



NCN: [2025] UKFTT 01006 (GRC)

Case Reference: FT/EA/2025/0029

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

Heard by Cloud Video Platform  
**Heard on: 15 August 2025**  
**Decision given on: 20 August 2025**

**Before**

**JUDGE HEALD  
MEMBER YATES  
MEMBER SCOTT**

**Between**

**STEPHEN PARKER**

Appellant

**and**

**THE INFORMATION COMMISSIONER**

Respondent

**Representation:**

The Appellant appeared in person.

The Respondent did not attend and was not represented.

**Decision:**

(1) the Appeal is Allowed.

(2) the Respondent shall promptly send a copy of this Decision to Guildford Borough Council.

**Substituted Decision Notice:** Guildford Borough Council ("the Council") shall within 35 days of being sent this Decision:-

(a) review the letter from the Respondent of 9 September 2024 (pages 2196 to 2198 of the Bundle) and ensure that all the enquires required by the Respondent in that letter about information said to be not held have been considered.

- (b) search for any relevant information created by any person who has left the Council where such information remains stored by the Council and if it no longer is in existence set out the reason it has ceased to exist if necessary by reference to a destruction policy.
- (c) search the Council's Teams system for any relevant information created by use of the Teams message function and provide details of the Council's retention period for this system.
- (d) send to the Appellant a response (indexed and paginated):-
  - (i) setting out the outcome of the reviews set out in (a) to (c) above
  - (ii) and provide him with any additional relevant information identified or confirmation that none had been identified.
  - (iii) listing the key words and combinations of key words used for the searches.
  - (iv) and provide him with a copy of the item dated 28 February 2024 referred to on page 2553 of the Bundle unless paragraph (d)(v) applies.
  - (v) if the Council seeks to rely on reg 12(4)(d) Environmental Information Regulations 2004 as suggested on 19 November 2024 to the Respondent (2253) for the information referred to in (iv) above or any other information it shall explain to the Appellant the basis of this reliance.
  - (vi) with an explanation as to how the letter from "Claire" refers to her in the third person and, if it exists, provide any information relevant to this and in scope of the Request unless an exception is said to apply in which case the Council shall explain this to the Appellant.
- (e) the Council shall not be required to provide information if it considers that Regulation 13 Environmental Information Regulations 2004 applies but if it does consider it applies it shall set that out and explain its position to the Appellant.

## **REASONS**

1. This Appeal is brought by the Appellant by reg 18 Environmental Information Regulations 2004 ("EIR") and section 57 Freedom of Information Act 2000 ("FOIA"). It relates to a Decision Notice ("the DN") issued by the Information Commissioner ("the IC") on 25 November 2024 with reference number IC-310739-S2PO and it concerns a request for information ("the Request") made by the Appellant to the Guildford Borough Council ("the Council") on 2 February 2024.
2. What follows is a summary of the submissions, evidence and our view of the law. It does not seek to provide every step of our reasoning. The absence of a reference by us to any specific submission or evidence does not mean it has not been considered.
3. In this Decision page numbers indicated by their inclusion in brackets refer to pages of the Bundle.

### **Evidence and matters considered**

4. For this Appeal the Appellant attended the hearing and we were provided with:-
  - (a) the Bundle of 2707 pdf pages.

(b) a witness statement dated 11 June 2025 signed by the Appellant and four exhibits SP1- SP4 in all amounting to 1081 pdf pages (also in the Bundle).

(c) the Appellant's skeleton argument dated 16 June 2025.

### **Preliminary issue**

5. In his skeleton of 16 June 2025 the Appellant referred to a number of procedural issues. In his view these raised:-

*"..serious concerns about the fairness and regularity of the proceedings. The Appellant reserves the right to object to the admissibility of the bundle or to request exclusion of any unverified material."*

6. By a form GRC5 dated 27 June 2025 supported by a covering email the Appellant made an application to *"Address procedural concerns regrading the Respondent's late and voluminous bundle and clarify position on skeleton arguments"*.
7. By the time of the Appeal various issues had been superseded and having reviewed these matters with him, no order was sought or required on the application.

