier framework agreement to provide Services to Contracting Bodies on a call-off basis in respect of the Supplier’s Lots;
- (D) This Framework Agreement sets out the award and ordering procedure for Services which may be required by Contracting Bodies, the main terms and conditions for any Call-Off Contract, and the obligations of the Supplier during and after the Term;
- (E) There will be no obligation for any Contracting Body to award any Orders under this Framework Agreement during its term.”

The “Call-Off Contract” is a contract for the provision of Services made between the Council or other Contracting Body and the Supplier.

[8] Only a few terms of the Framework Agreement require to be mentioned. Clause 4.1 states that the Framework Agreement governs the relationship between the Council and the supplier in respect of the provision of Services by the supplier to the Council and other Contracting Bodies. Clause 7 deals with Responsibility for Awards and contains an

acknowledgement by the supplier that each Contracting Body is independently responsible for the conduct of its award of call-off contracts under the Framework Agreement.

Clause 17 requires the supplier to keep and maintain over a period of five years full and accurate records and accounts of what it has done under the Framework Agreement, including the services provided by it, the call-off contracts entered into with Contracting Bodies and the amounts paid to it by each Contracting Body; and to provide such records and accounts to the Council or relevant Contracting Body. Schedule Part 4 sets out the Call-Off Terms and Conditions, which make it clear that the Contract is between the Supplier and the Customer identified in the Order Form which, in context, means the Council or other Contracting Body.

The request for information and the response to it

[9] The appellant first requested this information by email of 28 January 2018. Under reference to the fact that on 23 August 2017 the City Council had published in the European Journal a call for tenders for a four year framework agreement with the Council for the provision of electoral services for the returning officers in the two councils' areas, he asked to see (1) a list of the contracts called off by the 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 the Council paid the invoice and (4) if so, whether the Council reclaimed the input VAT on the invoice. The Council responded by letter dated 20 February 2018 advising that the information requested was held by the Council on behalf of the returning officer and that the Council was therefore "not deemed to hold this information" in terms of section 3(2)(a)(i) of FOISA (the letter refers to section 2(a)(i), but this is plainly a

typographical error). With the permission of the returning officer, however, they provided answers to questions (3) and (4) of the appellant's request.

[10] The appellant was dissatisfied with this response. He sought a partial review of the decision, limited to information relating to local elections. His argument at this time involved a contention, no longer insisted on by him, that the returning officer in local elections was a council officer and not independent, a contention which (he said) was supported by the fact that the Council reclaimed the VAT on local election expenses. The Council's argument, in response, was that the information belonged to the returning officer, who acted independently of the council "when carrying out this distinct and separate role". The Review Panel to which the matter was then referred agreed with the Council that the information was not held by the Council for the purposes of FOISA, "being held on behalf of the Returning Officer". It accepted that the returning officer was a separate entity from the Council "and this meant that the Council did not hold the information for the purposes of the Act".

Application to the Scottish Information Commissioner

[11] On 30 July 2018 the appellant applied to the Information Commissioner. In his application he now acknowledged that the office of returning officer was distinct and separate from the Council. His argument that the documents were nonetheless held by the Council focused particularly, though not exclusively, on the fact that it was the Council, not the returning officer, who recovered the VAT associated with local election expenses and on that basis the documents associated with those transactions were held by the Council within its own accounts and (wholly or in part) for its own purposes. But he also argued that the

information must be held by the Council in its accounts under section 101 of the Local Government (Scotland) Act 1971 and associated tax, finance and public accountability legislation. During the course of the investigation the Council also changed its position. It now agreed that it did “hold” for its own purposes information relating to parts (2), (3) and (4) of the appellant’s request for information in respect of local election expenses. It was bound to pay local election expenses in terms of section 42 of the Representation of the People Act 1983 and on that basis it reclaimed the associated VAT in terms of the relevant tax rules. It therefore accepted that the relevant invoices and purchase orders were held by it in part on its own behalf and not solely on behalf of the returning officer. In October and November 2018 the Council provided the appellant with information relating to the contracts called off under the Framework Agreement. So far as concerned the call-off contracts themselves, the Council argued that, while all call-off contracts were handled and signed off by it, the Council was simply acting as a contracting authority for the returning officer as an independent legal entity.

