

**From:** [Foi Enquiries](#)  
**To:** [REDACTED]  
**Subject:** FOI-17-0764 - FOI - Appeal Submission  
**Date:** 05 June 2017 08:39:54  
**Attachments:** [APP-16-1437 - Submission.pdf](#)  
[Further Information - Right to Review & Appeal.pdf](#)

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Dear [REDACTED]

-  
Thank you for your information request of 26 May 2017. Aberdeen City Council (ACC) has completed the necessary search for the information requested.

**The Scottish Information Commissioner has just published a decision *083/2017: Dr Ian Graham and Aberdeen City Council* relating to the withholding information on the compliance of electoral management services provided to the Council. The decision makes reference to submissions by the Council. I would like to see a copy of the submissions made by Aberdeen City Council to the Scottish Information Commissioner relating to this decision.**

Please see attached.

We hope this helps with your request.

Yours sincerely,

Information Compliance Team

#### **INFORMATION ABOUT THE HANDLING OF YOUR REQUEST**

ACC handled your request for information in accordance with the provisions of the Freedom of Information (Scotland) Act 2002. Please refer to the attached PDF for more information about your rights under FOISA.

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## **APP-16-1437: Postal Votes**

**I would be grateful if you would now provide me with any comments you would like to make on Dr Graham's application, and also provide the following information or answers to the questions below, to enable me to make progress with the investigation.**

**Please explain fully why the Council considers the information requested is not held by it. This should include an explanation of why the Council considers that officers in the Council's Election Unit were acting in the capacity of Depute Returning Officers.**

The information is held by the Returning Officer or otherwise held by Aberdeen City Council on behalf of the Returning Officer (section 3(2)(a)(i)).

The request is for *"Any plans or actions to amend postal voting 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"*.

The applicant refers to alleged non-compliance with regulations 85A and 86 of the Representation of the People (Scotland) Regulations 2001. Regulations 85A and 86 place duties on the Returning Officer in relation to "postal voting statements: personal identifier verification" and "opening of ballot paper envelopes."

Section 63 of the Representation of the People Act 1983 states:

*63.— Breach of official duty.*

*(1) If a person to whom this section applies is, without reasonable cause, guilty of any act or omission in breach of his official duty, he shall be liable on summary conviction to a fine not exceeding level 5 on the standard scale.*

*(2) No person to whom this section applies shall be liable for breach of his official duty to any penalty at common law and no action for damages shall lie in respect of the breach by such a person of his official duty.*

*(3) The persons to whom this section applies are—*

*(a) the Clerk of the Crown (or, in Northern Ireland, the Clerk of the Crown for Northern Ireland),*

*(b) any [...]registration officer, **returning officer** or presiding officer,*

*(c) any other person whose duty it is to be responsible after a [ parliamentary or] local government election for the used ballot papers and other documents (including returns and declarations as to expenses),*

*(d) any [official designated by a universal postal service provider] , and*

*(e) any deputy of a person mentioned in any of paragraphs (a) to (d) above or any person appointed to assist or in the course of his employment assisting a person so mentioned in connection with his official duties;*

**and “official duty” shall for the purposes of this section be construed accordingly, but shall not include duties imposed otherwise than by the law relating to parliamentary or local government elections or the registration of parliamentary or local government electors.**

(4) Where—

(a) a returning officer for an election to which section 46 of the Electoral Administration Act 2006 applies is guilty of an act or omission in breach of his official duty, but

(b) he remedies that act or omission in full by taking steps under subsection (1) of that section,

he shall not be guilty of an offence under subsection (1) above.

(5) Subsection (4) does not affect any conviction which takes place, or any penalty which is imposed, before the date on which the act or omission is remedied in full.

Therefore, if there was non-compliance with postal opening procedures, which is denied, the Returning Officer would be **personally liable** under section 63 of the 1983 Act, subject to subsection 4. Any information that may be held in connection to alleged non-compliance is held **by or on behalf of the Returning Officer**. The applicant is suggesting that despite being personally liable for non-compliance, officers were not acting in the capacity of Depute Returning Officers in relation to action he suspects may have been taken in connection to alleged non-compliance.

Additionally the Returning Officer has the general duty to review systems and processes between elections. Officers carrying out work in connection to this duty are acting in the role of Deputy Returning Officer (see answer to q2(1) below).

**In his review request of 16 November 2016, Dr Graham included four specific points supporting his contention that the information requested was held by the Council rather than the Returning Officer. I'd be grateful if you would provide your views on each of those points in turn.**

***I argue that the information requested is held by ACC.***

***1. The Representation of the People Act 1983 (as amended) Schedule 1 specifies the roles and responsibilities of Returning Officers in Scottish elections. Reviewing the system and procedures between elections is not defined as a responsibility of the Returning Officer therefore neither the Returning Officer nor ACC can claim that the requested information is held solely in relation to the Returning Officer's responsibilities as Returning Officer;***

The 1983 Act does not contain an exhaustive list of the Returning Officer's duties. The Political Parties, Elections and Referendums Act 2000 s.9A(1) states:

“(1) The Commission may from time to time—

(a) determine standards of performance for relevant officers, and

*(b) publish, in such form and in such manner as they consider appropriate, the standards so determined.*

*(2) The standards of performance are such standards as the Commission think ought to be achieved by–*

- (a) electoral registration officers in the performance of their functions;*
- (b) returning officers in the administration of the elections specified in subsection (6);*
- (c) counting officers in the administration of the referendums specified in subsection (7).*