### **Background to the Appeal**

8. The Appellant told us that this matter arose from an issue with changes to the roof of a neighbouring property. In his view these changes were not in accordance with the relevant planning requirements and were damaging to him. He said that there was a meeting on 19 July 2023 at the location between himself, his ward councillor George Potter and Claire Upton-Brown ("Claire") the Council's executive head of planning. He told us that that Claire agreed verbally at the location that she agreed that the changes seen breached the relevant requirements. He sent an email on 20 July 2023 (2237) in which he set out what had been said to him at the time and had a response on 27 July 2023 from Mr Potter (2237) agreeing his summary of the meeting. He told us that subsequently the Council sought to change its position and he complained about this to the Council on 13 September 2023 (2262).

### **The EIR**

9. The Appellant referred to the Request as being made pursuant to The Freedom of Information Act 2000 ("FOIA") but the IC concluded it was an EIR request. The Appellant did not have a view on this question. In our view the Request did relate to environmental matters as defined in the EIR and we proceeded on that basis.
10. The relevant part of reg 5 EIR says as follows:-

*"5. – (1) Subject to paragraph (3) and in accordance with paragraphs (2), (4), (5) and (6) and the remaining provisions of this Part and Part 3 of these Regulations, a public authority that holds environmental information shall make it available on request"*

11. Reg 5(3) EIR provides that:-

*"(3)To the extent that the information requested includes personal data of which the applicant is the data subject, paragraph (1) shall not apply to those personal data."*

12. These rights are subject to a number of exceptions and relevant to this Appeal is reg 12(4)(a) EIR which provides that:-

*"For the purposes of paragraph (1)(a), a public authority may refuse to disclose information to the extent that – (a)it does not hold that information when an applicant's request is received"*

13. This exception is stated to be subject to the public interest test in reg 12(1)(b) EIR but we note that in its guidance the IC says *"...we recognise that it can be impossible to do a meaningful public interest test if you don't hold the information."*

14. The IC has published guidance on its approach if a complainant is not satisfied with a "not held" response. Its guidance states:-

*"..it is seldom possible to prove with absolute certainty that there either isn't any information or anything further to add. The Commissioner will apply the normal civil standard of proof in determining the case, i.e. he will decide on the balance of probabilities whether the information is held "*

15. In *Preston -v- the Information Commissioner and The Chief Constable of Yorkshire Police* [2022] UKUT 344 ACC the Upper Tribunal ("UT") citing *Jeremy Clyne v IC and London Borough of Lambeth EA/2011/0190* held that:-

*"30. The Tribunal has consistently applied the balance of probabilities when approaching this question.." and "Importantly, in Clyne v IC and London Borough of Lambeth the Tribunal held that the 'issue for the Tribunal is not what should have been recorded and retained but what was recorded and retained. ([38])."*

16. The IC in its Response at para 10 (35) said:-

*"For the reasons set out in the DN the Commissioner submits that he was entirely correct to rely upon the representations of the Council made to him during the course of his investigation. In Councillor Jeremy Clyne v IC and London Borough of Lambeth EA/2011/0190 (at [23]), and Oates v Information Commissioner and Architects Registration Board EA/2011/0138 at [11] the Tribunal accepted that the Commissioner was entitled to accept at face value the response of a public authority, where there was no evidence of an attempt to mislead the Commissioner, or of a motive to withhold information actually in its possession."*

17. While we agree with the above in *Oates* the Tribunal decided that (emphasis added):-

*"11 As a general principle, the IC was, in the Tribunal's view, entitled to accept the word of the public authority and not to investigate further in circumstances, where there was no evidence as to an inadequate search, any reluctance to carry out a proper search or as to a motive to withhold information actually in its possession. Were this to be otherwise the IC, with its limited resources and its national remit, would be required to carry out a full scale*

*investigation, possibly onsite, in every case in which a public authority is simply not believed by a requester.*

18. In *Preston* the UT referred to the First-tier Tribunal ("FtT") decision in *Linda Bromley v the Information Commissioner and the Environment Agency* (EA/2006/0072; 31 August 2007) and that:-

