

## **Freedom of Information Act 2000 (FOIA)**

### **Decision notice**

**Date:** 15 February 2023

**Public Authority:** London Borough of Croydon  
**Address:** Bernard Weatherhill House  
8 Mint Walk  
Croydon  
CR0 1EA

#### **Decision (including any steps ordered)**

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1. The complainant has requested from the London Borough of Croydon ("the Council") information relating to election counts for the 2022 elections.
2. The Council initially disclosed some information in scope of the request and explained information not provided was not held at the time of the request.
3. The Commissioner's decision is that the information sought by the complainant is not held by the Council for the purposes of FOIA and that the Council is entitled to rely on section 3(2)(a) of FOIA. However, the Council failed to provide their response within 20 working days of the request, and therefore breached both section 10 and section 17 of FOIA.
4. The Commissioner does not require any steps to be taken as a result of this decision notice.

## Request and response

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5. On 11 April 2022, the complainant wrote to the Council and requested information in the following terms:

"Please find a Freedom of Information request relating to this year's election counts.

3) COSTS Please could you provide a breakdown of costs for this year's mayoral and local elections, including overtime, or direct me to where this information can be found? I would like costs to be broken down according to expected costs according to the 9pm mayoral finish time and 2am local finish expected, and how this changed due to delays. Please provide a breakdown of all staff costs, including the media team, count staff, supervisors, returning officer, food, venue hire, and other expenses.

4) DECISIONS Please provide any and all documents relating to the expected costs of the 2022 elections, as well as any documents reviewing how the count was handled – particularly regarding decisions of the returning officer and delays.

- a. Why were the mayoral results delayed?
- b. Were any count staff sent home? If so, how many out of the total and why?
- c. How long did count staff spend counting compared to waiting for orders?
- d. How many supervisory staff were there and did they fulfil their roles effectively?
- e. What was the rationale behind the returning officer's decisions to delay the mayoral count at various points?

5) VENUE Please can you also let me know how the decision to hold the count at Trinity school was arrived at and whether and how other potential venues were considered and rejected? I'd like to know specifically why Fairfield Halls was not used. I'd also like to know why any council-owned buildings with lower costs and more availability were rejected.

I am happy for you to answer these requests separately if necessary due to costs, or combine if that is preferable. Please contact me immediately if anything is unclear. I expect a response within the statutory 20 day deadline and before if at all possible."

6. The Council responded on the 24 May 2022 disclosing information it held in scope of the request and an explanation for its response.
7. The complainant requested an internal review on 26 May 2022 outlining the points they felt information had not been provided for, and the lack of any of the documentation requested.
8. The complainant chased the Council on a number of occasions for a response to their internal review request.
9. The Council eventually responded on 22 December 2022, after the Commissioners intervention. They said the Council does not hold the requested information for the purpose of FOIA. The Electoral Registration Officer (ERO), who is not subject to FOIA, would hold any related information in scope of the request.

### **Scope of the case**

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10. The complainant initially contacted the Commissioner on 29 June 2022, to complain about the way their request for information had been handled and after further correspondence with both the Council and the ICO, the complaint was accepted on 12 September 2022 due to the lack of an internal review outcome.
11. The Commissioner considers the scope of his investigation is to determine if the Council has correctly refused to provide the information requested under section 3(2)(a) of FOIA.

### **Reasons for decision**

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#### **Section 3(2) – information held by a public authority**

12. Section 1(1) of the FOIA states:

“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.”

If a public authority does not hold recorded information that falls within the scope of the request, the Commissioner cannot require the authority to take any further action.

13. Section 3(2) sets out the criteria for establishing if information is held for the purposes of FOIA:

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

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(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.”

14. The Commissioner interprets the phrase “otherwise than on behalf of another person” to mean that a public authority holds information for the purposes of the FOIA if it is held to any extent for its own purposes. Therefore, in this case the only circumstance in which information would not be held by the Council by virtue of section 3(2) would be where it is held only on behalf of the Returning Officer (RO), Electoral Registration Officer (ERO) and any deputised officer regarding their statutory responsibilities, and not to any extent for the Council’s own purposes.

