



Neutral citation number: [2024] UKFTT 1118 (GRC)

Case Reference: EA/2024/0350

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

**Determined on the papers on 10 December 2024
Decision given on: 17 December 2024**

Before

**JUDGE JONATHAN SCHERBEL-BALL
TRIBUNAL MEMBER MARION SAUNDERS
TRIBUNAL MEMBER SUSAN WOLF**

Between

PETER STEAD

Appellant

and

INFORMATION COMMISSIONER

Respondent

Decision:

The Appeal is refused.

REASONS

Introduction

1. This is an appeal against a Decision Notice of the Information Commissioner (the “Commissioner”) dated 29 August 2024 (Reference IC-287616-N4V0) (the “Decision Notice”). The appeal is brought under s.57(1) of the Freedom of Information Act 2000 (“FOIA”).
2. This appeal concerns whether the Commissioner was correct to determine in the Decision Notice that, on the balance of probabilities, the Department for Culture, Media and Sport (“DCMS”) does not hold the names of individual external attendees at “DCMS Bullying and Harassment Roundtable meetings” which were held in April and July 2023.
3. The parties both agreed that this appeal could be determined on the papers. The Tribunal agrees that it is fair, appropriate and in keeping with the overriding objective for the appeal to be determined on the papers.
4. On 15 November 2024, the Tribunal made case management directions to allow for the determination of this appeal on the papers (the “CMDs”). Paragraph 1 of the CMDs provided that the appeal would not be decided before 20 December 2024. On 29 November 2024, the

Appellant made an application to delay the date for filing of Certificates of Compliance from 6 December 2024 on the basis that he needed to discuss the contents of the bundle with the Commissioner. However on 2 December 2024, the Appellant withdrew that application as he stated that it *“is no longer necessary as I have now been able to return my Certificate of Compliance this morning”*. The Appellant had indeed that day filed his Certificate of Compliance stating that the case was ready for determination. The Commissioner filed his Certificate of Compliance on 3 December 2024 also stating that the case was ready for determination. The parties have all complied with the CMDs to the extent required to do so and the appeal is ready for hearing.

5. Accordingly, and in circumstances where the parties agreed that the case was ready for hearing and there was a convened Tribunal Judge and two panel members available to determine this appeal, Judge Scherbel-Ball considered that the overriding objective required that paragraph 1 of the CMDs be set aside to allow for the determination of this appeal on 10 December 2024. Judge Scherbel-Ball accordingly directed that this paragraph be set aside in accordance with r.2(1) and pursuant to r.5(2) of the Tribunal Procedure (First-Tier Tribunal) (General Regulatory Chamber) Rules 2009 (the “GRC Rules”) and the Panel went on to consider and determine the appeal as set out in this judgment.

Background to the Appeal

6. On 18 January 2024, the Appellant requested the following information under FOIA:

“Please send to me the names of the individuals who attended the DCMS Bullying and Harassment Roundtable meetings. If they represented an organisation, please tell me which. Please search only after the 25th October ‘22 to before 28th November ‘23”.

7. DCMS responded on 30 January 2024. DCMS confirmed that it held the list of organisations represented at meetings between those dates, but that this was information which was publicly available to the Appellant. DCMS provided a hyperlink to where the Appellant could find that information and relied on the exemption in s.21 FOIA for information available to the appellant by other means. DCMS confirmed that it did not hold a list of individual attendees at the meetings between 25 October 2022 and 28 November 2023.

8. The Appellant sought an internal review of DCMS’s response on 31 January 2024. He contended that DCMS’s position was not credible, because (i) DCMS itself attended so that it must “know those names” and (ii) other minutes have had the individual names listed, for example from November 2023.

9. DCMS conducted an internal review and responded on 7 February 2024. It confirmed that it did not hold external names for those meetings, but said that the name of one junior DCMS official had been withheld under s.40(2) FOIA. DCMS considered that such information constituted that official’s personal data and its disclosure other than under FOIA would breach the first data protection principle. DCMS continued to rely on s.21 FOIA in respect of the information relating to the identity of the attending organisations as this was reasonably accessible by other means.

10. On 9 February 2024, the Appellant complained under s.50 FOIA to the Commissioner about DCMS’s handling of his request. The Appellant stated that (i) he *“still do not see how they can not have it recorded anywhere the individual attendees, and which, if any, organisation they represented at recent meetings held at the DCMS”*, (ii) the *“DCMS themselves attended these and so those individuals surely know who else attended”*, and (iii) *“other DCMS meetings in the same series published full attendee lists, for example November ‘23...however my*

understanding is that they were all held at the DCMS...furthermore all of the meetings in the same series prior to this (bar one) dating back to June '21 also contain full attendee lists."

