

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 6 August 2019

Public Authority: Scarborough Borough Council
Address: Town Hall
St Nicholas St
Scarborough
YO11 2HG

Decision (including any steps ordered)

1. The complainant requested information relating to the decision by Sheffield International Venues (SIV) not to hire Whitby Pavilion to the then promoter, or their company, as part of Whitby Goth Weekend.
2. Scarborough Borough Council (the Council) provided some information within the scope of the request, but refused to provide the remainder citing sections 40(2) (personal information), 41 (information provided in confidence), 42 (legal professional privilege) and 43(2) (commercial interests) of the FOIA. It also said that some information within the scope of the request was not held.
3. The Commissioner has investigated the Council's application of sections 42 and 43(2) to the information withheld by virtue of those exemptions. She has also considered whether, on the balance of probabilities, the Council held further information within the scope of part (d) of the request.
4. The Commissioner's decision is that the Council was entitled to apply the section 42 and 43(2) exemptions to the withheld information. She also determined that, on the balance of probabilities, the Council did not hold the disputed information within the scope of part (d) of the request.
5. The Commissioner requires no steps to be taken as a result of this decision.

Background

6. The Commissioner understands that SIV are under contract to the Council to provide specified operational and management services at the Whitby Pavilion, amongst other venues.

Request and response

7. On 20 July 2018, the complainant wrote to the Council and requested information in the following terms:

"Please could you provide me with any information you have available of any involvement of SBC [Scarborough Borough Council] (or its staff) regarding the decision by Sheffield International Venues (SIV) to not hire Whitby Pavilion to [name redacted] or [company name redacted] as part of Whitby Goth Weekend (aka: Whitby Gothic Weekend) (collectively referred to below as 'WGW'). This decision was released to the public in June 2018, but could've been ongoing for a period of months or even years prior to that.

Such as (where appropriate and not covered by specific confidentiality issues)

a) the dates of any meetings involving SBC where potentially not hiring to WGW was discussed

b) the attendees of those meetings, either specific names or more generally whether SIV were involved

c) the agenda or a synopsis of anything relevant to this FOI enquiry

d) the minutes of those meetings, or the relevant section(s), redacted to protect confidentiality if required

e) any correspondence or verbal discussion between SBC and anyone in SIV or other organisations (such as Yorkshire Coast Tourism Advisory Board) on this subject

f) any passing of information on this subject from SBC to third parties (such as Yorkshire Coast Tourism Advisory Board) and whether that included any contractually sensitive details that shouldn't have been released to the public.

Also, on the wider subject:

g) Whether SBC's contract with SIV includes the specific requirement to maintain 'goth' events in Whitby

h) Whether the renewal of SBC's contract with SIV, due to come to an end in 2022, has been discussed yet

i) Whether those discussions have involved the possibility of separating/removing any of the venues currently covered in the current contract, from any new contract”.

8. The Council responded on 15 August 2018. It stated that it did not hold information within the scope of part (h) of the request. It provided some information within the scope of the request, (in relation to parts (g) and (i)), but refused to provide the remainder – namely the information within the scope of parts (a) – (f) of the request. The Council cited the following exemptions as its basis for doing so:
 - section 43(2) commercial interests
 - section 41 information provided in confidence
9. The complainant requested an internal review of the Council's handling of parts (a) – (f) of the request.
10. Following an internal review, the Council responded on 5 October 2018. It provided information within the scope of parts (a) and (c) of the request. However, the Council maintained its position with respect to the remaining withheld information.

Scope of the case

11. The complainant contacted the Commissioner on 24 October 2018 to complain about the way his request for information had been handled. He told the Commissioner that he considered that the Council “*had wrongly applied blanket exemptions*” to the substantive elements of his FOI request.

12. Although not required to do so, he explained:

“My request is specifically regarding whether SBC acted properly in their handling of Sheffield International Venue's decision not to hire to [the promoter], how long that decision had been discussed for, and whether that decision was made for any reason other than those already stated publicly by said parties”.