[12] The Information Commissioner was satisfied that the returning officer was a distinct legal entity, separate from the Council. He identified the question as being whether the information was held by the Council in its own right or whether it was held by it on behalf of the returning officer. He noted the Council’s change of position in respect of the information answering parts (2), (3) and (4) of the request. Given that the Council had now given the appellant the information corresponding to those parts of the request, no further action was required in respect of this information. He considered that Guidance published by the Electoral Commission in May 2017 for Returning Officers for Council Elections in Scotland endorsed 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”.

He took notice of the introductory paragraph of the ITT (quoted above) which set out that the 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. His conclusion is set out in the following paragraphs:

“42. In the Commissioner’s view, all of these provisions and points clearly indicate that procurement for the 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.

...

44. In the Commissioner’s view, these provisions [viz. the provisions of the Representation of the People Act 1983 dealing with the obligation on a council to pay expenditure properly incurred by a returning officer and to advance to him such sums as he might reasonably incur] clearly indicate that the 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 requirements 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 Dr Graham on 12 October 2018, the Commissioner considers it unfortunate that the Council told Dr Graham 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 any relevant earlier time]) 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 Dr Graham ... that it did not hold this information (i.e. the call-off contracts).”

Submissions

[13] For the appellant, Mr MacGregor submitted that, because the purpose of the Act and its English equivalent was to make information available to the public, the court should adopt a liberal approach to FOISA (*University and Colleges Admission Service v Information Commissioner* [2014] UKUT 0557 (AAC) (“UCAS”) at para 39, *Common Services Agency v Scottish Information Commissioner* 2008 SC (HL) 184 per Lord Hope at para 4 (though, as Lord Hope went on to say (*ibid*), that proposition must not be applied too widely without regard to the way in which the Act was designed to operate in conjunction with data protection legislation). He submitted that the concept of information being “held” by an authority does not require sophisticated legal analysis. The word “held” is an ordinary English word which does not require to be interpreted by reference to concepts of ownership, possession or control: *University of Newcastle v Information Commissioner* [2011] UKUT 185 (AAC) (“*Newcastle University*”) at paras 23, 27, 28. A common-sense approach is required: *Newcastle University* at para 43. Though there must be some connection between the information and the party holding it (*Newcastle University* at paras 23, 27) there is no “dominant purpose” test: *UCAS* paras 55 and 58. So long as the connection between the information and the party holding it is not *de minimis*, that is sufficient; see *Department of Health v Information Commissioner* [2017] 1 WLR 3330 at para 55, 57, where a ministerial diary was “held” by the Department even if it had been kept by it simply as a historical record, an “efficiency tool” to enable the Department to see what had been done at any particular time should such matters become relevant. Information held by an authority is outside the ambit

of FOISA only if it is held solely on behalf of another person: FOISA section 3(2)(a)(i), *Newcastle University* at paras 21, 22, *UCAS* at paras 55, 58. The Information Commissioner had adopted an overly technical approach to the interpretation of FOISA section 3(2) and the underlying facts with which he was presented. He adopted a legalistic approach to the question of whether the information was held by the Council, focusing unduly on the technicalities of election law and the independent status of the returning officer when a broader more holistic approach was required. He approached the legislation on the basis that there was a binary choice to be made between the information being held by the Council in its own right and it being held by it on behalf of the returning officer, when in truth the answer might be that it was held in both capacities. He appeared to have considered that, because the procurement exercise was conducted for the purpose of enabling the returning officer to carry out his independent duties in relation to the conduct of local elections, then it followed that all the information was held on behalf of the returning officer, ignoring the fact that the Council clearly conducted the procurement exercise and entered into contracts pursuant thereto on its own behalf. This amounted to an error of law. The legal error could be expressed in different ways: applying the wrong test to the meaning of "held" in this context; irrationality (reaching a decision that no reasonable tribunal, properly directed in the law, could properly have reached); misdirection in law (in not appreciating the Council's obligations in respect of the procurement exercise); failing to recognise that the Council had rights and obligations under the various contracts; and failing to recognise the need for the Council to hold documents for the purpose of performing its VAT obligations. But it was accepted that these were simply specific formulations of the much broader point set out above.

[14] For the Information Commissioner, Mr Johnston QC accepted the need to approach the construction of the Act in a liberal fashion, with a presumption in favour of openness. He submitted that the Information Commissioner had reached the right result for the right reasons. But he said that the Information Commissioner looked to the court for guidance in the event that it was against him and in favour of the appellant.

