Neutral Citation Number:

IN THE FIRST-TIER TRIBUNAL **Appeal No: EA/2014/0174**
GENERAL REGULATORY CHAMBER
(INFORMATION RIGHTS)

ON APPEAL FROM:

The Information Commissioner's Decision Notice No: FS50528260
Dated: 9 June 2014

Appellant:	**Darryl Chamberlain**
Respondents:	**The Information Commissioner**
Date of "paper" hearing:	**23 October 2014**
Venue:	**Fox Court, Gray's Inn Rd**

Before

HH Judge Shanks

Judge

and

Nigel Watson and **Narendra Makanji**

Tribunal Members

Date of Decision: **29 October 2014**

Subject matter:

Freedom of Information Act 2000

s.1	Whether information held

Case cited:

University of Newcastle-upon-Tyne v Information Commissioner and BUAV [2011] UKUT 185 (AAC)

DECISION OF THE FIRST-TIER TRIBUNAL

For the reasons set out below the Tribunal dismisses Mr Chamberlain's appeal and upholds the Commissioner's decision notice dated 9 June 2014.

REASONS FOR DECISION

Introduction

1. On 30 September 2013 the Appellant, Mr Chamberlain requested information from Greenwich Council under FOIA in these terms:

> **I understand that between May and August 2012 a councillor submitted a proposed strategy for dealing with bullying among members and/or officers.**
>
> **Could you please:**
>
> **(a) Send me this strategy.**
>
> **(b) Explain what action has been taken since – whether it has been implemented, or whether nothing has been done.**

2. It is common ground that the relevant document was in fact produced in May 2013 by Alex Grant, who was at the time a Labour councillor, that it was emailed by Mr Grant to various councillors and officers of the Council and that it remains accessible by the Council. The Council say, however, that it is not "held" by them for the purposes of FOIA and that they are therefore under no obligation to supply it to Mr Chamberlain under section 1(1)(b). The Information Commissioner upheld the Council's position in a decision notice dated 9 June 2014 and Mr Chamberlain has appealed to this Tribunal.

3. The issue for the Commissioner (and for this Tribunal in reviewing his finding) was whether Greenwich "held" the information in question at the time of Mr Chamberlain's request. That is an issue of fact which we must decide on the balance of probabilities in the light of the "matrix of [relevant] findings of [primary] fact" we make based on the evidence now before us (see *University of Newcastle-upon-Tyne v Information Commissioner and BUAV* [2011] UKUT 185 (AAC) at [44]). "Hold" is an ordinary English word and sophisticated legal analysis of its meaning is not required or appropriate; but it has to be understood with the purposes of FOIA in mind and there must be an "appropriate connection" between the information and the public authority in question so that it can be properly said that the information is held by the authority; and the mere fact that information is physically on the authority's premises or somehow within its control is not sufficient (*ibid* at [23] and [27]).

Findings of fact

4. We turn therefore to make relevant findings of fact. We should record at the outset that this process has not been as perfect as it may have been because we have not had the benefit of a hearing with live evidence and cross-examination and we have not seen Mr Grant's email or the document in question. What we do have are various submissions by Mr Chamberlain, a statement from Mr Grant dated July 2014 (pp 16 and 17), a review letter dated 25 March 2014 (pp39-41) from the Council's Head of Law and Governance, Russell Power, and comments produced by the Council on the notice of appeal and Mr Grant's statement (pp55-57); we infer that these comments were produced by Mr Power although surprisingly they do not bear either a date or a

name. We are satisfied nevertheless that we have sufficient material to decide the case fairly and, the parties having consented to a "paper hearing", that we can properly determine the issues in that way (see rule 32(1) of our rules of procedure).

5. Mr Grant was, as we have said, a Labour councillor on Greenwich Council in 2013. We take judicial notice of the fact that the Council was under Labour control but that there were a few Conservatives councillors. At the time there was a Standards Committee which was considering a new code of conduct for councillors. The Standards Committee consisted of three councillors and three independent members (one of whom was chairman of the committee) and there was an Indepent Person who attended its meetings. Mr Grant was not a member of this committee or the Council's Cabinet and he had no executive responsibility.

