



NCN: [2024] UKFTT 820 (GRC)

Case References: EA/2023/0046, EA/2023/0323

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

**Decided without a hearing
Decision given on: 12 September 2024**

Before

**JUDGE STEPHEN ROPER
MEMBER SUZANNE COSGRAVE
MEMBER JO MURPHY**

Between

TERENCE LETHEBY

Appellant

and

THE INFORMATION COMMISSIONER

Respondent

Decision: The appeal is Allowed

Substituted Decision Notice:

The Tribunal's Decision Notice in case references EA/2023/0046 and EA/2023/0323, set out below, is substituted for the Commissioner's Decision Notice reference IC-158093-G9Y1 dated 20 December 2022 and the Commissioner's Decision Notice reference IC-231449-D6W2 dated 21 June 2023, respectively, with regard to the requests for information made to Elmbridge Borough Council by Terence Letheby dated 2 December 2021 and 27 September 2021.

Substituted Decision Notice

1. Elmbridge Borough Council shall make a fresh response to the request for information made to it by Terence Letheby dated 2 December 2021.
2. Elmbridge Borough Council shall also make a fresh response to the request for information made to it by Terence Letheby dated 27 September 2021, in respect of items 1, 2, 3, 6 and 7 set out in that request.
3. Each such fresh response must make clear whether or not any information within the scope of the requests is held by Elmbridge Borough Council. For the avoidance of doubt, if two throwing cages (whether portable or otherwise) are within the scope of

First Appeal:	The appeal referred to in paragraph 7, in respect of the First Decision Notice.
First Decision Notice:	The Decision Notice of the Commissioner dated 20 December 2022, reference IC-158093-G9Y1, relating to the First Request.
First Request:	The request for information made by the Appellant, dated 2 December 2021, as referred to in paragraph 10.
FOIA:	The Freedom of Information Act 2000.
Requests:	The First Request and the Second Request.
Requested Information:	The information which was requested by way of the First Request and/or the Second Request (as the context permits or requires).
Second Appeal:	The appeal referred to in paragraph 8, in respect of the Second Decision Notice.
Second Decision Notice:	The Decision Notice of the Commissioner dated 21 June 2023, reference IC-231449-D6W2, relating to the Second Request.
Second Request:	The request for information made by the Appellant, dated 27 September 2021, as referred to in paragraph 16.

2. Unless the context otherwise requires (or as otherwise expressly stated), references in this decision:
 - a. to numbered paragraphs are references to paragraphs of this decision so numbered; and
 - b. to any section are references to the applicable section of FOIA.
3. We refer to the Commissioner as ‘he’ and ‘his’ to reflect the fact that the Information Commissioner was John Edwards at the date of the Decision Notices and the Appellant’s related complaints to the Commissioner, whilst acknowledging that the Information Commissioner was Elizabeth Denham CBE at the time of the Requests and the Council’s responses to the Requests.
4. Notwithstanding that the First Request was made subsequent to the Second Request, we have defined them as such because the earlier of the decision notices regarding the Requests was the First Decision Notice.
5. Nothing we say in this decision should be taken as an indication as to whether or not all of the Requested Information is held by the Council.

Introduction

6. The Tribunal heard two appeals at the same time, given the similarity in the subject matter: case references EA/2023/0046 and EA/2023/0323. This decision relates to both appeals.

7. Case reference EA/2023/0046 is an appeal against the First Decision Notice, in which the Commissioner decided that, on the balance of probabilities, the Council had provided the Appellant with all of the relevant information it held relating to the First Request. The First Decision Notice did not require the Council to take any steps.
8. Case reference EA/2023/0323 is an appeal against the Second Decision Notice, in which the Commissioner decided that, on the balance of probabilities, the Council had provided the Appellant with all of the relevant information it held relating to the Second Request. The Second Decision Notice did not require the Council to take any steps.

Background to the Appeals

9. The background to the Appeals is as follows. The Requests were focussed around various aspects of the “Excel Centre used by Walton Athletic Club” (as referred to in the First Request) and the “Elmbridge Xcel Sports Hub” (as referred to in the Second Request). The Appellant stated that he is a qualified athletics coach specialising in throwing events, as well as a UKA qualified field referee.

The First Appeal

The First Request

10. On 2 December 2021, the Appellant wrote to the Council requesting information in the following terms (we have added numbers to each part of the First Request for ease of reference and we refer below to each part using those numbers):

“1. Please provide all information regarding the dates and test records of the two throwing cages at the Excel Centre used by Walton Athletic Club.

