

Freedom of Information Act 2000 ('FOIA')

Decision notice

Date: 19 November 2015

Public Authority: Luton Borough Council
Address: Town Hall
George Street
Luton
LU1 2BQ

Decision (including any steps ordered)

1. The complainant has requested information relating to ballot papers in the constituencies of Luton South and Luton North. The Commissioner's decision is that the requested information is not held by Luton Borough Council under section 1(1)(a) of the FOIA as under section 3(2)(a) the information is only held on behalf of another person. The Commissioner does not require the public authority to take any steps.

Request and response

2. On 11 May 2015, the complainant wrote to Luton Borough Council ('the council') and requested information, within a letter of complaint, in the following terms:

"Please would you take this email as a formal Data Subject Access request under the a Data Protection Act (1998) and the Freedom of Information Act, as to the number and dispersion across Luton of the total number of tendered ballot papers in the constituencies of Luton South and Luton North."
3. The council responded on 14 May 2015 stating that the FOIA does not apply to individuals appointed under the Representation of the People Act which includes the Electoral Registration Officer, Returning Officer or any other person appointed under this act. It said that it is therefore unable to respond to the request.

4. The complainant expressed dissatisfaction with the response on 15 May 2015. The council provided an internal review on 2 July 2015 in which it maintained its original position stating that the information is not held under section 1(1)(a) of the FOIA as under section 3(2)(a) the information is only held on behalf of another person, that being the Returning Officer. It also said that even if the information were held by the council, section 44(1)(a) of the FOIA would apply.

Scope of the case

5. The complainant contacted the Commissioner on 25 July 2015 to complain about the way his request for information had been handled.
6. The Commissioner has considered whether any of the information within the scope of the request is held by the council as a public authority for the purposes of the FOIA.
7. As the Commissioner has decided that information within the scope of the request is not held by the council as a public authority for the purposes of the FOIA, he has not deemed it necessary to consider whether the exemption at section 44(1)(a) applies in this case.

Reasons for decision

Section 1(1) and 3(2)

8. Section 1(1) of the FOIA states that:

"Any person making a request for information to a public authority is entitled –

(a) to be informed in writing by the public authority whether it holds information of the description specified in the request, and

(b) if that is the case, to have that information communicated to him."
9. Section 3(2) states that –

"For the purposes of this Act, information is held by a public authority if-

(a) it is held by the authority, otherwise than on behalf of another person, or

(b) it is held by another person on behalf of the authority."

10. The Commissioner's guidance, 'Information held by a public authority for the purposes of the Freedom of Information Act'¹, states that when a public authority holds information solely on behalf of another person it is not held for the purposes of the FOIA and that each case needs to be considered according to the specific circumstances.
11. The Commissioner asked the council to provide a detailed explanation as to on what basis it has concluded that, although it physically holds the information of the nature requested, it does not hold this information for the purposes of the FOIA – i.e. on what basis has the council concluded that although it physically holds the information it is not needed for any of the council's own functions.
12. The council said that section 3(2) applies since, to the extent that it holds any information which might be relevant to the request, it does so solely on behalf of the Returning Officer and/or Acting Returning Officer for the purposes of the Representation of the People Act 1983 ('the 1983 Act') and in accordance with the 1983 Act and regulations made under it. It said that the duties of the Returning Officer are separate from their duties as a local government officer under Section 27 of the Act which has the effect of making the office of Returning Officer totally distinct from the office by virtue of which they have become a Returning Officer.
13. It explained that it holds information relating to ballot papers on behalf of the Returning Officer but the information requested relates solely to the conduct of the Election on 7 May 2015 and, more specifically, the content and treatment of ballot papers. It said that it exercises no functions or duties in respect of such elections and has no interest in law or fact (real or tangible) in the Returning Officers information in relation to those matters and that information is not used by or for the purposes of any council function or service.
14. The council quoted the following paragraphs from a previous decision of the Commissioner dated 12 November 2014² stating that they are relevant to this request:

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https://ico.org.uk/media/1148/information_held_by_a_public_authority_for_purposes_of_foia.pdf

² https://ico.org.uk/media/action-weve-taken/decision-notices/2014/1043262/fs_50549048.pdf

"The Commissioner's view

14. The Commissioner must note that a Returning Officer is not a public authority subject to FOIA. Therefore information produced/received by the Returning Officer is out of scope of FOIA.