13. Taking account of the complainant's comments, the Commissioner wrote to him at the start of her investigation explaining that the scope of her investigation would be to determine whether the Council handled parts (b), (d), (e) and (f) of his request in accordance with the FOIA.

14. During the course of the Commissioner's investigation, the Council revisited its handling of parts (b), (d), (e) and (f) of the request, as a result of which it disclosed some further information to the complainant. In its correspondence with the complainant, the Council revised the exemptions it considered applied to the withheld information. It confirmed its application of sections 41 and 43(2) to the withheld information and additionally cited sections 40(2) (personal information) and 42 (legal professional privilege) of the FOIA.
15. The Council also clarified the amount of information it held that fell within the scope of parts (b) and (d) of the request, telling the complainant that that no record was held of the attendees of the meeting held on 5 June 2018 and that it did not hold minutes of the meeting held on 24 April 2018.
16. The complainant contacted the Commissioner to express his continued dissatisfaction with the Council's handling of his request for information. He told the Commissioner:

"[The Council] seem to be suddenly bringing in "legal professional privilege" now, having never even hinted at it previously".
17. The Commissioner accepts that a public authority has the right to claim an exemption for the first time before the Commissioner or the Tribunal. The Commissioner does not have discretion as to whether or not to consider a late claim.
18. In the course of his correspondence, the complainant raised a number of issues which are outside the scope of the Commissioner's remit. The Commissioner's duty is to decide whether a request for information made to a public authority has been dealt with in accordance with the requirements of Part I of the Freedom of Information Act 2000 (FOIA).
19. In light of the above, the Commissioner wrote the complainant explaining the revised scope of her investigation into the Council's handling of parts (b), (d), (e) and (f) of his request for information. She told him her investigation would look at whether the Council was entitled to rely on section 41, 42 and/or section 43 of the FOIA as a basis for refusing to provide the withheld information. She also told him that she would consider whether the Council was correct when it said that it did not hold some of the requested information within the scope of parts (b) and (d) of the request.
20. The Council subsequently confirmed that it had located further information within the scope of part (b) of the request, namely information relating to the meeting held on 5 June 2018. It provided the complainant with a redacted copy of that information.

21. The analysis below considers the Council's application of sections 41(1), 42 and 43(2) to the remaining withheld information. The Commissioner accepts that where the information is in the form of email chains, the information contains duplicates, as the emails chains often overlap.
22. The Commissioner has also considered whether, on the balance of probabilities, the Council held further information within the scope of part (d) of the request, namely minutes of the meeting held on 24 April 2018.
23. The Commissioner acknowledges that the request includes a named individual and their named company. For the purposes of this decision notice, the Commissioner will refer to both, generically, as 'the promoter'.

Reasons for decision

Section 42 legal professional privilege

24. Section 42(1) of the FOIA provides that information is exempt from disclosure if the information is protected by legal professional privilege (LPP) and this claim to privilege could be maintained in legal proceedings.
25. LPP protects the confidentiality of communications between a lawyer and client. It has been described by the Information Tribunal in the case of *Bellamy v The Information Commissioner and the DTI* (EA/2005/0023) (Bellamy) as:

" ... a set of rules or principles which are designed to protect the confidentiality of legal or legally related communications and exchanges between the client and his, her or its lawyers, as well as exchanges which contain or refer to legal advice which might be imparted to the client, and even exchanges between the clients and their parties if such communications or exchanges come into being for the purposes of preparing for litigation."
26. There are two categories of LPP – litigation privilege and legal advice privilege. Litigation privilege applies to confidential communications made for the purpose of providing or obtaining legal advice in relation to proposed or contemplated litigation. Legal advice privilege may apply whether or not there is any litigation in prospect but legal advice is needed. In both cases, the communications must be confidential, made between a client and professional legal adviser acting in their professional capacity and made for the sole or dominant purpose of obtaining legal advice.

27. In this case, the Council considered that the information withheld by virtue of section 42(1) is exempt from disclosure because it is subject to advice privilege.

28. The complainant accepted that a lawyer *"must be able to have free and frank discussions with their client"*.

29. He also told the Commissioner:

"I can understand how there would be legal privilege in a private meeting between a lawyer and their client, but not how it could be in a meeting where people not represented were present".