11. In a letter to the Commissioner dated 10 July 2024, DCMS reiterated its position, stating *"we did not record the names of the individual people in attendance at the two requested meetings. An electronic search was conducted by the relevant policy team to confirm this fact (by looking up the minutes, the only record of the meeting), however, there was no stage at which we ever held the individual names of the people from the organisations in attendance, who are listed publicly online. This is inconsistent with the other minutes we have released, however there is no standard practice with meeting minutes for recording specific attendees for meetings of which we are not the hosts...We understand that it looks slightly strange as previously, and subsequent meetings did have a full list of attendees. Unfortunately in this instance that is not the case."*

12. The Commissioner rejected the Appellant's complaint in the Decision Notice. There was no challenge to DCMS's reliance on s.21 FOIA. The Commissioner considered both the Appellant's arguments and DCMS's position and considered that there was *"no evidence to suggest that the information in question is or was held, including for example in a record in addition to the minutes."* The Commissioner considered that the meetings of April and July 2023 were in different formats from the other minutes as they constituted a "readout" which did not contain attendee names, noted that the meetings were not held at DCMS, and that DCMS did not have a standard practice or policy relating to the recording of minutes. The Commissioner concluded that on the balance of probabilities, DCMS did not hold the identity of the attending individuals, save for the identity of a junior employee, whose personal data the Commissioner agreed was exempt under s.40(2) FOIA.

This Appeal

13. The Appellant has filed detailed grounds of appeal dated 2 September 2024, along with numerous annexes of supporting documents. In essence, the Appellant contends that on the balance of probabilities it is more likely that DCMS do hold the identity of external attendees at the meetings in April and July 2023 because (in outline):

- a. A number of the statements relied on by DCMS to explain why they do not hold this information are *"questionable or provably incorrect"*. Specifically, the Appellant contends that DCMS is incorrect to state (i) that these meetings are *"not DCMS roundtables"* and (ii) DCMS hosted one roundtable in June 2021. The Appellant also contends that it is irrelevant that DCMS states that as a result of this roundtable, a working group was created which is chaired by Creative UK. He also asserts that it is also not relevant who 'led' these meetings, and whether or not DCMS led or hosted these meetings are not *"the most relevant factors"* in assessing DCMS's position.
- b. One of the roles DCMS plays for these meetings, as it has previously confirmed is to act as the "secretariat", in which role it produces minutes to give to Creative UK who then refine them before distribution. It is therefore likely that DCMS followed its usual procedure, creating minutes which recorded the names of individual external attendees and sent the complete minutes to Creative UK. It is then likely that Creative UK removed them.
- c. Creative UK has previously refused to provide the Appellant with information about individual attendees at these meetings. He claims that Creative UK previously gave him *"false"* information about a particular attendee at a previous meeting, which he was ultimately able to discover through a separate request under FOIA for other minutes of these roundtable meetings. The Appellant suggest that Creative UK may

have been seeking to “*cover up a previous attempt at a cover up*”. The Appellant suggests that the timing of the two meetings in April and July 2023 correlates in similar time to when he started to question Creative UK about the attendees at these meetings, and that Creative UK may have been seeking to remove the name from the minutes of these meetings as a method of concealment. Once the Appellant had been successful in learning about the other meetings and their attendees in October 2023, Creative UK reverted to its previous practice of identifying individuals in the minutes of the meeting in November 2023. If Creative UK did remove the names to try to conceal them from scrutiny, then it is likely that DCMS would have recorded the original names which they would still hold.

