



IN THE FIRST-TIER TRIBUNAL

Case No. Appeal No. EA/2014/0262

GENERAL REGULATORY CHAMBER INFORMATION RIGHTS

ON APPEAL FROM Information Commissioner's Decision Notice FS50539567

Dated 24th September 2014

BETWEEN

Mr Martin Byrne

Appellant

And

The Information Commissioner

1st Respondent

And

Birmingham City Council

2nd Respondent

Determined at an oral hearing on 18th March and 15th May 2015 at Birmingham Employment Tribunal

Date of Decision 6th July 2015

BEFORE

Fiona Henderson (Judge)

Anne Chafer

And

Michael Hake

Representation

Mr Byrne Represented himself (at both hearings)

The Council – Ms Bennett (2nd June 2015)

The Commissioner – chose not to be represented at either hearing.

Subject matter – Information not held s1(1) FOIA:

Decision: The Appeal is allowed, the Tribunal does not require the Council to take any further steps.

REASONS FOR DECISION

Introduction

1. Birmingham City Council operates a concierge service at some of its Tower Blocks. “*The concierge service represents additional services provided over and above the “standard” housing management service provided and funded from tenants’ rents.*”¹
2. The Appellant as a leaseholder has to pay an annual charge for this service in addition to other service charges (e.g. for caretaking, repairs reporting service). His concern is that the local housing department may have been using the resources of the Concierge Service to carry out Housing Management and Advice Centre Duties to the detriment of the security duties that were the primary function of the concierge service² and that in the absence of a clear definition of what is included in the service there is no accountability for what the charge is spent upon.³ This appeal is against the Information Commissioner’s Decision Notice dated 24th September 2014 which held that no further information was held by the Council in relation to “*how the concierge service was constituted*”.⁴

The information request

3. Following a telephone call to the Council during which he was asked to put his request in writing, on 21st November 2013 Mr Byrne wrote to the Council asking for information about the background to the concierge service on the Lyndhurst Estate. In this letter he made no reference to a consultation period but stated that he understood the scheme to have been introduced by the Council “*under the auspices of it being voted in by the residents...*”. The Council responded on 30th December 2013 asking for clarification of the request as they were unsure what specific information he required. The Council’s letter also included the following paragraph “for information”:

“records relating to the consultation period ⁵ which preceded the introduction of the Concierge service on the Lyndhurst Estate are no longer held. This information was destroyed in line with retention schedules which are part of Birmingham City Council’s Records Management Policy. Subsequent changes to the service over the

¹Mr Olivant Head of City Finance – Housing Revenue Account 26.3.14 letter p 132 OB1

² P43 OB

³ P44 OB1

⁴ Decision Notice paragraph 1

⁵ Emphasis added

*past 20 years would have been made in order to update systems and adapt to the changing environment and service requirements.*⁶

4. The Appellant provided clarification in his letter of 7th January 2014 when he asked⁷:

“When the Lyndhurst estate concierge service was first established there would be a record of what constituted it: a statement about the purpose for which it was intended. Its objectives would have been set out: which reflected the consultation period?”

*Also there would be a record of it having been registered for legal reasons?*⁸

5. The Council’s response dated 21st January 2014 did not address the registration for legal reasons aspect of the request and stated that *“after a thorough search the Council does not hold this information”*. The refusal notice defined the information sought as being records relating to the consultation period and contained the identical paragraph about destruction of information as appeared in the letter of 30.12.13 as the reason for refusing the FOIA request on the grounds that it was not held.
6. Following an internal review the Council panel held that *“it would be reasonable to assume that information relating to the concierge service would be held along with details about the purpose and objectives of the service”*⁹. However, following a further search on 4th March 2014 the Council wrote back stating that despite further searches it could confirm it did not hold the information. In that letter it relied upon the same paragraph (from 30.12.13) defining the information as relating to the consultation period and asserting that the information had been destroyed in line with retention schedules. There was further contact from the Appellant by telephone and letter and although these were forwarded to “all officers” no further information within the scope of his request emerged.

Complaint to the Commissioner

7. The Appellant complained to the Commissioner on 29th April 2014 who conducted an investigation including obtaining details of the searches conducted. The Council told the Commissioner that the Concierge service was not a separate entity to the Council and falls under the landlord services role carried out by the Council through its housing functions. This department manages the Council’s tower blocks and decides how it will discharge its duties. The service for Lyndhurst was implemented in 1998 it does not have a constitution but does have service standards publicly available on the website¹⁰. The Commissioner concluded on a balance of probabilities that further information was not held.

