

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

### **Decision notice**

**Date:** 27 June 2018

**Public Authority:** Copeland Borough Council  
**Address:** The Market Hall  
Market Place  
Whitehaven  
Cumbria  
CA28 7JG

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

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1. The complainant submitted a request to Copeland Borough Council (the Council) for a copy of an agreement between the Mayor and the leader of the Labour group of councillors. The Council responded and explained that it did not hold a copy of the agreement. The complainant disputed this response on two grounds. Firstly, she argued that in her view it was likely that the Council did physically hold a copy of the agreement. Secondly, she argued that even if this was not the case, then the Mayor held this agreement on behalf of the Council and therefore the Council could be said to hold it for the purposes of FOIA by virtue of section 3(2)(b) of the legislation. With regard to the first ground of complaint the Commissioner is satisfied that on the balance of probabilities the Council did not physically hold a copy of the agreement at the time of the request. With regard to the second ground of complaint, the Commissioner has concluded that the copy of the agreement held by the Mayor is not by held on behalf of the Council. The Commissioner is therefore satisfied that the Council does not hold a copy of the agreement by virtue of section 3(2)(b) of FOIA.

## Request and response

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2. The complainant submitted the following request to the Council on 22 November 2017:

*'I have attached a thread from the internet in which Councillor Gill makes reference to an agreement held by your Council relating to the agreed coalition terms and conditions.*

*I have sent this conversation to your DPI officer by email.*

*Can you please provide a copy of that agreement.'*

3. The Council responded on 28 November 2017. It explained that following a search of its paper and electronic records, it had established that the requested information was not held by the Council. Furthermore, the Council explained that:

*'This was a political agreement made between the mayor and labour group. It is not part of Council business, the Council does not hold a copy of it. It was a private agreement, that said its contents were read out and subsequently recorded at Full Council.'*<sup>1</sup>

4. The complainant contacted the Council on the same day and asked it to undertake an internal review of this decision.
5. The Council informed her of the outcome of the internal review on 24 January 2018. The review upheld the Council's initial findings, namely that it did not hold a copy of the information falling within the scope of the request.

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<sup>1</sup> The Commissioner understand that this refers to this meeting <http://copeland.moderngov.co.uk/documents/s5090/Council%2012.09.17%20-%20minutes%202%20docx.pdf> See item C43 Oral Questions to the Mayor and Executive

## Scope of the case

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6. The complainant contacted the Commissioner on 24 January 2018 in order to complain about the Council's handling of her request. She raised the following two grounds of complaint:
  - Firstly, she questioned the Council's position that it did not physically hold a copy of the requested agreement; and
  - Secondly, even if the Council did not physically hold a copy of the requested agreement, the complainant argued that the Mayor held this agreement on behalf of the Council and therefore the Council could be said to hold it for the purposes of FOIA by virtue of section 3(2)(b).
7. The Commissioner has considered both points as part of her investigation of this complaint.

## Reasons for decision

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### Complaint 1

8. The complainant's first ground of complaint focuses on whether, at the time of the request, the Council physically held a copy of the agreement.<sup>2</sup>
9. In cases such as this where there is some dispute as to whether information falling within the scope of the request is held, the Commissioner, following the lead of a number of Information Tribunal decisions, applies the civil standard of the balance of probabilities.
10. In other words, in order to determine such complaints the Commissioner must decide whether on the balance of probabilities a public authority holds any information which falls within the scope of the request.

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<sup>2</sup> It is important to note that the Commissioner's role, in determining a complaint made to her under section 50 of FOIA, is limited to considering the circumstances as they existed at the point that a request is submitted rather than at the point she is making a decision on that complaint.

11. In applying this test the Commissioner will consider the scope, quality, thoroughness and results of the searches, or as in the circumstances of this complaint, other explanations offered as to why the information is not held.
12. In order to investigate whether the Council physically held a copy of the agreement at the time of the request the Commissioner asked the Council a series of questions about the searches it had undertaken of its records in order to locate this information. The Commissioner has replicated these questions, and the Council's answers, below.

- **What searches were carried out for a copy of the requested agreement and why would these searches have been likely to retrieve the requested information?**

*Early verbal communications identified that neither the Chief Executive or the Monitoring Officer were aware of the document. The Mayor has confirmed that the agreement had not been forwarded, copied or held by the council and is retained by him in hard copy in his personal files.*

- **As the searches included electronic data, which search terms were used?**

*No electronic searches were necessary as it was apparent following confirmation from the Mayor around the drafting of the document, that the document was not held by the council. Both the Corporate Leadership Group and the Mayor were consulted verbally.*

- **Please explain whether the searches included information held locally on personal computers used by key officials as well as information on networked resources and emails.**

*Not applicable for the reasons stated above.*

- **As part of this search did the Council ask the Mayor to search his emails and records stored on Council IT systems for a copy of the requested agreement?**

*No. The Mayor was able to confirm at an early stage that the document was retained in hard copy only at his home.*

- **The Council's responses to the complainant suggest that only electronic searches were undertaken. Is it possible that a copy of this agreement would have been held by the Council as a manual record?**

*Copeland BC did not have possession or ownership of the document in any format.*

13. On the basis of the above responses, the Commissioner is satisfied that on the balance of probabilities the Council did not physically hold a copy of the requested agreement at the time of this request. She has reached this conclusion given that the Mayor, who was of course one of the two signatories to the agreement, confirmed that the only copy of the document he held was a hard copy one. Furthermore, this document was not held on Council premises but was stored at his home in what the Council referred to as his 'personal files' and that it had not been copied, forwarded or retained by the Council. Furthermore, the Commissioner notes that neither the Chief Executive nor the Monitoring Officer were in fact aware of the agreement. In light of this, and given the Mayor's clarification as to how and where he held a copy of the agreement, the Commissioner considers it reasonable for the Council not to have conducted detailed electronic or manual searches of its records in order to locate a copy of the agreement.