### **The complainant’s position**

15. The complainant has argued that their request was for information relating specifically to the process in the run up to the elections and during the counting process and said: “Whilst I accept the ERO is a separate data controller, that is mainly around their responsibilities with data on the electoral roll, not the staffing, payments and decision-making around the count itself, which is the subject of this FoI and which I believe falls under the remit of the council....The ERO, who is also the council chief exec, cannot be the sole holder of information relating to how public money is spent. It’s utterly absurd to suggest the council has no information, no oversight, conducted no reviews, and is basically clueless about what went on with their own council staff, buildings and money that night. The council has a statutory duty to ensure public money is not wasted. Decisions relating to the use of that public money must be transparent and those responsible must be held accountable should there be any errors.”

### **The Council’s position**

16. The Council has said that all the information requested and in scope, is that held by the ERO/RO and cited a previous decision notice<sup>1</sup> upholding another Council's stance on the matter as justification for their internal review response.

### **The Commissioner's view**

17. The Commissioner has carefully considered the points made by the complainant and the Council.
18. The Commissioner appreciates that the complainant has concerns about the way their request was handled by the Council and the excessive time taken. The Commissioner considers that the Council's responses have addressed some of the initial points but have also caused confusion with their internal review response and lack of clarity thereof.
19. During his investigation, the Commissioner has clarified the points regarding the Council's stance and understands that the requested information relates solely to the powers and duties of the RO, ERO and any deputised officer. It is therefore not a council function, and should the information be held, the Council has no reason to hold the requested information for its own purposes. Although relevant data may be held on the Council's managed system, the information is not held for the Council's own purposes and therefore it is not data subject to FOIA.
20. The Commissioner must note that a RO, ERO and any deputised officer are not a public authority subject to FOIA. Therefore, information produced/received by them is out of scope of FOIA.
21. However, if the information is held by the RO or ERO it is possible that it can also be held by the Council. The question is therefore whether the Council has any reason to hold the requested information for its own purposes.
22. As set out at paragraphs 16 and 19, if the information was held, it is not held for the Council's own purposes. The Commissioner also acknowledges that the requested information relates to the powers and duties of the RO and ERO.

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<sup>1</sup> [FS50549048 \(ico.org.uk\)](https://ico.org.uk/FS50549048)

23. 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 guidance 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”

24. The Commissioner is satisfied that the information requested relates to the powers and the duties of the RO and of the ERO and is consequently not held by the Council for the purposes of FOIA.

### **Other Matters**

25. The Commissioner, after conducting his enquiries on this case, feels it necessary to highlight some concerns he has about the Council's practices in relation to dealing with requests for information and the clarification of its responses.
26. The Council failed to respond to the initial request within 20 working days and therefore breached section 10 of FOIA.
27. As the public authority failed to issue a refusal notice within 20 working days it breached section 17 of FOIA.
28. The Council failed to provide the relevant section of FOIA it had relied upon to refuse the request in its internal review and caused confusion when stating that all the information requested would be held by the ERO, not recognising the fact that the majority of the information in scope of the request, would likely be held by the RO (whether they be both one and the same).
29. The Commissioner recognises the Council has recently been required to improve its practices when dealing with FOIA requests and the time taken for responses. He is concerned that despite this undertaking being completed by December 2022, the Council still seems to be experiencing issues in these areas.

## Right of appeal

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30. 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@justice.gov.uk](mailto:grc@justice.gov.uk)

Website: [www.justice.gov.uk/tribunals/general-regulatory-chamber](http://www.justice.gov.uk/tribunals/general-regulatory-chamber)

31. 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.
32. 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

**Joanna Marshall**  
**Group Manager**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
**Cheshire**  
**SK9 5AF**