



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

Appeal Reference: EA/2020/0352

Before

**JUDGE BUCKLEY
DAVID WILKINSON
GARETH JONES**

Between

SELBY AREA INTERNAL DRAINAGE BOARD

Appellant

and

THE INFORMATION COMMISSIONER

First Respondent

DECISION

1. For the reasons set out below the Tribunal allows the appeal in part and substitutes the following decision notice.

SUBSTITUTE DECISION NOTICE

Organisation: Selby Area Internal Drainage Board
Complainant: Mr Crooks
Substitute Decision Notice – ref IC-46142-Q5J6 and IC-46193-N9P2

For the reasons set out below the Selby Area Internal Drainage Board ('the Board') breached s 1(1) of the Freedom of Information Act 2000 (FOIA) because it advised Mr Crooks that it held no information within the scope of his requests of 21 October 2018 and 17 February 2019 when it did hold some information within the scope of the requests which it had not communicated to him.

The Board breached s 10(1) FOIA as it did not communicate to the claimant the relevant information that it held within 20 working days of the requests.

The Board is required to take the following step to ensure compliance with the legislation:

If it has not already done so, communicate to Mr Crooks the information for the period up to the date of Mr Crook's second request contained in the document entitled 'Selby Area IDB Minutes Summary' that the tribunal has determined falls within the scope of the requests in paragraphs 56 and 61 below.

REASONS

Introduction

1. This is an appeal against the Commissioner's decision notice dated 12 November 2020 which held that:
 - 1.1. The Selby Area Internal Drainage Board ('the Board') breached s 1(1) of the Freedom of Information Act 2000 (FOIA) because it advised Mr Crooks that it held no information within the scope of his requests of 21 October 2018 and 17 February 2019 when it did hold some information within the scope of the requests which it had not communicated to him.
 - 1.2. The Board breached s 10(1) FOIA as it did not communicate to the claimant the relevant information that it held within 20 working days of the requests.
2. The Commissioner required the Board to communicate to Mr Crooks the information for the period up to the date of Mr Crook's second request in the document described at para 35 of the decision notice as 'the minute document', redacting any personal data.
3. Although the claim was listed for a CVP hearing, the Board informed the tribunal shortly before the hearing that it consented to the matter being determined on the papers. The Commissioner had already consented to the matter being determined on the papers. In the light of this the tribunal decided that it was in the interests of justice to determine the matter without a hearing.
4. After the panel deliberations some missing documents were requested by the tribunal and provided by the Commissioner. Further the parties were given the opportunity to provide additional submissions on the issue of the scope of the request and the Commissioner provided additional submissions dated 20 July 2021.

5. The panel then carried out a further discussion to consider the additional documents and additional submissions.

Factual background to the appeal

6. The request arises out of the treatment of pieceworkers engaged by the Board from 1984 onwards. It is not necessary for the purposes of this appeal to set out the nature of the dispute.

Requests, Decision Notice and appeal

First Request (21 October 2018)

7. On 21 October 2018 Mr Crooks made an information request via the website "What Do They Know?" in the following terms:

Dear Selby Area Internal Drainage Board,

I ask that all Board members ask that the answers to the following questions be considered, decided and provided by the Board in full and open session, and for them to know that I only need to ask this because all of these questions remain unanswered after fifteen years of asking. A full account of exactly why this action is necessary has been sent to every Board and SDC member, also to every rate payer, business, and politician in the Board's area.

Numbered evidential material can be found at the "The Selby Secret @ weebly.com, then at "Moore" and the at "The Wall of silence IDB."

1/ I refer to the Board's Clerk's letter to the District Auditor as shown at (1). Why was the actuality of piece worker treatment omitted from the Board's minutes 1982 to 2003? Will the full Board, in full and open session, consider and decide the reason for these omissions?

2 Prior to 1984 all in the pay of the Board enjoyed the annual "Staff" cost of living wage award. The piece workers agreed and accepted this wage award with the Board's Foreman. This constituted a verbal contract. In 84 this contract was broken in that the piece workers began to be denied any cost of living wage award whatsoever, this whilst weekly paid workers and management continued to enjoy the yearly cost of living wage award. Will the full Board, in open session, consider and decide what party authorised this discriminatory treatment, and where is this decision recorded?