The Appeal

⁶ Ms McMullen 30.12.13 p 80 OB1

⁷ He also asked for the records management policy and retention schedules which are not the subject of this appeal.

⁸ OB2 p77

⁹ Letter of 27th February 2014 p 86 OB1

¹⁰The Council assert that they provided a copy with their reply. The Appellant disputes this but it is not in dispute that he had had a copy prior to his complaint to the Commissioner.

8. The Appellant appealed on 19th October 2014. In his letter accompanying the appeal he disputed certain factual assertions made by the Council (in particular he disputes that there was a consultation period, or that the service standards have changed over the years, as well as the date of the introduction of the service to the Lyndhurst Estate). He challenged the scope and sufficiency of the search which he maintains was confined to a search for records of the consultation and criticized the Commissioner's investigation for having mis-defined his information request and having failed to examine the Council's evidence critically.
9. The case was listed for an oral hearing on 18th March 2015. Upon consideration of the bundle prepared by the Commissioner¹¹, Mr Byrne's written submissions and the additional submissions provided at the oral hearing the Tribunal was unable to determine the case as it did not have sufficient information. The Council were joined and directions issued relating to the issues upon which the Tribunal required further information.
10. In their response the Council argued that there was no further information to disclose because:
 - a) it had never been held,
 - b) it had been destroyed in line with the retention and disposal policy provided,
 - c) the information had been disposed of by way of transferring information into the city archive,
 - d) the Council could not be expected to search every scrap of paper it stored in every Council location.

The case was listed for an oral hearing on 2nd June 2015 at which the Council were represented and Ms McMullen (Place Directorate's Governance and Compliance Manager for Birmingham City Council's Place Directorate which includes the Council's Housing Department) attended to give evidence. An additional bundle was provided including the Council's internal record of the progress of the request with supporting documentation (132 pages), Ms McMullen's statement and 170 pages of exhibits¹² which included the following documents:

- Concierge Review
- Concierge Service Leaflet – Security in mind
- Concierge and Security Service
- Security Officers Guidance Notes
- Security Officer Job content and criteria
- Concierge person specification

¹¹ Comprising 281 pages OB1

¹² OB2

- Concierge officer job description
11. Ms McMullen provided a further bundle at the hearing comprising a schedule of contents and photocopied records from the city archive¹³. Whilst it was unfortunate that additional material was served at the hearing, the Tribunal went through the contents in evidence and is satisfied that the Appellant had the opportunity to understand the contents and address any points arising at the hearing especially as the likelihood of the existence of this material had been foreshadowed at the earlier adjourned hearing.
12. The remit of the Tribunal was explained to Mr. Byrne at the first hearing and reaffirmed at the resumed hearing. He signified understanding and had the opportunity to clarify matters on both occasions (which he did at the first hearing). Following the conclusion of the oral hearing but prior to the writing of the decision the Appellant wrote to the Tribunal in a letter dated 4th June 2015, the Tribunal is satisfied that all issues raised in that letter were ventilated at the oral hearing and no new points are raised, the issues are dealt with in this decision and in these circumstances the Tribunal did not consider it necessary or appropriate to ask for further submissions from the other parties relating to the letter.

Preliminary Legal Issues

Provenance of documents

13. The Appellant was concerned that various documents before the Tribunal were not genuine:
- In relation to the 1993 concierge pamphlet the Tribunal heard that it had been kept by a Council employee because his photograph appeared in it. As such we are satisfied that it was held by the employee for personal reasons and it was not held by the Council at the relevant date. The Appellant disputed that this was a genuine document or came from the Council (viewing it as a promotional leaflet from the technical partner who installed the CCTV whose logo appeared on the leaflet). We note “(c) *Birmingham City Council Housing Department 1993*” on the last page and the “*Birmingham City Council Housing with Care*” Logo on the front page and are satisfied that this is a genuine Council document.
 - The Appellant wants validation of Exhibits p 35-46¹⁴. The Tribunal is satisfied that they state the department name on their face, some carry the Council logo and they have been provided by Council’s lawyer in support of Court proceedings, we are satisfied with the provenance of these documents.
 - The Appellant wanted “*Official recognition of the status of the documents representing the activities of the concierge in the form of job descriptions*” because it was not clear who was responsible for creating these job descriptions. The Tribunal is satisfied that it is not material who authored the documents and the

¹³ OB3

¹⁴ OB2

official status of the documents is apparent from their production as job descriptions in these legal proceedings on behalf of the party whose document it is.