- d. The Appellant alluded to his arguments as summarised at paragraphs 13.b and 13.c above in his complaint to the Commissioner, yet they are not mentioned in the Decision Notice. Accordingly, it is to be inferred that the Commissioner did not investigate these with DCMS and did not properly consider them. This was an error of law, or at least “*clear evidence he should have exercised his discretion differently.*”
 - e. DCMS must have retained the information which the Appellant seeks because without it, they would not know which organisations attended.
 - f. The fact that DCMS attended the meetings means that its employees would also likely have known the identity of at least some of the non-DCMS individuals who attended.
 - g. DCMS have a “dismal record” of responding to the Appellant’s requests about these roundtables.
 - h. The Tribunal should use its powers under r.5(3)(d) of the GRC Rules to obtain clarification from DCMS on unanswered questions such as did DCMS exclude individual attendee names from these two meetings and did they delete all other traces from their systems, and if so, why they did so.
14. The Commissioner opposes the appeal in his Response dated 10 October 2024. The Commissioner relies on the conclusions reached in the Decision Notice. The Commissioner considered that the explanation provided by DCMS as to what information it held and did not hold was reasonable and found no evidence to suggest that the information requested was held. The Commissioner also noted that DCMS’s meeting minutes were not always recorded in a standard fashion. The Commissioner stated that the Appellant had not provided any new information which on the balance of probabilities did suggest that DCMS held the information sought. The Commissioner contended that the appeal was “*premised upon the claim that there has been a cover-up involving Creative UK and DCMS to prevent the Appellant accessing the information he seeks*” but that the Commissioner does not find these arguments sufficiently convincing to reverse his conclusion that, on the balance of probabilities, DCMS did not hold the information within the scope of the request.
15. The Appellant has filed a detailed (undated) Reply to the Commissioner’s Response. He maintains his previous arguments and in addition makes a number of additional points, which we summarise as follows:
- a. If DCMS hosted the meetings, then they may hold a list of attendees for security reasons. The Appellant notes that the November 2023 meeting was held at DCMS.
 - b. That previous minutes taken by DCMS, and not Creative UK, show that it was DCMS’s previous general practice to record individual attendee names in meetings.

Accordingly the lack of individual names in the meetings in question is not a difference between Creative UK and the DCMS, as the Commissioner's Reviewing Case Officer thought, because Creative UK recorded minutes for the November 2023 meeting which did include details of individual attendees.

- c. There is "*direct evidence*" that DCMS's search was inadequate because DCMS's search was limited to searching for the minutes rather than applying standard key word searches on its systems.
- d. The Appellant considers that there "*may*" be a cover up and there is evidence that suggests this "*could*" be the case. In support of this, the Appellant also relies on different responses he received from DCMS and Creative UK in response to a subject access request made by him under Article 15.3 of the UK GDPR. The Appellant accepts that he does not say there is "*definitely a cover-up*", and it could simply be the case that the responses were "*sloppy*".
- e. The Appellant then poses a number of question for DCMS, including where did the April 2023 meeting take place, acknowledging that the July 2023 meeting was "held offsite". He asks who paid for the meeting and did they record names at the meeting? He suggests obtaining a witness statement from DCMS attendee(s) at the meetings on why attendee names were not recorded.

The law

16. The Tribunal's jurisdiction to consider this appeal is set out in s.58 FOIA. If the Tribunal considers that the notice against which the appeal is brought is not in accordance with the law or, if it 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. In any other case, the Tribunal shall dismiss the appeal.

17. The Tribunal must consider whether the provisions of FOIA have been correctly applied and is not bound by the Commissioner's views or findings but must arrive at its own view, giving such weight to the Commissioner's views and findings as it deems fit in the particular circumstances - *Guardian Newspapers & Brooke v Information Commissioner and BBC* (EA/2006/0011 & 0013) at [14(3)].

18. S.1(1)(a) FOIA provides any person with the right to be informed in writing by a public authority whether it holds information of the description specified in the request. S.1(1)(b) FOIA provides that if such information is held by a public authority, the individual has the right to have that information communicated to them. These rights are subject to various limits and exemptions set out in Part I and Part II of FOIA.

19. Information is held by a public authority for the purpose of FOIA if (a) it is held by the authority, otherwise than on behalf of another person, or (b) if it is held by another person on behalf of the authority – s.3(2) FOIA.

20. When determining whether a public authority holds information, the test is not one of certainty, but rather the normal civil standard of proof, assessing the issue on the balance of probabilities – see for example *Malcolm v Information Commissioner* EA/2008/0072 at [24], *Dudley v Information Commissioner* EA/2008/008 at [31], and *Councillor Jeremy Clyne v Information Commissioner and London Borough of Lambeth* EA/2011/0190 at [21] – [22].

21. In *Bromley v Information Commissioner and the Environment Agency* (EA/2006/0072, 31 August 2007) at [13], the Tribunal provided helpful guidance in respect of the factors to be

considered when assessing whether information was “held” by a public authority. These factors included (a) the quality of the public authority’s initial analysis of the request, (b) the scope of the search that it decided to make on the basis of that analysis, (c) the rigour and efficiency with which that search was then conducted and (d) the discovery of materials elsewhere within the public authority whose existence or content point to the existence of further information which had not been brought light. Having considered these factors (and any other relevant applicable factors), the task of the Tribunal was to decide “*whether the public authority is likely to be holding relevant information beyond that which has already been disclosed.*”

22. In *Oates v Information Commissioner and the Architects Registration Board* (EA/2011/0138) at [11], the Tribunal stated that:

“As a general principle, the IC was, in the Tribunal’s view, entitled to accept the word of the public authority and not to investigate further in circumstances, where there was no evidence as to an inadequate search, any reluctance to carry out a proper search or as to a motive to withhold information actually in its possession. Were this to be otherwise the IC, with its limited resources and its national remit, would be required to carry out a full scale investigation, possibly onsite, in every case in which a public authority is simply not believed by a requester.”

