



First-tier Tribunal
(General Regulatory Chamber)
Information Rights

Appeal Reference: EA/2019/0034

Decided without a hearing

Before

JUDGE DAVID THOMAS

TRIBUNAL MEMBERS ROSALIND TATAM AND ROGER CREEDON

Between

RITA PALMER

Appellant

and

THE INFORMATION COMMISSIONER

Respondent

and

BARNSLEY METROPOLITAN BOROUGH COUNCIL

Second Respondent

DECISION AND REASONS

The appeal is allowed. Barnsley Metropolitan Borough Council has disclosed a significant amount of information in the course of the appeal. There is no further information for it to disclose, with the exception of that referred to in paragraph 42. That information should be disclosed within the later of 28 days and an unsuccessful appeal to the Upper Tribunal, unless the Council informs the Tribunal within 28 days that it is **claiming an exemption**.

NB Numbers in [square brackets] refer to the bundle

Introduction

1. This is the appeal by Mrs Rita Palmer against the rejection by the Information Commissioner (the Commissioner) on 20 December 2018 of her complaint that Barnsley Metropolitan Borough Council (the Council) had wrongly failed to disclose certain information to her under section 1(1)(b) Freedom of Information Act 2000 (FOIA).
2. The Tribunal added the Council as a party on 3 June 2019. The parties opted for paper determination of the appeal. The Tribunal was satisfied that it could properly determine the issues without a hearing within rule 32(1)(b) of The Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules 2009 (as amended).¹

Factual background

3. Mrs Palmer's adult daughter has profound learning disabilities. Until its closure on 20 April 2018, she visited Keresforth Special Resource Centre in Barnsley (the Keresforth unit), a day facility run by the Council. The building is owned by South West Yorkshire Partnership NHS Foundation Trust (SWYFT). No other day centres were suitable for her daughter, who is now in residential care.
4. There has been disagreement between the Council and SWYFT about the Council's role in the decision to close Keresforth. The Council has claimed that the decision was SWYFT's and that it was simply the lead provider of the service. SWYFT takes a different view.
5. Mrs Palmer is unhappy about the decision to close the centre and the process which was followed and wished to find out more; hence her FOIA request.

The request and the Council's response

6. On 3 January 2018, Mrs Palmer made the following request of the Council [32]:

'Request for Freedom of Information. Barnsley Council meetings also meetings with SWYFT regarding closure of Keresforth resource centre, Keresforth Close, Barnsley. Minutes of any meeting regarding the closure of Keresforth, papers and any correspondence pertaining to the closure of Keresforth'.

7. The Council replied on 25 January 2018 [33]. It said that meetings with SWYFT were 'more operational matters and cover a wide range or property issues and as such are not minuted'. It suggested Mrs Palmer contact SWYFT for a copy of its Asset Strategy. It did enclose slides from a presentation given to families by Ms Geeta Azam on 20 September 2016 during an operational day opportunities review [35].

¹ SI 2009 No 1976

8. It appears that Mrs Palmer then telephoned the Council on 30 January 2018 to ask (i) where was the report of the 20 September meeting; and (ii) what other meetings had been held. In its letter of 6 February 2018 to Mrs Palmer [41], the Council described in general terms meetings with families, carers and users during 2016 but said that no formal report was produced (it is unclear whether this was a specific reference to the 20 September 2016 meeting) and no minutes taken. The letter also referred to notes collated from all the discussions. Finally, the Council said that, once it became clear that Keresforth would close, letters were sent to each family in June and November 2017 and reviews of each user's needs arranged.
9. Still not satisfied, Mrs Palmer requested an internal review, which the Council provided by its letter of 12 March 2018 (posted the following day) [44]. The Council noted that Mrs Palmer was in receipt of a copy of the letter sent to its Chief Executive by the Chief Executive of SWYFT on 20 December 2017 about the closure of Keresforth. The Council appeared to accept that the letter was within the scope of Mrs Palmer's request and it later sent her another copy. It said it held no further information within scope.

Proceedings before the Commissioner

10. Mrs Palmer made a complaint to the Commissioner on 15 March 2018 [46].
11. During the course of her investigation, the Council told the Commissioner that decisions about the future of the Keresforth unit were included in SWYFT's *Trust Energy Estate Strategy 2012-2022*. It reiterated that it held no relevant minutes, whether of meetings with SWYFT or Cabinet, full Council or committees (although it had not searched for minutes of meetings with SWYFT because its Corporate Asset Manager had advised that there were no records to search). Various officers had been asked whether they held information. No information had been deleted or destroyed.
12. The Council said that its duty under the Local Government Act 1972 to keep minutes only applied to the meetings of the full Council, Cabinet, regulatory boards and so forth.

