



**Neutral citation number: [2024] UKFTT 841 (GRC)**

**Appeal Numbers: EA 2023/0293 & EA/2023/0295**

Decision given on: 24 September 2024

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

**Between:**

**Andrew Lownie**

**Appellant**

**and**

**The Information Commissioner**

**First Respondent**

**and**

**The Council of the University of Southampton**

**Second Respondent**

**Date of hearing:**

**Panel:** Brian Kennedy KC, Anne Chafer, and Miriam Scott

**Hearing type:** Remote on GRC CV Platform

**Result:** The appeals are dismissed.

**Date of decision:** 16 September 2024.

## REASONS

### **Introduction:**

1. This decision relates to two appeals against the decisions of the First Respondent, the Information Commissioner (“the Commissioner”), brought by Andrew Lownie (“the Appellant”), under section 57 of the Freedom of Information Act 2000 (“FOIA”). The appeals are against the Commissioner’s Decision Notices of 25 May 2023 - Ref. IC-218211-C4J5 (“25<sup>th</sup> May DN”) and the Commissioner’s Decision Notice of 31 May 2023 - Ref. IC-222311-L7H0 (“31<sup>st</sup> May DN”). In the interests of saving time and costs we have consolidated these appeals together for the purpose of giving Judgment as the facts and parties are so closely related. Many of the arguments hereon therefore overlap.

### **Legal Framework:**

2. Under section 1(1) of the Act a person who has made a request to a ‘public authority’ for information is, subject to other provisions of the Act: (a) entitled to be informed in writing whether it holds the information requested (section 1(1) (a)) - (emphasis added) - and (b) if it does, to have that information communicated to him (section 1(1) (b)).
3. For the information to be disclosable, the information must also be held in recorded form. This is because the definition of ‘information’ in section 84 FOIA is ‘...*information recorded in any form*’.
4. The test to be applied when considering whether a public authority holds information pursuant to section 1(1)(a) of the Act is that set out in the case of *Bromley v Information Commissioner & the Environment Agency* (EA/2006/0072) in which the Tribunal held that when deciding whether information is held by a public authority for the purposes of section 1 of FOIA, “*the test to be applied [by the Commissioner and the Tribunal] was not certainty but*

*the balance of probabilities” [13].*

5. This test has become established, followed in numerous Tribunal decisions since and endorsed by the Upper Tribunal in *Preston v Information Commissioner* [2022] UKUT 344 (AAC) - see in particular paras [29] and [30].

6. The Tribunal in *Oates v Information Commissioner* EA/2011/0138 concluded, 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 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” [11].*

### **Background:**

Decision Notice - EA/2023/0295: - 25<sup>th</sup> May 2023

### **Request and Response:**

7. On 15 November 2022, the Appellant wrote to the University of Southampton (“the University”) and requested information in the following terms: -

*“Under FOIA all information relating to the visit on 14th March 2018 by a member of the Royal Household.”*

8. In its response on 13 December 2022, the University provided the information it held but relied on section 40(2) FOIA to make redactions.

9. Following an internal review, the University wrote to the Appellant by email on 17 February 2023. The University explained which organisation was

corresponding with which in the emails but maintained that this was the only information that it held.

### **Complaint and Decision Notice:**

10. The Appellant made a complaint to the Commissioner on 24 February 2023. In effect asserting that the University had failed to deal with his request for information made on 15 November 2022 in accordance with the requirements of Part 1 of FOIA. The Commissioner wrote to the University on 28 February 2023 asking it to provide its submissions and the withheld information within 20 working days. As no response was received the Commissioner was required to issue an Information Notice on 13 April 2023 compelling a response. The University failed to comply with the Information Notice by the deadline but did subsequently respond.
11. The Commissioner concluded in this Decision Notice that the University has provided the information it holds within the scope of the request and that s.40(2) had been correctly complied with.

### **Grounds of Appeal:**

12. In his grounds of appeal, the Appellant argues that further information in scope should be held by the University on the following grounds:
  - i) Given the public interest in the Mountbatten archives and the FTT proceedings, it is more likely than not that Professor Woolgar at the University and / or one of the University's in-house lawyers would have made a note of a visit by a member of the Royal Household and ensured that at least the CEO and VC knew about the visit, and thereafter at least would have provided a brief report on what transpired.
  - ii) The wording of the request for information "*relating to*" the visit on 14 March was sufficiently wide as to include information held concerning

any follow-up visit.

**Commissioner's Response:**

13. The Commissioner maintains his position as set out in this Decision Notice. Generally, the Commissioner relies on this Decision Notice as setting out his findings and the reasons for those findings. The Commissioner nevertheless sets out further observations in response to the Appellant's Grounds of Appeal.
14. Concerning the scope of the request, the Commissioner maintains that, on an objective reading of the request, he was correct to determine the scope of the request as relating to the visit on 14 March and not to any follow up visit.
15. In relation to whether the information in scope was held on the balance of probabilities, he argues the question before this Tribunal is not whether the University should hold the information within the scope of the request but whether, on the balance of probabilities it did in fact hold information within the scope of the request at the time of the request in accordance with the test.
16. The Commissioner contends that he is entitled to accept the word of the University that it holds no further such information than had already been disclosed, especially where there was no evidence of such or any apparent attempt to mislead the Commissioner. On the facts of this case, even if one might have expected a member of the University's staff make a record of the visit, the Commissioner accepts on the available evidence that, for whatever reason, that did not happen.
17. In the Tribunal's decision in the case of Bromley (see §4 above) the Tribunal had accepted that it was rarely possible to say with absolute certainty that a public authority did not in fact hold requested information somewhere in its records, but that, provided a search had been undertaken which was sufficiently rigorous, and the information had still not come to light, it was to

be regarded, on the balance of probabilities, as not held for the purposes of FOIA.