## **Complaint 2**

14. Section 3(2)(b) states that:

*'3. (2) For the purposes of this Act, information is held by a public authority if...*

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

15. This provision therefore accounts for scenarios where information is not physically held by the public authority but another person holds that information on behalf of the authority and it will therefore be held by the public authority for the purposes of FOIA. In the Commissioner's view, each case needs to be considered individually with the purpose and use of the information being key factors in determining whether the information is held by a public authority for the purposes of FOIA by virtue of section 3(2)(b).
16. In the circumstances of this case the issue at question is whether the copy of the agreement held by the Mayor in his 'personal files' can be said to be held on behalf of the Council for the purposes of section 3(2)(b) of FOIA.

### The complainant's position

17. The complainant argued that the purpose of the agreement in question was to administer the Council. She explained that it was her understanding that it set out, amongst other issues, how members of Council committees were to be appointed. Consequently, the complainant argued that the Council could not properly function without

that document being implemented. As such, the complainant argued that if the document was only held by local councillors and/or the Mayor, as opposed to the Council itself, then it was held on behalf of the local authority for the purposes of Council business and as such can be said to be held by the Council for the purposes of FOIA by virtue of section 3(2)(b).

### The Council's position

18. As part of her investigation the Commissioner asked the Council to explain why it did not have an interest in, or a business reason to know, how the members of various committees are appointed, and thus by implication why it did not need to hold or have an interest the content of the requested agreement. (This question of course presupposes that the agreement does refer to the membership of the Council's committees as the complainant suggests. The Commissioner notes that the reference to the agreement in the minutes of a Council meeting does suggest that the agreement ensured that 'the Leader of the Labour Group was automatically appointed to the Executive'<sup>3</sup>).
19. In response the Council explained that the appointment to committees is controlled by law. In respect of the exercise of section 9c of the Local Government Act 2000 it explained that councillors to the Executive are exclusively appointed by the Mayor with political balance rules being dis-applied by section 9Gc. The Council explained that in respect of all other committees, other than the Executive, the political balance requirements set out in sections 15 to 17 of the Local Government and Housing Act 1989 have effect and at its annual meeting the Council appoints members to the other committees.
20. Therefore, the Council argued that it is for the Mayor to choose who he appoints to the Executive and it is a matter for him alone. The Council reiterated its position that the agreement in question was therefore a personal one, made on political grounds, between the Mayor and the leader of the Labour group with the Mayor acting in his capacity under section 9c of the aforementioned legislation. The Council also argued that the agreement did not form any part of its decision making process and emphasised that it had not been aware of the existence of the agreement for two years, prior to it being reviewed.<sup>4</sup>

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<sup>3</sup> Again, see <http://copeland.moderngov.co.uk/documents/s5090/Council%2012.09.17%20-%20minutes%202%20docx.pdf> item C43 Oral Questions to the Mayor and Executive

<sup>4</sup> This review of the agreement is also referred to in the minutes of the Council meeting cited at the previous footnote.

The Commissioner's position

21. Having considered the Council's submissions the Commissioner is satisfied that the Mayor does not hold the agreement on behalf of the Council for the purposes of section 3(2)(b) of FOIA. She has reached this conclusion given that the Council was unaware of the agreement for two years; indeed, and as noted above, neither the Chief Executive nor the Monitoring Officer were personally aware of the agreement. In the Commissioner's view this strongly suggests that the Council did not, in contrast to the complainant's suggestion, need to know the contents of the document in order to be able to function. In other words, there is no evidence to suggest therefore that the Council had a purpose or use of the agreement in question.
  
22. Furthermore, the Commissioner is satisfied that the Mayor was clearly acting in line with the powers granted to him under local government legislation in appointing members of his Executive. How, and indeed who, he appointed to this committee is in the Commissioner's view simply a matter for the Mayor; it is not a decision for the Council itself. On this point the Commissioner considers it important to remember that there is a distinction in terms of FOIA between the functions of the local authority, ie Copeland Borough Council, and the functions of the elected Mayor. It is the local authority itself which is the body covered by FOIA; the Mayor is an elected political leader who is not covered by the legislation in his own right. For the reasons set out above, in the Commissioner's view the appointment of the Executive committee members is clearly a function of the Mayor's; it is not a function of the Council itself. The Commissioner therefore accepts the Council's line of argument that the agreement in question was a political one entered into by the Mayor and is not one that he entered into on behalf of the Council. Moreover, for the reasons discussed above, the Commissioner is satisfied there is no evidence that the Council needed access to, or knowledge of, the requested agreement in order to undertake its functions.ss

## Right of appeal

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23. 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](mailto:GRC@hmcts.gsi.gov.uk)  
Website: [www.justice.gov.uk/tribunals/general-regulatory-chamber](http://www.justice.gov.uk/tribunals/general-regulatory-chamber)

24. 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.
25. 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 .....**

**Jonathan Slee**  
**Senior Case Officer**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
**Cheshire**  
**SK9 5AF**