



Neutral citation number: [2024] UKFTT 001166 (GRC)

Case Reference: FT/EA/2024/0229

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

Decision given on: 6 January 2025

Before

**JUDGE A. MARKS CBE
MEMBER K. PEPPERELL
MEMBER M. SCOTT**

Between

PETER STEAD

and

THE INFORMATION COMMISSIONER

Appellant

Respondent

Representation:

For the Appellant: the Appellant represented himself

For the Respondent: Helen Wrighton, Solicitor

Decision: The appeal is dismissed.

REASONS

Introduction

1. This is an appeal against the Information Commissioner's decision notice IC-284617-G8S8 dated 3 June 2024 which held that, on the balance of probabilities, the British Film Institute (BFI) did not hold any information relevant to the Appellant's request, nor did it hold such information on behalf of another person.
2. The parties agreed to the Tribunal deciding this appeal on the papers rather than requiring an oral hearing. The Tribunal was satisfied, in accordance with Rule 32 of The Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules 2009 (as amended) (GRC Rules), that it could properly determine the issues in this case without an oral hearing.

The request for information, internal review and responses

3. On 27 November 2023, the Appellant (PS) emailed BFI a request for information – the relevant extract of which is as follows:

“...I ask for materials relating to the set up of this new standards authority (CIISA and before that ISA) [for the creative industries]. Minutes, notes, records, emails, text messages, in whatsoever form, whether on official or personal devices, from before...around August 2022. Please note this...request does not only relate to meeting minutes but all written materials of whatsoever nature.”

4. BFI responded on 19 December 2023 confirming that it had no further materials other than those it had already provided to PS voluntarily in August 2023 (with redactions of some third party data) following a previous information request PS had made in February 2023. BFI explained that while its previous Director of Culture and Inclusion (JS) might be referenced in those documents supplied to PS, BFI was unable to access any of JS's files as they had been deleted after she formally left BFI in April 2023.
5. On 20 December 2023, PS requested an internal review of BFI's response. He said that JS had attended roundtable meetings on behalf of BFI and was therefore acting for BFI in terms of creation of the new standards authority rather than attending in a personal capacity. Hence it made no sense for the requested files (including even JS's personal files) to have been deleted. Further, JS had been seconded to CIISA as 'interim CEO' while she retained her employment at BFI.
6. On 21 December 2023, BFI responded to PS that IT colleagues had confirmed that the files had been deleted one month after JS left BFI. She was initially seconded from BFI to CIISA but her employment with BFI ended in April 2023.
7. On 23 January 2024, PS complained to the Respondent (the Commissioner) about the way BFI had dealt with his information request.

The Decision Notice

8. On 3 June 2024, the Commissioner issued his Decision Notice which in summary concluded that BFI had considered PS's request a number of times; had carried out a number of searches and discussed the request with relevant people. BFI had also addressed the various questions PS had put to it.
9. For the reasons BFI had explained, including its retention schedule, the Commissioner was satisfied that, on the balance of probabilities, BFI did not hold any information within the scope of PS's request for its own purposes and that BFI had therefore complied with section 1(1) of the Freedom of Information Act 2000 (FOIA). Further, BFI did not hold any such information on behalf of another person but, if it had, section 3 FOIA would have applied.

Appeal to the Tribunal

13. On 12 June 2024, PS sent a Notice of Appeal to the Tribunal challenging the Commissioner's decision notice.
14. The basis of PS's appeal was that:
 - (a) It was very unlikely that BFI had provided all information it held because of its pattern of behaviour and the unreliability of its claims. Further, given the momentousness of the creation of a new standards authority and the key role BFI played in it, surely significant material would have been generated.
 - (b) JS told BFI she was invited to the roundtables for her personal expertise rather than on behalf of BFI, but she was definitely BFI's representative at those meetings from June 2021 to August 2022 as confirmed by the meeting minutes PS obtained from the Department for Culture, Media and Sport (DCMS).
 - (c) BFI's previous claim that JS was using her BFI address for CIISA business only once she had been seconded to CIISA (from September 2022 - April 2023) makes no sense when she was BFI's representative at roundtable meetings for more than a year prior to her secondment.
 - (d) BFI admitted that they had mistakenly used 'CISSA' rather than 'CIISA' as a search term when looking for information on their systems.
 - (e) BFI said their policy was to delete former employees' email accounts a month after they had left but had not provided a copy of this policy to PS despite him asking for it.
 - (f) Even if JS's emails had been deleted, she surely emailed BFI colleagues about ISA/CIISA and some of those colleagues surely still work at BFI.
 - (g) The fact of JS's secondment alone must have generated material because BFI and CIISA would have had to agree between this them.
 - (h) BFI maintains that emails received in 2021 were deleted by February 2023 when PS's original request came in, but does not believe that any emails would have been deleted afterwards, even though that was a longer period.
 - (i) The Commissioner should have exercised his discretion differently because:
 - i. PS was required to submit a new complaint to the Commissioner (rather than reopen the previous one).
 - ii. The same case officer worked on PS's new complaint as his previous one.