**18.** On the facts of this case, the University advised the Appellant that: -

*“Searches were undertaken in both electronic records, such as emails and physical records, such as diary entries etc. Search terms were used to cover the scope of the request such as ‘Royal Household’, ‘14 March 2018’ and / or ‘Visit’. Other key staff were consulted, who searched paper records, with our own Head of Information Governance checking these searches”.*

**19.** The Commissioner remains satisfied that the searches referred to above are reasonable and appropriate.

**20.** The University has provided to the Appellant email correspondence which falls within the scope of the request. There is no obvious motive, therefore, for suppressing information in scope.

**21.** The Appellant’s arguments appear to be based upon a questioning of the administrative practice of the University, alleging that the notes should have been taken and a report made following the 14 March visit. However, the University’s internal procedures for making a record of such visits is not a matter within the jurisdiction of the Commissioner or indeed this Tribunal. In *Clyne*, the Tribunal was satisfied that a gap in the public authority’s documentary records reflected *‘inconsistent and poor administrative practice’* but this did not amount to a breach of FOIA.

**22.** Further, *Wikely J* in *Commissioner of Police for the Metropolis v Information Commissioner and Mackenzie* [2014] UKUT 479 (AAC) held that “FOIA is not a means of reviewing a public authority’s record-keeping and in some way testing it against best practice” (at [37]).

23. In light of the above, the Commissioner submits that he was correct, to conclude, on the balance of probabilities, no further information was held within the scope of the Appellant's request, and he is therefore satisfied that the University has satisfactorily complied with its duty under section 1(1) of the Act.
24. However, the Commissioner maintained that should the Tribunal wish to explore the above further with the University, the Tribunal should either join the University or alternatively exercise its powers under rule 5(3)(d) of the 2009 Tribunal Rules to require the University to provide further information or submissions to the Tribunal. The Tribunal has agreed with this helpful suggestion and has joined the University as the Second Respondent.
25. It is not clear from the Appellant's notice of appeal whether he disputes the Commissioner's conclusion on the application of section 40(2) to the names of the individuals referred to in the emails.
26. The Commissioner maintains that he was correct to conclude in his DN that the University, at the time of the request, did not hold further information (other than the information disclosed in response to the request) falling within the scope of the request. The Commissioner accordingly invited the Tribunal to dismiss the appeal.

**Case Management Directions in EA/2023/0295 of 5 October 2023:**

27. The Appellant confirmed that he consented to the Commissioner's request for an extension of time in which to serve his Response, and the extension was granted. The University had not responded to the invitation to join as a party to the appeal.

**CVP Hearing 14 December 2023:**

28. The Panel heard submissions from the Appellant and issued Preliminary Case Management Directions of the Tribunal on 14 December 2023 in which the University was joined as a Second Respondent and required to provide detailed submissions and evidence to the parties and the Tribunal by 4 January 2024. Unfortunately, the University was not served notification of the joinder or the accompanying papers, so the Case Management Directions were amended to extend the deadlines for compliance.

### **Appellant's Submissions:**

29. The Appellant provided submissions in relation to his appeal and response to the Commissioners argument dated the 5 of September 2023. The Appellant stated that there appears to have been a visit in February to look at the material which relevant. The Appellant avers that there are examples of the material which does not appear to have been disclosed.

30. The Appellant contended that there is no reason why, 'in relation to the representative of the Foreign Office' was not within the scope of his request which was about vetting of the papers by an outside body. The Appellant refutes that reasonable steps were taken. Further, that a detailed explanation of the searches was never provided.

31. The Appellant argued that the Second Respondents attempt to paint him as vexatious, the Appellant stated that his requests were either ignored or partially answered.

32. The Appellant contended that the Second Respondent failed to comply with the requirements under FOIA. Further, that Commissioner was disingenuous in his reply. The Appellant stated that the purpose of FOIA is for transparency and the scrutiny of public authorities in order to uphold the law. The Appellant invited the Tribunal to provide justice in this case.



### **Preliminary Response of the Second Respondent in EA/2023/0295:**

33. In its Preliminary Response, the University addresses the issues which arose from the Preliminary Case Management Directions of the Tribunal on 14 December 2023 in which the University was joined as a Second Respondent.

34. The University have filed two witness statements in connection with this matter in order to properly address the submissions made by the Appellant relevant to the current appeal.

35. The University observed: There are a number of assertions made by Dr. Lownie in his submissions such as: -

*(1) At par 7: The FOI request relates to a visit by a member of the Royal Household to Southampton on 14 th March 2018 to vet the Mountbatten papers for references to the Royal Family.*

*(2) At par. 11: "...As the Cabinet and Foreign Office were involved there must have been some sort of liaison. Ditto the trustees of the Broadlands Archive. All this is missing."*

*(3) At par. 12: "Perhaps that is not surprising. Here was a collection of papers, freely sold by the Mountbatten family to pay for a new roof for Broadlands, bought after a highly public fundraising campaign with public monies to be open and which had been unilaterally closed by the archivist...."*

*(4) At par. 13: "Here was an academic institution, supposedly in favour of historical documents being open, inviting an outside body with no legal claim on the material, to censor papers which it had bought with public monies on the basis that they should be open. Southampton had no obligation to apply FOI exemptions – they were discretionary – but they had done so and hence perhaps the desire to keep their collusion and this censorship secret."*