Scope

14. Although the Council raise the amount of time taken in conducting the searches and concerns that the work and disruption outweighs any perceived value to the Appellant in their response, they have not relied upon s12 or s14 FOIA and the Tribunal does not therefore consider them in this decision. In their response the Council makes reference to the fact that the request was made against a context of an ongoing Ombudsman case and this was a factor in their continuing to search for information. The Appellant considers this to be an inappropriate conflation of two separate legal rights. It is not disputed that the Ombudsman had no involvement in the FOIA case and the Tribunal is satisfied that the Council's reasons for continuing to search are not material to the sufficiency of the search.
15. The Concierge service relates to the weekday day time service provided at the block. The night-time and weekend service is known as the security service. Although they are separate services, they are billed together as the concierge service. The Council has treated the scope of the request as including the security service which appears to have been implemented at the same time. The Appellant's understanding was that this was also included within the terms of the request. Based on the agreement between the parties as to scope, the Tribunal adopts that approach.
16. In his arguments the Appellant has raised several arguments relating to the form and content of the Decision Notice:
 - i) He wants the ICO to account for his actions in that the exercise of his discretion was misguided. The Tribunal is satisfied that the Commissioner's decision did not involve the exercise of his discretion. The Tribunal is not bound by the evidence before the Commissioner neither is it bound by the Commissioner's findings of fact: the Tribunal constitutes a complete rehearing.
 - ii) In his letter of July 9th 2014, the Commissioner defined the investigation as "*whether the Council was correct to say that it did not hold any of the information that the Appellant had requested*". It asked the Appellant to contact the Commissioner if he thought there were other matters that he considered ought to be addressed. The Appellant did provide more factual background, but he did not dispute the Commissioner's definition of the investigation. The Tribunal has had regard to the terms of s50 FOIA whereby the Commissioner's role is to determine whether the Council have complied with part 1 FOIA the applicable section in this case being s1(1) FOIA which provides:
 - 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.

Similarly the Tribunal's jurisdiction under s58 is limited in this case to determining whether the Decision Notice was in accordance with the law. The Council state that they do not hold information description specified in the request and have not therefore provided it to the Appellant. As such we are satisfied that the scope of both the Commissioner's and the Tribunal's decision must be whether we are satisfied that the information is not held.

iii) The Commissioner's decision states that it appeared that relevant information had been destroyed under the retention schedule whereas in letters to the Appellant the Council asserted categorically that it had been destroyed. The Appellant therefore argues that the Commissioner is re-representing the Council's evidence "*in a euphemistic way*"¹⁵ distorting the Council's evidence and trying to make it make sense. The Tribunal is satisfied that this attribution of motive to the Commissioner is unfounded, the discrepancy has arisen from the supplementary evidence submitted to the Commissioner by the Council which is before this Tribunal.

iv) The Appellant asks the Tribunal to strike out paragraph 16 of the Commissioner's decision (dealing with the retention and destruction policy) because the evidence relied upon by the Commissioner is different from the account given to the Appellant in the FOIA response. We are satisfied that this is not an error in law and not sufficient to form a ground of appeal. The Commissioner is required to investigate, his role is inquisitorial and he is not limited to the material produced in the initial response.

v) The Appellant argues that the Commissioner did not examine the Council's response critically in that the Council evidence appeared to relate to the Consultation period and the ICO was referring to records relating to the constitution of the service. We agree that the Commissioner was applying information in relation to one search to the perceived sufficiency of a different search.

vi) The Appellant argues that the ICO changed the meaning of his request from "what constituted it" to "how it was constituted". The Tribunal is satisfied that this is a reflection of the Commissioner addressing the second half of the request and is not wrong, however, as set out above we are satisfied that the Commissioner was not addressing himself to the correct definition of the request.

vii) In considering the FOIA response Mr Olivant observed that the Council was in the middle of a consultation over a major service redesign, he observed that Ms McMullen might want to make reference to this and encourage the Appellant to respond to the consultation. The Appellant is of the view that this is a deliberate attempt to derail his request and divert him from his information request. The Tribunal has insufficient evidence to attribute motive and is satisfied that it is equally in keeping with the Council trying to address the underlying concerns it believes the Appellant had. There is no evidence that this has impacted upon the adequacy of the search and in our view is an example of the Council attempting to fulfil its obligations under s16 FOIA.

¹⁵ Appellant submissions p 7

17. At times the Appellant criticizes what he believes should be held or e.g. the title of a document which he does not feel defines its contents helpfully¹⁶. The Tribunal reminds itself that its role is to evaluate what is held, not what should be held.