- iii. PS should not have needed to refer to any specific time period when requesting the information he wanted.
 - iv. Despite BFI contradicting themselves, being contradicted by evidence or otherwise making incorrect statements, the Commissioner gave BFI an extraordinary level of indulgence.
- (j) A fresh process was needed to look into this.

Commissioner's response to the appeal

15. The Commissioner's response to the appeal on 19 July 2024 in summary stated that:

- (a) In reaching his decision, the Commissioner applied well-established principles to determine whether BFI held the relevant information. These principles are:
 - i. the relevant standard is the balance of probabilities; and
 - ii. having reviewed factors such as the quality of the public authority's analysis of the request; the scope of the search it made; the rigour and efficiency of that search; and whether other materials point to the existence of further information, the question is whether the public authority is **likely** to be holding relevant information beyond that already disclosed.
- (b) On the basis of BFI's confirmations about the scope of the request, the searches it had made – including correcting a previous search term error – and the absence of other materials pointing to the existence of further information, the Commissioner accepted that the requested files had been deleted some months before the request was made.
- (c) For the reasons set out in the Commissioner's decision notice, the Commissioner was therefore persuaded that, on the balance of probabilities, BFI held no further information within scope at the time of the request.
- (d) PS's complaints about the way in which the Commissioner handled his case fall outside the scope of the Tribunal's remit.

PS's reply to the Commissioner's response

16. In his reply dated 26 July 2024, PS stated that:

- (a) In view of BFI's numerous changes of story to explain why they do not hold the requested information there is ample reason not to take BFI's explanations at face value.
- (b) Even if JS's files had been deleted, surely she emailed other BFI colleagues about the roundtables where she represented BFI for over a year.
- (c) BFI and Creative UK (which organised the roundtables) were in contact with each other and DCMS about PS's enquiries: they were clearly coordinating to stop the release of the minutes of those roundtables.
- (d) While not objecting to the balance of probabilities being used as the test, it is doubtful that this balance is in favour of BFI's claims.
- (e) Criticisms of the Commissioner are part only of PS's reasons why he thinks the Commissioner is wrong and should have exercised his discretion differently.

The Law

Section 1(1) FOIA: general right of access to information held by public authorities

Any person making a request 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 this is the case, to have that information communicated to him...

...

Section 3 FOIA: 'Held' by a public authority

...(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.

The role of the Tribunal

17. The powers of the Tribunal in determining appeals against the Commissioner's decisions for the purposes of FOIA are as follows:

s.57 Appeal against notices...

(a) Where a decision notice has been served, the complainant or the public authority may appeal to the Tribunal against the notice...

s.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.

Evidence

18. Prior to the hearing of this appeal on the papers, the parties had submitted an Open Bundle of 457 pages (including indices) which contained the parties' evidence and other materials.

Discussion

The facts

19. The panel first considered the relevant facts of this case. Based on all the evidence provided, the panel made the following findings of fact on the balance of probabilities. Those findings shown in bold are disputed with the panel's reasoning set out below the bold text.

- (a) BFI voluntarily provided some information in response to an earlier request by PS.
- (b) On 29 June 2021, JS attended a roundtable hosted by the Minister for Digital and Culture with representatives from across the creative industries to agree a plan of action to tackle bullying, harassment and discrimination issues for those who work in the creative industries.
- (c) Between July 2021 and July 2022, JS attended further quarterly roundtables organised by Creative UK (formerly The Creative Industries Federation), to discuss the setting up of CIISA (originally known as ISA).
- (d) JS's title at BFI was Director of Culture and Inclusion.
- (e) In the 'readouts' of the roundtables, JS was described on the attendance list as BFI's Head of Inclusion.
- (f) In September 2022, while still employed by BFI, JS began a six-month secondment to CIISA as its interim CEO.
- (g) BFI, when initially searching for information within the scope of the request, mistakenly used the acronym CISSA rather than CIISA. BFI then conducted further searches with the correct acronym and found two documents which BFI shared with PS in April 2024.
- (h) **BFI carried out appropriate searches (including correction of its error of CISS to CIISA) to determine what information it held.** The panel's reasoning for this finding is:
 - i. The Commissioner's guidance makes clear that he can rely on the results of the public authority's searches provided they were appropriate and thorough.
 - ii. BFI explained that the searches it had conducted were numerous keyword and acronym searches, including all those suggested by PS. BFI also contacted JS's line managers, her inclusion and public affairs colleagues and other interested parties within BFI to search their files for information within scope of the request. In the panel's view, the Commissioner was entitled to accept that these searches used appropriate

keywords, and were of areas where it was reasonable to expect that BFI would find the information requested if it existed.