2. Please provide the name of the Council Officer who authorised the removal of the warning notice on both throwing cages on the week commencing 29th November.

3. Please provide current test certificates/reports on both cages.

4. Please provide tensile strength of the fabric used on both throwing cages and the tensile strength of the electrical cable ties used to repair parts of the netting.”.

11. The Council responded on 24 December 2021, providing some information to the Appellant.
12. Following an internal review, the Council wrote to the Appellant on 25 January 2022. It provided further information relating to part 4 of the First Request and confirmed that it was satisfied that it had already provided all the information that was relevant to the remaining parts of the First Request.
13. The Appellant contacted the Commissioner on 27 February 2022 to complain about the way the First Request had been handled by the Council.

The First Decision Notice

14. The Commissioner stated in the First Decision Notice that his remit was to consider whether the Council had identified all of the information which it held falling within the scope of the First Request – and therefore that some of the concerns raised by the

Appellant, such as those that relate to the safety of the throwing cages, went beyond the Commissioner's remit.

15. In the First Decision Notice, the Commissioner decided (in summary) that, having considered all of the available information, including details provided by the Council regarding the searches it had undertaken (which was stated to include searches on shared drives on its computer networks and within emails), the Commissioner was satisfied that, on the balance of probabilities, the Council had provided all of the information it holds which is relevant to the First Request.

The Second Appeal

The Second Request

16. On 27 September 2021, the Appellant wrote to the Council requesting information in the following terms (the numbers for each part were used in the Second Request and we refer below to each part using those numbers):

"1. Please provide copies of all correspondence between the Council and the site operator Place Leisure at the Elmbridge Xcel Sports Hub concerning the maintenance of the athletic facilities and the drainage problems in the toilets and changing rooms.

2. Please state if there are any penalties clauses in the contract with Places Leisure for not attending to the maintenance of the facilities.

3. The portable throwing cage was incorrectly installed is the Council going to rectify the incorrect installation.

4. When the testing company noted defects in the main throwing cage, what action was taken to rectify these defects?

5. Who is responsible for rectify the defects in 4) above.

6. What was the cost of rectifying the original faults in the installation of the main throwing cage?

7. What was the cost of rectifying other defects in the original installation of the athletic facility?¹

8. Who is responsible for the maintenance of the athletic facilities at the Xcel Sports Hub? Please provide their name and contact details."

17. The Council responded to the Second Request on 25 October 2021. Details of the response are set out in paragraph 57.
18. Following a complaint by the Appellant in respect of the Council's handling of the Second Request, the Commissioner issued a decision notice (prior to the Second Decision Notice, under reference IC-149229-N8X7). In that decision notice, the Commissioner considered that the Council had not dealt with the Second Request in accordance with FOIA, on the basis that the Council's response to it had failed to

¹ The Second Decision Notice included (at paragraph 4) the following additional text for this question: "If under warranty the installation company, ongoing maintenance". This was included in the Council's response but appears to have been added by the Council in error - it was not in the original request.

clearly confirm or deny if information was held in respect of each part of the Second Request. That decision notice required the Council to issue a substantive response to the Second Request.

19. On 31 October 2022, the Council issued a fresh response to the Second Request. In this response, the Council disclosed certain information and stated that no information was held for parts 6 and 7 of the Second Request. Again, details of the response are set out in paragraph 57.
20. The Appellant was unhappy with the fresh response issued by the Council and requested an internal review. The Appellant subsequently complained to the Commissioner, stating that he had not received a response to his request for an internal review. Following that complaint, the Council provided an internal review and therefore the Commissioner did not issue a decision notice in respect of it.
21. The Appellant was also unhappy with the outcome of that internal review and, following some further correspondence between the Appellant and the Council, the Appellant contacted the Commissioner by letter dated 1 May 2023² to complain about the way the Second Request had been handled by the Council.

The Second Decision Notice

22. In the Second Decision Notice:
 - a. The Commissioner considered that the Appellant's complaint related only to parts 6 and 7 of the Second Request and therefore the Commissioner concluded that his remit was to consider whether the Council had identified all the information it held falling within the scope of those parts of the Second Request.
 - b. The Commissioner noted that there was disagreement between the Appellant and the Council in respect of whether or not there were any defects in the throwing cages referred to in those parts of the Second Request (which the Commissioner stated was not a matter he could determine).
 - c. The Commissioner decided (in summary) that, if the Council does not consider there to have been any such defects, it would therefore not hold any information relating to those parts of the Second Request. Accordingly, having considered all of the available information, the Commissioner decided that, on the balance of probabilities, the Council does not hold any information relevant to parts 6 and 7 of the Second Request.