*"29... There can seldom be absolute certainty that information relevant to a request does not remain undiscovered somewhere within a public authority's records. This is particularly the case with a large national organisation like the Environment Agency, whose records are inevitably spread across a number of departments in different locations. The Environment Agency properly conceded that it could not be certain that it holds no more information. However, it argued (and was supported in the argument by the Information Commissioner) that the test to be applied was not certainty but the balance of probabilities. This is the normal standard of proof and clearly applies to Appeals before this Tribunal in which the Information Commissioner's findings of fact are reviewed. We think that its application requires us to consider a number of factors including the quality of the public authority's initial analysis of the request, the scope of the search that it decided to make on the basis of that analysis and the rigour and efficiency with which the search was then conducted. Other matters may affect our assessment at each stage, including, for example, the discovery of materials elsewhere whose existence or content point to the existence of further information within the public authority which had not been brought to light. Our task is to decide, on the basis of our review of all of these factors, whether the public authority is likely to be holding relevant information beyond that which has already been disclosed. ([13].)"*

19. Reg 12(2) EIR requires a public authority to apply a presumption in favour of disclosure and although this is noted it is not relevant when determining if (on the balance of probabilities) in-scope information does or does not exist.

### **Role of the Tribunal**

20. The Appeal is brought by reg 18 EIR and section 57(1) FOIA which provides that:-

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

21. The Tribunal's role is by Section 58 FOIA which provides that:-

*(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.*

22. The IC referred to the FtT decision in *William Stevenson -v- Information Commissioner* (EA/2015/0117) and we also had regard to:-

(a) *Information Commissioner v Malnick and Advisory Committee On Business Appointments* [2018] UKUT 72 (AAC) (see para 90) where the UT said:-

*"...the F-tT exercises a full merits appellate jurisdiction and so stands in the shoes of the Commissioner and decides which (if any) exemptions apply. If it disagrees with the Commissioner's decision, the Commissioner's decision was "not in accordance with the law" even though it was not vitiated by public law error."*

(b) *NHS England -v- Information Commissioner and Dean* [2019] UKUT 145 (ACC) where the UT said "10. The First-tier Tribunal 'exercises a full merits appellate jurisdiction and so stands in the shoes of the IC and decides which (if any) exemptions apply..."

(c) *Peter Wilson -v- The Information Commissioner* [2022] UKFTT 0149 in which the FtT said:-

*"30...the Tribunal's statutory role is to consider whether there is an error of law or inappropriate exercise of discretion in the Decision Notice. The Tribunal may not allow an appeal simply because it disagrees with the Information Commissioner's Decision. It is also not the Tribunal's role to conduct a procedural review of the Information Commissioner's decision making process or to correct the drafting of the Decision Notice."*

### **Request to Appeal (Overview)**

23. On 2 February 2024 (1122) the Appellant made the Request to the Council. It said:-

*"On 13 September 2023 I emailed Claire Upton-Brown about an unresolved breach of planning policy/control relating to the roof pitch/height at 50 Charlock Way. This is a long overdue and unresolved complaint raised 1May 2022 [HB/35] and followed up by Ward Councillor/Lead Member for Planning (George Potter) on 3 May 2022. Having not had a response from Claire Upton-Brown I am writing to make a Freedom of Information (FOI) request in relation to the complaint (ref COM2022/00505 stage 2 complaint). in accordance with the Freedom of Information Act 2000, I request the following information pertaining to the above-mentioned complaint. I understand information should be available including (but not limited to):*

*1. Copies of all documents, including but not limited to emails, letters, and reports, related to the handling and investigation of my complaint.*

*2. Any correspondence between your organization and any third parties, including regulatory bodies, concerning my complaint.*

*3. Other correspondence or advice given on plans and planning and the process including e-mails, letters, reports, faxes, file notes, notes of phone calls, videos, audio, digital recordings.*

*4.5. Details of the individuals involved in the investigation of my complaint, including their names, positions, and roles.*

6. Any policies or procedures followed in the handling and resolution of complaints, particularly those relevant to my case.