- iii. It is not the task of the Commissioner or this Tribunal to decide whether a public authority should hold the information.
 - iv. Since FOIA states that the information which must be provided is that held at the time of the request, public authorities need not stop their normal processes of deleting records. However, it is a criminal offence deliberately to delete requested information in order to prevent its disclosure.
 - v. BFI told the Commissioner that BFI employees have limited inbox capacity and they are encouraged to delete emails regularly: it would not be 'uncommon' for emails received in 2021 to have been deleted by the date the information request was received.
 - vi. There is no evidence to suggest, nor reason to believe, nor is it alleged that BFI deliberately deleted the information requested to avoid disclosing it.
- (i) **JS was invited to the roundtables not as a BFI representative as such – even though she was still employed by BFI at the time – but as a result of her experience in the field.** The panel's reasons for this finding are:
- i. This is how BFI itself describes the position and while its responses to PS's request have at times been confusing or incorrect, these do not amount to bad faith on BFI's part.
 - ii. The roundtables were not minuted as such: instead 'readouts' were prepared comprising summaries of each participant's contributions.
 - iii. There is no evidence that the readouts (presumably prepared by or for DCMS since DCMS attended all the roundtables and later provided the partially redacted readouts to PS) were ever shared with participants or their organisations nor were those parties' corrections sought as would have been expected of conventional meeting minutes.
 - iv. Had the readouts been shared with participants or their organisations, JS or BFI would more likely than not have corrected her role title – wrongly recorded in the attendance list as BFI's 'Head of Inclusion'.
 - v. BFI informed the Commissioner during his investigation that JS's colleagues, when asked to search their files for any information within the scope of the request, explained that JS was the main contact on ISA/CIISA and that the involvement of other BFI employees was minimal.
 - vi. In August 2023, when dealing with PS's earlier FOIA request, BFI's CEO emailed internal colleagues saying *"To my knowledge the BFI have not been present at any meetings regarding the development of CIISA? I'm still a little concerned with how we are represented on CIISA's website as a partner. I think*

this is inaccurate and misleading. There is also a quote from me which I wasn't sure we had approved the use of?"

- vii. The panel considered it highly unlikely that CEO would have been unaware of JS being BFI's official representative at the roundtables had she been such.
 - viii. The panel considered the only evidence supporting the proposition that JS attended the roundtables on behalf of BFI was that she was repeatedly described in the attendance list as being BFI's 'Head of Inclusion' (but see iv. above) but this was outweighed by the other features described above.
- (j) **The development and setting up work of CIISA was carried out during JS's secondment between September 2022 and March 2023.** The panel's reasons for accepting BFI's explanation to this effect are:
- i. If discussions within BFI about JS's six-month secondment to CIISA with effect from September 2022 were committed to writing – and they may not have been - there is no evidence to suggest that 'set up' of CIISA would have been explicitly referred to nor that these records would have been retained by BFI until November 2023 when PS made the present request.
 - ii. Not just before her secondment but also thereafter, JS's use of BFI systems for emails and filing was because CIISA did not yet have systems of its own. Accordingly, JS's materials were 'held' by BFI on behalf of another person (i.e. CIISA and/or JS personally) rather than 'held' on its own behalf for the purposes of FOIA.

Error of law or wrongful exercise of discretion

Is there an error of law in the Commissioner's Decision Notice?

- 20. Having made the above findings of fact, the remaining issues for the panel in this appeal were (a) whether the decision notice was not in accordance with the law and (b) to the extent that the notice involved an exercise of discretion by the Commissioner, whether he ought to have exercised his discretion differently.
- 21. PS does not suggest there is any error of law as such in the decision notice but he challenges the Commissioner's findings of fact that BFI was neither holding the requested information on its own behalf nor that the requested information was held by another person (i.e. JS) on behalf of the BFI.
- 22. PS also challenges the Commissioner's exercise of his discretion in the way he handled PS's complaint.
- 23. The panel concludes - in light of its findings of fact in paragraph 19 above – that the Commissioner did not make any error of law (or fact) in his decision notice in concluding that, on the balance of probabilities, BFI did not hold any further requested materials beyond those it had already voluntarily disclosed. Furthermore,

BFI did not – as a matter of law – ‘hold’ the information because it fell within the exclusion in s.3(2)(b), namely it was held by BFI “on behalf of another person”.

Did the Commissioner wrongfully exercise his discretion?

24. The panel considers that the extent of the Tribunal’s jurisdiction under s.58 FOIA is limited to the exercise of the Commissioner’s discretion in the context of the decision notice itself. In this case, because no exemptions under FOIA were engaged, there was no question of the Commissioner exercising discretion in the balancing of public interest factors for and against disclosure of requested information as is required for all ‘qualified’ exemptions under FOIA.

25. The panel considers that where an appellant raises criticisms or concerns about the way in which the Commissioner investigated or otherwise handled their complaint about a public authority’s handling of a FOIA request, these do not fall within the scope of s.58 FOIA which defines the Tribunal’s powers when dealing with an appeal against a decision notice.

Conclusion

26. For the above reasons, the panel finds that the Commissioner’s decision notice was not wrong in law (or fact) nor did his conduct of PS’s complaint involve wrongful exercise of his discretion within the meaning of s.58 FOIA.

27. Accordingly, this appeal is dismissed.

Signed:

Date: 23 December 2024



Alexandra Marks CBE
(Recorder sitting as a First-tier Tribunal Judge)