*(3) Before determining standards under subsection (1), the Commission must consult–*

- (a) the Secretary of State, and*
- (b) any other person they think appropriate.*

*(4) The Commission may determine different standards for different descriptions of relevant officers.*

*(5) When the Commission publish standards under subsection (1) they must send a copy of the published standards to the Secretary of State who must lay a copy of the published standards before each House of Parliament.*

*(6) The elections specified in this subsection are–*

- (a) an election mentioned in section 5(2);*
- (b) a parliamentary by-election;*
- (c) an election under section 9 of the Scotland Act 1998 (constituency vacancies);*
- (d) an election under [section 10 of the Government of Wales Act 2006(constituency vacancies)]*
- (da) an election under section 51 of the Police Reform and Social Responsibility Act 2011 (election to fill vacancy in office of police and crime commissioner);*
- (e) a local government election in England or Wales.*
- (f) a local government election in Scotland.*

*(7) The referendums specified in this subsection are–*

- (a) a referendum to which Part 7 applies;*
- (b) a referendum under Part 2 of the Local Government Act 2000.*

*(8) For the purposes of this section and sections 9B and 9C, the relevant officers are–*

- (a) electoral registration officers;*
- (b) in relation to elections within subsection (6), returning officers;*
- (c) in relation to referendums within subsection (7), counting officers.*

The Electoral Commission publishes performance standards for Returning Officers. [http://www.electoralcommission.org.uk/\\_data/assets/pdf\\_file/0006/141990/Part-F-After-the-declaration-of-result-SLG.pdf](http://www.electoralcommission.org.uk/_data/assets/pdf_file/0006/141990/Part-F-After-the-declaration-of-result-SLG.pdf)

The aim of Performance Standard 5b “Review of election procedures” is to evaluate the conduct of the election and to identify any improvements for future electoral events. To meet the standard the Returning Officer must “carry out a thorough evaluation of all processes outlined in the project plan, seeking feedback from appropriate stakeholders, and produce a lessons learnt document which will be used to inform the project plan and risk register for future electoral events.” The Electoral Commission have clearly placed the duty on the Returning Officer to

review the system and procedures between elections. Information held in relation to this function is held by the Returning Officer.

Information held by the Returning Officer is not subject to the Freedom of Information (Scotland) Act 2002.

***2. I contend, following the lack of a legislatively defined responsibility for the Returning Officer, that the maintenance of election software and election procedures is a responsibility of the elections unit, who then provide it as a service to the Returning Officer during the period of an election;***

The duty to review election procedures has been placed on the Returning Officer. This includes the maintenance of election software and procedures.

***3. Information held by the Chief Executive or Election Unit that is not held as part of the legally defined responsibilities of the Returning Officer is subject to Fol;***

Section 3 of the Freedom of information (Scotland) Act 2002 states:

*“(1) In this Act, “Scottish public authority” means—*

*(a) any body which, any other person who, or the holder of any office which—*

*(i) is listed in schedule 1; or*

*(ii) is designated by order under section 5(1); or*

*(b) a publicly-owned company, as defined by section 6.*

*(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*

*(ii) in confidence, having been supplied by a Minister of the Crown or by a department of the Government of the United Kingdom; or*

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

*(3) Subsection (1)(a)(i) is subject to any qualification set out in schedule 1.*

The office of Returning Officer is not listed in Schedule 1. Any information held by Aberdeen City Council in relation to the duties and functions of the Returning Officer is held on behalf of the Returning Officer within the meaning of section 3(2)(a)(i).

***4. Idox have stated publically that their contract to supply election management software and services is with ACC and not with the Returning Officer so the Returning Officer has no direct contractual relationship with Idox and any communication with and from Idox are subject to Fol.***

***Even if ACC believe that the information requested is held solely by the Returning Officer, the Electoral Commission guidance in Part F of their guidance to Returning Officers advises that information not including personal data should be released under Fol:***

**"5.1 Following the elections you may receive requests under the Freedom of Information (FOI) Act 2000. ROs and EROs are not a public authority under this Act and, as such, are exempt from the disclosure requirements imposed by it.**

**5.2 However, where possible, ROs and EROs should disclose the requested information, provided this information is already in the public domain, or the information requested does not include personal data. An example of nonpersonal data would be statistical data providing the total number of electors registered in your area or the turnout of postal voters."**

Election management software and services is purchased to fulfil the responsibilities of the Returning Officer. Any information held in this respect is held on behalf of the Returning Officer.

It is understood that the applicant refers to guidance produced by the Electoral Commission "Part F – After the declaration of results - UK Parliamentary general election in Great Britain on 7 May 2015: guidance for (Acting) Returning Officers"

[http://www.electoralcommission.org.uk/data/assets/pdf\\_file/0011/175394/UKPE-Part-F-After-the-declaration-of-result.pdf](http://www.electoralcommission.org.uk/data/assets/pdf_file/0011/175394/UKPE-Part-F-After-the-declaration-of-result.pdf)

The guidance clearly states: *"In this guidance we use 'must' when we refer to a specific legal requirement. We use 'should' for items we consider to be recommended practice, but which are not legal requirements."*

Paragraph 2 states: *"However, where possible, ROs and EROs should disclose the requested information."*

There is no legal requirement that information held solely by the Returning Officer must be released under the Freedom of Information (Scotland) Act 2002.