The Appeals

The grounds of appeal – the First Appeal

23. The Appellant's grounds of appeal in respect of the First Decision Notice were based on his comments regarding the various parts of the First Request, associated matters relating to the Requested Information and his views on the Council's position. In summary, these comments were as follows:
 - a. In respect of parts 1 and 3:

² The Second Decision Notice erroneously recorded this as 10 May 2023.

- the Council supplied the test report on the main throwing cage, which showed the defects in the netting of the cage;
 - the test report was not out of date as stated by the Council;
 - there was no date on the certificate for the portable cage;
 - the portable cage test certificate showed numerous defects;
 - the Council refused to supply the test report on that cage and have continued to state there is nothing wrong with the cage;
 - the cage netting had now been replaced and its strength had not been stated.
- b. In respect of part 2, the Council had refused to state which Council Officer had authorised the removal of the test certificates on both cages.
- c. In respect of part 4:
- repairs to the cages had been carried out with string and electrical cable ties of various sizes;
 - it is an important requirement that these repair materials have the same tensile strength as the cage;
 - the Council had provided information stating the cage netting has a strength of 3.3KN; World Athletics state that cage netting should have a breaking energy of 4.4KJ;
 - the Council had refused to state the strength of the materials used to repair the cage netting; and
 - the Council is ultimately responsible for the safety of the facility.

24. The Appellant also stated in his grounds of appeal that:

- a. he had complained to the Council about the numerous faults with the throwing cages;
- b. there were test reports on each cage showing faults;
- c. following his complaint to the Council, the warning labels were removed.

The grounds of appeal – the Second Appeal

25. The Appellant's grounds of appeal in respect of the Second Decision Notice were based on his comments regarding the various parts of the Second Request, associated matters relating to the Requested Information and his views on the Council's position. Some of those comments reflected those in the Appellant's grounds of appeal in respect of the First Decision Notice and we do not repeat them here.

26. The material points from the Appellant's grounds of appeal were that (as was set out in his section 50 complaint to the Commissioner) he considered that the Council had refused to answer parts 6 and 7 of the Second Request. The Appellant stated that, as

the Council built the facility, it must be aware of the design defects and the cost to the ratepayer for correcting these defects. He also considered that if those defects were errors by the contractor and the contractor carried out the work at no cost to the Council then the Council should provide the information showing that there was no cost to the ratepayers.

The Tribunal's powers and role

27. The powers of the Tribunal in determining the Appeals are set out in section 58. In summary, the Tribunal's remit for the purposes of the Appeals was to consider whether the Decision Notices were in accordance with the law, or whether any applicable exercise of discretion by the Commissioner in respect of either of the Decision Notices should have been exercised differently. In reaching its decision, the Tribunal may review any findings of fact on which the Decision Notices were based and the Tribunal may come to a different decision regarding those facts.

Mode of hearing

28. The parties consented to the Appeals being determined by the Tribunal without an oral hearing.
29. The Tribunal considered that the Appeals were suitable for determination on the papers in accordance with rule 32 of the Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules 2009 and was satisfied that it was fair and just to conduct the Appeals in this way.

The evidence and submissions

30. The Tribunal had a bundle of evidence and pleadings in respect of each of the Appeals.
31. All of the contents of the bundles were read and considered, even if not directly referred to in this decision.

Outline of relevant issues

32. In accordance with the Tribunal's remit which we have referred to, the fundamental issue which we needed to determine in the Appeals was whether the Commissioner was correct to determine, by way of the Decision Notices, that the Council does not (on the balance of probabilities) hold any further information within the scope of the Requests.

The relevant legal framework³

General principles

33. Section 1(1) provides individuals with a general right of access to information held by public authorities. It provides:

³ We acknowledge the Practice Direction dated 4 June 2024 (<https://www.judiciary.uk/guidance-and-resources/practice-direction-from-the-senior-president-of-tribunals-reasons-for-decisions>) and particularly paragraph 9, which refers to the First-tier Tribunal not needing to specifically refer to relevant authorities. We include references to the applicable legislative framework but have accordingly not set out details of the applicable case law.

“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.”.