The Commissioner's decision

13. The Commissioner decided that, on the balance of probabilities, the Council did not hold any further information within the scope of the request. She was influenced by the fact that it did not own the site and that it did not (so it had claimed) make the decision to close the unit.
14. The Commissioner indicated she understood why Mrs Palmer should expect the Council to hold further information, given that it ran the day service at the Keresforth unit. However, in the Commissioner's experience, 'the expectation of

what may or should be held can be significantly different to what is or is required to be held, as appears to the case in this request’.

The Grounds of Appeal and the Commissioner’s Response

15. In her **Grounds of Appeal**, Mrs Palmer said that she wanted to know who made the decision to close the Keresforth unit and why. The Council and SWYFT were each pointing the finger at the other. She queried why there were no supporting papers for meetings discussing the closure of the centre, and no correspondence either.
16. In her **Response**, the Commissioner maintained that her decision that no further information was held was reasonable based on the response received from the Council during her investigation – which, in light of the Tribunal’s decision in *Clyne v Information Commissioner and another*,² was the appropriate benchmark – and given that there was no evidence of an attempt to mislead Mrs Palmer and no obvious motive to withhold information.

Case Management Directions (CMD) issued by the Tribunal

17. On 3 June 2019, the Tribunal issued CMD, noting that ‘[o]n the face of it, it is surprising that the Council should hold so little information in recorded form about the closure of a service of central importance to vulnerable adults’. It expressed its provisional view that any information relating to the proposed closure of Keresforth was within the scope of the request and directed the Council to address the following issues:
 - i. *What communications were there within the Council about closing the day centre and making alternative provision for attendees? If in recorded form, why have they not been disclosed?*
 - ii. *Was there a financial assessment made of the pros and cons of closing the day centre and making alternative provision?*
 - iii. *Which body or individual made the decision and when?*
 - iv. *Were members involved in the decision?*
 - v. *Was the decision minuted or otherwise recorded in writing? If so, why was the information not disclosed?*
 - vi. *Mrs Palmer has obtained, it is believed following a FOIA request of the Trust shortly after her request of the Council, the minutes of various meetings of the Barnsley Strategic Estates Group between June 2016 and August 2017 [92], [99], [103] and [105]. ‘Keresforth’ was mentioned in each. Tony Taylor of the Council attended two of the meetings (and gave his apologies for the other two) and Tim Hartley, also of the Council, attended three. Does the Council regard these minutes as within the scope of the request and, if so, why have they not been disclosed given that they would presumably have been sent to Mr Taylor and Mr Hartley?*

² EA/2011/0190 at [23]

- vii. *At [91] is an undated project progress report (or extract) for Sheffield City Region Public Estate Programme, again it is believed obtained by Mrs Palmer from the Trust. The report describes as a project objective 'master-planning and feasibility work in order to bring forward the Keresforth site for future development' and says that consideration will be given to 'new day care provision for learning difficulties'. It is understood that the Council is part of the One Public Estate Programme and may lead it. Is this report within the scope of the request and, if so, why has it not been disclosed?*
- viii. *Did the Council CEO reply to the letter of 20 December 2017 other than by a short email on 22 December 2017 [113]? The email says 'Happy to meet if helpful' – did a meeting take place and, if so, does the Council hold any record of it?*
- ix. *The email also refers to a joint communications plan with the Trust. Is this within the scope of the request?*
- x. *Mrs Palmer says that Geeza Azam took copious notes of the meeting with families on 20 September 2016. Are those notes within the scope of the request? Does Ms Azam work for the Council and, if not, does she hold on its behalf notes and any other information?*
- xi. *The Council's letter of 28 November 2018 to the Commissioner [74, 75] says that plans were developed during 2015 to relocate staff and services from the site (i.e. the Keresforth Centre) with the exception of the Keresforth Support Unit (thought to be a reference to the day centre). Were similar plans in time developed for the day centre and, if so, why have they not been disclosed if in recorded form?*
- xii. *Whether the Council has undertaken any searches other than those set out in that letter*

18. In response, the Council provided an undated **witness statement** from Ms Wendy Lowder, Executive Director-Communities and part of the Council's Senior Management Team (SMT). Ms Lowder said that she had been inadvertently misled by colleagues when giving two of the answers to the Commissioner on 28 November 2018 [74]. A further search of Asset Management records might have revealed documents which Mrs Palmer had obtained from SWYFT. These were the minutes of the Barnsley Strategic Estates Group (BSEG) meetings held on 6 June 2016, 6 December 2016, 4 April 2017 and 1 August (?2017) attended by Mr Hartley and Mr Taylor [92], [99], [103] and [105].