15. However if the information is held by the Returning Officer, it is possible that it can also be held by the Council³. The question is therefore whether the Council has any reason to hold the requested information for its own purposes.

16. As set out at paragraphs 12 and 13, the Council has explained that if the information was held, it is not held for the Council's own purposes. The Commissioner also acknowledges that the Council has confirmed that the requested information relates solely to the powers and duties of the Returning Officer.

17. The Commissioner has decided that if the information was held, the Council does not hold the information for its own purposes. In coming to this conclusion, the Commissioner has referred to his own guidance⁴ which states the following:

"We recognise that the offices of the Returning Officer and of the Electoral Registration Officer are separate to the functions of local authorities. Information held by a local authority on behalf of these two officers is not currently covered by the Freedom of Information Act".

18. The Commissioner is satisfied that the information requested relates solely to the powers and the duties of the Returning Officer and is consequently not held by the Council for the purposes of FOIA."

15. The Commissioner does not dispute that a Returning Officer is not a public authority for the purposes of the FOIA.

16. Therefore he has considered whether, in this case, the council has any reason to hold the requested information for its own purposes. He asked the council questions relating to the support provided to the Returning Officers, access to and ownership of the requested information, how

³ https://ico.org.uk/media/action-weve-taken/decision-notices/2012/757052/fs_50416752.pdf

⁴ https://ico.org.uk/media/for-organisations/documents/1262/definition_document_local_authorities.pdf

enquiries about the information are dealt with, and whether costs arising from holding the information are included in the council's budget.

17. In relation to support provided to the Returning Officers, the council said that local authorities are obliged to provide staff to support the Returning Officer in the administration of elections and that it receives payment from the Cabinet Office to cover those costs for all elections and, apart from local government elections, for the time staff are working on the elections they are responsible to the Returning Officer and not to the council.
18. The council said that access to the information requested is controlled by the Returning Officer and governed by statute. It also said that deciding what information is created, retained, altered or deleted is overseen by the Returning Officer and is governed by statute.
19. The council explained that enquiries about electoral registration would be dealt with the Electoral Registration Officer and enquiries about the election would be referred to the Returning Officer who is not responsible to the local authority but is directly accountable to the courts as an independent statutory office holder.
20. In relation to whether costs arising from holding the information are included in the council's budget, the council said that ballot papers and other election information are stored securely on its premises but that no specific costs are identified in the provision of this storage.
21. The Commissioner has taken into consideration that the council exercises no functions or duties in respect of the relevant election and has no interest in law or fact in the Returning Officers information; that the information is not used by or for the purposes of any council function or service; that the duties of the Returning Officer are separate from the role of local government officer; that the council does not perform any administrative or management functions in relation to the office of Returning Officer; that ownership and control of the requested information lies with the Returning Officer; that enquiries about the election are not dealt with by the council; and that no specific costs from holding the information are identified by the council. He has considered the complainant's assertion that because the Returning Officer appeared on BBC Three Counties Radio talking about the number of tendered ballots paper the position that the information is not held is undermined but does not consider that this has any effect on whether the information is held by the council for its own purposes. Given the above, he concludes that the information is not held under section 1(1)(a) of the FOIA as under section 3(2)(a) the information is only held on behalf of another person, that being the Returning Officer.

Right of appeal

22. Either party has the right to appeal against this decision notice to the First-tier Tribunal (Information Rights). Information about the appeals process may be obtained from:

First-tier Tribunal (Information Rights)
GRC & GRP Tribunals,
PO Box 9300,
LEICESTER,
LE1 8DJ

Tel: 0300 1234504

Fax: 0870 739 5836

Email: GRC@hmcts.gsi.gov.uk

Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

23. If you wish to appeal against a decision notice, you can obtain information on how to appeal along with the relevant forms from the Information Tribunal website.
24. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

Signed

Andrew White
Group Manager
Information Commissioner's Office
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