



**Appeal Number: EA/2021/0075**

**[2022] UKFTT 298 (GRC)**

**First-Tier Tribunal  
(General Regulatory Chamber)  
Information Rights**

**BETWEEN:**

**NIGEL WESSON**

**Appellant:**

**and**

**THE INFORMATION COMMISSIONER**

**First Respondent:**

Tribunal: Brian Kennedy QC, Pieter De Waal and Raz Edwards.

Date of Hearing: 3 August 2022 – On the papers.

Decision: The Tribunal allows the Appeal in part.

**SUBSTITUTED DECISION NOTICE**

**The Substituted Decision:**

We substitute the Decision Notice as a set out at Paragraph 21 below but do not direct the Council to take any action.

## **REASONS**

### **Introduction:**

- [1] This decision relates to an appeal brought under section 57 of the Freedom of Information Act 2000 (“the FOIA”). The appeal is against the decision of the Information Commissioner (“the Commissioner”) contained in a Decision Notice (“DN”) dated 7 March 2022 (reference IC-98129-N4S9), which is a matter of public record.

### **Factual Background to this Appeal:**

- [2] Full details of the background to this appeal, the complainant’s request for information and the Commissioner’s decision are set out in the DN. The appeal concerns a request for information relating to an increase to the rental rates for beach huts. Lewes and Eastbourne Borough Council (“the Council”) withheld some information on the basis of section 43(2) (commercial interests) of FOIA, and stated that further information was not held. The Commissioner held that section 43(2) was correctly applied and the public interest in maintaining the exemption outweighs the public interest in disclosure. The Commissioner also held that, on the balance of probabilities, no further information is held by the Council.
- [3] The Commissioner maintains the position set out in his DN; namely that section 43(2) was correctly applied and the public interest in maintaining the exemption outweighs the public interest in disclosure. The Commissioner accepts, on the balance of probabilities, that the Council does not hold any further information. The Appellant now appeals against the DN. The Commissioner opposes the appeal and invites the Tribunal to uphold the DN. The Appellant has stated that he wishes for a paper hearing of this appeal. The Commissioner agrees that such a mode of hearing is appropriate and consents to this matter being dealt with on the papers.

## History and Chronology

- [4] On 7 January 2021 the Appellant requested information from the Council in the following terms:

*“We have just received your letter of 4th January announcing the new rental rates for Beach Huts for 2021/22. Under the provisions of the Freedom of Information Act we are applying for information on the criteria, and any supporting report, used to decide the new rate which, for the hut we currently rent, is due to rise from £635 to £1,000 – an increase of 57%.”*

- [5] The Council responded on 27 January 2021. It denied holding the requested information, and provided the following explanation:

*“The council does not hold any supporting documentation which was used to decide the new rates for beach huts. The effects of the pandemic have resulted in the Tourism department, along with all other council departments, being asked to make savings or improve revenue from resources. The beach huts, which are in prime beach spots in one of Britain’s top resorts, have only had minimal annual rental increments in the last ten years and were considered to be below their true market value and this review has sought to address that shortfall.”*

- [6] The Appellant requested an internal review on 28 January 2021.

- [7] The Council provided the outcome of its internal review on 5 February 2021. It revised its position to disclose an email dated 14 November 2019 named “Fee income review”, and advised that 2 further documents were withheld on the basis of section 43(2) of FOIA.

- [8] The Appellant contacted the Commissioner on 12 March 2021 to complain about the way their request for information had been handled. Specifically they dispute the application of section 43(2) to withhold information. Furthermore, they contend

that the Council has not identified nor disclosed any information about the decision-making criteria used for establishing the rent increases.

## **Legal Framework**

### **S1 FOIA – General right of access to information held by public authorities**

(1) 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.

(2) Subsection (1) has effect subject to the following provisions of this section and to the provisions of sections 2, 9, 12 and 14.

(3) Where a public authority—

(a) reasonably requires further information in order to identify and locate the information requested, and

(b) has informed the applicant of that requirement,

the authority is not obliged to comply with subsection (1) unless it is supplied with that further information.

(4) The information—

(a) in respect of which the applicant is to be informed under subsection (1)(a), or

(b) which is to be communicated under subsection (1)(b),

is the information in question held at the time when the request is received, except that account may be taken of any amendment or deletion made between that time and the time when the information is to be communicated under subsection (1)(b), being an amendment or deletion that would have been made regardless of the receipt of the request.