19. Ms Lowder revealed for the first time that the proposed closure had been discussed by the SMT. She also said that, where SMT records referred to an intention to submit further reports to SMT and Cabinet, that did not take place. This was because managers took the view that the decisions which needed to be made were operational, involving the detailed consideration of appropriate service provision for vulnerable individuals, rather than strategic, since the Council was not closing an asset which it owned.

20. With its **Response**, the Council disclosed: the Opportunities Options Appraisal Report written by Ms Azam on 24 October 2016, a report to the SMT dated 5 December 2018, extracts of SMT meetings on 5, 12 and 19 December 2017 and a report under delegated powers dated 27 April 2018 authorising relocation of

Keresforth staff. It made a number of points, broadly corresponding to the questions raised by the CMD:

- Ms Azam's report had not previously been disclosed because it was considered confidential
- SMT meetings were private and records relating to them were not routinely searched because a FOIA request would probably be met with a certificate under section 36 FOIA (disclosure prejudicial to the conduct of public affairs) (the Council had now, it explained, decided to disclose SMT minutes in the present case in the interests of transparency)
- Any communications within the day opportunities service about service users' needs which were recorded despite being operational in nature would include personal data to which the exemption in section 40 FOIA would apply (personal information)
- There was no financial assessment 'as such' made of the pros and cons of closing the day centre and making alternative provision, simply some basic modelling included in Ms Azam's report. There were some records subsequent to the closure and therefore not, the Council said, within the scope of the request.
- The Council did not know which body or individual made the decision to close the centre and when. The centre had been declared surplus to requirements by SWYFT in its Estate Strategy 2012-2022 and '[t]he coincidence of opportunities for improved alternative provision for day care, falling numbers at Keresforth, and proposed alternative uses for the wider Keresforth site, meant that closure, which it was understood to be the intention of [SWYFT], was not resisted by the Council'. Cabinet was not involved because the Council was simply acquiescing in the closure of the centre building; alternative arrangements for service users were operational matters. Members were not involved either
- The Council accepted that the undated project progress report for Sheffield City Region Public Estate Programme, obtained it seems by Mrs Palmer from SWYFT [91], should have been disclosed. It had not been because of human error, poor filing or inadequate searching
- There was no record of a meeting between the CEOs of the Council and SWYFT following the latter's letter of 22 December 2017. Mrs Terris, the Council's CEO, had since retired. She had attended a Provider Alliance meeting on 1 March (?2018) at which Mr Webster, the SWYFT CEO, would have been present. There is no record of any discussion of the closure of the Keresforth unit. There did not appear to be a joint communications plan between the two bodies.
- The Council did not have the notes taken by Ms Azam, who did not work for it and whose consultancy arrangement had ceased about two years ago. It did have some early drafts of her options appraisal report

- There were no records about the relocation of staff other than in the disclosed delegated report.
21. Mrs Palmer has given a detailed Reply to the Council's Response. In part, this consists of arguments about why, in her opinion, the Keresforth unit should not have been closed and why alternative centres were not suitable for her daughter. It is understandable why Mrs Palmer should wish to convey her opinions in this way, given how important the welfare of her daughter is to her and how strongly she feels about the way her daughter has been treated, but the Tribunal's role is limited to determining what information the Council holds within the scope of the request.
22. However, Mrs Palmer also makes arguments about why she believes the Council has still not disclosed all the information it holds. Her main point is that there must surely be a fuller audit trail about a decision of this magnitude. Why were discussions not minuted, she asks? She adds: 'you would have thought [a detailed financial assessment] would be required about the viability of the closure and its impact not only to [the Council] but also to The Continuing Health Care budget. Surely discussions/correspondence took place with the respective Commissioners of [the council] and Continuing Health Care before acting on the closure'. If the Council identified who within it made the decisions to close the unit, it would be easier to track down relevant information. If, on the other hand, the decision was made by SWYFT, where was the documentation to support that?