3 In the years following 84 the piece workers were allowed just five meagre, randomised, wage awards, the damaging effect of which may be easily evidenced by mathematical calculation only. Such a procedure could not be reduced to any contract form for the Board to consider or decide. As no contract could therefore exist for the Board to consider or decide, how then can the Board,

as a legal entity, know of the workers treatment from 84 to 03? Given all the above, will the Board, in full and open session, consider and decide the extent of the Board's knowledge of its contractual relationship with the pieceworkers 84 to 03?

4? Will the Board in full and open session consider and decide why, when the Inland Revenue was "Brought in" in 2003, were they not told that the piece workers had no contractual relationship whatsoever with the Board at that time, or for any of the previous nineteen years?

5 I asked the above questions from 2003 onwards, until a hospital surgeon joined the Board and raised these same matters with all authorities. These questions, however, have never been answered. Rather, I then began to be asked to make a "Claim" of the Board as at (2) and (7). Over some two years I responded, as I do now, by asking "What party authorised this "Claim," to what does this "Claim" refer, and does this "Claim" apply to all other workers also?" How can I be expected to "Claim" without being told why I am "Claiming?" I therefore ask that the full Board, in open session, considers and decides what party asked me to "Claim" and why.

6 I refer you to the letters at (9) From Cllr [redacted] and at (13) from the Board solicitor. Bearing in mind that matters re persons' rights cannot be delegated, must be considered and decided before the full Board, I ask: what decision of the Board authorised the Board's solicitor to advise Board members not to contact me, on pain of legal action? What decision of the Board authorised the solicitor, as at (13) to invite me to a meeting to discuss an unspecified matter, and, that if I did not comply in this, then any further contact is forbidden? What decision of the Board authorised the solicitor to contact me in the first instance? Have my concerns re all of this ever been the subject of open consideration and decision by the full Board? If they have been so considered and decided, what was the date and what was the decision? I therefore ask that all of these questions be considered, decided and answered by the Board in full and open session.

7/I also refer you to the submission made by Cllr [redacted], as at (8) at the above reference, in which he asked for all of the above matters to be considered by the full Board, to the end that restitution should be made to the piece workers for the damage suffered. Why was this submission not put before the full Board, and what party placed this "In the hands of the Board's solicitor," where it presumably remains to this day? I ask that this be considered, decided and answered by the full Board in full and open session.

8/As aforesaid, between 84 and 03 the piece workers were allowed only five meagre wage awards at randomised intervals. The District Auditor at (4) describes this treatment as being that the Finance Committee considered "Requests for increases by contractors and peace workers when they were made." This describes the actuality of our situation as workers, in that we actually had to beg for any wage increase when times became really hard. Here the District Auditor describes the treatment of serfs, rather than free men. This raises the question "What attribution of employment status is given to a serf?" And, as follows "What act of consideration and decision of the full Board

attributed what employment status to the Board's pieceworkers 84 to 03?" The piece workers treatment here can also be evidenced by the workers themselves and the Board's present Foreman. I ask that this be considered, decided and answered by the full Board in open session.

9/ Given the treatment of the piece workers as described above, how could the Board, as a legal entity, either agree a contract with or attribute any employment status to these workers between 84 and 03? Will the full Board, in open session, consider and decide as to what should have been the proper attribution of employment status to the piece workers 84 to 03?

10/ in 2004, the District Auditor sent a list of questions to the Board's Clerk, this as at (14). According to the Auditor, these questions were distributed to all Board members. These questions were never answered. With these questions sent to every Board member? If these questions were not sent to every Board member, what was the reason for this? I asked that this be considered, decided and answered by the full Board in open session.

11/ Over the past fifteen years I have myself sent many questions to all Board members and management for consideration and decision, many of these via Nigel Adams MP. Why were none of these questions ever answered? I ask that this question be considered, decided and answered by the full Board in open session.

Second request (17 February 2019)

8. Mr. Crooks made the following request via the website "What Do They Know" on 17 February 2019:

Dear Selby Area Internal Drainage Board,
(17)

This as [sic] sent to the Board's solicitor and all Selby Area Internal Drainage Board members.

Dear Mr Ware

As you leave some doubt as to whether you saw my communication with the Board of 13 January, I will begin again. All numbered references may be found at <https://theselbysecret.weebly.com>

You are termed "The Board's solicitor." In this capacity your client is the Board as a legal entity, and you thus owe a duty of care to this entity, to all constituent parts of the Board, and to the public at large. In order to fulfil your brief to supply me with relevant documents, you must necessarily acquaint yourself entirely with all of this matter. I therefore ask for your help and seek to inform your opinion.