30. The Commissioner recognises that parts of the request specifically refer to meetings. However, she is mindful of the wide range of the request in its entirety, notably *'any information you have available ... such as'*.

31. Having had the benefit of viewing the small amount of information withheld by virtue of section 42, the Commissioner is satisfied that it constitutes communications between a lawyer and their client and that it clearly relates to legal matters. She is also satisfied that the communications were made for the dominant (main) purpose of seeking or giving legal advice.

32. Having established that the requested information falls within the definition of LPP, the next matter for the Commissioner to consider is whether privilege has been lost or waived because of earlier disclosures.

33. The Commissioner's published guidance on section 42¹ of the FOIA states:

"...under FOIA we are concerned with disclosures to the world at large rather than disclosures to a limited audience. In a freedom of information context, LPP will only have been lost if there has been a previous disclosure to the world at large and the information can therefore no longer be considered to be confidential".

34. The Commissioner regards the key to deciding whether the right to claim LPP has been lost will be to consider whether previous disclosures to the world at large mean that the information can no longer be said to be confidential.

¹ https://ico.org.uk/media/for-organisations/documents/1208/legal_professional_privilege_exemption_s42.pdf

35. In this case, the Commissioner is not aware of any previous disclosure of the information under consideration to the world at large.
36. She therefore finds that section 42 is engaged in respect of the withheld information.

The public interest test

37. Section 42 is a qualified exemption, subject to the public interest test as set out in section 2(2)(b) of the FOIA. In accordance with that section the Commissioner must consider whether the public interest in maintaining the exemption outweighs the public interest in disclosing the information.

Public interest arguments in favour of disclosing the requested information

38. The complaint put forward a generic public interest argument in relation to the Council's overall handling of his request. He told the Commissioner:

"If there was an impropriety involved, I can see why those involved would want it hidden, but I also think it is very much in the public interest to shine a light on these activities".

Public interest arguments in favour of maintaining the exemption

39. The Council argued that disclosure of the information would be contrary to the principle behind legal professional privilege – namely safeguarding openness in all communications between client and lawyer to ensure access to full and frank advice.

Balance of the public interest arguments

40. In *Bellamy* the principal question which the Tribunal had to consider was whether it was in the public interest for the public authority to disclose the information sought. Explaining the balance of factors to consider when assessing the public interest test, it said:

"... there is strong element of public interest inbuilt into the privilege itself. At least equally strong counter-vailing considerations would need to be adduced to override that inbuilt public interest".

41. In balancing the opposing public interest factors under section 42, the Commissioner considers it necessary to take into account the in-built public interest in this exemption: that is, the public interest in the maintenance of LPP. In her view, the general public interest inherent in this exemption will always be strong due to the importance of the principle behind LPP: safeguarding openness in all communications

between client and lawyer to ensure access to full and frank legal advice. In her view, that principle is fundamental to the administration of justice and disclosing any legally privileged information threatens that principle.

42. Although she considers there will always be an initial weighting towards maintaining the exemption, the Commissioner recognises that there are circumstances where the public interest will favour disclosing the information.
43. In accordance with her guidance on section 42, the Commissioner considers the factors in favour of disclosure include the assumption in favour of disclosure and the rationale behind the assumption (ie accountability, transparency, furthering public debate etc).
44. She recognises that additional weight may be added to the above factors in favour of disclosure if the following issues are relevant in the particular case:
 - large amount of money involved;
 - whether or not a significant group of people are affected by the advice or resulting decision;
 - lack of transparency in the public authority's actions;
 - misrepresentation of advice that was given;
 - selective disclosure of only part of advice that was given.
45. The Commissioner recognises that it is also important to take into account the significance of the actual information and what it reveals.

Conclusion

46. In reaching a conclusion in this case, the Commissioner is mindful that, while the inbuilt weight in favour of the maintenance of legal professional privilege is a significant factor in favour of maintaining the exemption, the information should nevertheless be disclosed if that public interest is outweighed by the factors favouring disclosure.
47. In reaching her decision in this case, the Commissioner has considered the arguments put forward by the complainant and the stated position of the Council, in addition to the prior findings of the Commissioner and the Information Tribunal in relation to legal professional privilege. She has also had regard to the content of the withheld information.

48. The Commissioner accepts that there is a public interest in ensuring that public authorities are transparent in their actions and accountable for the decision making process. She gives weight to those arguments.
49. However, the Commissioner has also taken into account that, at the time of the request, the legal advice was relatively recent and was 'live' in that it was still being relied on.
50. Furthermore, in order to outweigh the inherent public interest in maintaining the exemption, the Commissioner considers that there must be a compelling argument for disclosure. In this case the Commissioner has not been presented with any such argument.
51. In all the circumstances of this case, the Commissioner does not consider that there are factors present that would equal or outweigh the strong public interest inherent in this exemption.
52. The Commissioner is therefore satisfied that the exemption provided by section 42(1) of the FOIA for legal advice privilege has been correctly applied.
53. The Commissioner has next considered the Council's application of exemptions to the remaining withheld information. The Council told the Commissioner that it considered that both sections 43(2) and 41 apply and that *"these exemptions apply equally to all the information"*.
54. The Commissioner has first considered its application of section 43(2) to the remaining withheld information.

Section 43 commercial interests

55. Section 43(2) of the FOIA states 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)."

56. In order for a prejudice based exemption, such as section 43(2), to be engaged the Commissioner considers that three criteria must be met:
 - first, the actual harm which the public authority alleges would, or would be likely to, occur if the withheld information was disclosed has to relate to the applicable interests within the relevant exemption;
 - secondly, the public authority must be able to demonstrate that some causal relationship exists between the potential disclosure of the information being withheld and the prejudice which the exemption is designed to protect. Furthermore, the resultant prejudice which is alleged must be real, actual or of substance; and

- thirdly, it is necessary to establish whether the level of likelihood of prejudice being relied upon by the public authority is met – ie, disclosure 'would be likely' to result in prejudice or disclosure 'would' result in prejudice.

57. In relation to the lower threshold of likelihood the Commissioner considers that the chance of prejudice occurring must be more than a hypothetical possibility; rather there must be a real and significant risk. With regard to the higher threshold of likelihood, in the Commissioner's view this places a stronger evidential burden on the public authority to discharge.

The complainant's view

58. The complainant disputed the Council's application of section 43 in this case. He told the Council that he understood that the decision by SIV regarding Whitby Goth Festival Weekend:

"... was purely due to a breakdown in relationships ... and their decision was not commercial".

The Council's view

59. In correspondence with the complainant, the Council told him that release of the withheld information would be likely to prejudice the commercial interests of:

"(a) the third party contractors; and

(b) the Council".

60. It described the withheld information as relating to "*confidential commercial discussions*" between the Council and the two third parties.

61. In addition to disclosure being detrimental to the third parties named in the request, the Council also told the complainant that disclosure of the requested information:

"... would be likely to prejudice any negotiations with other customers for other services in the future".

62. With respect to its own interests, the Council told the complainant:

"Disclosure of the information would be likely to prejudice the Council's commercial interests, being the ability to run a genuinely competitive exercise to procure such services".

63. In this case, the Council considered that disclosure of the requested information in this case 'would be likely' to prejudice the commercial interests concerned.

64. The Council argued that disclosure of the requested information would be likely to lead to a deterioration in the relationship between all parties.
65. In that respect, it told the complainant that disclosure would be likely to prejudice the commercial interests of the third party contractors and the Council.

The Commissioner's view

The applicable interests

66. When identifying the applicable interests, the Commissioner must consider whether the prejudice claimed is to the interest stated, which in the case of section 43(2), is commercial interests.
67. In the Commissioner's view, a commercial interest relates to a person's ability to participate competitively in a commercial activity, ie the purchase and sale of goods or services.
68. The Commissioner is satisfied that, in the context of the request in this case, the information relates to a commercial interest. She is also satisfied that the commercial activity involved – the procurement of services – is conducted in a competitive environment.
69. Therefore, with regard to the first criterion of the three limb test described above, the Commissioner accepts that the potential prejudice described by the Council clearly relates to the interests which the exemption contained at section 43(2) is designed to protect.

Nature of the prejudice

70. The Commissioner's view is that the use of the term 'prejudice' is important to consider in the context of the exemption at section 43. It implies not just that the disclosure of information must have some effect on the applicable interest, but that this effect must be detrimental or damaging in some way.
71. Secondly, there must be what the Tribunal in the case of *Christopher Martin Hogan and Oxford City Council v the Information Commissioner* (EA/2005/0026 and 0030) called a 'causal link' between the disclosure and the prejudice claimed. The authority must be able to show how the disclosure of the specific information requested would, or would be likely to, lead to the prejudice.

Nature of the prejudice – the Council

72. With respect to prejudice to its own commercial interests, the Council told the complainant:

"If this information were to be disclosed, then this may distort any future procurement exercise and result in a failure to obtain best value for the Council. In addition, if it were thought that the Council would disclose commercially sensitive information, parties may be either unwilling to bid for the provision of services at all, or may be reluctant to provide full information due to concern that it would be disclosed. Again, this distorts any procurement exercise to the detriment of the Council in achieving best value. This in turn could have an adverse impact upon the local taxpayers".

Nature of the prejudice – third party contractors

73. In relation to the third parties' commercial interests, the Council told the complainant that disclosure of the requested information is likely to prejudice the commercial interests of both of the third parties named in the request:

"... in being detrimental to their ability to negotiate with other parties in the future".

74. It also said:

"Disclosure of some or all of the information requested may cause unwarranted reputational damage to any/all of the parties concerned, which may in turn damage commercial interests through loss of trade".

75. When claiming that disclosure would, or would be likely to, prejudice the commercial interests of a third party, the Commissioner expects a public authority to consult with the third party for its view. In this case, the Council accepted that it had not consulted with the promoter, either at the time of the request or during the Commissioners' investigation. However, the Council provided the Commissioner with a copy of correspondence from the promoter, to the Council, in which they clearly expressed their views regarding disclosure of information on the subject matter of this notice. The Commissioner accepts that that correspondence was sent around the time of the request. She considers it appropriate for the Council to consider that such views remained live at the time of the request.
76. In its submission to the Commissioner, the Council confirmed what it had told the complainant, namely that SIV had been consulted and considered that disclosure of the information would be likely to prejudice their commercial interests.

Is the exemption engaged?

77. The Commissioner considers that the prejudice test is not a weak test: an evidential burden rests with public authorities to be able to show that

some causal relationship exists between the potential disclosure and the prejudice and that the prejudice is, real, actual and of substance. In the Commissioner's view, if a public authority is unable to discharge this burden satisfactorily, the exemption is not engaged.

Is the exemption engaged – the Council

78. In determining whether or not the effect of disclosure in this case would be likely to be detrimental or damaging in some way to the commercial interests of the Council, the Commissioner has considered the nature and likelihood of harm that would be likely to be caused.
79. The Commissioner acknowledges that the Council explained that disclosure in this case would be likely to cause a deterioration in the relationship between all parties "*due to the loss of apparent trust in the Council*".
80. The Commissioner recognises that there may be circumstances where the release of information held by a public authority could damage its reputation or the confidence that customers, suppliers or investors may have in it.
81. Having had the opportunity to consider the information withheld by virtue of section 43(2), the Commissioner is satisfied that disclosure of some of the information withheld on that basis has the potential to harm the Council's own commercial interests. She accepts that the disclosure of some of the withheld information may impact on the Council's ability to compete for business. She also considers it plausible that disclosure has the potential to impact on the commercial interests of the Council, namely its ability to run a procurement exercise.
82. From the evidence she has seen, the Commissioner is satisfied that there is a more than a hypothetical risk of prejudice occurring to the Council if the withheld information was disclosed; rather the risk of such prejudice occurring can be correctly described as one that is real and significant.
83. Accordingly, the Commissioner considers that the lower threshold of prejudice applies.
84. The Commissioner has therefore concluded the section 43(2) exemption is engaged in respect of the withheld information relating to the commercial interests of the Council.