Discussion

A public authority's duty on receipt of a request for information

23. Under section 1(1)(b) FOIA, a public authority must disclose information falling within the scope of a request. This is subject to three exceptions. First, it need not disclose information which falls within an exemption (and, where the exemption is a qualified one, the public interest favours withholding the information). Second, it need not do so where the cost of processing the request so would exceed certain limits (section 12 FOIA). Third, it need not do so where the request is vexatious (section 14 FOIA). The Council has not claimed that either of the last two exceptions applies in the present case.
24. In addition, a public authority need only disclose information which it holds. It has no duty to acquire information which it can then pass onto the requester, however easily it could acquire the information.
25. Section 3(2) of FOIA contains a partial definition of whether information is held:
'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'
26. The definition means that mere possession by a public authority of information is not sufficient (if it is held on behalf of someone else) but also that possession is not

necessary (if the information is held on behalf of the authority by someone else). An example of the latter would be an archive company.

27. For information to be disclosable it must also be held in recorded form. This is because the definition of 'information' in section 84 FOIA is '(subject to sections 51(8) and 75(2) [not relevant]) ... information recorded in any form'. 'Recorded form' implies a degree of permanence. Information which is simply in the mind of an employee is not held in recorded form; similarly, information transmitted verbally is not held in recorded form if no recording is taken. It follows that information comprising discussions which were not preceded by papers and which were not minuted, and which are not evidenced by correspondence or notes or captured on tape, does not have to be disclosed. The Council's case is that much of the discussion around the closure of the Keresforth unit was not reduced to permanent form.

The question is whether the Council held relevant information, not whether it should have done so

28. Subject to the exceptions, a public authority has to disclose information which it in fact holds. Whether it *should* hold other information is legally irrelevant. Of course, if an authority should hold information it is more likely that it does, particularly where it needs the information to perform its statutory functions. Ultimately, however, a public authority can only be required to disclose information which it actually holds (in the section 3(2) (sense). The Commissioner and the Tribunal must be astute not to order an authority to do the impossible, particularly since there may be serious consequences should it fail to comply with a direction to disclose.

The standard of proof

29. It is clear from caselaw that, as one would expect, whether a public authority holds particular information has to be determined on the balance of probabilities: is it more likely that not that it holds particular information?

Scope

30. The Tribunal has to determine the scope of the request before it can decide whether relevant information is held. It is clear from the House of Lords' decision in *Common Services Agency v Scottish Information Commissioner*³ that, given the constitutional importance of FOIA (and its Scottish equivalent), requests for information should be construed liberally. This must be particularly so where, as in the present case, the requester is not legally represented. Mrs Palmer could not be expected to frame her request with the precision of a lawyer. Where there is doubt about the intended scope of a request, a public authority should, under its duty under section 16 FOIA to provide advice and assistance, enter into discussions with the requester.

³ [2008] UKHL 47

31. The Council claims to have construed the request in a narrow way, narrower than the Tribunal provisionally did in its CMD. In fact, the scope of the request is perfectly clear. Mrs Palmer wished to have all the information held by the Council relating to the closure of the Keresforth unit. The request expressly asks for minutes, papers and correspondence relating to closure. That leaves no room for doubt about what she wanted. She did not place a time limit such 'all information since x' (there is always the risk with an open-ended request that the public authority may rely on section 12 FOIA but the Council has not done so).
32. The one limitation to the width of the request relates to correspondence with other users and their families about alternative provision for individuals service users. Although the request is semantically broad enough to include such correspondence, Mrs Palmer cannot reasonably be thought to have wanted to see it because she would understand that it would contain personal and confidential information. The correspondence falls outside the scope of the request.

The time at which the request must be considered

33. Section 1(4) FOIA provides:

*'The information –
 (a) in respect of which the applicant is to be informed under subsection (1)(a), or
 (b) which is to be communicated under subsection (1)(b),
 is the information in question held at the time when the request is received, except that account may be taken of any amendment or deletion made between that time and the time when the information is to be communicated under subsection (1)(b), being an amendment or deletion that would have been made regardless of the receipt of the request'.*

34. It follows that, subject to the exception in the full-out words ('except that ... receipt of the request') - not thought to be relevant in the present case - a public authority need not disclose information which it creates, or which comes into its possession, after the date of the request. That was 3 January 2018. This is relevant because the Council indicates in its Response that certain financial information was created after the Keresforth unit closed. That appears to have been on 20 April 2018. Any information, financial or otherwise, which was in the Council's possession as at 3 January 2018 should, however, have been identified as held, even if only in the form of drafts or working papers.
35. It follows that the Council did not need to disclose the delegated powers report about relocation of staff because this was produced on 27 April 2018. Disclosure of that report has therefore been made on a voluntary basis.