34. In essence, under section 1(1), a person who has requested information from a public authority (such as the Council) is entitled to be informed in writing whether it holds that information. This is known as 'the duty to confirm or deny'. If the public authority does hold the requested information, that person is entitled to have that information communicated to them. However, those entitlements are subject to the other provisions of FOIA, including some exclusions, exemptions and qualifications which may apply even if the requested information is held by the public authority. Section 1(2) provides:

“Subsection (1) has effect subject to the following provisions of this section and to the provisions of sections 2, 9, 12 and 14.”.

35. Accordingly, section 1(1) does not provide an unconditional right to be told whether or not a public authority holds any information, nor an unconditional right of access to any information which a public authority does hold. The rights contained in that section are subject to certain other provisions of FOIA.

36. Section 3(2) provides:

“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.”.

Section 16 - Duty to provide advice and assistance

37. Section 16 provides:

“(1) It shall be the duty of a public authority to provide advice and assistance, so far as it would be reasonable to expect the authority to do so, to persons who propose to make, or have made, requests for information to it.

(2) Any public authority which, in relation to the provision of advice or assistance in any case, conforms with the code of practice under section 45 is to be taken to comply with the duty imposed by subsection (1) in relation to that case.”.

The relevant legal test for whether or not information is held

38. It is important to note that, notwithstanding section 1(1), it is not the role of either the Commissioner or the Tribunal to determine conclusively (or, in other words, with certainty) whether or not information is actually held by a public authority for the purposes of that section. The legal test to be applied by the Commissioner and the Tribunal is the 'balance of probabilities'. In simple terms, the 'balance of probabilities' means that something is more likely than not to be the case.

39. Accordingly, in determining whether or not information is held on the balance of

probabilities, a decision should be reached based on an assessment of the adequacy of the public authority's search for the information and any other reasons explaining why the information is not held.

Discussion and findings

40. We first address some preliminary points before turning to the fundamental issues in the Appeals.
41. The Appellant, in his grounds of appeal in the Second Appeal, asked the Tribunal to "*confirm that the cage was originally defective as per documents provided by the Council*". The Appellant also, in correspondence with the Tribunal on 21 September 2023 (prior to the determination of the Appeals) stated: "*Attached is a photo of the track, which had to be extended to facilitate the time keeper's stand, who paid for this work and how much did it cost.*".
42. As we noted in paragraph 27, the scope of the Tribunal's jurisdiction relates to the lawfulness of the Decision Notices. Any other issues are beyond the Tribunal's powers to determine and fall outside of the scope of the Appeals. It is therefore outside of our remit to make any finding in respect of the cages or any other matter which the Appellant was concerned about regarding the subject matter of the Requested Information. It is also outside of our remit to consider the subsequent question raised with the Tribunal by the Appellant on 21 September 2023 (which was not part of the Requested Information). Likewise, the Tribunal's jurisdiction does not extend to matters such as any allegations relating to impropriety or other wrongdoing by the Council and we have no power to consider or determine any such issues.
43. However, as part of the Tribunal's remit, we may review any relevant findings of fact in the Decision Notices and may come to a different decision regarding those facts. Essentially, the Tribunal is empowered to undertake a 'full merits review' of the Appeals (so far as the Decision Notices are concerned). That is what we have done.
44. We also note that the Appellant, in correspondence with the Commissioner dated 26 December 2022 regarding the First Decision Notice, stated that "*the whole point of FOIs is to provide the truth*". That is an incorrect characterisation of FOIA. As we explained in paragraphs 34 and 35, FOIA simply operates (subject to the exemptions we referred to) to provide individuals with access to information which is held by a public authority. It is not necessarily the case that any such information will be correct and accordingly the operation of FOIA does not relate to the accuracy or truthfulness of any information which may be held by a public authority.

Whether any further Requested Information is held by the Council

The First Request

45. As we noted, the Commissioner's conclusion in the First Decision Notice, that (on the balance of probabilities) the Council had provided all of the information it holds which is relevant to the First Request, was based in part on the details provided by the Council regarding the searches it had undertaken. During the Commissioner's investigation, the Council explained the following to the Commissioner in respect of the searches it had undertaken:
 - a. All information about the management of the Excel Leisure Centre was held

within shared drives on the Council's computer networks and in email.