7. Any internal communications or memos discussing my complaint and its resolution.

8. Site visits, diary entries and measurements (of roof height and window height etc). I understand that under the Act I am entitled to a response within 20 working days of your receipt of this request. If my request is denied in whole or in part, I ask that you justify all deletions by reference to specific exemptions of the act. I will also expect you to release all non-exempt material. I reserve the right to appeal your decision to withhold any information or to charge excessive fees. I would prefer to receive the information electronically. If you require any clarification, I expect you to contact me to provide advice and assistance if you find any aspect of this FOI request problematic. Please acknowledge receipt of this request, and I look forward to receiving the information in the near future.

24. The Council responded on 28 February 2024 (1123) and provided information amounting to just over 1000 pages of information.

25. On 10 April 2024 the Appellant responded (2182). He asked for an internal review and said that (a) there was some illegibility and some repetition, (b) there were redactions in the material he would question and (c) he thought about 50% of the information requested was missing.

26. On 19 April 2024 the Council replied (2184-2183) and said that the internal review had been completed and that some unreadable material was being sent again. There was further correspondence culminating in the Council saying on 24 April 2024 (2183):-

*"Yes, the internal review has been undertaken. Having looked back over those five binders again, I'm afraid I cannot agree with your assertion. There is minimal redaction on all of the binders which only takes out personal information such as names, addresses, email addresses etc. Nothing more is redacted."*

*If you mean information that is omitted rather than redacted, again I can't agree. The officers have provided everything matching your request and having seen the source information myself, I can confirm that you have received it all."*

27. On 6 May 2024 the Appellant complained to the IC (2185). He summarised his complaint as follows:-

*"The public body has not responded to my request, The public body says it does not hold the information and I disagree, or I believe it holds more information than it has sent, I disagree with the public body's refusal to provide the information I requested, I'm concerned about a public body's overall compliance (but i understand I will not get a formal response)"*

28. The IC issued the DN on 25 November 2024 (5-16). In it at para 2 (5) the IC said that the Council had *"failed to provide all the requested information in time and breached regulation 5(1) and regulation 5(2)."* The IC required the Council to *"Disclose the information identified in paragraph 26"* which stated (10):-

*"In addressing the points made by the complainant the Council identified some additional information falling within the scope of the request and confirmed that this would be disclosed to the complainant. At the time of issuing this decision notice, however, this had not happened. The Commissioner considers it is appropriate to find a breach of regulation 5(1) in relation to this information and he has identified the disclosure of this information as a step in this decision notice."*

29. The Appellant told us that following the DN further information was disclosed to him amounting to several hundred more pages.

30. On 20 December 2024 the Appellant commenced this Appeal (17) supported by Grounds of Appeal (30). The outcome sought is:-

*"I respectfully request that the First-tier Tribunal:*

*1. Orders a comprehensive re-investigation of the complaint, focusing on the following substantive issues:*

*o A thorough review of all internal communications and relevant systems beyond emails, including Microsoft Teams messages, meeting notes, and other forms of internal/3rd party communication that may be relevant to the request.*

*o A clear explanation from the Council regarding the employment status of Nicola Haymes, and a more detailed examination of the adequacy of the search process carried out by the Council.*

*o The immediate release of all relevant, non-exempt information held by the Council in response to the FOIA request, specifically regarding the planning services issue, and including all internal communications between the Executive Head of Planning, other officers, and any parties involved.*

*2. Directs the ICO to take further action, if necessary, to ensure the full disclosure of the withheld information, including the possibility of penalties or further enforcement measures against the Council for non-compliance with the FOIA.*

31. The IC has provided a Response (33) dated 28 February 2025 to which the Appellant Replied (38) on 13 March 2025. The Council is not a party to the Appeal.

### **Issues**

32. In his skeleton at section B the Appellant set out the issues he said were in dispute namely:-

*"a. Whether the Council conducted adequate and comprehensive searches for the information requested;*

*b. Whether the Commissioner properly investigated the inconsistencies and omissions identified by the Appellant;*

*c. Whether the Decision Notice failed to address credible evidence of non-disclosure;*



*d. Whether material information has been improperly withheld."*

33. At the Appeal the Appellant indicated that he did not seek to challenge redactions made pursuant to reg 13 EIR to protect personal data and that the sole issue for him was the question of whether there was relevant information in existence, held by the Council, but not disclosed.

### **The position of the Council and the IC**

34. The response to the Request of 28 February 2024 (1123) did not refer to how the Council had gone about locating relevant information. Following the request for an internal review in which the Appellant had said:-

*"...and I believe a significant amount of information has not been provided, probably less than 50% of what was requested"*

the Council on 24 April 2024 said (2183):-

*"The officers have provided everything matching your request and having seen the source information myself, I can confirm that you have received it all."*

35. The Council and the IC and the Appellant had correspondence on this issue.

(a) on 9 September 2024 the IC set out (2196-2197) what it expected the Council to do as regards the issue of "information not held". For example the IC asked the Council for examples of what searches had been carried out and to describe thoroughly any searches of relevant paper/electronic records and include details of any staff consultations. The Council was asked for search terms and if the search was on a local or networked resources and email. The letter went on to ask about record management and destruction policy and practice. The Council was told that the IC required a thorough response to ensure the Council complied with its statutory obligations.

(b) on 23 September 2024 (2199) the Council replied saying for example what had been sent out and how the request for an internal review had been handled but did not (in our view) address all the clear and precise enquiries made by the IC.

(c) on 2 October 2024 (2207) the IC asked the Council about what enquires had been made with four named individuals.

(d) on 17 October 2024 (2208) the Council said that one of those named held no information and answers were awaited from the other three and the IC asked for an answer on the other three "ASAP".

(e) on 22 October 2024 (2210) the IC in a letter recorded that the Council had now said that further relevant information had been identified and this was confirmed by the Council on 25 October 2024 (2211).

(f) on 11 November 2024 the IC said to the Appellant (2544):-

*"...I acknowledge that the Council's handling of this has been poor and I can absolutely understand why you might consider that further information is held."*

(g) on 11 November 2024 (2545) the IC raised questions with the Council that said:-

*"In this case, because the disclosure of relevant information held only happened after prompting from the complainant / the ICO, I need to explore the possibility that further information might still be held. In short, before I issue a decision notice I need the Council to address the complainant's points and, if relevant, provide me with explicit confirmation that no further information is held"*

(h) a week later on 18 November 2024 this was chased up by the IC who said to the Council (2549):-

*"Thank you for your email. I appreciate you are busy but, given the background to this complaint and the delays involved in providing the information to the complainant, I need this to be prioritised."*

*In short I need the Council to confirm, with reference to the points made by the complainant below, whether any further information is held. I need this to be done ASAP."*

*If I don't receive this response within the next day or so I it is likely that I will need to refer this matter to our Investigations team and escalate it within the Council as the Council is potentially exposing itself to allegations of blocking access to information and committing an offence under section 77 of the FOIA."*

36. The Council replied on 19 November 2024 (2552). Here they referred to additional information and said for example:-

*"...The individual tasked with the investigation is not currently at the council, so it has been difficult to find further definitive material which may be directly relevant. I can confirm however that a comprehensive search was carried out on the email archiving system covering relevant dates and using appropriate key words."*

*"Please note however that I have also carried out a comprehensive search on the email archive using a combination of relevant key words"*

37. The Council also referred to an item dated 28 February 2024 (2553) and said to the IC that it was being withheld by reg 12(4)(d) EIR because it was a draft of a response to a complaint and contained material which was at the time in the course of completion. They said *"the Council requires space to think in order to reach a view on responding to complaints"* and that the public interest balance test favoured non-disclosure.