The origin of all this matter lies in the fact that, from 1984 to 2003 the piece workers wage rates were more than half. This injustice came about because

Board members thought that the piece workers always enjoyed the annual “Staff” cost of living wage award, and the piece workers, on the other hand, believed that the Board members were voting every year to cut their wage rates. Thus both members and workers were denied the truth. This state of affairs has been compounded because contact between workers and Board members has been forbidden, as at (9) and (13)

So, between 1984 and 2003 the piece workers of Selby IDB were brought almost to pauperisation by being denied any cost of living wage award. The crucial question here, and the one which no one will answer is “What party authorised this bizarre situation?” here I refer you to a specific document as at (1) and ask you to verify this by consulting the minutes on which it is based. I ask to see same if these differ from (1).

It will be seen that the Clerk tells us that no minuted record whatsoever was made of piece worker treatment between 1982 and 2003. I am led to understand that Boards are required by law to have minutes taken, which must provide a record of motions, votes and abstentions. I ask you then, as a solicitor, was any offence committed here? If so, what was this offence? Also, if no legal record of the piece workers’ treatment exists, how can your client, the Board as a legal entity, know of this part of its own business from 82 to 03? I also ask to see any document which informed the Board, as a legal entity, of the actuality of piece worker treatment 1982 to the present date. If these concerns are answered, many requests on the list which follows will be unnecessary, but this is up to you. As of now, I ask to see the minuted documents re the following decisions, which, as matters of persons rights, should, properly, have been made and recorded by the full Board.

1/ the decision to appoint your firm of solicitors to act for the Board in providing relevant documents.

2/ the 1984 decision to begin to deny the piece workers any annual cost of living wage award, this whilst the weekly paid workers and management continued to enjoy such an award. The randomised treatment which followed this decision as described below could not be reduced to any contract form for the Board to consider, therefore there was no contract to ratify and neither the Board nor any other party can know of the piece workers’ treatment.

3/ the decision taken at fourteen meetings between 84 and 03 to deny the piece workers any wage award whatsoever.

4/ the decision taken at five meetings between 84 and 03 to allow the pieceworkers a major award.

In 2003 both Board and Inland Revenue were told that the piece workers were contractors, this despite the fact that their randomised treatment, which began in 1984, denied them any contract status whatsoever.

I therefore ask to see.

5/ The decision to tell the Inland Revenue that the piece workers were contractors.

6/ The decision taken in 2003 to abolish contractor piece work, something which had not even existed since 1984.

As a result of this decision the police workers were put from their work for nine months without pay. In 2004 they were allowed to return to work, but without any explanation or apology. The Inland Revenue ruled that some piece workers had always been self employed in status, and others were employees, whereas in fact they all, at that time, had no employment status whatsoever.

I therefore ask to see.

7/ The decision in 04 to allow the piece workers to return to work without giving them any explanation or apology, and for their pay rates to be based on those of the late 1980s, as they are to this day.

8/ The decision made in 04 to offer the piece workers a contract for the first time since the 1984 decision to deny the pieceworkers a contract.

9/ The decision to ask me to "put in a "Claim" for "The Board" to consider, as conveyed to me by two consecutive Board members, as at (2) and (7), and to not offer any explanation as to why this "Claim" was necessary.

10/ The decision to place Mr Price's submission, which asked for piece worker treatment to be considered by the full Board, to the end that restitution should be made to them for damage suffered as at (8) "In the hands of the Board's solicitor" rather than be placed before the full Board.

11/ The decision made in 2004 not to answer the District Auditor's questions at (14) which asked all questions asked here fifteen years ago.

12/ The decision to distribute these questions to all Board members.

13/ The multiple decisions made to ignore submissions to the Board re piece worker treatment made by myself and Nigel Adams MP.

14/ The decision to advise Board members not to contact me, and to tell me not to contact Board members, on pain of legal action.

15/ The decision to appoint a solicitor to contact me as per the above decisions.

16/ The decision, as at (13), to authorise the solicitor to invite me to a meeting to discuss an unspecified matter, and, that if I did not comply in this, that any further contact would be forbidden on pain of legal action.

In all of this, please also bear in mind the Board's obligations to me as a "Whistle blower."