The distinction between whether information is held and whether an exemption applies

36. There are separate questions a public authority must consider on receipt of a FOIA question. First, whether it holds information falling within the scope of the request. Second, whether it has to disclose some or all of that information.
37. The Council has confused these questions. It says that it did not tell Mrs Palmer about the report prepared by Ms Azam because it was confidential (presumably a reference to the exemption in section 41 FOIA). It did not tell her about the SMT meetings because these were private and disclosure of information relating to them would probably prejudice the conduct of public affairs (the exemption in section 36 FOIA). It did not tell her about correspondence with other users because the information was personal to those users (the exemption in section 40(2) FOIA). This is the wrong approach. Sometimes a public authority is entitled to refuse even to confirm or deny whether it holds information but the Council does not rely on those provisions. In all other cases, where it does hold requested information, a public authority should inform the requester, even if it relies on one or more of the exemptions from disclosure. This is clear from section 17 FOIA. This includes information which is otherwise available to the requester (see the exemption in section 21 FOIA).

Has the Council now disclosed all the information within the scope of the request?

38. Disclosure of information by the Council has been piecemeal. On receipt of the request, it disclosed the slides from Ms Azam's presentation. During the course of the Commissioner's investigation, it disclosed the letter from the SWYFT CEO to its CEO of 20 December 2017 (Mrs Palmer had in fact already obtained a copy through a FOIA request of SWYFT). It has now been prompted by the Tribunal to disclose a number of other documents (some, but by no means all, of which Mrs Palmer had again already obtained from SWYFT).
39. The question is whether the Council holds further information. It admits to holding early drafts of Ms Azam's options appraisal report. In the Tribunal's judgment, those fall within the scope of the request. The Tribunal accepts that the Council does not possess the notes taken by Ms Azam and that she does not hold them on its behalf within section 3(2) FOIA. She was an independent consultant and there is no evidence of any contractual provision whereby she agreed to hold on the Council's behalf information she obtained or generated. Even if the Council had the right to call for the notes, that would not mean that Ms Azam held them on its behalf. It accepts that it holds correspondence with other users and their families but as explained above in the Tribunal's judgment this is out of scope. Similarly, any information created or obtained by the Council after receipt of the request does not have to be identified as being held or disclosed.
40. Mrs Palmer makes a compelling case as to why the Council *should* hold more information. A well-run council considering or facing the closure of a day centre for high vulnerable adults would be expected to have had a clear audit trail of discussion papers, correspondence and minutes. It is surprising that the closure of the unit was not discussed at full Council or at least Cabinet.

41. With some hesitation, however, the Tribunal has concluded, on the balance of probabilities, that the Council has now identified all the information falling within the scope of the request which it holds (and, with the exception of the early drafts of Ms Azam's report, has disclosed it). Its record of deliberations, record-keeping and record-searching for this project appear to have been shambolic, with no minutes apparently taken of important meetings, and it is scarcely credible that it should not know who was responsible for making the decision to close, or to acquiesce in it if it was primarily SWYFT's. The distinction the Council seeks to make between operational and strategic is not always convincing, and there are in any event many operational decisions which need to be recorded. Promised follow-up reports were not prepared. There clearly was a report of Ms Azam's discussions with families, despite an earlier apparent denial by the Council, because it has now been disclosed. There has been staff turnover but good record-keeping should anticipate that.
42. All that said, it is not the Tribunal's function to rule on the reasonableness of the decision to close the unit and relocate the users or to assess the Council's internal processes and record-keeping. Its role is simply to determine what the Council holds, within the meaning of sections 3(2) and 84 FOIA. It has pressed the Council hard on this question and it is satisfied that, apart from the early drafts of Ms Azam's report, there is no further information it holds but has not disclosed. It accepts that all reasonable searches have now been undertaken.
43. The Tribunal has considerable sympathy for Mrs Palmer. She is clearly a dedicated parent, understandably concerned about service provision for her profoundly disabled daughter. She feels that she was not properly involved in the decision to close the unit, which has led, she believes, to her daughter having to go into residential care. She should not have had to fight so hard to get the Council to accept that it held information beyond the slides of Ms Azam's presentation to families.

Conclusion

44. For these reasons, the appeal is allowed. The Commissioner should have probed further.
45. The information which has now been provided would have been a good deal more useful to Ms Palmer had it been supplied when requested, but that, unfortunately, is often the consequence of the time a complaint to the Commissioner and any subsequent appeal takes to determine.
46. The decision is unanimous.

Signed
Judge of the First-tier Tribunal
Date: 13 November 2019
Promulgated Date: 14 November 2019