Evidence

23. We have considered a bundle containing 239 pages. This contains detailed argument by the Appellant, together with extensive supporting documents. It also sets out the position of DCMS as relayed initially to the Appellant and then subsequently to the Commissioner when he was considering the Appellant’s complaint. The Tribunal has considered all of this material carefully, but does not consider it necessary to refer to all, or indeed most of it, in this judgment.

24. In addition to the argument and supporting documents relied upon by the Appellant, the evidence in the bundle includes in particular the following documents which the Tribunal considers relevant to the issue it needs to determine:

- a. An internal DCMS document dated from May 2023 which states that “*to assist Creative UK with resourcing this work, we also provide secretariat support to produce the draft minutes, with Creative UK then refining the draft, and sharing with the roundtable group.*”
- b. Assorted minutes or “read outs” of roundtable meetings, chaired by Creative UK, of industry working groups to tackle the issues of bullying, harassment and discrimination in the creative industries. These minutes or “read outs” are in a variety of forms, and date between 29 June 2021 and October 2022 (distinct from those which took place in 2023 detailed below). All of these, except the minutes for July 2022, specifically identify the individual attendees at the meetings.
- c. A document entitled “Bullying, Harassment and Discrimination (BHD) Roundtable Readout 11 April 2023”. This lists attendees according to their organisation and does not identify the individuals in attendance. As its name suggests, this is in the form of a “read out” with associated action points identified. It does not identify where the meeting took place.
- d. A document entitled “Read out: Bullying, Harassment and Discrimination (BHD) in the Creative Industries Working Group” held on 13 July 2023 between 10:00 and 12:00. Again, this is in the form of a “read out”. It identifies attendees by organisations only and does not name individuals in attendance. It is a short

document, only 1½ pages in length. It states that the meeting was held at LABS Hogarth House.

- e. A document entitled “Bullying and Harassment Roundtable Summary Minutes and Actions” of a meeting dated 28 November 2023 which took place at DCMS (in person with video-link for virtual attendees). These bear a “Creative UK” logo and identify the names of the attendees and are set out in a format which would be typically associated with summary minutes of a meeting.
- f. The response of DCMS dated 10 July 2024 to the Commissioner’s questions as part of his consideration of the Appellant’s complaint. In this letter, DCMS, amongst other things, states that *“we did not record the names of the individuals in attendances at the two requested meetings. An electronic search was conducted by the relevant policy team to confirm this fact (by looking up the minutes, the only record of the meeting), however there was no stage at which we ever held the individual names of the people from the organisations in attendance, who are listed publicly online”*.

Conclusions

25. The Tribunal unanimously agreed that on the balance of probabilities, DCMS did not hold information of external attendees for the meetings in April and July 2023. The Appellant’s arguments do not come close to evidence that on the balance of probabilities, DCMS does hold this specific requested information.

26. The Tribunal reached this conclusion for the following reasons:

- a. First, the Appellant’s case is entirely based on speculation. Speculation does not equate to evidence. The Appellant implicitly accepted that his case is based on speculation in his Reply to the Commissioner as set out at paragraph 15.d above. “*May*” and “*could*” are not a sufficient evidential foundation to sustain this case. There is no evidence before the Tribunal, let alone sufficiently cogent evidence, to support his case of a cover-up on the part of DCMS and Creative UK to conceal the name of attendees at these meetings. Nor is there any evidential foundation from which such conduct could reasonably be inferred. The minor criticisms levelled by the Appellant in relation to DCMS’s statements about these meetings, for example, who “led” the meetings, provide no evidential foundation for these assertions.
- b. Second, even if the Appellant’s theory (as summarised at paragraph 13.c above) as to a cover-up by DCMS were correct, it would undermine, rather than support his case that DCMS held the information he sought in January 2024. If DCMS and Creative UK were seeking to conceal the identity of attendees at these meetings after the Appellant had sought to obtain this information in 2023, then it would not make sense for DCMS to have simply removed the information from the minutes. Logically, as part of a cover-up, DCMS would have had to have deleted any other information it held also. Otherwise, the information would have been obtainable under FOIA, precisely the same way the Appellant was seeking it in the first place and the attempted cover-up by removing the information from the minutes alone would have been futile. The logical conclusion of the Appellant’s theory (which we emphasise there is no evidence to support) is that DCMS would have deleted the information at some point after the meetings of April and July 2023 and before his request for the information in January 2024. That would mean, if so, that DCMS would not hold the information which he seeks.