Response to the requests

9. On 26 December 2018 Mr. Crooks requested an internal review because he had not received a response.
10. On 3 January 2019 the Board's solicitor asked Mr. Crooks to provide specific details of the documents to which he wished to have access.
11. Mr. Crooks responded on 9 January 2019. He stated that the 'essence of his request' was to establish whether the Board 'does or does not know of its own business, as being the treatment of piece workers from 31st March 1982 to the present date'. He stated that the first document he required was '...the minuted reference to the Board being told of piece worker treatment at some time subsequent to 2003.' He then stated that he also asked for his FOI questions to be answered fully.
12. On 21 January the Board's solicitor wrote again to Mr. Crooks asking him to respond directly to the solicitor's firm to their request for clarification of the specific document that he required the Board to produce under FOIA.
13. On 31 March 2019, having made his second request, Mr. Crooks complained to the Commissioner about the failure to response to the first request. The Commissioner instructed the Board by email dated 12 May 2019 to respond to the first request.
14. The Board responded to both requests by letter dated 22 May 2019. In its response the Board's representative stated that:

..the current Clerk to the Board has made investigations and searches to obtain a copy of any Minutes of the like that you have requested for the period 1984 to 2003. Unfortunately, the Clerk has been unable to obtain a copy of any such Minutes...

So far as more recent events are concerned we are able to confirm the details of the following Minutes which have been recorded by the Board:-

Meeting 29th November 2018

Number 147 Freedom of Information Request

The Clerk reported on a freedom of information request which had been received and was authorised to refer the matter to the Board's legal advisor.

Meeting 31st Jan 19

Number 162 Freedom of Information Request

The Clerk confirmed that the matter was referred to the Board's legal adviser who had issued a response directly

15. Mr. Crooks requested an internal review. By letter dated 16 July 2019 the Board upheld its decision stating that it believed that 'the request for information that you have made previously have been answered.'
16. Mr Crooks referred the matter to the Information Commissioner on 21 July 2019.

17. During the Information Commissioner's investigation Mr. Crooks was asked what specific recorded information he was expecting to receive and he confirmed by letter dated 5 November 2019 that he was interested in 'decisions re our treatment as piece workers from 1984 to the present date'.
18. By letter dated 21 January 2020 the Commissioner asked the Board if the Board had carried out any searches for the period subsequent to 2003 and whether it was the Board's position that it did not hold any relevant information for that period.
19. On 3 February 2020 the Board's representative said the following in an email to the Commissioner:

...we have now obtained our client's further instructions. Our client has now produced to us the attached Minutes in respect of the meetings at which the issues of the piece workers terms and conditions were discussed after 2002. Would you please note that these have been redacted where appropriate in respect of rates of pay etc.
20. Attached to that email was a document entitled 'Selby Area IDB Minutes Summary', which appears to contain extracts or summaries of relevant sections of the minutes of the board meetings at which piece workers terms and conditions were discussed. The first extract/summary is from a meeting dated 28 May 2003 and the last is from a meeting dated 28 November 2019.
21. The Board was asked by the Commissioner in a number of emails (including those dated 3 February 2020 and 12 July 2020) whether it held copies of the minutes summarised in the minutes summary.
22. By email dated 21 August 2020 the Board clarified that it did hold those minutes, but it had understood the original complaint to relate to minutes and notes of meetings which took place up until 2003 and therefore the minutes used to produce the summary sent to the Commissioner had not previously been released to Mr. Crooks.
23. The Commissioner's reply dated 25 August 2020 indicated that it seemed that the Board did hold information relevant to the requests, in the minutes from 2003 onwards.
24. A telephone discussion then took place between the case officer and the Board's solicitor on 10 September 2020, which is referred to in a letter from the case officer dated 22 September 2020. The letter states: 'In the course of our conversation it became apparent that it wasn't clear what recorded information Mr. Crooks was expecting to receive through his two sets of requests. I advised that, under section 1(3) of the FOIA, a public authority isn't obliged to comply with a request if it's not completely clear what information it is that is being requested. You told me that you would contact [Mr Crooks]... with a view to clarifying and confirming with

him exactly what recorded information it is that he is seeking. If the Board remains unclear what information is being sought and considers that it cannot comply with the request(s) for that reason, it should advise Mr Crooks that he can pass the matter to the Commissioner for her decision.'

25. The case officer repeated this in a letter dated 21 October 2020, in which she stated:

..as far as the two sets of requests... are concerned, after discussing them it became clear that neither of us are quite sure what recorded information it is that Mr. Crooks is seeking through those requests. I advised that the Board isn't obliged to comply with a request that isn't clear.

...

...I suggest that the Board advises Mr. Crooks that, having discussed these two request, neither the Board nor the Commissioner is clear what recorded information is that he's requested. You could then ask him to clarify those requests ie what recorded information is it that he's expecting to receive? In order to comply with section 16 of the FOIA (advice and assistance) you could suggest to Mr. Crooks what you think he's requested and allow him to agree or disagree with that interpretation. But again, the Board isn't obliged to comply with any request which isn't crystal clear about what recorded information is being requested.

So, if you let me know that you've written to Mr. Crooks in the week (and before **Thursday 29 October**) I'll then write to him. I'll confirm that:

- You've written to him
- The Commissioner agrees that the requests of Oct 18 and Feb 19 aren't clear
- You've asked him to clarify those requests and he should do so if there's specific recorded information he's seeking
- These two complaints will be closed; and
- That if he remains dissatisfied once the Board has responded to any clarified request and he has been through its internal review process, then a new FOIA case can be opened to deal with that.

26. However, on 29 October 2020 the case officer wrote to the Board's solicitor stating that she had become aware of a letter from Mr. Crooks to the Commissioner dated 8 June 2020 which she needed to take account and 'plot a way forward in response to that'. In response the Board's solicitor indicated that he would withhold sending his own letter to Mr. Crooks pending further information from the case officer.

27. On 30 October 2020 the Commissioner wrote to Mr Crooks and stated:

I appreciate that you consider that your requests (...) are clear, but it has been less clear to the Board and I what specific, recorded information it is that you are seeking.

...

Both the Board and I need to be clear about what information you are seeking under the FOIA in order to progress your cases. Therefore, in order to conclude the cases as soon as possible I have carefully reviewed your requests again. Below I have summarised what I have identified can be categorised as valid FOIA requests:

Request 1 -21 October 2018

2/ A Board minute from 1984 that records the decision to change piece workers terms and conditions

Request 2- 17 February 2019

1/ A Board minute that records the decision to appoint a firm of solicitors to manage FOIA requests sent to the Board

3/ A Board minute from between 1984 and 2003 that records the decision to change piece workers' terms and conditions

4/ A Board minute from between 1984 and 2003 that records decisions made about the piece workers' pay award

5/ A Board minute from between 1984 and 2003 that records the decision to tell the Inland Revenue that piece workers were contractors

6/ A Board minute from 2003 that records the decision to stop contractor piece work

7/ A Board minute from 2004 that records the decision that piece workers return to work with pay rates based on those of the late 1980s

8/ A Board minute from 2004 that records the decision to offer piece workers a contract for the first time since 1984

10/ A Board minute that records the decision to put 'Mr [redacted]'s submission to a solicitor rather than to the Board

11/ A Board minute from 2004 that records the decision not to answer District Auditor's questions

12/ A Board minute [from 2004] that records the decision to distribute the District Auditor's questions to all Board members

13/ Board minutes that record the decision not to act on submissions to the Board made by Nigel Adams MP.

28. The case officer asked Mr. Crooks to contact her by 6 November 2020 if he considered that her interpretation of what he was seeking was not correct, and informed him that otherwise she would investigate with the Board and come to a final decision on whether the Board holds the information based on the interpretation above. This letter was copied to the Board's representative by email dated 30 October, stating that the letter summarised those parts of the two sets of requests that the case officer has identified as valid requests for information under the FOIA. The letter states 'It would be helpful if you could 'review the above parts of the requests and consider/reconsider the Board's response to these in the meantime'.

29. The case officer wrote again to the Board's representative by letter dated 9 November 2020, indicating that she had not had a response from Mr. Crooks. She stated that she intended to prepare the decision notice based on what she considered to be a reasonable interpretation of his requests, and asked two questions, including asking the Board to confirm that it no longer held minutes for the period 1984 to 2002. The other question fell away later that day and the case officer stated by a further email dated 9 November that she would proceed on the basis that it no longer held those minutes if she did not receive confirmation from the Board within the next couple of days. In the absence of a substantive response

from the Board the Commissioner proceeded to issue the decision notice on that basis on 12 November 2020.