Factual basis to define searches

Definition of the Request

18. The Appellant's case is that he wanted information on what constituted the concierge service when it was first established. He explained that he used the word "constituted" to mean: to be, amount to, consist of, or have the status of a particular thing; but instead argues he got information relating to a search for records relating to a consultation period. From his examination of the documents he believes that the Council has interpreted his reference (from anecdotal evidence) to the scheme having been voted in by residents as being an assertion that there had been a consultation and that is all they have understood him to be asking for. He concedes that in his clarified request he adopted their reference to a consultation period believing from their letter that there must have been one, but relies upon his use of a colon¹⁷ to indicate that this did not limit the request but provided context. Notwithstanding the Appellant's reference to a consultation in his request he now believes (having spoken to fellow residents and having no personal recollection that one took place) that there wasn't one, and that the Council have been looking for something that does not exist.
19. In his view the Council was considering a different object and when the Appellant examined the information provided he became convinced that their response was "a hypothetical scheme" in that it had no factual basis in itself – there was no supporting evidence that there had been a consultation period or that there were applicable retention schedules or any changes to the service standards that would justify destruction of the original documents. Although at times the Council has acknowledged the wider ambit of his request¹⁸ he was unable to get the Council to acknowledge the mistake about the object of the search and Ms McMullen who was co-ordinating the response kept appearing to revert to the misdirected search for information relating to the consultation period.
20. Having had regard to the correspondence in OB1 the Tribunal agrees that the impression given by the Council's letters of 30.12.13, 21.1.14, 4.3.14¹⁹ and 18.7.14²⁰ appears to state that the Council have treated the request as confined to being a request for information on the consultation about the proposed concierge service, this was the principle reason for the adjournment. The Tribunal is satisfied that the terms of the request read objectively are far broader and includes:

- "what constituted it"
- "a statement about the purpose for which it was intended"

¹⁶ Concierge review which he believes would be better entitled

¹⁷ *Its objectives would have been set out: which reflected the consultation period?*

¹⁸ P9 OB2 email of 4.3.14

¹⁹ P88 Open Bundle

²⁰ P70 OB

- “its objectives”.
- Any “record of it having been registered for legal reasons”.

Consultation period

21. The Appellant asserts that there was no consultation. The Tribunal observes that to the extent that there was any consultation it would fall within the scope of the request as defined by the Appellant. Following the adjournment the Council undertook manual searches Housing Committee records at the City Archive for the years 1995-1999, 1984-6, 1987-9 using key words concierge/security management/caretaking /estate management and services/high rise blocks/Lyndhurst. Additional material was served at the hearing. From this we are satisfied that the following can be established:
- i. In 1987 there had been a concierge pilot project set up in 12 multi storey city blocks (but not on the Lyndhurst Estate.)
 - ii. In 1988 there was a petition from the Lyndhurst estate requesting concierge services.
 - iii. The Housing Management Committee 14th April 1988²¹ resolved that the rent levels for blocks of flats with a concierge service be determined in accordance with the Committee’s current policy to make additional charges for the services provided. A report on Security Measures in High Rise Developments set out some of a range of services which were to be included in the concierge scheme.
 - iv. In December 1988 approval was given to the programme for concierge schemes subject to the availability of capital finance, (from the attached report it is clear that this included blocks on the Lyndhurst Estate).
 - v. A survey did take place of 69 blocks in August 1988 (but not the Appellant’s block)
22. At the original oral hearing, Mr Byrne’s arguments relating to the second part of his request were based upon the supposition that the Council would need to have legal authority to levy the Concierge charge. The scheme would have been passed through the committee stage and have been passed by the Council. The decision as a minimum would be likely to state what was to be included in the charge and how it was to be collected, background/briefing papers may also have been retained²². The Tribunal is satisfied that this provides the legal justification for the levy of the charge and confirms that there was a consultation period prior to the introduction of the scheme which it was intended would be rolled out citywide. This information is not complete and it is likely that more is held in the City Archive, however, as set out below the Tribunal is satisfied that this information is not held by the council and as such they are not required to disclose it pursuant to s1(1) FOIA. We are also satisfied that following the hearing Mr Byrne is aware of where to find such material and of the willingness of the Council to point him in the right direction.

