

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 24 September 2014

Public Authority: Milton Keynes Council

Address: Civic Offices
1 Saxon Gate East
Central Milton Keynes
MK9 3EJ

Decision (including any steps ordered)

1. The complainant has requested information relating to the ballot paper for the European election. The Commissioner's decision is that the requested information is not held by Milton Keynes 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 26 May 2014, the complainant wrote to Milton Keynes Council ('the council') and requested information in the following terms:

"Please provide me with the following information under the Freedom of information act:

- an electronic copy of the printer's proof of your ballot paper for the Euro election, including the official mark - by printer's proof I mean the actual electronic file or specification sent to the printer to print, not just a scanned copy of the completed ballot papers

- everything you hold on how the official mark for this ballot paper was selected and a high resolution copy, preferably in a vector format, of this mark - or if this is not possible, a copy of the mark in any electronic format

- everything you hold on the ballot papers, if any, which ended up being cut into multiple pieces during the postal voting process (including advice on how to count them and information on how it happened, any internal correspondence, correspondence with local returning officers etc)

If the cost threshold becomes an issue please focus on the first two bullet points above.”

3. The council responded on 5 June 2014. It said that the information is not held by the council by virtue of section 3(2)(a) of the FOIA, as the information is only held on behalf the Regional Returning Officer, and is not held to any extent for the council’s own purposes
4. The complainant did not request an internal review as the council suggested that the further appeal should be made directly to the ICO.

Scope of the case

5. The complainant contacted the Commissioner on 5 June 2014 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.

Reasons for decision

Section 1(1) and 3(2)

7. Section 1(1) of the Act 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.”
8. 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.”

9. 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.

10. The complainant has asserted that this case involves a similar set of facts as that in *McBride v Information Commissioner and Ministry of Justice (EA/2007/0105)*² and that the information is held by the council for the following reasons:

- The information requested is not simply held on council servers as a favour to the Returning Officer. It was created by or transmitted to persons employed by the council, and in general elections are administered by persons employed by the council, a factor specifically identified in *McBride* ("The staff who undertook this work was the same staff that did other [...] work [for the public authority]").
- The employees, in the council democratic services department, are paid an annual wage by the council and are appraised in relation to their work on the European elections (a factor specifically identified in *McBride* at paragraph 30).
- On 14 December 2010 councillors considered a paper (<http://cmis.milton-keynes.gov.uk/CmisWebPublic/Binary.ashx?Document=31751>) which noted: "This [having the chief executive nominated as Returning Officer] is seen as advantageous by the Electoral Commission as a Chief Executive is likely to be more able to access the necessary resources and support from around the whole Council." Therefore it is clear that the council does not merely hold the information on behalf of the Returning Officer but actively

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[http://www.ico.org.uk/for_organisations/guidance_index/~media/documents/library/Freedom_of_Information/Detailed_specialist_guides/information_held_by_a_public_authority_for_purposes_of_foia.ashx](http://www.ico.org.uk/for_organisations/guidance_index/~/media/documents/library/Freedom_of_Information/Detailed_specialist_guides/information_held_by_a_public_authority_for_purposes_of_foia.ashx)

² <http://www.informationtribunal.gov.uk/DBFiles/Decision/i98/McBride.pdf>

services him or her in their core functions: it provides 'resources and support', two factors specifically identified in *McBride*. The paper goes on to explain: "The Council is required to make available staff and resources to the Returning Officer to allow him/her to carry out the duties of that post." Again, the council's employees and resources are being 'made available' to the Returning Officer; they are not being transferred or seconded, the council is simply instructing them to perform his or her core functions as necessary. Direct parallels with *McBride*.

- The council holds this information not only on behalf of the Returning Officer but also in pursuit of its statutory duty to fulfil the service of the Returning Officer which is 'one of its own purposes'.
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, bearing in mind the complainant's reasons why he believes the information is held for the purposes of the FOIA. He also asked the council questions relating to the support provided to the Returning Officers, access to and ownership of the requested information, how enquiries about the information are dealt with, and whether costs arising from holding the information are included in the council's budget.
 12. The council explained that the information requested relates solely to the conduct of the European Elections in 2014 and, more specifically, the treatment of the Ballot Paper. 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. It explained that information may be physically held within council offices occupied by the Local Returning Officer, but it is held wholly on behalf of the Regional Returning Officer.
 13. It further explained that for each European Election region, the Secretary of State prescribes under Section 6(2) European Parliamentary Elections Act 2002, a parliamentary constituency acting Returning Officer who is the Regional Returning Officer for that region and that for the 2014 European elections, this was laid out in the European Parliamentary Elections (Returning Officers) Order 2013.
 14. The council said that the duties of the Returning Officer are separate from their duties as a local government officer. This follows from Section 27 Representation of the People Act 1983 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.

15. In relation to support provided to the Returning Officers, the council said that it does not perform any administrative or management functions in relation to the office of Local/Regional Returning Officer. It said that any of the council officer's functions or other activities that are used by the Local/Regional Returning Officer are used separate to their day duties and that others are used also to support the Local/Regional Returning Officer in terms of presiding officer, poll clerk and counting officer but there is no physical business, managerial or legal relationship between the two.
16. The council also explained that the Regional Returning Officer has their own email address, distinct telephone numbers, and the council does not deal with matters on their behalf. It said that enquiries are not responded to on council paper but are sent on Regional Returning Officer headed paper and signed by the Regional Returning Officer in that capacity.
17. In relation to whether costs arising from holding the information are included in the council's budget, the council said that costs of elections are paid for separately from council work. It said that for elections paid for from the consolidated fund (Parliamentary and European elections being two), these are subject to Fees and Charges Orders, and all staff costs and other expenses are paid for from the consolidated fund and subject to audit by the Electoral Claims Unit. It confirmed that time is separately accounted for.
18. In relation to the ownership and control of the information requested, the council said that that information is, in statutory terms, in the ownership and control of the Returning Officer for the relevant election, i.e. the Regional Returning Officer in this case, not the council.
19. The council concluded that it is therefore clear that as a matter of practice and perception, as well as quite clearly laid out by the law, that the role of the Returning Officer and the Council are entirely separate. The role of the Returning Officer is not integral to its functions; it is separate and maintained separately for good, sound legal reasons.
20. The Commissioner has taken into consideration that the council exercises no functions or duties in respect of the European Elections, the duties of the Returning Officer are separate from the role of local government officer, the council does not perform any administrative or management functions in relation to the office of Returning Officer, ownership and control of the requested information lies with the Returning Officer, enquiries relating to the information are not dealt with by the council, and all costs are paid separately from the consolidated fund. He acknowledges the complainant's reference to the tribunal decision in *McBride* but considers that each case needs to be considered

according to the specific circumstances, which are different in this case to those in *McBride*. 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

21. 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

22. 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.
23. 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
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF