



NCN: [2023] UKFTT 00815 (GRC)

Case Reference: EA/2022/0418

**First-tier Tribunal  
General Regulatory Chamber  
Information Rights**

**Heard by: remotely by video conference  
Heard on: 7 September 2022  
Decision given on: 04 December 2023**

**Before**

**TRIBUNAL JUDGE HAZEL OLIVER  
TRIBUNAL JUDGE GARETH WILSON  
TRIBUNAL MEMBER NAOMI MATTHEWS**

**Between**

**DIANE JONES**

Appellant

**and**

**INFORMATION COMMISSIONER**

Respondent

**Decision:** The appeal is Dismissed

## **REASONS**

### **Mode of hearing**

1. The proceedings were held by video (CVP). The Respondent did not attend and was not represented. The Appellant was in attendance and represented herself. The Appellant joined remotely. The Tribunal was satisfied that it was fair and just to conduct the hearing in this way.

### **Background to Appeal**

2. This appeal is against a decision of the Information Commissioner (the "Commissioner") dated 10 November 2022 (IC-127452-G8F5, the "Decision Notice"). The appeal relates to the application of the Freedom of Information Act 2000 ("FOIA"). It concerns information about

Stonewall's Diversity Champions Programme and Workplace Equality Index requested from Newcastle Upon Tyne Council (the "Council").

3. Stonewall operates an annual UK Workplace Equality Index, which they describe as "The definitive benchmarking tool for employers to measure their progress on lesbian, gay, bi and trans inclusion in the workplace". Participating employers demonstrate their work in eight areas of employment policy and practice, and staff also complete an anonymous survey about their experiences of diversity and inclusion at work. Organisations receive their own scores, and Stonewall publishes an annual list of the 100 employers who have received the highest ranking in that year's survey.

4. On 4 February 2021, the Appellant wrote to the Council and made a six-part request for information (the "Request"). This appeal relates to parts 1 and 2 of the Request, as follows:

*"This is a request under the Freedom of Information Act 2000 (FOIA). Please provide any information that you hold answering to any of the following descriptions:*

*1. Any application you made in 2019 or 2020 to be a "Stonewall Diversity Champion" or to be included on Stonewall's "Workplace Equality Index," including any attachments or appendices to those applications. Please redact personal details if necessary.*

*2. Any feedback you received in 2019 or 2020 from Stonewall in relation to either application or programme."*

5. The Council responded on 8 March 2021 that they did not hold information relevant to part 1 of the Request and did not directly address whether they held information relevant to part 2. On internal review on 4 June 2021, they maintained that they did not hold information relevant to part 1, and withheld information relevant to part 2 under section 41(1) FOIA (breach of confidence).

6. The Appellant complained to the Commissioner on 3 September 2021. The Commissioner decided:

- a. On the balance of probabilities, the Council did not hold information relevant to part 1 of the Request. This was on the basis that applications were submitted via Stonewall's electronic portal and the Council did not keep its own records of the submissions, and the Commissioner was satisfied that the Council had carried out appropriate searches.
- b. The Council was not entitled to rely on section 41(1) to withhold information relevant to part 2 of the Request.

### **The Appeal and Responses**

7. The Appellant appealed on 8 December 2022. Her grounds of appeal relate to part 1 of the Request only. She says that it is "beyond the bounds of credibility" that none of the material submitted to Stonewall has been retained. She says that other organisations who have responded to similar FOIA requests have disclosed hundreds of pages. She questions whether the Council has really not retained any of the policy and practice data that they relied on for their submission. She says there must have been correspondence relating to the proposal, internal consultations, drafting discussions, and messages to request input. She also questions whether staff wrote "off

the top of their head” into the portal without having worked on a draft of any of the content and didn't save any of what was submitted in electronic form locally.

8. The Commissioner’s response maintains that the Decision Notice was correct. The Commissioner says that the background, planning and policy material referred to by the Appellant in her Grounds would not be within the scope of part 1 of the Request. The scope was squarely on the application made to Stonewall, along with any attachments and appendices to that application.

### **Applicable law**

9. The relevant provisions of FOIA are as follows.

**1 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.*

.....

(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.*

.....

**3 Public authorities**

.....

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

- (a) *it is held by the authority, otherwise than on behalf of another person, or*
- (b) *it is held by another person on behalf of the authority.*

.....

**58 Determination of appeals**

(1) *If on an appeal under section 57 the Tribunal considers—*

- (a) *that the notice against which the appeal is brought is not in accordance with the law, or*
- (b) *to the extent that the notice involved an exercise of discretion by the Commissioner, that he ought to have exercised his discretion differently,*

*the Tribunal shall allow the appeal or substitute such other notice as could have been served by the Commissioner; and in any other case the Tribunal shall dismiss the appeal.*

- (2) *On such an appeal, the Tribunal may review any finding of fact on which the notice in question was based.*

10. In determining whether or not information is held, the standard of proof is the balance of probabilities. It is rarely possible to be certain that information relevant to a FOIA request is not held somewhere in a large public authority’s records. The Tribunal should look at all of the circumstances of the case, including evidence about the public authority’s record-keeping systems and the searches that have been conducted for the information, in order to determine whether on the balance of probabilities further information is held by the public authority. In accordance with section 1(4), the information is that held at the time the request is received.