²¹ Minute 467

²² Paragraph 9 adjournment directions

Retention

23. The second element to the “hypothetical scheme” was the Council’s initial assertion that records relating to the Consultation had been destroyed in line with retention schedules. Mr Byrne concludes this response was not based on any search that had been made. The Appellant was provided with a copy of the Council’s retention schedule which did not in his view provide the authority for destruction of any documents setting up or defining the concierge service. He argued that there was no factual evidence to support the idea that a retention schedule as such existed and was applicable to the situation.

- He argues that retention schedules do not destroy records of actual institutions rather the records of day to day events.
- The retention schedule²³ doesn’t mention the concierge service.
- There was nothing to link the retention schedules to the search outcome.

24. Before the ICO the Council:

- a) confirmed that there is no specific formal records management policy for information of this type.
- b) similar policies are retained until the policy is superseded plus 6 years.
- c) There is no business purpose for which this information should be held.
- d) recorded information in scope was deleted/destroyed as a result of office moves around 2004 and 2012, in line with the retention schedule.
- e) There was no record of any destruction of information requested and no exact date could be given but it was likely to be in 2012.
- f) The last concierge review was carried out during 1998.

25. In their response the Council stated that their view was that a decision was made not to keep these records beyond 20 years.²⁴ This was amplified in the evidence of Ms McMullen who confirmed that there was no record of the destruction of relevant documents. She said it was likely that retention schedules were implemented around the time that the DPA and then FOIA were introduced. In addition she would expect a review would have been undertaken relating to what is held and whether it should be retained each time a new regime was introduced. She was unable to provide the retention policy applicable to 1990s and early 2000s if any such existed.

26. The Appellant argues that there is a considerable shift between the Council’s original response (namely that the documents were destroyed in line with the retention policy) their account to the Commissioner (the Council not knowing what the applicable retention policy was but presuming that they must have been destroyed because the documents cannot be found) and their eventual position before the Tribunal. He argues that the deletion of records on the concierge system if they had taken place would have made the concierge service extinct. He also takes issue with the Council’s assertion in their response that there was no business purpose for retaining the documents because—historical documents are not necessary to produce or update current schemes. An initial

²³ P49 OB1

²⁴ Paragraph 18

scheme proposal would not remain static but would develop and benefit from improvements. It would not be necessary to retain the original master scheme in order to run an existing scheme or roll it out into a new block.

27. The Tribunal deals with the factual issue of whether the service standards have changed over time below. We accept that the Council's original response and reference to the retention schedules was overstated and misleading as it implied that there was clear evidence of the documents being destroyed and a clearly identified policy that was being adhered to, in order to justify the destruction, when in fact this amounted to an educated guess of what the Council thought was the explanation for their failure to find documentation relating to the introduction of the scheme and how it originally operated and what it was comprised of. The Tribunal has heard Ms McMullen give evidence orally and accepts this evidence, the Tribunal takes judicial notice of the evolution of data management processes within public authorities in parallel to the introduction of DPA and FOIA and is satisfied that it would be expected that a review relating to what was held would take place upon moving offices. Additionally the Tribunal accepts that there may well not be an essential business reason for keeping historical documents of practice and procedure such as service standards once they have been replaced and there is no longer an operational reason to consult them. Indeed in a large and dispersed organisation there may be sound reasons for not keeping such documents so as to avoid confusion or misuse as to required practice.

Service Standards

28. In their original response the Council said that "*subsequently changes to the service would have been made*". The Appellant argues that there is no factual evidence to support the idea that changes took place to the service over time and that this is therefore speculation. His current position is that the service standards have remained unchanged. This is despite his assertion to the Council in his letters that there have been changes in the service provided.²⁵
29. From the documentation before us we are satisfied that there have been some changes:
- a) The Tribunal has been provided with a 1993 pamphlet in which there was acknowledgement that not all flats had intercoms (which would necessitate alternative procedures for checking on visitors) whereas from the 2012 documentation all flats have intercoms.
 - b) The Concierge Review 1998 – is a document reviewing staffing levels and rotas culminating in an agreement signed by Members of the Council and Union representatives and dated 19/2/1998. We are satisfied that the fact of the need for an agreement shows that there have been changes to the staffing levels over time.
 - c) The Concierge and Security Services - Housing Management Estate Services Procedure - Concierge Service document is Version No. 3 Issue date March 2012,

²⁵ E.g letter of 7.2.14 "After the Councils own management office was demolished on Lyndhurst Estate, this concierge service then became involved in carrying out Housing Department management duties...." p117 OB1

whereas the similar document relating to Security Services is Version No.2 and dated 21.5.2008.

Whilst the operation and procedures would appear to have evolved over time we are satisfied that the stated purpose has remained largely unchanged as set out in the 1993 to 2008 and 2012 documents.