Decision Notice

30. In a decision notice dated 12 November 2020 the Commissioner decided that:
 - 30.1. The Selby Area Internal Drainage Board ('the Board') breached s 1(1) of the Freedom of Information Act 2000 (FOIA) because it advised Mr Crooks that it held no information within the scope of his requests of 21 October 2018 and 17 February 2019 when it did hold some information within the scope of the requests which it had not communicated to him.
 - 30.2. The Board breached s 10(1) FOIA as it did not communicate to the claimant the relevant information that it held within 20 working days of the requests.
31. The Commissioner required the Board to communicate to Mr Crooks the information for the period up to the date of Mr Crook's second request in the document described at para 35 of the decision notice as 'the minute document', redacting any personal data.
32. The Commissioner stated that in the course of the investigation a small amount of information was identified which fell within the scope of part 1 of the second request. The information was published on the Board's website and therefore the Commissioner had removed part 1 of the second request from the scope of her investigation.
33. The Commissioner recorded that Mr. Crooks had not responded to a request on 1 November 2019 to let the Commissioner know what specific recorded information he was expecting to receive from the Board when he submitted the two requests. 'In the absence of clarity' the Commissioner had reviewed the two requests and summarised in her letter of 30 October 2020 her understanding of what recorded information the complainant was seeking (set out above). In the absence of a response from Mr. Crooks she proceeded on that basis.
34. In para 25 the Commissioner records that the requests concern decisions recorded in Board minutes. Mr. Crooks has referred to the period 1984 to 2004 for the majority of the requests. Where he has not given a date (parts 10, 12 and 13 of the second request) the Commissioner assumed that the period of interest was between 1984 and 2004. She assumed that the time period in the clarification of 9 January 2019 'subsequent to 2003' is up to the end of 2004 and that this request is repeat of part 3 of request 2.
35. In relation to the first request the Commissioner agreed with the Board that the first request was a request for action rather than a request for information, save for part 2, which is broadly repeated in any case in part 3 of the second request.

36. In relation to the second request, the Commissioner noted that the Board stated that it did not hold any Board minutes from 1984 to December 2002. She held that the Board must have held some of the information requested, i.e. specific minutes for the period 1 January 2003 to 31 December 2004 because it was included subsequently in the 'Selby Area IDB Minutes Summary' document. Mr. Crooks requested Board minutes on a specific matter and the 'Selby Area IDB Minutes Summary' itemises particular minutes that fall within the scope of Mr. Crooks' request.
37. In her summary the Commissioner concludes that on the balance of probabilities at the time of the request, the Board did not hold any information relevant to the majority of the request, because it did not hold any minutes for the period from 1 January 1984 to 31 December 2002. She held that it did hold some information i.e. specific minutes included in 'Selby Area IDB Minutes Summary' document concerning the treatment of piece workers for the period 1 January 2003 to 31 December 2004. On that basis she concluded that the Board breached s 1(1) 10(1) FOIA because it held some relevant information which it did not communicate to Mr. Crooks.

Grounds of Appeal

38. The Grounds of Appeal are in summary that the finding that the Board breached s 1(1) FOIA was incorrect and unreasonable. The Board was not in breach of s 10(1) because it was unable with any sufficient certainty or reasonableness to provide information which was not properly set out or requested in the two requests.
39. The Board submits that the first request does not amount to a request for information but a request that the Board take action by holding a meeting to consider matters in respect of which the complaint was being made.
40. In relation to the second request the Board submits that:
- 40.1. The contents of the letter do not amount to a reasonable and proper request for documents or information upon which the Board were able to take action and respond;
 - 40.2. That in seeking clarification of the nature of the requests and in conjunction with the Commissioner the Board took all reasonable steps to seek to identify the nature of the documents or information sought;
 - 40.3. Both the Commissioner and the Board were unclear as to the nature of the requests;
 - 40.4. Following discussions between the Board's advisor and the Commissioner it was agreed that the Board would write to Mr. Crooks seeking clarification of the request;
 - 40.5. In contravention of that agreement the Commissioner proceeded to issue its decision.