- b. Searches were undertaken of the organised electronic files and searches with key words were undertaken of email files.
 - c. The Council's Leisure and Cultural Services Manager is responsible for the contract management of the contract with Places Leisure (we comment on the role of Places Leisure, also referred to as 'Places for People', below). The Leisure and Cultural Services Manager knows of all of the issues and correspondence between the Council and Place Leisure, was "very involved" in all of the matters raised by the Appellant and would know the location of all of the relevant information.
 - d. The relevant information was held in an organised filing system, therefore a search of the relevant files retrieved all such information. The folders involved were cited by the Council, showing the file extensions (which we refer to below).
 - e. A search of key words in Outlook would have retrieved any email correspondence not filed in those named folders.
46. In respect of the Commissioner's question during his investigation about which search terms were used, no response was given by the Council regarding any specific search terms. Rather, the Council's response merely stated that the Council's data is all held on a network and is not saved locally, such that the searches they referred to (being those to which we have referred above) would retrieve all the information held.
47. Based on that response, no search terms were therefore actually given to the Commissioner. There was no evidence that they were subsequently provided to (or requested by) the Commissioner. Accordingly, the Commissioner could not ascertain the relevance or suitability of any search terms which may have been used by the Council.
48. Further, whilst that response stated that the data was all held on a network and not saved locally, the drives which the Council cited were file extensions relating to two drives - a 'G' Drive and a 'U' Drive. The file extension for the 'U' Drive was clearly structured differently than for the 'G' Drive, in that the 'G' Drive comprised various folder extensions which might reasonably be expected for a shared or network folder, whereas the 'U' Drive extension was shorter and comprised the first name of the Council's Leisure and Cultural Services Manager. Without specifying their name, the file extension given was simply: "U:\FirstName\FOI". The existence of a separate 'U' Drive, with that folder reference, suggests that there was actually data stored locally, in a private (unshared) drive used by the Council's Leisure and Cultural Services Manager. Accordingly we find that the Commissioner simply accepted the statement of the Council regarding the 'shared' location of the data, rather than making more enquiries which ought to have followed given that apparent inconsistency in the Council's explanation.
49. In addition, we find that there was inadequate evidence regarding checks made with the Leisure and Cultural Services Manager. The Council did nothing more than state, in essence, that the Leisure and Cultural Services Manager 'knew' about the issues and the location of the relevant information. The question which was asked by the Commissioner regarding the searches which had been undertaken was (with emphasis

added): *“Please describe thoroughly any searches of relevant paper/electronic records and include details of any staff consultations”*. It is evident from the Council’s response to that question that no such thorough description was provided by the Council and that no details were provided by it of any staff consultation. The subsequent question related to the search terms used which, as we have noted, did not receive any response regarding specific search terms or any even any specific searches. The Council’s response did not even state that key word searches were undertaken in respect of the electronic files (referring only to key word searches in respect of emails). Accordingly, it was clear that the Commissioner had not received suitable responses to his own questions, which were highly pertinent. We find that the Commissioner erred in drawing the conclusions he did in the First Decision Notice that, on the balance of probabilities, no further information was held by the Council, given the inadequacy of the responses received to his questions.

50. Turning to the content of the First Request, it is self-evident that the Appellant was seeking information, in all four parts of the First Request, in respect of two throwing cages – respectively, each part of the First Request refers to “two throwing cages”, “both throwing cages”, “both cages” and “both throwing cages”. However, in its response, the Council provided a cage report relating to only one cage (which we note, as did the Appellant in correspondence with the Council, was barely legible). In subsequent correspondence with the Appellant relating to the Council’s response (including its updated response to part 3 of the First Request, on 25 January 2022, following its internal review), the Council continued to refer to only one cage, despite it being abundantly clear that the Requested Information related to two cages.
51. We also note that the Council’s initial response to the First Request (dated 24 December 2021) completely omitted part 1 of the First Request. In its updated response (dated 25 January 2022), following an internal review, the Council referred to the First Request in full (including all four parts of it) but then addressed only the 3 parts which the Council had cited in its initial response.
52. We acknowledge that the Council did subsequently, in further correspondence with the Appellant, state that it was providing copies of test reports covering the years 2018, 2019 and 2020 (having considered that the 2021 report had been previously provided). However, in respect of the information which was provided, it was not entirely clear to us whether, or to what extent, it covered both cages or just one (for example, one report states: *“Please note that there’s a separate discuss only cage [info provided below] The above summary only relates to the hammer/discus cage”*). The relevant point for current purposes, though, is that there is some doubt over the nature and extent of the information which was disclosed to the Appellant in respect of the First Request and we consider that the Commissioner erred in not identifying that doubt in concluding that it was more likely than not that no further information is held by the Council falling within the scope of the First Request.
53. What is clear, however, from the documents which were disclosed by the Council is that at least one inspection report of both the ‘hammer/discus cage’ and the ‘discus only cage’ recorded some points as ‘fails’ where rectification work was required. We stress that matters relating to the safety of the throwing cages, or (as referred to in the Second Decision Notice) relating to any dispute between the Appellant and the Council as to whether or not there were any defects in the throwing cages, are outside of the scope of the Appeals. However, given that there is evidence of some failings and the need for rectification work, we would expect the Council to hold further

correspondence relating to that, such as the repercussions of those failings or indeed regarding any follow-up action which was taken. This is another reason why we find that the Commissioner erred in concluding on the balance of probabilities that no relevant further information is held by the Council.