30. The published service standards were identified as defining what the service consisted of. We are satisfied that the terms of the request includes a request for a copy of the Operational Manual which it would be expected would be the genesis of the published service standards. The published service standards are not sufficiently specific to be the original document which could be expected to include job descriptions, daily activities checks/reporting procedures, statements of required practices and technological specifications.

Date

31. The Council appears to have experienced some difficulty, which was not helpful to Mr Byrne or themselves, in arriving at a clear factual understanding of the period it should have been searching for; asserting the Lyndhurst scheme was introduced in 1998 although Ms McMullen said changes took place over 20 years implying an earlier start date. The Council gave the relevant date variously as:

- Approximately 20 years ago²⁶
- Set up 15 years ago²⁷
- *The Lyndhurst concierge service was implemented in 1998*²⁸.
- A pamphlet relating dating from 1993 was produced introducing the Concierge service.
- Council archives found records in 1987-8.

32. Twenty years was not an accurate figure and was anecdotal and not linked to the available documentation. The Tribunal notes that Mr Olivant identified the importance of clarifying the date early on. However, reliance was placed upon the recollection of those employed at the time. Although attempts were made to find collateral information such as the record of the first levy of the concierge charge from the finance department, this was unsuccessful. The Tribunal observes that defining the date would have focussed the search which was confused because the legal authority for the scheme started with the original introduction at other blocks in 1988 and it was rolled out across the city over many years.

33. Before the Commissioner, the Council asserted that the Lyndhurst scheme was implemented in 1998, there was no documentary support for this and it now appears that it was not true. The Appellant dates the introduction on the Lyndhurst Estate to not

²⁶ Therefore we do not have the information available from approximately 20 years ago that Mr Byrne is seeking. 18.12.13

²⁷ Carl said it would have been about 15 years ago when the service was first set up. Log 15/1/14 p 7 OB2

²⁸ Letter to the Commissioner p195 OB1

before 2000 in light of a planning application for concierge office space which was granted at the end of 1999. The Tribunal accepts this evidence of the likely approximate start date on the Lyndhurst Estate and notes that the archived records relating to 2000 have not yet been searched by the Council, however, as set out below the Tribunal is satisfied that these are publicly available and if the Appellant wishes to he is at liberty to search for any further material in the records from that time. In relation to searches of documents held by the Council we are satisfied that there is no evidence that these have been affected by the uncertainty relating to date.

Legal Status of the Concierge Service

34. The Appellant disputes that he is interested in the legal status of the concierge scheme arguing that what he wanted to know was “what constituted it” rather than “whether it had a constitution”. Similarly where he asks for “*Also there would be a record of it having been registered for legal reasons*” he told the Tribunal that he wanted to know the legal authority for them being able to levy the charge, which in his view linked to the business need to keep the original foundation service standards so that the Council could prove what they were entitled to charge for. It was his case that it wouldn’t be able to function without an official status defined by commercial law. This would necessitate a record being held of its constitution (he argued that it may be that the service standards are in fact the constitution). The concierge service is identified as an entity which generates its own specific service charge the Appellant therefore argues that this is not represented as a management service scheme administering any of these other services.

35. In relation to the second part of the request the Council told the Commissioner:

The Lyndhurst Estate Concierge Service is not a separate legal entity to the Council

The legal entity is Birmingham City Council, and falls under our Landlord Services role.

The Lyndhurst concierge service was implemented in 1998. We do not have a constitution, we have service standards, a copy of which have been provided to Mr Byrne and are also available on our web site²⁹.

36. As set out above it now appears that the Lyndhurst concierge service was implemented around 2000. However, we are satisfied that an objective reading of the Appellant’s request required the Council to address the legal identity of the concierge service. Their original FOIA response failed to address this aspect and was therefore incomplete, we are satisfied that it is appropriate that the Commissioner sought this information as part of his investigation.

Sufficiency of the Searches

The Original Searches

²⁹ Donna Mc Mullen letter to Commissioner 18.7.14 p70 OB

37. Outside of the Freedom of Information request the Appellant asked to inspect the accounts in his status of a leaseholder³⁰, he was provided with the breakdown of costs for his district however whilst these had components for employee costs and overheads it did not shed light on what was included in the concierge scheme or what its legal status was. This was referred to in correspondence from the Council who appeared to treat it as part of his FOIA request.
38. The Tribunal is satisfied that this does not constitute an error but was in keeping with the Council's obligation under s16 FOIA to provide advice and assistance. There was an overlap in topic and reference to the accounts in his FOIA correspondence. The Council were aware the Appellant had wider issues and has sought to meet his concerns fully.
39. At the second oral hearing Ms McMullen gave evidence about what she understood a consultation period to mean. She explained that it was wider than just asking tenants for their views and would include reports, committee minutes and referred to the birth of the process, the root, where it started. Her evidence was also that whilst she had made reference to searching for records relating to the consultation in her letters to the Appellant, in fact the scope of some of the original searches had been wider, although it is clear that some were limited to searches for the consultation period.

