



NCN: [2024] UKFTT 00285 (GRC)

Case Reference: EA/2023/0200

**First-tier Tribunal
General Regulatory Chamber
Information Rights
Heard: On the GRC CV Platform**

**Heard on: 3 April 2024.
Decision given on: 10 April 2024.**

Before

Tribunal:

**Judge Brian Kennedy with Specialist Panel Members Suzanne Cosgrave
and Kate Grimley Evans**

Between:

MICHAEL RICHARDSON

Appellant

and

THE INFORMATION COMMISSIONER

First Respondent

and

THE UNIVERSITY OF LONDON

Second Respondent

Representation:

For the Appellant: Michael Richardson as a Litigant in person in written submissions

For the First Respondent: Gemma Garvey in a written response dated 7 June 2023.

For the Second Respondent:

Decision: The appeal is Dismissed.

REASONS

Introduction:

1. This decision relates to an appeal brought under section 57 of the Freedom of Information Act 2000 (“FOIA”) against his decision notice of the Commissioner dated 29 March 2023 Ref. IC-180524-J0H7 (“the DN”) which is a matter of public record.
2. The Commissioner opposes the appeal and states that the Appellant has failed to set out why the Commissioner’s DN is not in accordance with the law. If the Appeal is not struck out the Commissioner asks for the appeal to be dismissed for the reasons given in the DN and in his response.

The Relevant Law:

3. A person requesting information from a public authority has a right, subject to exemptions, to be informed by the public authority in writing whether it holds the information (s.1(1)(a) FOIA) and to have that information communicated to him if the public authority holds it (s.1(1)(b) FOIA).
4. When determining whether or not information is held the Commissioner and Tribunal applies the normal civil standard of proof, on the balance of probabilities. The Tribunal in *Linda Bromley v the Information Commissioner and the Environment Agency* (EA/2006/0072; 31 August 2007) held that in determining a dispute as to whether information is ‘held’ at [13]:

“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.”

5. The Tribunal has repeatedly confirmed that the relevant test is whether the information is held on the balance of probabilities: see, for example, *Malcolm v Information Commissioner* EA/2008/0072 at [24]; *Dudley v Information Commissioner* EA/2008/008 at [31], and *Councillor Jeremy Clyne v the Information Commissioner and London Borough of Lambeth* EA/2011/0190 at [21]-[22]).

6. In *Oates v IC and Architects Registration Board EA/2011/0138* at [11] the Tribunal recognised that *“As a general principle, the IC was, in the Tribunal’s view, entitled to accept the word of the public authority and not to investigate further in circumstances, where there was no evidence as to an inadequate search, any reluctance to carry out a proper search or as to a motive to withhold information actually in its possession. Were this to be otherwise the IC, with its limited resources and its national remit, would be required to carry out a full-scale investigation, possibly on-site, in every case in which a public authority is simply not believed by a requester.”*
7. In the case of *Councillor Jeremy Clyne v IC and London Borough of Lambeth EA/2011/0190* [38] the Tribunal recognised that, *“The issue for the Tribunal is not what should have been recorded and retained but what was recorded and retained.”*

Request & Decision Notice:

8. The Appellant wrote to the University of London (“the University”) on 10 May 2021 and requested the following information:

“I request, pursuant to the Freedom of Information Act, a copy of the 1983 University of London regulations on PhD thesis examinations. I have attached the 1983 regulations on theses themselves as a finding aid. I believe the regulations I seek will follow the attached regulations.”

9. The University responded on 8 June 2021. It provided the Appellant with the following: -

“The regulations for Internal Students proceeding to the degrees of M.Phil. and PhD for academic year 1982-83.”

10. On 10 June 2021 the Appellant submitted a revised request to the University as follows: -

“1. 1982-1983 academic year: UL regulations, or Guidance for Supervisors and Candidates, including the regulations regarding Nomination of Examiners for MPhil and PhD degrees after the examination entry form is submitted by candidate.

2. 1983-1984 academic year: UL regulations, or Guidance for Supervisors and Candidates, including the regulations regarding Nomination of Examiners for MPhil and PhD degrees after the examination entry form is submitted by candidate.

3. 1982-1983 academic year. The name of thesis book binder approved by UL.

4. 1983-1984 academic year. The name of thesis book binder approved by UL.

5. 1982-1983 academic year. The name of the University body responsible for the PhD programme.