54. We also consider that the Council should have identified that the First Request was wider in scope than would appear at face value. This is because the thrust of the First Request is clearly about concerns (whether or not merited) that something was 'not right' regarding the throwing cages and there may have been some wrongdoing. That is clearly the subtext to the First Request. Essentially, we think that the First Request, read as a whole, is essentially asking whether the warning notices were removed by or on behalf of the Council and if so then why, especially if there were some defects present. If the Appellant's request had only included part 2 of the First Request then the position would be different, but we consider that the other parts of the First Request provide relevant context. In our view, it is clear that the Appellant was concerned (rightly or wrongly) about the safety of the throwing cages, the associated warnings to be given to the public and that the request to name the person who may have removed (or authorised the removal of) the warning notices was linked to those concerns. This is not to say that the Council would need to name that person (if information was held on that), as there could be other exemptions in FOIA entitling the Council not to disclose that information, but rather that the First Request should have been read in its wider context - and at the very least the Council should have sought to clarify the nature and extent of the Requested Information pursuant to its duties under section 16.
55. The Council stated in correspondence with the Appellant that the First Request was "quite clear" and that the Council did not consider that it needed explaining or that the Council required any clarity on it. However, for the reasons given in the preceding paragraph, we disagree and we find that the Council failed in its duty to provide advice and assistance, pursuant to section 16, in respect of the First Request.

The Second Request

56. We consider it helpful to comment on each aspect of the Council's responses to the Second Request.
57. We set out below the various numbered requests within the Second Request, together with the Council's original response (as referred to in paragraph 17, dated 25 October 2021) and the Council's subsequent response (as referred to in paragraph 19, dated 31 October 2022):

1. Please provide copies of all correspondence between the Council and the site operator Place Leisure at the Elmbridge Xcel Sports Hub concerning the maintenance of the athletic facilities and the drainage problems in the toilets and changing rooms.

Original Answer: The Council received regular verbal updates regarding the drainage issues at the Sports Hub

Subsequent Answer: Although not stipulated specifically in your question it is assumed the request for correspondence relating to maintenance of the athletics stadium and drainage issues in the toilet and changing rooms is from the commencement of the contract in 2018. Please note that the majority of maintenance

issues are addressed through verbal discussions between the Council and Places Leisure and the Council does not hold the information which has only been conveyed verbally. The Council does hold some email correspondence with Places Leisure and this information is provided at Appendix A. Please note that the Council has redacted all personal data from the emails and any information not relating to the request made.

2. Please state if there are any penalties clauses in the contract with Places Leisure for not attending to the maintenance of the facilities.

Original Answer: Yes a penalty clause system exists.

Subsequent Answer: The Council holds this information and this has been confirmed in the FOI response sent on 25th October 2021.

3. The portable throwing cage was incorrectly installed is the Council going to rectify the incorrect installation.

Original Answer: The portable cage was not incorrectly installed. There has been issues over the last 2 years some of which have been down to incorrect use.

Subsequent Answer: The portable cage was not incorrectly installed. There have been maintenance issues over the last 2-years but these did not relate to installation issues. (As stipulated in FOI response sent on 25th October 2021.

4. When the testing company noted defects in the main throwing cage, what action was taken to rectify these defects?

Original Answer: Whenever defects become apparent these are repaired using an external maintenance contractor. The only outstanding issue at the time of your FOI request was some small holes in the netting at high level which have subsequently been repaired.

Subsequent Answer: Sport and Play Inspection Report for the throwing cage was undertaken in July 2021. (see attached in Appendix B) The Identified area to be addressed were 5 small holes which were temporarily fixed on the 18th October 2021 before the netting was fully replaced on 3rd February 2021.

5. Who is responsible for rectify the defects in 4) above.

Original Answer: Places Leisure.

Subsequent Answer: As stated in the original response sent on 25th October 2021 Places Leisure are responsible for rectifying any defects regarding the throwing cage.

6. What was the cost of rectifying the original faults in the installation of the main throwing cage?

Original Answer: Information not available as commercially sensitive.