The Tribunal has had regard to the evidence of the.

40. *The Lyndhurst estate will receive the same service as any searches conducted as set out in the log of the progress of the case and takes the following into consideration:*
- 14.1.14: A colleague actioned an email from Ms McMullen by sending the request to 2 colleagues asking: *“Any pointers on where to find the document setting out the management arrangements of this concierge service”*.
 - This was responded to with:
It is clear that the document being referred to isn't available. Carl said it would have been about 15 years ago when the service was first set up other area of the City and the existing service standards set out what tenants can expect from us. There is also a booklet on concierge on [website] VL checking with Democratic department and YH checking her committee database³¹.
 - Ms McMullen checked with democratic systems who were unable to locate any documents 15.1.14
 - A search was conducted for *“anything about the Lyndhurst Estate Concierge Service”³²* in Iron Mountain (Council's storage facilities).
 - Additionally a governance and compliance officer identified that she now believed that the Appellant was asking for *“the original constitution”* and a detailed breakdown of his charges.³³

³⁰ S22 Landlord and Tenant Act 1985

³¹ This pamphlet on the website was not drawn to the Appellant's attention. Ms McMullen's evidence was that she had not realised that this was different from the service standards.

³² OB2 p8

41. We are also satisfied that consideration was given to searching Cabinet reports at that time. From 2003 they are kept in electronic format but they have to be searched manually prior to that, and are prohibitively time consuming to search without a specific date because they are huge binders with a list and summary at the front.
42. The Appellant does not accept this evidence of the extent of the original search and is of the view that the Council are “*pulling the wool over the Tribunal’s eyes*” and urges the Tribunal to rely instead upon the repeated definition of the object of the search as being information relating to the consultation period. From the oral and documentary evidence we accept that the scope of the original searches went beyond looking for records of the consultation period. The work done was documented and the log is consistent with information in the contemporaneous correspondence.
43. Whilst we accept that the Council were keen to help and a lot of work was done, there was scope for more focus. The long, protracted and confused correspondence has not been helpful. There was too much reliance upon anecdotal evidence and recollection rather than recorded information to guide the search. Some of the Council’s responses were generalised statements of belief rather than based on precise facts. No guidance was given to employees to define what in fact was being searched for and where it might be found, as the person co-ordinating the search had not clarified what she thought it meant. The same errors were repeated in correspondence through the use of expedient cut and paste (e.g. whilst the internal review had correctly defined the scope of the request, the response stating that no further information had been found despite additional searches reverted to the earlier more restricted definition).

The search was not structured, consistent, logical or complete as the same search terms were not used by each searcher. A document setting out more detail of the service standards was not disclosed even though it was identified as Ms McMullen did not realise that this was a different document from the service standards flyer that had already been ³⁴located. The failure to clarify the date meant that it was not realistic to conduct a manual search of the City Archive which were treated as being within scope during the initial search. Whilst the Tribunal accepts that not every scrap of paper in the Council’s possession needs to be searched “just in case”, the Tribunal is satisfied that if it is likely that a particular filing system contains the withheld evidence it should be searched before the public authority can conclude that it is not held or section 12 FOIA relied upon if the reality is that it is not possible to search it because to do so would take so long that the costs provisions would be engaged. Use of Section 12 is of course a matter of discretion rather than a requirement under FOIA.

Following the adjournment:

44. The Council’s response states:

“Relevant legal background and background to this appeal:

³³ Whilst this was wrong and conflated the FOIA request with the inspection of accounts, this increases the definition that was being used by the Council.

³⁴ 15.1.14 entry in log p 7 OB2

information for both of these had been provided previously”

The Appellant has understood this as meaning that the Council continues (post adjournment) to rely upon its previous synopsis of his request which defined the information request as relating to the Consultation and takes this as further evidence that the search continues to be confined to looking for records relating to the Consultation period. The Tribunal is satisfied that this is no more than a legal convention to indicate that the author of the response was not going to set out the history which is available from the copies of the actual correspondence and documentation in the bundles, as set out below we are now satisfied with the adequacy of the search against the terms of the Appellant’s request as defined by him.