6. 1983-1984 academic year. The name of the University body responsible for the PhD programme.
7. 1982-1983 academic year. The thesis binding instruction provided by the University Registrar.
8. 1983-1984 academic year. The thesis binding instruction provided by the University Registrar.”
11. The University did not respond to the Appellant’s revised request, despite several chaser e-mails, until 31 March 2022. At that point it disclosed information in response to parts 1 and 2 of the Appellant’s revised request, however it stated that it did not hold information in relation to parts 3-8.
12. On 1 April 2022 the Appellant requested an internal review of the University’s response stating that he had not received the information requested in parts 1 and 2 of the request. The information provided was not the regulations requested. However, the Appellant did note that there were missing pages in the regulations they had been sent and therefore the information he required may have been contained within the missing pages.
13. Following an internal review the University wrote to the Appellant on 10 May 2022. It enclosed the pages which had been missing from the regulations and stated that it did not hold any further information within the scope of parts 1 and 2 of the request, that is information regarding the nomination of examiners for the time and the composition of examination boards. It enclosed its current guidelines for this information.
14. On 12 July 2022 the Appellant complained to the Commissioner about the way the request for information had been handled as he considered he had not been provided with the information he had requested.
15. The Commissioner considered that the scope of his investigation was to establish whether the University holds information falling within the scope of the request.
16. The Commissioner accepted that, in the circumstances of this case, on the balance of probabilities, the requested information is not held by the University.

Grounds of Appeal:

17. The Tribunal received this appeal from the Appellant on 6 April 2023.
18. The Commissioner has read the Appellant’s Grounds of Appeal and has not reiterated them in full in his response.
19. In summary the Appellant has said that the regulations provided by the University are not the regulations he had requested.

20. The Appellant submits that the Commissioner's decision in this case is based upon speculation [DN13]. He asserts that this speculation is contrary to the robust and tightly controlled thesis examination protocol that governed viva examiners in the early 1980s and he considers the requested information should be held by the University. The Appellant has also referred to Exhibit E however this document does not appear to have been provided. The Appellant concluded based upon his evidence that:

“The differing requirements for examiners, appointed by the UL Senate and assigned by the various UL Boards of Studies, necessitated that the UL had guidance, requirements, or regulations on the examination of PhD candidates and the composition of viva examination panels.”

21. The Appellant submits that whilst the University searched for the missing regulations in the Archives and an unnamed storeroom, it has made no indication of a search of the files and records of the Boards of Studies which assigned thesis examiners.

22. The Appellant submits that the University's assertion that there is no business purpose for which the regulations from 1982 or guidance for examiners in 1982-1984 should be held is contrary to primary and customary business duties of the University to award degrees upon successful completion of examinations and provide subsequent verifications of qualification.

The Commissioner's Response:

23. The Commissioner resists this appeal. Generally, the Commissioner relies on the DN as setting out his findings and the reasons for those findings, and repeats the matters stated therein. The Commissioner nonetheless sets out below his observations in respect of the Appellant's Grounds of Appeal.

24. The Appellant has provided evidence as to why he considers the requested information should be held by the University. However, the Second Respondent has made clear that:

“We can find no evidence that the University of London produced guidance relating to the nomination of examiners 1982-1984. We now believe that the individual colleges may have been responsible for assigning the examiners and so any Regulations or guidance relating to this would have been issued by those individual colleges.” [DN 13]

25. The Commissioner made his decision based upon what recorded information the University holds under FOIA rather than what the Appellant considers should be held (noting Councillor Jeremy Clyne EA/2011/0190 para 21 and 22 (OB A75 para 8). Furthermore, noting Oates v IC and Architects Registration Board EA/2011/0138 para 11 (OBA 75 para

9), the Commissioner submits he was entitled to accept the word of the Second Respondent in this regard.

26. The Appellant has provided various procedures, minutes and documents dating back to the 1980s to explain why the regulations he has requested would have existed. This information was not provided by the Appellant to the Commissioner in support of his section 50 FOIA complaint. The Commissioner indicated that if the Tribunal would be assisted in its decision-making on this matter by input from the University in relation to this supporting evidence or the extent of searches conducted, the Commissioner respectfully invited the Tribunal to consider requesting written submissions or requiring the University to join proceedings. This was done by the Tribunal with appropriate Case Management Directions in a decision dated 8 August 2023 resulting in the comprehensive witness statements produced by the Second Respondent and now before the Tribunal.

27. Regarding whether there is a business purpose for the University to hold the requested information, the University has said that regulations or guidance relating to this would have been issued by individual colleges. As such it would be unlikely the University would have had a business purpose to have held this information even at the time. However, even if it could be established that there was a business purpose to hold the requested information in the 1980's it is highly unlikely there would remain a business purpose to hold this information at the time of the FOIA request. However, the University has explained further that:

“It does not have retention schedules from the 1980s and so staff do not know the record management policy which may have been followed in relation to this type of information, however the University is aware that no Regulations have been sent to the Archive. Some bound versions of the Regulations have been retained, however up to 2000 this appears to have been on an ad-hoc basis. From 2018, the University of London has followed the JISC model retention schedule in relation to these records and they are now retained permanently.” [DN 14]

28. The above explanation was provided in relation to the parts of the request for - *“the name of thesis book binder”*: - however it is likely this information regarding records management pre-2000 would be relevant to the request as a whole.

29. For the reasons set out above, the Commissioner remained of the view, on the balance of probabilities, the requested information is not held by the University.

Appellant's Reply:

30. A motion to strike out the Appeal was inappropriate because there are arguable questions of fact, and the First Respondent's civil balance of probabilities analysis was upset and tainted by a false and erroneous submission from the University of London: *“We can find no evidence that the University of London produced guidance relating to the nomination of*

examiners 1982-1984. We now believe that the individual colleges may have been responsible for assigning the examiners and so any Regulations or guidance relating to this would have been issued by those individual colleges." [DN, 13].

31. The Appellant argued that the University's statement to the First Respondent upon which the balance of probabilities was based is contrary to the University of London 1982-1983 Calendar statutes governing Boards of Studies. The Calendar contains the contemporaneous University statutes governing Boards of Studies which the Appellant states in part says: *"The Senate shall assign to each Board and each standing committee of a Board of Studies such powers and duties as in the opinion of the Senate are necessary to secure effective consideration of the provision for teaching, research and examinations for degrees and other awards of the University in the field of study with which the Board is concerned."*
32. The Appellant further suggested that the University of London statement to the Commissioner also conflicted with the 1982-1983 Calendar's statutes governing Examinations which state in part: *"The Examiners for all prescribed examinations shall be appointed by the Senate."*
The 1982-1983 Calendar provisions are corroborated by the Thesis Titles and University Boards of Studies protocol adopted by the London School of Economics and Political Science [LSE] for students seeking degrees from the UL. The protocol explains the role of the University Boards of Studies and states in part: *"It is this Board which will be asked by Senate House to appoint the examiners when the student enters for examination – "*
33. The LSE Graduate School Committee minutes explain the University has differing requirements for viva examination panels and states: *"It was noted that some Boards of Studies required three examiners rather than two and there might be differences in thesis specifications which could cause difficulties"*.
34. The Appellant argued that the paradoxical speculation; *"We now believe that the individual colleges may have been responsible for assigning the examiners and so any Regulations or guidance relating to this would have been issued by those individual colleges."*; is contrary to the University's promulgated statutes for examinations and the LSE protocol and is so manifestly in error that it raises a question about good faith by the University.
35. The Appellant asserted that the Commissioner was correct that his Exhibits A-E, constituting evidence of an inadequate search, were not presented at the time of complaint. The information only became known to the Appellant subsequent to the Respondent's DN. Therefore, the Appellant joined the First Respondent in respectfully inviting the Tribunal to request a written submission from the University to explain the discrepancy between its submission and the University's statutory requirements concerning appointment of examiners.

36. The Tribunal have since been provided with two extensive and comprehensive witness statements on behalf of the Second Respondents which we have not set out verbatim herein, but they detail the extensive and comprehensive searching undertaken.

Corrected Response from the Appellant:

37. The Appellant (OB A217 15 September 2023), after review of the Second Respondent's Bundle, noted the University has finally investigated the requested missing viva examination regulations which concludes the University no longer possesses said missing examination regulations.

38. The Appellant also suggested that the assertion by the Director of Student Registry Services that, *"I believe the individual colleges were responsible for assigning the examiners"* and maintains this was an erroneous speculative statement. Second Respondents' Bundle 35]. [We do not accept this quote as a correct quotation and note in the document the witness, Suzanne Miles did not say "were" she said "may" and further she used the phrases; "I believe" and "may have been" -see OB D306]

39. The Appellant noted that the missing viva examination regulations for the 1983-84 school year prevent the University from being able to now verify with certainty that individual viva panels were properly constituted.

40. The Appellant cannot accept that the University of London has acted in good faith in conducting its search for the missing regulations as the Second Respondents submission he suggests does not explain how or why the false statement about the assignment of examiners was made to the Information Commissioner. He notes that the said false statement stated: *"We can find no evidence that the University of London produced guidance relating to the nomination of examiners 1982-1984. We now believe that the individual colleges may have been responsible for assigning the examiners and so any Regulations or guidance relating to this would have been issued by those individual colleges."* [OB A4].

41. The Appellant argues that the said false statement has been refuted by the London School of Economics several times, is not borne out by the Second Respondent's search for the missing regulations, and contradicts evidence submitted by Appellant.

Second Respondent's Response:

42. The Second Respondent notes Paragraph 1 of the Corrected Response by the Appellant which it received in an email timestamped 18:07 on 15 September 2023 (hereafter the "Corrected Response"). The Second Respondent rejects the use of the words *"the UL has finally conducted an investigation"* on the basis that the Second Respondent had previously conducted a search under the FOIA request from the Appellant on or around 11 January 2021 albeit that it was constrained to the timescales laid down by the Commissioner in conducting said search referring to [time-for-compliance-foia-guidance.pdf](https://ico.org.uk/time-for-compliance-foia-guidance.pdf) (ico.org.uk).