Subsequent Answer: The Council does not hold this information as the throwing cage was not installed incorrectly and consequently there has not been any additional costs.

7. What was the cost of rectifying other defects in the original installation of the athletic facility?

Original Answer: Information not available as commercially sensitive.

Subsequent Answer: There have been no costs to the Council in rectifying any defects in the athletics facility.

8. *Who is responsible for the maintenance of the athletic facilities at the Xcel Sports Hub? Please provide their name and contact details.*

Original Answer: Places Leisure. enquiriesxcelportshub@pfpleisure.org.

Subsequent Answer: As previously stipulated in the original response sent on 25th October - Places Leisure. enquiriesxcelportshub@pf_pleisure.org.

58. As can be seen from the above, the original response to part 1 only stated that the Council received verbal updates. Subsequently, the Council stated that some other information was held and disclosed this. However, it still stated that the majority of maintenance issues were addressed through verbal discussions, which the Council did not hold any information regarding. We consider it questionable that the Council would not have taken notes during those verbal discussions, or have other written records of "the majority of maintenance issues", particularly where there is a contract in place (which we address further below) relating to those maintenance issues. Similarly, given that the maintenance issues could have health and safety implications, we would expect that the Council would need to maintain an appropriate written audit trail relating to the maintenance of the facilities.
59. The information which the Council did provide (referred to as Appendix A in its subsequent answer) mainly related to problems with drainage and other plumbing issues and dated from around April 2018 to April 2019, with one further email exchange dated September 2021. There were also some other (limited) emails from October and December 2021 related to repairs to the throwing cages. This strikes us as being relatively sparse information in respect of maintenance which occurred "for a long period" (see further below). We would expect there to be a greater amount of information relating to maintenance of the athletic facilities over that period.
60. In respect of part 2, in our view this is clearly a request for information relating to the penalty clauses in the contract (namely 'What are the penalty clauses in the contract?'). We consider that it was inappropriate for the Council to view it simply as a question requiring a 'yes' or 'no' answer - this being a request under FOIA for information held by the Council - and we consider that the Council has taken too narrow an approach to answering this question. We also consider that the Council should have provided advice and assistance to the Appellant (in accordance with its duties under section 16) in order to clarify the information being sought, in the absence of providing the penalty clauses or another appropriate response to this part of the Second Request.
61. We note that there is a difference of opinion between the Appellant and the Council regarding whether there was any incorrect installation in respect of the portable throwing cage, insofar as part 3 of the Second Request is concerned, but the Council's initial response was not that there were no installation defects; rather that the information was not available on the basis that it was "commercially sensitive". The Appellant also produced evidence which he stated showed that there were defects.
62. In addition, within the information which was disclosed to the Appellant, there was an email (dated 8 December 2021) which stated, in respect of the "throwing cage":

“After installation, I think that UK athletics changed the cage layout/dimensions following a throw accident that had taken place at a major uk event (a spectator was hit by a hammer!).....so we had our cage adjusted to be compliant and certified for competition”.

63. We think that there are two important points of note regarding that email. The first is that this could be taken as being relevant to the Appellant’s view that the cage was incorrectly installed. Accordingly, we would have expected the Council to explain this to, and seek clarification from, the Appellant regarding whether this was the matter he was referring to, pursuant to its duty to provide advice and assistance under section 16.
64. The second point is that the reference to the ‘hammer’ is noteworthy. We understand that the portable cage to which the Appellant was referring was used only for discus throwing and not hammer throwing. Accordingly, the use of the term “throwing cage” in that email (which term was initiated by the Council in the email exchange) was potentially misleading. In any event, it appears to us that the response shows that the cage which was the subject matter of the email we have quoted from was not the portable cage, but rather the ‘main’ cage which is used for hammer throwing (in addition to discus throwing). We find, based on the evidence before us, that the Council have treated this response as affirming their perception that the Appellant was wrong in his view that the portable cage was incorrectly installed. We also find that the Council was wrong to reach that conclusion, on the basis that the email does not relate to the portable cage. It follows that the Council’s view (and accordingly likewise that of the Commissioner) that there was no incorrect installation of the portable cage was flawed and this resulted in an error regarding the decision reached in the Second Decision Notice that there would be no information held by the Council.
65. A related point is that at least one of the reports which were disclosed by the Council stated: *“Recommend survey for installation of new discus cage”*. This is further evidence which appears to support the Appellant’s view that there may have been some issues with the installation of the cage. Again, we find that the Commissioner failed to take this in account in reaching the conclusion that the Council would hold no information regarding any such alleged defective installation. In any event, similar to our point in respect of the First Request, this is also evidence of matters in respect of which we would expect the Council to hold further follow-up correspondence or other documentation.
66. In respect of part 4, the Council accepted that there were some defects in the main throwing cage and appears to have responded appropriately, providing a copy of an inspection report. Based on the information before us, it appears that this part was answered appropriately.
67. Parts 5 and 8 were straightforward questions, which were responded to accordingly by the Council. We therefore turn to parts 6 and 7, which the Commissioner considered were the main focus of the Appellant’s appeal.
68. In correspondence with the Commissioner, the Council explained that:
 - a. it is the freehold owner of the Xcel Sports Centre and the Sports Hub (which includes the athletics ground);
 - b. it has a contractual arrangement with Places for People, pursuant to which the