11. A relevant and helpful decision is that of the First-Tier Tribunal in ***Bromley v the Information Commissioner and the Environment Agency*** (EA/2006/0072). In discussing the application of the balance of probabilities test, the Tribunal stated that, “*We think that its application requires us to consider 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.*”

### **Issues and evidence**

12. The issue in this case is whether, on the balance of probabilities, the Council held information within scope of part 1 of the Request.

13. By way of evidence and submissions we had the following, all of which we have taken into account in making our decision:

- a. An agreed bundle of open documents.
- b. The Appellant’s oral submissions at the hearing

### **Discussion and Conclusions**

14. In accordance with section 58 of FOIA, our role is to consider whether the Commissioner’s Decision Notice was in accordance with the law. As set out in section 58(2), we may review any finding of fact on which the notice in question was based. This means that we can review all of the evidence provided to us and make our own decision. We deal in turn with the issues.

#### *Scope of the Request*

15. *The Appellant requested “Any application you made in 2019 or 2020 to be a “Stonewall Diversity Champion” or to be included on Stonewall’s “Workplace Equality Index,” including any attachments or appendices to those applications.”*

16. It is clear from the Appellant’s grounds of appeal and submissions that her view is that the Request should be treated broadly and should include, for example, drafts preparatory papers source materials etc. The Appellant’s position is that it is implausible that in the preparation and submission of the applications there were no drafts, correspondence or internal written dialogue to seek contributions and finalise the applications. The Appellant’s position is that these documents are within scope of the Request. We do not agree. The Request is unambiguous, it is limited to applications made in 2019 or 2020 including attachments or appendices. It does not extend to drafts, preparatory materials, data relied upon or associated internal communications. We agree with the Appellant’s position that such documentation is likely to exist. However, that is not the information which was requested. Should the Appellant require such information it is within her gift to make a further request.

*Has there been a Reasonable/Appropriate Search and Is the Information Held?*

17. The scope of the Request is a relevant factor when considering the extent and appropriateness of any search. The scope of the Request is very narrow, it is limited to applications in 2019 and 2020 and related attachments and appendices.

18. The papers before us indicate that Council's search included asking officers who worked on the application and remained employed as to the information that was held. We find that whilst the Council's search efforts were limited they are nonetheless reasonable and appropriate within the context of the request. Those who worked on the submission could reasonably be expected to know how the application was submitted and whether copies of the applications were retained and held. We find that it was unnecessary for the Council to expand its search. We find that the Council has searched those areas where it is reasonable to expect that they would have found the information if it existed.

19. In addition, the response of the Council, in relation to why the final version of the application was produced via the portal and no copies were retained, is plausible. The Council's responses to questions asked by the Respondent indicate that it was necessary for multiple parties to input information both from their own knowledge and policy and procedures. We find that it is entirely plausible that, in circumstances of multiple contributors who were likely to have been completing and editing the application contemporaneously, the version produced and edited via the portal was likely to have been treated as a working draft before submission. We also find it plausible that a copy of the final submission was not retained by the Council because they had access to the application via the Stonewall portal whilst they were a member. We understand that the Appellant believes the Council should have retained a copy of the application and they are not providing accurate information, but we have no reason to disbelieve the information from the Council that they did not retain a copy. Accordingly, we find that the Council did not hold a copy of the applications at the time of the Request. They were stored only on the Stonewall portal. The Appellant's Request was received in February 2021. The Council accepts that it was a member of the Stonewall Diversity Champions Scheme and Workplace Equality Index until 31 May 2021. The Council also accepts that the applications could have been accessed by logging into the portal whilst it was a member of the scheme and Index. The Appellant's case is put on the basis that the Council should have retained copies of the applications, in addition to draft materials. She has not argued that the requested information was "held" by the Council when it was solely on the Stonewall portal. Therefore, although the Council may have been able to access the applications on the Stonewall portal for a short period after the Appellant sent the Request, we do not find that the information was "held" by Stonewall on behalf of the Council within the meaning of FOIA.

20. It follows from all that we have said above that we find that the Appellant has failed to demonstrate on the balance of probabilities that the Council held the information at the time of the Request.

21. We dismiss the appeal, the appeal is upheld and the Decision Notice.

Signed G Wilson

Date: 22 September 2023

Judge of the First tier Tribunal

### **Correction**

Pursuant to rule 40 of the Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules 2009/1976, on the 30 November 2023 the Tribunal corrected an error in the dates contained in paragraph 16 of this decision and reasons. The date was corrected from “2022” to “2020”.