45. Ms McMullen confirmed that following the adjournment notice, she took guidance from the directions to ensure the thoroughness of the search and stated that: Operations manuals, published service standards, job descriptions, daily activities, checks/reporting procedures, statements of required practices and technological specifications were searched. Old paper records and the intranet were searched
46. Ms McMullen asked for a search in Iron Mountain (Council’s storage facilities) using the following search terms:
 - Concierge : 70 records found (none related to Lyndhurst estate or relevant block)
 - Concierge Lyndhurst 0 records,
 - Staffing Security services 0,
 - Housing rents and Service charges³⁵ 0
47. She looked for records of when the first concierge service charge payment was made but the Council only holds records from 2003/4 when the software changed to SX3.
48. The 1993 leaflet is coproduced by Delaware a technical partner, Ms McMullen’s evidence was that Delaware are no longer the contractor and there was no obligation for them to hold any records on behalf of the Council as at November 2013. Their records were not checked as anything held would be on their own behalf and not the Council’s. T
49. In assessing the sufficiency of the search we must be satisfied that the search was for the right information against the relevant people in the relevant places. We now have clarity as to which records have been searched against which keywords.
50. From the oral and written evidence we are satisfied that all information has been provided in so far as it is still held by the Council and the rest is not held. The additional material uncovered pursuant to the additional searches has been disclosed. The reasons for further information not being held are material in our assessment of the credibility of the Council’s explanation for not holding the information. As set out above we accept the evidence as to the probability that this information would have been destroyed as it was updated.

³⁵ only located a Housing Engineers Service document destroyed in 2011

Clarification of the request

51. The Appellant's original letter to Ms McMullen 21/11/13 was reproduced in her response to him dated 30.12.13. However he points out and we accept that it has been rearranged in the way that it has been copied into her letter with the addition and removal of paragraph breaks and the deletion of several words. The Appellant argues that the letter has been distorted and this changes the emphasis and meaning of his request. Ms McMullen's evidence was that she was trying to make the request make more sense, on the balance of probabilities we accept this evidence and note that in the same letter the Appellant is asked to rephrase his request as the Council are not sure what he is asking for.

52. The Tribunal notes that pursuant to s1(3)

(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. The Tribunal is satisfied that despite the provision of "clarification" what the Appellant actually wanted was still not clear to the Council and further efforts to define in writing what he was looking for should have been made. The Tribunal considers this case an example of how important it is to understand what a request is asking for before the search is started. It is not appropriate to assume motive and search accordingly and in this case the search would have been more focused and efficient if the object of the search had been clearly defined.

S21 FOIA – information available by other means

53. The obligation to disclose only arises if the information is held by the Council. Ms McMullen's evidence was that the City Archives service is open to the public without appointment at the Library, any documents deposited there for permanent preservation are deemed to have been disposed by the Council and are deemed not to be held by the Council. We accept this evidence. Despite this the Council spent considerable time undertaking an incomplete manual search of Housing Committee records (covering years 1995-1999, 1984-6, 1987-9). This was publicly available and Ms McMullen now concedes that it might have been more appropriate for the Council to rely upon s21 FOIA (information available by other means) rather than searching the information itself.

Conclusion

54. The Tribunal allows the appeal because it is satisfied that the Council had not conducted a complete and thorough search at the date and as such the Commissioner could not be satisfied on a balance of probabilities that no further information was held, as such his Decision Notice was wrong.

55. Whilst following searches of the City Archive further material was disclosed which was in scope, the Council's failure to disclose it earlier was not a breach of s1(1) FOIA because the information was not held by the Council but was held in the City Archive which is separate from the Council.
56. Following further searches further information has been disclosed in particular the current operations manual which shows what constituted the service at the date of the request, but not at the date that the scheme was set up. We are satisfied that there have been changes to the service standards during the currency of the scheme and that as such later versions of the information are not within scope as the request focuses on the original position. Consequently the failure to disclose them earlier whilst unfortunate is not a breach of s1(1) FOIA.
57. Following the additional searches done pursuant to the Adjournment the Tribunal is satisfied on the balance of probabilities that no searches remain outstanding and that all information has been provided in so far as it is still held by the Council and the rest is not held. Consequently the Tribunal does not require any further steps from the Council.
58. This decision is unanimous

Dated this 6th day of July 2015

Fiona Henderson
Tribunal Judge