38. On 24 November 2024 the DN was issued which as well as requiring disclosure to be made of certain information also said (14) at para 62:-

*"The Council's handling of this request is characterised by the piecemeal disclosure of information over a long period of time which continued during the Commissioner's*

*investigation. He, therefore, has concerns that the Council is not meeting its obligations under the EIR.*

*In view of this the Commissioner intends monitoring the Council's future handling of requests via complaints received and, if he finds a recurrence of this or other poor practice, further action might be taken".*

39. On 3 December 2024 and on 4 December 2024 the Council wrote to the Appellant (2676/2679) with more information.

40. In the Response to the Appeal the IC referred to the legal authorities such as *Clyne* and *Oates*. The IC said for example:-

*"9...The Commissioner was satisfied with the searches carried out by the Council that no further information was found apart from the information that had been correctly withheld under Regulation 13 EIR." (35)*

*"16. As aforementioned the Commissioner was satisfied that the searches the Council carried out were sufficient and it did not hold further information.(36)*

*"17. For the reasons set out in the DN the Commissioner is satisfied, on the balance of probabilities, that the Council does not hold further information. Whilst the Appellant expects certain information to exist or suggests further searches to be made, the Commissioner reminds him that he only has a right to recorded information the Council hold, not what information he believes they should hold, or create to satisfy his request. "*

### **The Appellant's case**

41. This was set out in various documents in the Bundle such as the Appeal, Reply and his statement. The Appellant agreed that in relation to the "not held" question he would make submissions on:-

(a) why he considered the approach to the search for relevant information and the IC's position on this to be inadequate.

(b) particular examples which he said showed the existence of, as yet, non- disclosed relevant in-scope information.

42. He gave examples at the Appeal and in his Grounds of Appeal and Reply as to where he considered the approach to have been inadequate such as:-

(a) the failure by the IC to challenge the assertion that information could not be found including when issues were raised by the Appellant.

(b) the apparent acceptance by the IC of the inability of the Council to locate information due to a person no longer being at the Council.

(c) the failure by the IC to investigate inconsistencies or respond appropriately to the Council's reactive approach to disclosure.

(d) the IC's concern about the Council's compliance as seen in the DN itself (A14-15) and its letter to the Council threatening action by section 77 FOIA (2549).

43. He also referred us to para 10 of the IC's Response (A35) where the IC said:-

*"10. the Commissioner was entitled to accept at face value the response of a public authority, where there was no evidence of an attempt to mislead the Commissioner, or of a motive to withhold information actually in its possession."*

and it was his submission that in fact he had presented evidence to the IC that did show an attempt to mislead and/or a motive.

44. On 23 September 2024 (2200) the Council said to the IC:-

*"I carried out the internal review and sent out the response on 19/04/24 (2184). I also stated the following as part of my internal review...that having consulted relevant planning officers and carried out appropriate searches everything matching the complainants original request had been provided and no information had been deliberately withheld unless appropriate exemptions were applied."*

but apart from reg 13 EIR the Appellant was not aware to what this referred.

45. The Appellant referred us to page 61 of the Bundle in which the Council said:-

*"The individual tasked with the investigation is not currently at the council, so it has been difficult to find further definitive material which may be directly relevant"*

and he referred us to a LinkedIn profile for this person (A49) that post-dated this reply which indicated in his view that she was, at that later point, still at the Council. He also referred us to where he had challenged the Council about this (A60) and where in answer the Council had said:-

*"A thorough search was carried out for material relevant to your query, using appropriate key words. This material (which includes substantial internal communications on the investigation stretching over an approximate 6-month period) has been sent to you"*

46. He gave examples of missing material. On pages 2233-2235 is a letter to the Appellant from Claire of 29 August 2023. Towards the end of the letter despite it being from Claire she is referred to in the 3rd person on a number of occasions as if someone else had contributed towards the drafting. The Appellant asked the Council to confirm (A60):-

*"There are no records regarding discussions or decisions made by Ms. Upton-Brown – including notes, Teams correspondences, digital recordings, or any other communications between Ms. Upton-Brown and anyone involved with this issue – specifically relating to her visit to the site with George Potter, as well as the email sent by Ms. Upton-Brown on 29 August 2023 (which was partially written in the third person)?"*

to which the Council, rather than address the point directly, said:-

*"Similar to your query addressed above, a thorough search was carried out for material relevant to your query, using appropriate key words. Again, this material has been sent to you."*