(5) *At par. 21 the reference to “ ... the whole question of state censorship of a private archive etc.?”; and*

(6) *At par. 23 when Dr. Lownie refers to the decision notice by the Information Commissioner he states: “...He dismissed the visit as one of no ‘great significance’ 3 but it cannot be every day that a member of the Royal Household pays a visit to vet an archive of international historical significance. He claimed that there was ‘limited public interest in this visit’ but royal censorship of such an archive owned by the nation under Acceptance in Lieu would be of considerable public interest in every sense of the word...”*

#### **Scope of the search carried out by the University:**

36. The University states that it did not seek clarification of the Appellant’s FOI request because, *“having had so many FOI requests from Dr. Lownie in connection with the Broadlands Archive, it was clear to it that this request related to the Broadlands archive and a visit which occurred on the 14<sup>th</sup> March 2018.”*

37. The University draws attention to *Berend v Information Commissioner & London Borough of Richmond upon Thames* (EA/2006/0049 & 0050) (para.86), where the Tribunal was satisfied that: *“the request should be read objectively by the public authority, there is no requirement to go behind what appears to be a clear request, the Tribunal is tasked to consider the request in the terms in which it was phrased.”* The University also observes that the Tribunal adopted the Berend decision in *King v Information Commissioner* EA/2010/0126: *“A public authority need not look for other possible readings of a seemingly clear request or check previous correspondence: it should be able to take the request at face value.”*

38. The University submits that it is not required to leave every stone unturned in its search for information and as per *Linda Bromley v Information Commissioner and the Environment Agency* the searches it conducted were carried out *“with the*

*appropriate rigour and competence”.*

39. The University also draws attention to *Andrew Preston v Information Commissioner* [2022] UKUT 344, where in quoting *Bromley*, the Upper Tribunal stated: *“The Tribunal has consistently applied the balance of probabilities when approaching this question: 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 IC and London Borough of Lambeth EA/2011/0190 at [21]-[22]. 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]) ...”.*

**Witness Statement: Sophie Ferguson in EA/2023/029523 May 2024:**

40. Sophie Ferguson, employed by the University in the Information Governance team, provided helpful and material written witness evidence to the Tribunal as follows:

*“Scope and receipt of request*

2. *On 15 November 2022, the Information Governance team received the following Freedom of Information request (FOI) from the Appellant through its case management portal: “Under FOI all information relating to the visit on 14th March 2018 by member of the Royal Household.” The request was logged in the case management system referenced as G01476 (See Open Bundle C28).*

*Scope of the search*

3. *The Appellant is well-known to my team because the University has received a high number of requests from the Appellant. I was therefore aware of some of the background of the requests that had been related to the Broadlands Archives, which is an extensive collection of archival materials consisting of different groups of family and estate papers. More information on the archives can be found here.*
4. *I had a conversation with Letitia Baldock, Director of Legal Services on the matter, as*

*she had been previously responsible for the FOIA and SAR processes, and she informed me to contact Professor Chris Woolgar (now Emeritus Professor) and Karen Robson, Head of Archives and Special collections, who has worked with the Broadlands archive since the material arrived at the University who she advised would hold information if any that related to the request."*

5. *Further, Ms. Baldock explained that there had been a visit from the Cabinet Office in connection with the archive that took place the day after the 14 March 2018 visit. The Appellant had submitted an FOI request related to the other visit by the Cabinet Office on 15 March 2018, received on 21 June 2022. This request asked for any information held in relation to that visit, concerning the diaries and letters of the 1st Earl and Countess Mountbatten. "There was some confusion because the thread retrieved during the collation referred to both the visits on the 14 and 15 March 2018, (See Exhibit UOS02) (Page 2) from I think the Cabinet Office (CO) or the Foreign Commonwealth Development Office (FCDO) which was coordinated by the CO. (based on the context in the thread)."*

*"Search Terms*

6. *On the 28 November 2022 I met with Ms. Robson to discuss the request to make clear that she understood the scope of the request to be separate from the Cabinet office visit and to retrieve any information held in connection with the request. Professor Woolgar was further confirmed by Ms. Robson as the only other individual likely to hold any information of relevance. "In the meeting with Ms. Robson on 28 November 2022, I asked her to retrieve anything held electronically or hard copy in relation to the 14 March 2018 with a time of up to two months prior or the month following (i.e., from the start of 2018 to a reasonable period following the visit)."*
7. *Ms. Robson also confirmed through a search of her emails and checking notes in her diary, that the only documentation she held of any relevance was an email introducing the person from the Royal Household who was coming to visit to view the material and a diary entry confirmation of the visit taking place (hard copy). (See Exhibit UOS01) (Page 1) Ms. Robson also forwarded a thread of emails in relation to necessary introductions and travel arrangements which she had been copied into (which formed*

*the disclosure) (See Open Bundle C31. I have served also attached closed exhibits which will be served separately.*

8. *Ms. Robson also averred: "On 6 December 2022, I contacted Professor Chris Woolgar (See Exhibit UOS02) (Page 2) with the following recommendations for an additional search; "... I would recommend a search on the basis of any emails which mention the 14th March 2018, Royal Household, [Redacted] all dated within a search window of January 25 th January 2018 – 15 th April 2018." This extended time frame was given to ensure we captured a reasonable time span that captured that visit. Although the search related to the archive this wasn't used as a search term as we were given a time frame that related to this visit. The name of the individual who made the visit was given as a search term. This was redacted as it was personal information, and search term of 'Royal Household' was also given."*
9. *Ms. Robson added: ". I have been referred to the Appellants submission (paragraph 20), where he suggested other search terms should have been used, however I do not consider these search terms would have yielded relevant results. 'Legal issues' would have picked up every matter across our system marked 'legal' and produced wholly unrelated and thousands of results. The search term 'FOI exemption,' given the number of FOI requests we would have received would have likely given a large volume of emails unrelated to the request."*
10. *"On 7 December 2022, Professor Woolgar responded confirming that there was no report written. (See Exhibit UOS02) (Page 2) Professor Woolgar also provided further documents relating to both visits. (See Exhibit UOS03) (Page 4). Emails related to Royal Household (See Open Bundle C31) and then emails for the Cabinet Office visit (refer to above paragraph 5). I undertook no further searches as he reiterated in his email, he had sent me everything therefore I concluded this was unnecessary. I relied on what was provided to me by Professor Woolgar and Ms. Robson as to what information was held in relation to the visit on the 14 March 2018."*

*"Collation of the data*

11. *On 12 December 2022, I was absent from work, so I asked my colleague Liam Jackson*

*to apply final redactions, i.e., third party personal data and send for pre-approval before sending it out (as per my comment), e.g., "... please can you redact the attached and circulate to me and Letitia for reference ahead of sending to the requester tomorrow."* (See Exhibit UOS04) (Page 5). I had already collated but not redacted the disclosure via Adobe; at the time I was not familiar with the case management system, nor did I have access to it (as I was travelling). To be clear, I had already compiled the documents as one document but not applied the redactions.

12. *The information I collated consisted of some of what Professor Woolgar sent me on the 7 December 2022 and included information from Ms Robson. I excluded the information related to the Cabinet Office visit of 15 March 2018 as either it was not considered relevant, or the Appellant had already received the disclosure in the previous FOI of June 2022. As both Professor Woolgar and Ms Robson were recipients of the emails, only one set of emails were sent to the Appellant. I collated the data, organized and combined the documents using Adobe.*
13. *Mr Jackson applied s40(2) redactions only and prepared the covering note for the FOI disclosure. Mr Jackson then shared the redacted copy for double-checking before sending to the Appellant on 13 December 2022. (See Open Bundle C29).*
14. *The request was subject to Internal Review but because I collated the initial request and because of my position overseeing the whole team as well as other matters as Head of Information Governance, the review was allocated to another member of the team."*

**Witness Statement: Liam Jackson in EA/2023/0295 (1 March 2024):**

- 41.** Liam Jackson, employed by the University as Information Compliance Officer (Assurance), provided further helpful and material written witness evidence to the Tribunal as follows:

*"Application of Redactions and sending out the FOI response*

2. *On 12 December 2022, I received an email from Sophie Ferguson asking me to apply*

*redactions and send out the FOI response relating to all information regarding 'the Royal Visit,' in March 2018 to the Appellant, as she was on leave. (See Exhibit UOS04) (Page 5). Ms. Ferguson sent through via email, what was within the scope of the FOI request. This included information collated following the initial searches in relation to the FOI (G01476). I then applied the redactions using Adobe. Redactions were made to remove any third-party personal information from the intended disclosure. To clarify, I did not undertake any of the searches of the disclosure for G01476. As requested, I then circulated via email the 'Intermediate file' (the intermediate files show the proposed redactions before they are applied) to Letitia Baldock and Ms. Ferguson for comments. (See Exhibit UOS05) (Page 6).*

- 3. On 13 December 2022, I sent the response via the FOI email address to the Appellant. (See Open Bundle C29).*

#### *ICO Investigation*

- 4. On 28 February 2023 the ICO contacted the University to advise us of the Appellant's complaint relating to G01550. They advised that they had accepted the investigation, that they would assign a case officer and included information on how to prepare for the University's submission. (See Exhibit UOS06) (Page 8). This matter was then filed on our case management system as G01794 as the ICO Investigation.*
- 5. On 13 April 2023 the Information Governance team received an Information Notice from the ICO, stating that the two previous notices (one from 28 February 2023 and one from 3 April 2023) had not been responded to or acknowledged and requesting the University's submission and a further deadline to provide the submission within 30 days. (See Open Bundle D44)*
- 6. On 17 May 2023 at 09.39am, I wrote to the ICO to draw their attention to the fact that initial contact on this matter was made on 28 February 2023 but as at the date (17 May 2023) no ICO case worker had been assigned. I confirmed that since then, until the Information Notice dated 13 April 2023, no further correspondence was received, and the 3 April 2023 correspondence had not been received and that is why we failed to*

*respond. (See Open Bundle D48).*

7. *The Information Governance team received a further Information Notice on the same day at 12.07pm giving a deadline for the end of that week. The ICO referenced correspondence sent on 3 April 2023 and that nothing in my email earlier in the day indicated that we would have responded on time if we had received the 3 April 2023 email. (See Open Bundle D50).*
8. *Although not mentioned in my emails of 17 May 2023, at the end of March 2023 the Information Governance team had lost two members of staff at the same time to another team and in the weeks prior to that our FOI inbox had been subjected to a spamming attack where we were receiving an excessive number of FOI requests which were coming in faster than we could action them. We had exceeded our usual annual number of FOIs, by March 2023. Further to that I had been on annual leave from 12 April – 17 April 2023. This coupled with the increased volume of requests and being severely understaffed caused delays in our response times.*
9. *At 13.20pm on 17 May 2023, I sent a subsequent response to the ICO redefending our position (See Open Bundle D52) as to why we had not responded, also providing the information requested from the ICO, such as details of searches and application of section 40(2) of the Freedom of Information Act (FOIA). I sent 'Intermediate file.pdf' (See Exhibit UOS07) (Page 10) (before redactions) that contained the unredacted document to highlight what redactions had been applied and that these concerned third party personal information, so the ICO could determine what was reasonable. I will serve a set of closed exhibits which show the intermediate file was the disclosure and is already in the Open Bundle at C31.*
10. *The purpose of an Internal Review is to reconsider the original FOI, the response provided, and the searches carried out for the information requested. While gathering evidence for the ICO Investigation, I did look at both the original FOI and the Internal Review files to see what searches were undertaken, who was contacted and what they were asked to search. I also spoke with Ms Ferguson who confirmed the information provided was all the information available at that time.*



11. *I saw from the FOI case file that the searches were undertaken by Professor Woolgar (now Emeritus Professor) and Karen Robson, (Head Archives and Special Collections), both of whom have worked with the Broadlands Archive since the material arrived at the University. I saw that Ms Robson had confirmed through a search of her email inbox and checking notes from her diary, that the only documentation she held was what she had passed to Ms Ferguson (See Exhibit UOS01) (Page 1).*
  
12. *I also saw that Professor Woolgar had provided an email with attachments that he had sent to Ms. Baldock prior to this matter in relation to an FOI the Appellant had submitted in June 2022 concerning a Cabinet Office visit that took place on 15 March 2018, (with reference to G01091) the day after the Royal Household visit on 14 March 2018 (See Exhibit UOS03) (Page 4). I could see from the emails in the file and the disclosure made that information relating to the Cabinet visit on the 15 March 2018 had been excluded by Ms. Ferguson as it was not considered relevant, and in any event the Appellant had already received the disclosure. It was clear by the email from Ms. Ferguson to Professor Woolgar of 6 December 2022 (See Exhibit UOS02) (Page 2) that the search terms used were: the name of the individual who made the visit, 'Royal Household' and a reasonable time frame had been provided either side of the date of the visit. I could see from the file that the Internal Review had been approved by Wendy Appleby (VpOps).*
  
13. *While collating the information for this statement I discovered that the 3 April 2023 email sent by the ICO had been received (See Open Bundle D42), but it was misfiled. It contained the reference number G01550 which related to the Internal Review and had since been closed. The email should have been filed under reference number G01794 which related to the ICO investigation. I accept it was an oversight on our part and apologise on behalf of the University. For that reason, at the time, I had not had sight of the 3 April 2023 email when I wrote to the ICO on 17 May 2023 as referred to in paragraph 6 above.*
  
14. *On 25 May 2023 the Information Governance team received the ICO Decision Notice upholding the University's Internal Review decision. (See Open Bundle A2).*

## **The Second Decision Notice - EA/2023/0293:**

### **Request and Response:**

42. On 29 January 2023, The Appellant wrote to the University of Southampton (“the University”) and requested information in the following terms:

*- “Please supply the full Council minutes relating to the FTT case and my FOI requests to Southampton re the Mountbattens, plus all information relating to discussions thereon at Council meetings.”*

43. In its response on 24 February 2023, the University stated that it held information relevant to the request. The Council provided excerpts from the minutes of three University Council meetings in which there were references to the Appellant’s First Tier Tribunal case and FOIA requests. The Appellant disputed that this was all the information held by the University.

44. Following an internal review, the University wrote to the Appellant on 14 March 2023. The University stated that it had provided all the information it held.

### **Complaint and Decision Notice:**

45. The Appellant made a complaint to the Commissioner on 15 March 2023. The Commissioner considered that the scope of his investigation was to determine if the University has provided all the information it holds in scope of the request. In the course of the appeal, the Appellant made various further complaints many of which were not material to the issues before us. We have focused on the material complaints.

46. The Commissioner concluded in his Decision Notice that, with no further

evidence to the contrary, the University has provided the information it holds and complied with its obligations under s.1 FOIA.

**Grounds of Appeal:**

47. In his substantive and material grounds of appeal, the Appellant argues that further information in scope should be held by the University on the following grounds:

- (i) The Commissioner maintains his position as set out in his Decision Notice. Generally, the Commissioner relies on the Decision Notice as setting out his findings and the reasons for those findings. The Commissioner nevertheless sets out below his observations in respect of the Appellant's GOA. It is more likely than not that there were discussions at the Council meetings about the FTT case given that the case was high-profile and costly case for the University.
- (ii) Council members could have been expected at the meetings to challenge the decisions taken on the case.
- (iii) It is likely that the Secretary's notes of the discussions at the meetings to compile the minutes would have been retained.
- (iv) It is likely that the minutes would have recorded discussions concerning the proceedings brought by the Information Commissioner to certify the University for non-compliance with an information notice relating to a FOIA request by the Appellant to the University.

**Commissioner's Response:**

48. The Commissioner repeats, the question before this Tribunal is not whether the University should hold the information within the scope of the request but whether it did in fact hold information within the scope of the request on the balance of probabilities at the time of the request in accordance with the test set out above.

49. The Commissioner draws attention to the fact that the FOIA does not require public authorities to generate information or to answer questions, provide explanations or give opinions, unless this is recorded information that they already hold.
50. The University has provided in response to the request the information it does hold contained in the minutes. There is no evidence of subterfuge and no obvious motive, therefore, for suppressing information within the minutes of information falling within the scope of the request.
51. The University advised the Appellant in its email dated 14 March 2023 (in its response to the request for an internal review) that the case before the FTT was “...very much an operational matter and therefore not a subject on the Council agenda”. What the Commissioner understands by the phrase “operational matter” is that is a matter which was, at that time, continuing to be handled by a department of the University (in this case the legal department). Whilst there was likely to have been internal discussions (some of which would be the subject of legal professional privilege) between the University’s in-house legal team and internal clients in the University concerning the appeal to the FTT, the Appellant’s FOIA requests and the contempt proceedings also referred to by the Appellant, it was equally understandable that such matters would not necessarily be required to be a subject on the Council’s agenda each meeting.
52. It is submitted that the Commissioner was correct in accepting, on the balance of probabilities, that the University did not hold further information in scope. In the Tribunal’s decision in *Bromley* the Tribunal had accepted that it was rarely possible to say with absolute certainty that a public authority did not in fact hold requested information somewhere in its records, but that, provided a search had been undertaken which was sufficiently rigorous, and the information had still not come to light, it was to be regarded, on the balance of probabilities, as not held for the purposes of FOIA.

53. On the facts of this case, it is argued that the request is concerned only with the content of minutes of meetings of the Council and information held regarding the discussions at the Council meetings. The Council has provided to the Appellant extracts from the minutes which fall within the scope of the request. There is no evidence of subterfuge and no obvious motive, therefore, for suppressing information in scope.
54. The Appellant's arguments appear to be based upon a questioning of the administrative practice of the University, alleging that the notes taken at the meeting are not adequately reflected in the minutes. However, how the minutes of the University's meetings are compiled is not a matter within the jurisdiction of the Commissioner or this Tribunal. In *Clyne*, the Tribunal was satisfied that a gap in the public authority's documentary records reflected 'inconsistent and poor administrative practice' but this did not amount to a breach of FOIA.
55. Further, Wikely J in *Commissioner of Police for the Metropolis v Information Commissioner and Mackenzie* [2014] UKUT 479 (AAC) held that "FOIA is not a means of reviewing a public authority's record-keeping and in some way testing it against best practice" (at [37]).
56. Even if further discussions did occur following the issue being raised in the meetings and those discussions are not minuted (and even if it such discussions should have been minuted), then no further recorded information would be held for the purposes of FOIA.
57. In light of the above, the Commissioner submits that he was correct, to conclude, on the balance of probabilities that no further information was held within the scope of the Appellant's request and therefore remains satisfied that the University has satisfactorily complied with its duty under section 1(1) FOIA.

58. The Commissioner maintains that he was correct to concluded in his DN that the University, at the time of the request, did not hold further information (other than the information disclosed in response to the request) falling within the scope of the request. The Commissioner accordingly invites the Tribunal to dismiss the appeal.

**The Second Respondents position:**

59. Concerning the scope of the search carried out by the University, the University relies on the witness statement of Henry Daggenhurst (“HD”) served on 26 January 2024.

60. The University did not seek clarification of the Appellant’s FOI requests because it was objectively clear to it that the Appellant sought the minutes and all information relating to discussions held at the Council of the University concerning the FTT case referred to, and in his FOI requests.

61. The University refers to *Berend v Information Commissioner & London Borough of Richmond upon Thames* (EA/2006/0049 & 0050) (para.86), where the Tribunal was satisfied that: *“the request should be read objectively by the public authority, there is no requirement to go behind what appears to be a clear request, the Tribunal is tasked to consider the request in the terms in which it was phrased.”* The University also observes that the Tribunal adopted the Berend decision in *King v Information Commissioner* EA/2010/0126: *“A public authority need not look for other possible readings of a seemingly clear request or check previous correspondence: it should be able to take the request at face value.”*

62. The University notes that Harry Dagenhurst directly approached the Clerk to Council for the required information. The University submits that this complies with paragraph 1.12 of the Freedom of Information Code of Practice, which states: - *“...These searches should be conducted in a reasonable and intelligent way based on an understanding of how the public authority manages its records. Public authorities should concentrate their efforts on areas most likely to hold the requested*

*information.”*

**63.** Concerning the search terms, the University observes that:

- a) The initial search term ‘Mountbatten’ returned 12 documents but none of these were relevant as they related to a fire that destroyed the University’s Mountbatten that the search carried out by the University’s Governance department was not time restricted to the timeframe linked to the Appellant’s requests or of the Tribunal.
  
- b) HD requested that additional searches using the terms ‘Broadlands’ and ‘Lownie’ be conducted. This returned 8 documents (see paragraph 7 of HD’s witness statement). Harry Dagenhurst then examined each document and found only 2 documents contained information relevant to the Appellant’s request. The first document contained the minutes of a Council meeting held on 26 May 2021 (paragraph 8 of HD’s witness statement) and the second document contained the minutes of a Council meeting held on 24 November 2021 (paragraph 8 HD’s witness statement). Having considered these minutes, Harry Dagenhurst identified reference to additional documents, namely the Vice-Chancellor’s reports, which appeared to contain information relevant to the scope of the Appellant’s request (paragraph 10 HD’s witness statement).
  
- c) Harry Dagenhurst called for and received copies of the University’s Vice-Chancellor’s reports for May 2021, October 2021 and November 2021. The reports for March 2022 were also provided (paragraph 11 HD’s witness statement). He read through these reports and extracted the information relevant to the Appellant’s request and provided the response to the Appellant.

**64.** The University submits that it is not required to leave every stone unturned in

its search for information and as per *Linda Bromley v Information Commissioner and the Environment Agency* the searches it conducted were carried out “with the appropriate rigour and competence”.

65. The University also draws attention to *Andrew Preston v Information Commissioner* [2022] UKUT 344, where in quoting *Bromley*, the Upper Tribunal stated: “The Tribunal has consistently applied the balance of probabilities when approaching this question: 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 IC and London Borough of Lambeth EA/2011/0190* at [21]-[22]. 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]) ...”.

**Witness Statement: Harry Dagenhurst in EA/2023/0293 (26 January 2024):**

66. Harry Dagenhurst, employed by the University as Information Governance Adviser, provided written witness evidence to the Tribunal. For the avoidance of doubt, such repetition is for the sake of emphasis in that the Tribunal found this evidence crucial to the issues on the adequacy of searches to be determined herein, we cite in full this evidence as follows:

*“Scope and receipt of request*

2. *On 29 January 2023 at around 14:39, the Information Governance team received the following request from the Appellant through its case management portal: “Please supply the full Council minutes relating to the FTT case and my FOI requests to Southampton re the Mountbatten’s, plus all information relating to discussions thereon at Council meetings.” The request was classified by the Appellant as a SAR and was logged in the case management system with reference G01679.*

*A few minutes later (at around 14:42 on 29 January 2023) the Appellant submitted a request for the same information as before, but this time classified as a FOI request. The request was logged in the case management system with reference G01682 (See Exhibit HD01) (Page 1).*



*On 30 January 2023 at 08:43, I approved the submission of the second request (G01682) (See Exhibit HD02) (Page 2). At 08:53 on the same day, I rejected the first request (G01679) on the basis that it was a duplicate of the second (G01682).*

#### *Scope of search*

- 3. The Appellant is well known to me: on 24 February 2023, in response to a related request (G01683, submitted on 29 January 2023) from the Appellant for "full details of Southampton's costs relating to the FTT case and my FOI requests to Southampton re the Mountbattens", I calculated that, since May 2017, the University had logged 55 cases to deal with the Appellant's various requests and complaints. Accordingly, upon receipt of the request that was logged with reference G01682, I had an informal discussion with Lee Abraham (Clerk to Council, the governing body of the University) to inform him that the request had been received and to ask if the FTT case had been discussed at Council. Although I did not make a contemporaneous note of our conversation, my recollection of our conversation was that the FTT case was not put formally on the agenda or discussed, but mention was made of it.*

#### *Search terms*

- 4. On 20 February 2023 at 09:57, I emailed Mr Abraham. I referenced our informal conversation, and I asked him to send me relevant excerpts from any meetings where the Appellant was mentioned (See Exhibit HD03) (Page 3).*
- 5. On the same day at 10:54, Mr Abraham asked Rosie Newey (a colleague) by email, copy to me, to search for "Mountbatten" in Council minutes and to let me have copies of anything that might be returned (See Exhibit HD03) (Page3).*
- 6. Later that day at 14:56, Ms Newey sent me a link to a folder that contained the results of the search (See Exhibit HD04) (Page 5). The search returned 12 documents (11 PDF files and 1 Word document). I examined each document, and I determined that none was relevant to the Appellant's request: references to "Mountbatten" related to a fire that destroyed the University's Mountbatten building in 2005 and to the subsequent rebuilding project. I informed Ms Newey of this by email at 17:22 and I asked her to search under 'Lownie' or 'Broadlands' (See Exhibit HD04) (Page 5). I used the search term 'Lownie' because it would return any instance of the Appellant's name in the*

*Council minutes. I used the search term 'Broadlands' as it would return any instance of the word "Broadlands" and any reference to the University's acquisition of the Broadlands Archive (of which the Mountbatten Diaries were only a part) in the Council minutes.*

- 7. On 21 February 2023 at 10:36, Ms Newey sent me a link to a folder that contained the results of the new search (See Exhibit HD05) (Page7). The new search returned 8 documents (5 PDF files and 3 Word documents). I examined each document, and I determined that only 2 documents contained minutes of meetings that were relevant to the Appellant's request.*
- 8. The first document (006 May 2021 mins.docx, which contained the minutes of a Council meeting held on 26 May 2021) minuted (in Minute 80) that "Council noted highlights from the April and May 2021 editions of the Vice-Chancellor and Executive report." and also that the Vice-Chancellor highlighted "The University's involvement and obligations related to the Broadlands Papers archive".*
- 9. The second document (003 Council Minutes Nov 2021 (Approved).docx, which contained the minutes of a Council meeting held on 24 November 2021), minuted (in Minute 28) that "Council noted highlights from the October and November 2021 editions of the Vice-Chancellor and Executive report" and also that the Vice-Chancellor highlighted "A recent legal matter involving the Broadlands archive".*
- 10. I replied by email to Ms Newey on the same day at 11:30 to inform her that Minute 80 (from the minutes of the Council meeting held on 26 May 2021) and Minute 28 (from the minutes of the Council meeting held on 24 November 2021) would be of interest to the Appellant (meaning relevant to the scope of his request) and I asked whether there would be any more detail in the Vice-Chancellor's and Executive reports that were referred to in those minutes (See Exhibit HD05) (Page 7).*
- 11. Ms Newey replied by email to me on the same day at 11.57 and provided me with copies of (i) UoS VC & Executive Report May 2021.pdf, (ii) UoS VC & Exec Report Oct 2021.pdf, (iii) UoS VC Exec Report Nov 2021.pdf. Ms Newey noted that there was no*

*reference to the [Broadlands] archives in either the October 2021 or the November 2021 report, but she noted that the March 2022 report mentioned it [sic] in detail, so she also attached a copy of (iv) UoS VC and Exec Report March 2022.pdf (See Exhibit HD06) (Page 9).*

12. *I reviewed the documents that Ms Newey had sent me, and I replied by email on the same day at 12:27 to Ms Newey. I confirmed that I could not find any reference to Broadlands in either the October or the November edition, and I suggested that the the Appellant will "find it odd that the VC highlights a recent legal matter at the November Council meeting, but neither the October nor the November edition of the VC's report references this." I also surmised that the Appellant would query why we had not provided the April 2021 edition of the Vice-Chancellor's report, given that it was explicitly referenced in minute 80 of the May 2021 Council meeting. I then asked Ms Newey for a copy of the April [2021] report to be provided to me or for confirmation that it contained no mention of either Broadlands or the Appellant (See Exhibit HD07) (Page 11).*

13. *Based on the information that I had received to date; I drafted a response to be sent to the Appellant. The response was sent by email on 24 February 2023 at 19:18. The email contained a cover note: the substantive response was contained in a PDF file attached to the email (G01682.pdf, a copy of which is attached as Exhibit HD08 Page 14).*

14. *The substantive response included only what was relevant to the Appellant's request, namely: excerpts from (i) Minute 80 (of the Council meeting held on 26 May 2021), (ii) Minute 28 (of the Council meeting held on 24 November 2021), and (iii) the March 2022 edition of the Vice-Chancellor's report. I did not attach copies of the full minutes, nor did I attach a copy of the March 2022 report as the information relevant to the Appellant's request was already provided in the excerpts referred to above.*

## **Discussion and Conclusions:**

67. As stated, the Tribunal find the evidence provided by the witnesses' helpful.

The witness statement from Henry Daggenhurst dated 26 January is

particularly helpful in all material grounds of appeal before us – and we find accordingly as follows.

68. In Appeal 0293 – the request is for ‘... full Council minutes relating to the FTT case and my FOI requests to the University re the Mountbattens, plus all the information thereon at Council meetings’ . The University replied with excerpts from the minutes of three University Council minutes which referred to the Appellant’s FTT case and FOIA requests.
69. The witness statement from Henry Daggenhurst provides comprehensive details about the initial search terms which were used, how he had examined the responses which these searches located and found none of them were relevant to the request. He initiated additional searches which were then carried out and explained what he had found in those searches which were relevant to the request. These were the minutes of the Council meetings so a request was made for any more relevant details which might be held in the reports referred to in the Minutes. These were provided to the Appellant (see OB C33).
70. The Tribunal cannot see that there are any additional searches which the University could have made to find relevant information.
71. The submissions on behalf of the University by Letita Baldock dated 26 January 2024 effectively round up the University's' Response and although it seems to refer only to EA/2023/0295 – we find it probably does cover both appeals.
72. We find the submissions by Letitia Baldock dated 26 Jan 2024 relating to 0293 (EA/2023/0293 Key Docs, pdf 018260124 UOS Reply to Lownie pdf) covers briefly what Henry Daggenhursts’ statement of the same date explained in relation to the searches, as well as helpfully explaining the role of the University Council.

73. While the Tribunal could not find one dated 26 January 2024 relating to appeal 0295, we did find the Request for Directions, Consideration of an Application and Preliminary Response ... from Letitia Baldock dated 20 February 2024 which is relating to 0295 - this can be found at EA/2023/0295 Key Docs 017 200224 UOS\_prelim.resp.pdf. The searches carried out by the University to locate information relating to the royal visit on 14 March 2018 are covered by Sophie Ferguson in her first statement EA/2023/0295 Key Docs 019a 220524 Sophie Ferguson - First witness statement - signed.pdf and supported by EA/2023/0295 Key Docs 019 220524 Liam Jackson - First witness Statement - signed pdf.

**Consolidation:**

74. We are satisfied that in the interest of saving time and costs, both appeals EA/2023/0293 & 0295 should be consolidated in that one Judgment can cover both appeals. The facts are sufficiently similar and relate to the same parties. It is therefore expeditious and efficient to do so. We find that they can be combined in one judgement as both relate to no 'additional information held'.

75. In relation to the appeal 0295-scope point which the Commissioner covers in his. Response at page A20/2, we agree with the Commissioner that the wording of the request is such that it does not include any follow up visit.

76. Accordingly on the evidence before us in relation to both appeals, (0293 & 0295) the Tribunal cannot see that there are any additional searches which the University could have made to find relevant information. The witness statements provided to us have given us evidence by way of clear explanation of the comprehensive searches undertaken by the University. Accordingly, we are now satisfied that if there had been additional relevant information in scope held, these searches would have located it.

77. In relation to the S40(2) point which is covered at A24/25, it is not clear that this issue is appealed but we do address it for the avoidance of doubt –and we find the only redaction is the name of the visitor from the royal household.

78. Again, and for the avoidance of doubt, the Tribunal has received information contained within a Closed Bundle which includes disputed Information. The disputed information will be held, pursuant to rule 14(6), on the basis that it will not be disclosed to anyone except the Information Commissioner. To do otherwise would defeat the purpose of the proceedings. This permits a party to edit a document to prevent disclosure of disputed information; it is however the Tribunal’s decision whether a party may place documents before the Judge/Panel but withhold them from one of the parties.

**On-going duty under rule 14:**

79. The duty to ensure fairness in dealing with closed proceedings is a dynamic one. Nothing I am saying at this stage is intended to limit the ability of the Panel to act compliantly with *Browning* when considering the appeal.

80. Any application in respect of Rule 14 should be made promptly.

81. On consideration of all the evidence and material submissions before us we can find no error of Law, nor error in the exercise of the Commissioners’ discretion in the Commissioners Decision Notices under appeal herein and we must dismiss both appeals.

Brian Kennedy KC.

16 September 2024.