Is the exemption engaged – third party contractors?

85. The Commissioner considers it important that, in claiming the section 43 exemption on the basis of prejudice to the commercial interests of a

third party, the public authority must have evidence that this does, in fact, represent or reflect the view of the third party.

86. In this case, she is satisfied that the Council provided evidence that it had consulted with SIV in order to establish whether they had any objection to their information being disclosed. She acknowledges that SIV considered, given the nature of the information, that disclosure of the withheld information would "cause issues".
87. The Commissioner also accepts that the views of the promoter were known to the Council. Furthermore, she recognises that, given the context of the request, the information relating to the two third parties is inextricably linked.
88. The Council argued not only that disclosure of that information would be likely to prejudice any negotiations with other customers for similar services in future, but also that disclosure would prejudice the commercial interests of both third parties.
89. From the evidence she has seen, the Commissioner is satisfied that there is a more than a hypothetical risk of prejudice occurring to the third parties if the withheld information was disclosed; rather the risk of such prejudice occurring can be correctly described as one that is real and significant.
90. Accordingly, the Commissioner considers that the lower threshold of prejudice applies.
91. The Commissioner has therefore concluded that section 43(2) is engaged in respect of the withheld information relating to the commercial interests of SIV and the promoter.

The public interest test

92. Section 43 is a qualified exemption and therefore the Commissioner must consider the public interest and whether in all the circumstances of the case the public interest in maintaining the exemption outweighs the public interest in disclosing the information.
93. The complainant told the Council:

"There is significant public interest if the information you hold contradicts the position of SIV or any other parties.... If there is a risk to damaging commercial interests, then there must be a corresponding public interest consideration".

Public interest arguments in favour of disclosing the information

94. The Council accepted that there was a public interest in how Whitby Pavilion is run and in ensuring that best value is obtained when procuring services. It recognised that disclosure in this case would aid the public in assessing whether best value had been obtained. It also recognised that disclosure would enable the public to satisfy themselves that *"the matter had been dealt with fairly and appropriately"*.

Public interest arguments in favour of maintaining the exemption

95. Arguing in favour of maintaining the exemption, the Council was of the view that:

"The Council already have in place sufficient external and internal measures to ensure propriety and best value".

96. The Council told the complainant:

"Disclosure of this information has significant potential to impact upon the willingness of parties to deal with the Council in future. Even where parties do treat with the Council they may not be prepared to disclose certain information for concern that it may be disclosed without their consent. This would not be conducive to open and transparent negotiations and dealings between the Council and third parties".

97. The Council also considered that it was not in the public interest if it was not able to achieve best value:

"There is an obvious public interest in maintaining trust and preserving the free flow of information which is required for the performance of public functions. The public also have a clear interest in the Council being able to conduct their commercial affairs to the benefit of the borough. It cannot be within the public interest for the Council to have to disclose details connected to these affairs which would result in deteriorating relationships and loss of trust with suppliers. To do so would put the Council at a significant disadvantage which in turn has a direct impact upon the public".

98. The Council also put forward generic public interest arguments in relation to the risk of unwarranted reputational damage/loss of customer confidence to one or more of the third parties concerned.

The balance of the public interest

99. In her guidance², the Commissioner recognises that:

"There will always be a general public interest in transparency. There may also be a public interest in transparency about the issue the information relates to".

100. However, she also recognises that the public interest is not necessarily the same as what interests the public.

101. The Commissioner has taken into account the strong case for openness and transparency when balancing the public interest arguments in this case. In that respect, the Commissioner acknowledges that the Council provided the complainant with some disclosable information.

102. The Commissioner has also taken into consideration what purpose disclosure would serve and what this information would add to the information that is already in the public domain.

103. The Commissioner gives weight to the argument that disclosure of information may cause unwarranted reputational damage to the Council which may in turn damage its commercial interests through loss of trade.

104. She recognises the legitimate public interest in the Council being able to compete in a commercial environment and that disclosure of the withheld information, which would be likely to prejudice that ability to compete, would undermine that public interest.