43. Regarding Paragraph 2 of the Corrected Response, the Second Respondent does not accept the Appellant's characterisation of the assertion by the Director of Student Registry Services as constituting an "*erroneous speculative statement.*" This assertion by the Director of Student Registry Services was, they argue an informed assessment based on the evidence available at the time and gathered under the constraints of the timescales laid down by the Commissioner for dealing with the FOIA request in question referring to time-for-compliance-foia-guidance.pdf (ico.org.uk).
44. Regarding Paragraph 3 of the Corrected Response, where the Appellant states; "*Appellant accepts that the missing viva examination regulations for the 1983-84 school year prevent the UL from being able to now verify with certainty that individual viva panels were properly constituted*", the Second Respondent rejects this conclusion by the Appellant. There is no reason to doubt, they argue, that individual viva panels were properly constituted at the relevant time in line with applicable regulations, irrespective of whether the viva examination regulations for the 1983-84 school year are missing now.
45. Regarding Paragraph 4 of the Corrected Response, the Second Respondent rejects this response by the Appellant.
46. The Second Respondent rejects the characterization of its earlier statement as being false.

Conclusions:

47. The Tribunal sought evidence from the Second Respondent to support the contention that adequate searches were carried out and as a result have been able to carefully consider the comprehensive witness statements provided. We have no reason to believe that these statements were other than a genuine account of the searches made on behalf of the Second Respondent. At the hearing on 3 April 2024, Suzanne Miles (alias Suzie Mereweather) attended to present her evidence and was available for cross examination. The Tribunal accept her bona fides. We have not seen any credible evidence that would suggest otherwise. There is no credible reason for us not to do so. On the basis of the evidence now before us, we accept that reasonable searches have been carried out by the Second Respondent and we therefor accept that on the balance of probabilities the University does not hold information falling within the scope of the request. Accordingly, we find no error of Law in the DN, and we must dismiss this appeal.
48. In the course of our own investigations and deliberations we make the following observations;
49. The request was for information relating to the academic year 1982/1983.
50. The bundle and the two witness statements demonstrate that there were repeated searches for the information requested.

51. The two witness statements make clear that considerable effort was made by the University in terms of the extent of the searches, the number of people approached, and the questions raised.
52. It seems likely that some information relevant to the request for example about appointment of Examiners would have existed at some time, but it is the Second Respondent's case that that whatever relevant information they might have held is no longer held, easily accessible or available.
53. There have been reorganisations within the University (see witness statement of Suzanne Miles paras 33 and 34). The correspondence shows that the ownership / origin of any relevant information is no longer clear – the request relates to information at least 40 years old.
54. There is nothing to suggest that the information might have been disposed of for any reason relating to this, or any other FOIA request. In the witness statement of Suzanne Miles (Suzie Mereweather) para 36 she states there are no records of destruction from the 1980s.
55. The case made by the Second Respondent for why it holds no relevant information relates to the age of the information and the lack of any business case for such information to be retained. We find this is a reasonable explanation in all the circumstances. There is no available or accessible evidence of when such information that was or may have been held was disposed of, nor by whom.
56. The University has demonstrated considerable effort in trying to locate relevant material information and not sought to limit the effort and/or searches by use of s12 (cost limit) exemption. In the Appellant's Notice of Appeal, he suggests the Second Respondent have made a false and erroneous statement, we can find no corroborating evidence for this or any lack of good faith by the Second Respondent.
57. The Tribunal's remit is simply related to the handing of information Request made by the Appellant and the investigation of that by the Commissioner. It is not for the Tribunal to consider nor comment on the underlying reason for the request concerning as it does appear to the Appellant (see A228 and exhibits provided in support of Appellant's response on 7 November 223) to relate to the award of a degree by the University.
58. Obiter, and merely by way of comment, we record that well into the oral hearing on 3 April 2024, Mr Richardson, who identified himself to us as the Appellant spoke to the Tribunal on the CVPlatform contacting us from abroad (apparently South America). He stated that he had tried to contact the Tribunal to inform us that he had now received copies of the requested information from another source, and he had tried to contact the Tribunal to withdraw this appeal. However, he insists that the Second Respondent, were guilty of misrepresentation and bad faith. The Tribunal are not in a position to take evidence from abroad in such circumstances as have occurred at this hearing and as we have already

established there is no credible evidence before us to consider such allegations. If the Appellant wishes to pursue any such allegations, then this Tribunal is not the forum for that investigation. We have dismissed this Appeal on the credible evidence before us and there the matter ends with us.

Brian Kennedy KC

Date: 8 April 2024.

Promulgated

Date: 10 April 2024.