47. The next matter involved the absence of Teams messages. As seen above the Appellant asked about the use of Teams and had the answer also set out above. However the Appellant took us to page 66 of the Bundle which does appear to be a screen shot of the message function in Teams being used between a "Chris" and "Peter" of the Council dated 24 May and involving a discussion about the relevant property and planning matters.
48. The third example referred to was about the chimney height. On page 60 of the Bundle the Council and the Appellant had an exchange about this as follows:-

*"Chimney Height Information:*

*Finally, regarding the matter of the chimney height, the information you have provided so far does not seem to relate to the issue at hand. I will await your further response or attachment, as the documents sent thus far do not address the specific point raised in my request.*

*As above. However, in my previous communication I mentioned that there was an additional item of correspondence "28-02-24", which I said I would send to you separately, as it came under the scope of a subject access request. Please find attached."*

49. The Appellant told that this had not been received but we noted that:-

(a) on 3 December 2024 the Council, said to the Appellant (A61):-

*"I have also located an additional item "28-02-24". The ICO has ruled that as this document contains personal information about you, it falls outside the scope of FOI/EIR, and must therefore be dealt separately as a subject access request under the UK GDPR. I will therefore be responding you to separately with regard to this."*

(b) on 19 November 2024 the Council said to the IC (2253) that it was being withheld by reg 12(4)(d) EIR because it was a draft of a response to a complaint and contained material which was at the time in the course of completion. They said *"the Council requires space to think in order to reach a view on responding to complaints"* and that the public interest balance test favoured non-disclosure.

### **Our review**

50. When reviewing this Appeal we kept in mind the legal authorities of *Oates*, *Bromley Preston* and *Clyne* for example and that:-

(a) it is seldom possible to prove with absolute certainty whether information exists or not.

(b) the IC applies the test of "on the balance of probabilities".

(c) the issue is what was recorded and retained not what should have been.

(d) the IC may accept the word of the public authority where "*...there was no evidence as to an inadequate search, any reluctance to carry out a proper search or as to motive to withhold information actually in its possession...*"

51. We also considered the approach in *Preston and Bromley* to be helpful where the Tribunal said:-

*"We think that its application requires us to consider a number of factors including the quality of the public authority's initial analysis of the request. the scope of the search that it decided to make on the basis of that analysis and the rigour and efficiency with which the search was then conducted. Other matters may affect our assessment at each stage, including, for example, the discovery of materials elsewhere whose existence or content point to the existence of further information within the public authority which had not been brought to light. Our task is to decide, on the basis of our review of all of these factors, whether the public authority is likely to be holding relevant information beyond that which has already been disclosed."*

52. We had a number of issues about the approach to the Request by the Council and agree with much of what the IC said about this. For example:-

(a) when the Council replied to the Request on 28 February 2024 they did not refer to how they had gone about seeking to locate relevant information.

(b) when answering the request for the internal review the Council said "*The officers have provided everything matching your request and having seen the source information myself, I can confirm that you have received it all*" but it later transpired that this was an inaccurate assurance.

(c) the IC made a request to the Council for precise answers to specific questions on 9 September 2024 (2196) but in our view the reply of 23 September 2024 (2199) did not match what had been asked and the Council did not fully respond with the level of detail required by the IC who said "*...you are required to provide a thorough response to the above questions in order to comply with your statutory obligations*".

(d) on 2 October 2024 (2207) the IC asked the Council about what enquires had been made with four named individuals and had to be chased for an answer.

(e) a considerable amount of additional relevant information was located but only because of the insistence of the Appellant and intervention of the IC as the IC said to the Council on 11 November 2024 (2545).

(f) the IC on 11 November 2024 described the Council's handling of the Request as "poor" (2543).

(g) the IC, on 11 November 2024, said to the Appellant that (2543) "*...I can absolutely understand why you might consider that further information is held.*"

(h) the IC concluded it was appropriate to warn the Council on 18 November 2024 (2545) that it was exposing itself to prosecution pursuant to section 77 FOIA.

(i) the DN as well as requiring further disclosure indicated that the Council's handling had been "piecemeal" and "*...over a long period of time which continued during the Commissioner's investigation.*"

(j) in the DN the IC concluded that "*...the Council is not meeting its obligations under the EIR.*" and "*In view of this the Commissioner intends monitoring the Council's future handling of requests...*"

(k) we agreed with the Appellant that many of the Council's replies to the challenges he had made and the appearance of standard wording which, whether intended or not, gave the impression that the Request was not being engaged with to the extent expected.