(5) A public authority is to be taken to have complied with subsection (1)(a) in relation to any information if it has communicated the information to the applicant in accordance with subsection (1)(b).

(6) In this Act, the duty of a public authority to comply with subsection (1)(a) is referred to as “the duty to confirm or deny”.

The ‘derogation’ in Part VI of Schedule 1

1. Section 1 of the FOIA provides a “*General right of access to information held by public authorities*”.
2. Section 3 of the FOIA provides that the term “*public authority*” means anybody which is listed in Schedule 1 to the FOIA. Schedule 1 contains a long list of bodies, persons and office-holders, some defined generically and others specifically.

Whether information is “*held*” by a public authority

1. The right of access to information in section 1 of the FOIA extends to information “*held*” by a public authority.
2. Pursuant to section 1(1) of the FOIA: “*Any person making a request for information is entitled to – (a) 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.*”

Before an authority can be said to “*hold*” relevant information, it must “*have been given it, or have obtained it, or have created it*”: *Department of Health v Information Commissioner & Lewis* [2015] UKUT 0159 (AAC) at §96. Where there is a dispute as to whether a public body in fact holds information within the scope of a request, the approach to be adopted by the Tribunal is as follows:

- (1) Whether information is “*held*” by the authority is a question of fact to be determined applying a common sense and non-technical approach: *University of Newcastle upon Tyne v Information Commissioner and BUAV* [2011] UKUT 185 (AAC) at §§23, 27.

(2) The test is not one of certainty but whether on a balance of probabilities the public authority held more information than was disclosed at the relevant time: *Bromley & others v Information Commissioner* EA/2006/0072 at §13.

(3) This standard of proof necessitates the consideration of a number of factors, “*including the quality of the public authority's initial analysis of the request, the scope of the search that it decided to make on the basis of that analysis and the rigour and efficiency with which the search was then conducted. Other matters may affect our assessment at each stage, including, for example, the discovery of materials elsewhere whose existence or content point to the existence of further information within the public authority which had not been brought to light. Our task is to decide, on the basis of our review of all of these factors, whether the public authority is likely to be holding relevant information beyond that which has already been disclosed*”: *Bromley* at §13.

(4) If following a “*reasonable and intelligent*” search of the relevant areas, the information sought is not revealed, the public authority is entitled to consider on the balance of probabilities that the information is not held see Freedom of Information Code of Practice (“Code of Practice”) at §1.12.

However these rights are subject to certain exemptions set out in Part II of FOIA. For the purposes of this case, the relevant exemption in Part II is s.43(2) FOIA which provides that:

*“Information is exempt information if its disclosure under this Act would, or would be likely to, prejudice the commercial interests of any person (including the public authority holding it)”.*

Section 43 FOIA is a qualified exemption to disclosure, and is therefore subject to the public interest test under section 2(2)(b) FOIA. This states that a public authority does not have to provide the information if “*in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information.*”.

## **Commissioner's Decision Notice**

- [9] The Commissioner investigated the matter and concluded that the scope of his investigation was to determine whether any further information was held by the Council within the scope of the request, and whether the Council had correctly applied section 43(2) FOIA. The Commissioner considered the submissions of both parties and concluded that three withheld spreadsheets, so far as the information contained therein was within the scope of the request, were exempt under section 43(2) FOIA and that no further information was held.

## **Grounds of Appeal**

- [10] The Appellant's Grounds of Appeal detailed that there is no competition with the Council's beach huts, and therefore no commercial prejudice, and that the public interest in understanding the reasoning for the decision outweighs any such prejudice. Further, the Appellant argued that the Council should hold information regarding the criteria used for the increases.