- c. Third, the Appellant contends that DCMS's search is inadequate because it only searched for the minutes of the meeting and that it failed to conduct keyword searches. However, this does not take into account the full extent of DCMS's position as set out in its letter of 10 July 2024, namely that the minutes are the "only record of the meeting". It is not clear how further keyword searches would assist when DCMS have confirmed that this is the only record it holds of the meeting. We conclude that DCMS conducted a reasonable and appropriate search in all the circumstances.
- d. Fourth, the clear preponderance of the evidence supports the case that DCMS does not hold the information which the Appellant seeks in relation to these meetings. In this regard:
- i. The format of the "read outs" for April and July 2023 is substantially different from those minutes or read outs which preceded these two meetings and the November 2023 meeting which followed. This is consistent with the minutes for April and July 2023 being taken by a different minute taker (or minute takers) who did not record this information.
 - ii. These two meetings are not the only meetings of this roundtable group which do not identify all attendees by name. The meeting of July 2022 also does not identify the attendees by their individual names. The Appellant contends that this is "an accidental anomaly", but it is further evidence that different note or minute takers had different approaches to what information should be recorded in the minutes. This is consistent with DCMS's case that there is no uniform or prescribed minute taking format.
 - iii. The identity of the attendees is not contained within the minutes or read outs. This is the most obvious place for the information to be contained. Its absence is therefore consistent with this information not being held.
 - iv. The July 2023 meeting was not held at DCMS. There was no reason for DCMS to hold information about the identity of specific attendees for organisational reasons. We do not know where the April 2021 meeting was held, but even if such information was initially held by DCMS for organisational reasons such as security, there is no reason for DCMS to have retained this information by the time of the request in January 2024. Indeed, DCMS have an obligation under the UK GDPR not to retain personal data (such as the name of attendees in a security register) for longer than is necessary.
- e. Fifth, while we do not go as far as the Tribunal in *Oates* in suggesting that we can simply accept the word of the public authority without more and not investigate further absent good reason, we do consider that there is no evidence to justify any further searches in this case. Applying the approach of the Tribunal in *Bromley*, the position of DCMS has been consistent, reasonable and explicable and based on a reasonable analysis and search. It is supported by the extant evidence, principally supplied by the Appellant himself. We see no basis whatsoever to demand further evidence from DCMS. To demand further evidence from DCMS is not necessary to resolve this appeal fairly and proportionately and would be directly contrary to the overriding objective. For completeness, we note that that in its letter of 10 July 2024, DCMS has already expressly confirmed that at "no stage" did it hold the individual names of attendees. This addresses one of the Appellant's primary demands for evidence.

- f. Sixth, even if the identity of some or all of the attendees at these two meetings was known to an employee of DCMS in January 2024 when the request was made, that is not sufficient for it to be held by DCMS for the purpose of FOIA. The information must be “recorded” by DCMS for it to give rise to an obligation to provide it under FOIA – see the definition of “information” in s.84 FOIA. There is no obligation on a public authority to record information even if it may be known by an employee – see for example *Reed v Information Commissioner and Astley Abbots Parish Council*, IT, 29 December 2008 at [12] and *Ingle v Information Commissioner*, IT, 29 June 2007 at [7] - [8].
- g. Seventh, we reject the Appellant’s contention that by not expressly addressing all of the Appellant’s concerns in the Decision Notice, the Commissioner erred in law or uncritically accepted DCMS’s position. There is no obligation on the Commissioner to address in a decision notice every point raised, however speculative or irrelevant. The Decision Notice is clear and precise; it properly addresses in a proportionate manner the issues which needed to be considered by the Commissioner. The parties cannot be in any doubt as to the reasons which underpinned the Commissioner’s decision. Moreover, any suggestion by the Appellant that the Commissioner uncritically accepted DCMS’s position is undermined by the very arguments he has himself advanced based on the Commissioner’s internal documentation which sets out the deliberation and main points considered by the Commissioner’s case worker. Far from uncritically assessing DCMS’s position, the evidence shows that the Commissioner reasonably and proportionately critiqued DCMS’s evidence.

27. Having had careful regard to all the evidence, the Tribunal is satisfied that the Decision Notice was in accordance with the law. Indeed, we agree with the conclusions the Commissioner reached. Accordingly, the Tribunal rejects the appeal.

Signed: Judge Scherbel-Ball

Dated 12 December 2024