(l) as well as saying "*...I have also carried out a comprehensive search on the email archive using a combination of relevant key words*" it would, have assisted if those key words had been listed.

(m) on 23 September 2024 (2200) the Council said to the IC that:-

*"I carried out the internal review and sent out the response on 19/04/24 (2184). I also stated the following as part of my internal review...that having consulted relevant planning officers and carried out appropriate searches everything matching the complainants original request had been provided and no information had been deliberately withheld unless appropriate exemptions were applied. "*

but we could not see such a response being given on 19 April 2024.

(n) the IC asked the Council on 11 November 2024 for an explicit assurance that no more information was held (2546). It had to chase on 18 November and refer to section 77 FOIA (2549). When the Council did reply on 19 November 2024 they reported that there was further information to disclose. No explicit confirmation was given thereafter that was apparent to us and a few days later the DN was issued.

### 53. More specifically-

(a) while we did not know the employment status of the individual tasked with the investigation we could not see why her absence or even departure from the Council meant the Council could not search effectively for information as in our view relevant material, if it existed, would remain stored on the Council's systems in such circumstances unless deleted.

(b) we were not satisfied with the answer to the enquiry about what lay behind the email in which "Claire" appeared in the 3rd person.

(c) we were concerned that the person at the Council, dealing with the EIR request said that (2200) (emphasis added):-

*"...having consulted relevant planning officers and carried out appropriate searches everything matching the complainants original request had been provided and no information had been deliberately withheld unless appropriate exemptions were applied."*

because (i) this gives an impression that planning officers may have been withholding information if they considered exceptions applied but (ii) apart from reg 13 EIR we were not aware of any other exceptions formally in use as regards the Request.

(d) we were left uncertain as to the reference by the Council to an item dated 28 February 2024 (2553) and that it was being withheld by reg 12(4)(d) EIR as this exception was not raised in the Council's response or after review and it did not feature in the DN. Had the Council sought to rely on this exception (even if this had been late in the process) we would have expected it to have been said overtly and the material provided in a closed bundle for us to review with the protection of rule 14(6) 2009 Rules.

(e) as we saw evidence that the Council had used the Teams message function when discussing matters relevant to the Request we were not certain (on the balance of probabilities) that an effective search had been done of this function nor were we provided with details of the retention period for this system by way of explanation.

54. The IC based, on *Oates*, said that it was entitled to accept what had been said by the Council *"...where there was no evidence of an attempt to mislead the Commissioner, or of a motive to withhold information actually in its possession."* The Appellant made submissions on what he said were the Council's motives and where it had sought to mislead the IC. *Oates* states that the IC is entitled to accept what it is told unless the above applies and/or where there is no evidence as to an inadequate search or any reluctance to carry out a proper search. We have not concluded that the Council deliberately sought to mislead the IC or that it had a motive to mislead but we have concluded from the above on the balance of probabilities that the Council failed to carry out an adequate search and appeared reluctant to carry out a proper search.
55. We consider the request sent by the IC to the Council of 9 September 2024 to have been appropriate but in part answered only after chasing and other parts were not answered to the extent required. We also understand why the IC said to the Appellant on 11 November 2024 (2543) that the Council's handling of the Request had been poor. We agree with the IC in the DN at para 62 as regards the way in which the request was handled. In light of this and the other matters we have cited and the authorities such as *Preston and Bromley* we did not agree with the IC's conclusion in its Response to the Appeal that *"...the searches the Council carried out were sufficient..."*(36).

### **Decision**

56. No one factor is determinative itself but on the basis of our review of the matters referred to above we have concluded that the Council is likely to be holding relevant information beyond that which has already been disclosed. Accordingly the DN is



not in accordance with the law and to the extent that the notice involved an exercise of discretion by the IC he ought to have exercised it differently.

57. The Appeal is allowed.

**Signed Judge Heald**

**Date: 20 August 2025**