Discussion

[15] There was no dispute between the parties about the relevant principles. We accept that the relevant provisions of FOISA should, so far as possible, be interpreted in a manner consistent with the policy of the Act, namely the desirability of making information available to the public, all in the interests of promoting open, transparent and accountable government. We accept too that the words and expressions used in the Act should, so far as possible, be given their ordinary and natural meaning. There should be no scope for the introduction of technicalities, unnecessary legal concepts calculated to over-complicate matters and, by so doing, to restrict the disclosure of relevant information. That is as true of the words "holds" and "held" in sections 1 and 3 of the Act as it is of other expressions in the Act.

[16] There can be no doubt in this case that, subject to section 3(2)(a)(i) of the Act, the information which the Council has about the ITT, the Framework Agreement and the call-off contracts, and matters relating to the performance of those contracts, is "held by" the Council. The Council agrees to provide the services to the returning officer. To do so it requires to contract with others for the provision of those services. It begins a procurement process, designed to identify suppliers of such services who can be assigned to a framework

contract and who will compete amongst themselves to be appointed to provide the services should the need arise. It issues the ITT. It manages the process and ultimately selects the successful tenderers. It enters into the Framework Agreement with them. In due course, as the need for such services arises, it organises the mini-competition between suppliers who have been appointed to the particular Lot covering the services required. It selects the successful supplier and enters into a call-off contract with that supplier for the provision of the particular services. All of this is done in its own name. The Council bears the responsibility for carrying out the procurement process, at all stages, in a lawful and satisfactory manner. The Council bears the responsibility of ensuring that the suppliers perform according to the terms of the particular call-off contract for which they have been selected, and enforcing performance in the event of default. It is to the Council that the supplier looks for payment in accordance with the terms of the call-off contract. In short, although the purpose of the contracts is to enable the Council to provide electoral services to the returning officer, the contracts – both the Framework Agreement and the call-off contracts – are all contracts to which the Council, not the returning officer, is a party, both in form and in substance. It acts in its own right and not as agent for the returning officer.

[17] The implications of all this are plain. The Council requires to have available to it full information about the call-off contracts so that it can monitor performance by suppliers and make appropriate payments. It cannot do any of this unless it is in a position to know to whom it has awarded the particular call-off contract and what provisions there are governing standards of performance and times and amounts of payment. It will need the same information for accounting purposes and, for example, for the purpose of accounting

to HMRC for payment or reclaiming of VAT. In the event of a dispute, for example as to the manner in which the procurement process was conducted, the Council will need the relevant documentation and will need to know to whom the particular call-off contracts were awarded. The examples can easily be multiplied, but the point is the same. The Council requires full information about the contracts, including the call-off contracts, for its own purposes.

[18] Section 3(2)(a)(i) of the Act does not undermine this analysis. For it to have any impact in this case it would have to be shown not only that the Council held the relevant information about these contracts on behalf of the returning officer, but also that it had no (or no material) interest of its own: see the *Newcastle University* case, at paras 21-22, with which we agree. So even if it could be shown that the returning officer had a direct interest in this information – for example in a case where the Council was acting as agent for the returning officer – that would not alter the position. The Council would still have its own interest, since it acquired rights and undertook obligations of its own under the call-off contracts.

[19] It appears from the Information Commissioner's Decision Letter that he was influenced by the fact that the returning officer was independent of the Council; and that the purpose of the procurement process carried out by the Council was to procure a number of suppliers to provide electoral services to the returning officer. His thinking seems to have been that the suppliers were, by this process, brought into some direct relationship with the independent returning officer; and that once this had happened the Council had no further role to play in the process. This is not correct, for the reasons set out above. But even if that

had been a correct analysis of the transactions, it would not deprive the Council of all interest in holding the relevant information. An agent who brings about a contract for his principal still holds an interest in information about the process in which he has been involved – for example, to justify internally the time spent on the contract or payments made in relation to it, to justify his conduct in selecting the particular supplier, or even simply for his own record keeping or accounting purposes.

[20] In summary, therefore, we can see no proper basis on which the Information Commissioner's decision can be upheld. The information sought is clearly held by the Council within the meaning of FOISA.

Disposal

[21] It follows that the appeal must be allowed and the matter remitted to the Information Commissioner to reconsider the appellant's application in light of the views which we have expressed. We would hope, however, that the matter can be resolved by agreement without the need for any further procedure.