6. The email in question in this case was sent by Mr Grant on 14 May 2013; it is common ground that attached to the email was the document which Mr Chamberlain seeks, described by Mr Grant as "a report containing recommendations for a new anti-bullying strategy." Mr Power says in his review letter of 25 March 2014 that the email was sent only to councillors who were members of the Labour group and that it sought a meeting with those councillors. Mr Grant says in his July 2014 statement that his recommendations were applicable to the Council as a whole and not just a single political group but he does not challenge Mr Power's contention that the email was sent only to members of the Labour group. It is common ground that the email and its attachments were copied to Mr Power and to the chairman of the Standards Committee and the Independent Person. Mr Grant also says that the email was copied to the Council's Chief Executive, which is contrary to Mr Power's evidence; for what it is worth we accept the Council's position on this: it would have been open to Mr Chamberlain to invite Mr Grant to produce a copy of the email if the point was considered significant.

7. Mr Power in his letter of 25 March 2014 states that before receiving the email on 14 May 2014 he had advised Mr Grant orally and in writing that the matters he was raising were matters for his political group and not for the Council or its Standards

Committee. He states that after receiving the email he repeated that advice to Mr Grant and told him that the chairman of the committee and the Independent Person agreed with that view. It is notable that Mr Grant does not in his statement challenge those assertions. Further, Mr Power says that Mr Grant's document was never considered by the Standards Committee or the Council at any meeting; it appears that that is consistent Mr Grant's evidence: indeed, as we understand his position, it is for him a matter of serious complaint. It is not disputed that Mr Power deleted the email but that the Council still has access to it and its attachments in Mr Power's deleted items file.

8. Mr Grant says in his statement that the recommendations document was written by him on a Council laptop, that it carried the Council's logo and that it was distributed using the Council's email and internal post. He also says that a printed copy was placed in the Members' Library at Woolwich Town Hall in early 2014. We accept what the Council says about these points, namely that: (1) councillors are entitled to a laptop but Mr Grant did not have any secretarial or administrative assistance from the Council in writing his document; (2) Mr Grant placed the Council logo on the document without authority and was asked by the Chief Executive in writing to remove it; (3) the only evidence of email distribution is as set out above and the only evidence of distribution of the document by internal post is that Mr Grant sent hard copies of the document to Mr Power and the Chief Executive in December 2013 but they both returned them shortly after receipt; (4) the document was placed in the Members' Library by Mr Grant some months after Mr Chamberlain's request for information (but in any event mere presence of the document in the library would not make it a document "held" by the Council).

Conclusion

9. In the light of those findings, we are firmly of the view that the Council did not "hold" the document in question for the purposes of FOIA when Mr Chamberlain asked for it in September 2013. Whether or not Mr Power's advice was right or wrong, the fact was that he, as the Council's Head of Law and Governance, had made it clear to Mr Grant that the Council and its Standards Committee had no wish or need to receive his

document. The mere fact that it was (and is) still accessible to the Council in Mr Power's deleted items folder (having been copied uninvited to his Council email address) does not mean it was held by the Council. It is right to say that we have no evidence about what has happened to the copies of the emails sent to the chairman of the Standards Committee and the Independent Person but, even assuming the contents of their email accounts somehow belong to the Council and that the relevant email had not been fully deleted, we are satisfied that they both agreed with Mr Power's advice about the status of the document and that the only reason it would have been accessible to the Council through them was that it had been copied (uninvited) to their email accounts by Mr Grant.

10. In those circumstances we uphold the Commissioner's decision that Greenwich did not hold the information requested and we dismiss Mr Chamberlain's appeal.

11. Although that conclusion disposes of the case, we are bound to say that we are concerned that the pursuit of this case may have amounted to an abuse of the process. We say that because it is clear from the fact that Mr Grant has supplied Mr Chamberlain with a statement that there is a measure of co-operation between them and we are therefore at a loss to see why Mr Chamberlain could not simply have obtained the disputed document direct from Mr Grant. It appears that they are both intent on making a political point (which may or may not be a good point) about the Council's treatment of Mr Grant's recommendations (we refer to the penultimate para of Mr Grant's statement and the penultimate para of Mr Chamberlain's latest Reply document). It is right, of course, that the motives of someone seeking information under FOIA are generally irrelevant but that may not apply when they have another obvious way of obtaining the information.

12. This decision is unanimous.

HH Judge Shanks

29 October 2014