105. The Commissioner accepts that prejudicing the commercial interests of the third parties has the potential to distort competition in that market, which in itself would not be in the public interest.

106. On balance, the Commissioner considers that the public interest in disclosure of the withheld information is outweighed by the public interest in maintaining the section 43(2) exemption.

Section 41 information provided in confidence

107. The Council considered that both section 43 and section 41 applied to the withheld information.

² https://ico.org.uk/media/for-organisations/documents/1183/the_public_interest_test.pdf

108. As the Commissioner has found that the section 43 exemption applies, she has not considered the Council's application of section 41 to the same information.

Section 1 - general right of access

109. Section 1 of the FOIA 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."

110. The complainant disputed that there were no minutes or agenda for the 24 April 2018 meeting, information in scope of part (d) of the request.

111. He told the Commissioner:

"I find it rather hard to comprehend that there is no record of any attendees at a meeting that seems to usually have details like that meticulously recorded, and have minutes taken that need to be signed off at the next meeting".

112. He also considered that the absence of minutes or agenda for the 24 April 2018 meeting was:

"... seemingly in stark contrast with the 23 March 2018 and 5 June 2018 meetings".

113. In scenarios such as this one, where there is some dispute between the public authority and the complainant about the amount of information that may be held, the Commissioner, following the lead of a number of First Tier Tribunal decisions, applies the civil standard of the balance of probabilities.

114. In this case, the Commissioner has sought to determine whether, on the balance of probabilities, the Council held the disputed information within the scope of part (d) of the request.

115. In deciding where the balance of probabilities lies, the Commissioner will consider the complainant's evidence and arguments. She will also consider the searches carried out by the public authority, in terms of the extent of the searches, the quality of the searches, their thoroughness and the results the searches yielded. In addition, she will consider any other information or explanation offered by the public authority which is relevant to her determination.

116. For clarity, the Commissioner is not expected to prove categorically whether the information is held, she is only required to make a judgement on whether the information is held on the civil standard of the balance of probabilities.

117. In correspondence with the complainant, the Council simply told him:

"The Council does not hold minutes of the meeting held on 24 April 2018"

118. With respect to the meeting on 24 April 2018, in its submission to the Commissioner the Council confirmed what it had told the complainant, namely that no agenda was held for the meeting which took place on 24 April 2018. By way of explanation, it told the Commissioner:

"... this was an informal meeting".

119. It further explained:

"The 'meeting' of 24 April was not a formally convened meeting, simply an informal discussion, hence no minutes or records of the same were ever produced".

120. The Commissioner acknowledges that the requested information may be of interest to the complainant. However, while appreciating the complainant's frustration that the Council did not hold the requested information, the Commissioner is mindful of the comments made by the Information Tribunal in the case of *Johnson / MoJ (EA2006/0085)*³ which explained that the FOIA:

"... does not extend to what information the public authority should be collecting nor how they should be using the technical tools at their disposal, but rather it is concerned with the disclosure of the information they do hold".

121. Having considered the Council's response, and on the basis of the evidence provided to her, the Commissioner is satisfied that, on the balance of probabilities, the Council did not hold further information within the scope of part (d) of the request.

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<http://informationrights.decisions.tribunals.gov.uk//DBFiles/Decision/i90/Johnson.pdf>

Other matters

Records management

122. When a public authority receives a request, its first task is usually to determine whether it holds the requested information. In many cases it will be simple to locate information, particularly if the public authority practices good records management. However, in the Commissioner's view, the Council clearly had difficulty in this case in determining to what extent it held the requested information.
123. The Commissioner wishes to refer the Council to the Code of Practice issued under section 46 of the FOIA (the 'Code') which provides guidance to public authorities as to desirable practice in connection with the keeping, management and destruction of records.
124. If an authority follows the Code, its standard of record keeping and records management should conform to an acceptable standard. This enables it to act quickly in identifying and retrieving information requested, and will help it comply with its duties under FOIA and the Environmental Information Regulations 2004.

Right of appeal

125. 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
Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

126. 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.

127. 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

**Carolyn Howes
Senior Case Officer
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SK9 5AF**