## **The Commissioner's Response**

- [11] The Commissioner maintained his position as outlined in the DN and resisted the appeal. The Commissioner relied on her findings and reasons for those findings as set out in her DN. In relation to commercial prejudice, the Commissioner referred to the Tribunal's decision in *Christopher Martin Hogan and Oxford City Council v the Information Commissioner* (EA/2005/0026 and 0030) ("Hogan") to state that it is accepted that demonstrating prejudice will sometimes, by its very nature, be a speculative exercise, and on the facts of this case the Council has provided sufficient submissions to demonstrate that commercial prejudice would have been likely. The Commissioner considered that the alleged prejudice is more than a hypothetical or remote possibility.
- [12] The Commissioner considered the public interest in understanding the criteria used to decide the rent increase along with the general public interest in openness and transparency with regards to the use of public resources. However the Commissioner in particular noted that the focus of the request was to understand

why the rent was increased, and specifically what criteria was used. The information that was being withheld ultimately did not address this issue even though it was within the scope of the request. Balancing the weak public interest in the actual withheld information, which would not address the Appellant's concerns, and the quite weak public interest in maintaining the exemption the Commissioner concluded that the balance favoured withholding the information based on the Council's need to protect itself from competition and further rate disputes.

- [13] In relation to whether further information is held, the Commissioner referred to the Council's submissions and remained satisfied with the searches conducted by the Council for information within the scope of the request. The Commissioner submitted that he was correct in accepting, on the balance of probabilities, that the Council did not hold any further information within the scope of the request. The Commissioner invited the Tribunal to dismiss the appeal. The Commissioner stated that none of the Appellant's arguments are sufficient to alter his findings nor does the Appellant identify any error of law in the DN or incorrect exercise of the Commissioner's discretion.

### **Appellant's Reply to the Commissioner's Response**

- [14] The Appellant lodged a reply to the Commissioner's response on 29<sup>th</sup> April 2022. The Appellant argued that the Commissioner did not consider the Council's initial response to his information request. The Appellant refuted the argument that the Council's reputation is dependent upon this information not being disclosed. The Appellant argued that the public interest outweighs any need for secrecy. The Appellant contended that on the balance of probabilities, the information does exist. The Appellant criticised the Commissioner's approach to this case.



### **Tribunal Deliberations:**

- [15] The Tribunal sat to consider the papers on 3 August 2022.
- [16] On the scope of the request, whilst we find that the information provided in the Closed Bundle before us can be described as potentially commercially sensitive, it is very general and limited information on “Beach Huts” (in two minor references) and is of limited meaning. We also find that this information does not fall within the scope of the request, which specified; “*criteria*” and “*any supporting report*”.
- [17] In relation to reliance on s43(2), the Tribunal are of the view that there is insufficient evidence to demonstrate that any of the withheld information (as in the Closed Bundle) would or would be likely to prejudice the Councils’ commercial interests. We do not have before us any material evidence that disclosure of the withheld information would cause the Council to suffer any competitive disadvantage, particularly in reference to its operation of beach huts.
- [18] We agree with the Commissioner that the withheld information offers very little insight into the decision-making relating to the rental increases, apart from savings and increases needed to improve the Council’s budgetary position. In terms of public interest, we are of the view that the withheld information does not add anything to the information already available in the initial response provided to the Appellant at the outset in the communication to the Appellant dated 5 February 2021.
- [19] We are not persuaded that any disclosure of the withheld information, (even if it were in scope) would result in some identifiable prejudice that would or would be likely to occur and there is, in our view insufficient evidence to demonstrate that there would be a real, actual, or significant risk of such prejudice. We are not persuaded by the evidence before us that the Council is correct in its assertions referenced at Paragraph 23 of the DN. The Tribunal would not rely upon the research referred to at Paragraph 28 of the DN and would expect the Council to provide further evidence of its assertions to demonstrate prejudice.

[20] We find no evidence to challenge the veracity of the Councils' assertions as set out in Paragraphs 48 to 54 in the DN. In particular, we accept that; *"internal meetings are not normally minuted"*, that *"e-mails would only be kept for more strategic matters"* and that *"Pricing is delegated to the heads of each service"*. We have no reason to doubt that the Council did the appropriate searches following key words consistent with the scope of the request *"– beach hut price increase, price increase, beach hut prices, review of beach hut prices, rent review of beach huts,"* - or the Council's confirmation that no information in scope of the request had been destroyed or deleted etc. Whilst it is accepted that the record keeping practices explained by the Council may be questionable – particularly in relation to recording such decisions, we have no reason to doubt the Councils' assertion that it holds no further information within the scope of the request.

### **SUBSTITUTED DECISION**

[21] For the above reasons we allow the appeal in relation to the finding that s43(2) was engaged. However, we accept the Commissioner's conclusion that on the balance of probabilities the requested information is not held. We substitute this Decision for the DN accordingly.

Brian Kennedy QC

5 August 2022.