site is leased to Places for People;

- c. Places for People is responsible for the management of the site, with a repair and maintenance obligation placed on them;
- d. a new contract for the management commenced in April 2023, but the prior agreement for the management was based on the same structure;
- e. Places for People was also the previous manager and lessee and has been in occupation “for a long period”;
- f. the Council officer “requests and receives considerable correspondence and contract monitoring information from Places Leisure”;
- g. the Council do however expect to receive inspection reports as part of “the contract monitoring requirements”;
- h. the main contractor which built the sports facility and athletic facility was Willmot Dixon and Willmot Dixon would have been liable to undertake rectification works;
- i. the portable throwing cage was installed by R J Hills and they would have been responsible for rectification for that element.

69. We find, based on the Council’s stated position regarding the contractual arrangements with Places for People/Places Leisure, that information is being held by Places for People/Places Leisure on behalf of the Council, as referred to in section 3(2)(b). We also find that the Commissioner erred in failing to explore this issue before coming to his conclusion in the Second Decision Notice.

70. As we have noted, the Councils subsequent answer to part 7 was that there were no costs to the Council in rectifying any defects in the athletics facility. We consider that the Council's stance on this is flawed, because it also fails to take into account whether or not the information is held on behalf of the Council as referred to in section 3(2)(b). In other words, there may be no actual cost to the Council but this does not mean that no information is held by the Council in respect of that. The answer to this could be pursuant to the terms of the contract with Places for People/Places Leisure, but we were not provided with a copy of the contract in order to ascertain this. Likewise, the Commissioner did not have that information. As we noted above, we would also expect the Council, as the owner of the site, to need to maintain relevant records and correspondence from a health and safety perspective and any responsibilities which the Council might have in that regard. For these reasons, we find that the Commissioner failed to adequately consider the relevant issues in coming to the conclusion, in the Second Decision Notice, that if there were no costs payable by the Council in relation to any defects then there would be no relevant information held by the Council.

71. It is also clear from the Council's position that there has been ‘considerable correspondence and contract monitoring information’ over a “long period”. Therefore we also find, on the balance of probabilities, that there must be significantly more information held by the Council. Again, we find that the Commissioner failed to adequately explore the nature and extent of any such further information in order to be able to come to the conclusion, in the Second Decision Notice, that on the balance

of probabilities no further relevant information was held by the Council.

72. Linked to the above, we find that there was insufficient evidence of searches undertaken by the Council in respect of the Requested Information. For example, there was insufficient evidence of searches to verify the relevance of the extensive correspondence and contract monitoring information which the Council stated that it had received. We also consider that a relevant factor which should have been taken into account by the Commissioner was that the Council's response to part 1 of the Second Request, which stated (as noted above) that the majority of maintenance issues were addressed verbally, is entirely at odds with the Council's statement to the Commissioner regarding the "considerable correspondence and contract monitoring information" it received from Places for People/Places Leisure. In our view, this should (in addition to other factors, including the insufficient responses to the Commissioner's questions as we have noted) have alerted the Commissioner to the potential inadequacy of the Council's searches, given the stark contrast between that statement and the response given to the Appellant.

Final conclusions

73. For all of the reasons we have given, we find that the Decision Notices both involved an error in law because the Commissioner was wrong to conclude, in each, that on the balance of probabilities the Council had provided the Appellant with all of the Requested Information which it holds relating to the applicable Request.
74. We therefore allow the Appeals and we make the Substituted Decision Notice as set out above.

Signed: Stephen Roper
Judge of the First-tier Tribunal

Date: 3 September 2024

Promulgated:

Date: 12 September 2024