The Commissioner's response

41. The Commissioner sets out its understanding of the Grounds of Appeal in para 33:

...the Appellant contends that (1) the Commissioner was wrong to consider the First and Second Requests as requests properly made under the Act and triggering the section 1(1) duty, and (2) in any event, the Commissioner was bound to issue a decision reflecting advice provided by her Case Officer in the course of investigating the complaints (regardless of any intervening correspondence with the parties or internal decision-making processes). We refer to these as grounds one and two.

Ground one

42. In relation to the first request, the Commissioner agreed that the majority of the letter dated 21 October 2018 did not amount to a valid request for information, finding only that part 2 of the letter taken with the clarification on 9 January 2019 was a valid request for recorded information which was sufficiently clear to trigger the s 1 duty.

43. In relation to the second request, the Commissioner found that it was possible to identify valid requests in the February 2019 letter. That a Case Officer investigating the complaint had in the course of the investigation sought clarification from Mr. Crooks and has expressed opinions as to the clarity of the requests cannot bind the Commissioner to find that the request was so unclear as not to be a valid request at all.

44. It is not unfair or unreasonable as a matter of principle for the Commissioner to acknowledge a lack of clarity but nonetheless find that some valid requests can be identified. The Commissioner was entitled to find that the letter of 16 February 2019 contained with sufficient clarity the valid request summarised in the decision notice and shared in advance with the parties by the Case Officer.

45. The Commissioner noted that the Board had not taken any steps to clarify the Second Request, save for drafting a letter to Mr. Crooks as the Case Officer's suggestion 22 months after the request was made.

Ground two

46. The Commissioner is not bound by comments made the Case Officers during the course of an investigation and Case Officers do not have authority to reach bilateral 'agreements' with on or the other party in a complaint. Further the Case Officer made clear to the Board's solicitor that her preliminary view had changed when she copied her letter of 30 October 2020 summarising the valid requests to him.

Legal framework

47. The question of whether or not a public authority holds the information is a factual matter on the balance of probabilities.
48. We determine the scope of the request on an objective reading of the request in the light of any relevant background facts.
49. The tribunal's remit is governed by s.58 FOIA. This requires the tribunal to consider whether the decision made by the Commissioner is in accordance with the law or, where the Commissioner's decision involved exercising discretion, whether she should have exercised it differently. The Tribunal may receive evidence that was not before the Commissioner and may make different findings of fact from the Commissioner.

Evidence

50. We have read and were referred to an open bundle of documents. After the panel deliberations the tribunal requested and was provided with a copies of number of documents the relevant content of which was summarised or quoted in the Decision Notice or the Commissioner's response but which were not themselves included in the bundle. No additional relevant information was contained in these documents.

Issues

51. The issue we have to determine is whether, on the balance of probabilities, the Board held any information within the scope of the requests, as objectively read in the light of any relevant background facts.

Discussion and conclusions

On the balance of probabilities did the Board hold any information within the scope of the requests?

The first request

52. We agree with the Commissioner that the letter constitutes mainly a call for action, rather than a request for information. The letter must be taken together with the clarification provided by Mr. Crooks on 9 January 2019, that the 'essence of his request' was to establish whether the Board 'does or does not know of its own business, as being the treatment of piece workers from 31st March 1982 to the present date' and that the first document he required was '...the minuted reference to the Board being told of piece worker treatment at some time subsequent to 2003.'
53. Looking at both these documents, we find that on an objective reading of the first request, it is clear that Mr. Crooks' request included a request for the minuted reference to the Board being told of piece worker treatment at some time subsequent to 2003. Further, we find that there are other aspects of the letter which, objectively construed, contain requests for information, but these are requests for

information which are repeated in the second request and we therefore consider them below.

54. Apart from these aspects, we agree that the rest of the letter, even read in the light of the clarification of 9 January 2019, does not contain any requests for information.
55. Did the Board hold any information within the scope of the first request?
56. In relation to the request for the minuted reference to the Board being told of piece worker treatment 'at some time subsequent to 2003' we have reviewed the document entitled 'Selby Area IDB Minutes Summary'. We find that any entries post 2003 up to the date of the request in which the Board was told about the treatment of pieceworkers fall within the scope of the request. In our view this includes all the entries in the 'Selby Area IDB Minutes Summary' document subsequent to 2003 and up to the date of the request. On this basis we conclude on the balance of probabilities that the Board held information within the scope of the first request.

The second request

57. The second request is more clearly a request for recorded information. The request explicitly states: 'I ask to see the minuted documents re the following decisions'. Many of the decisions in the list are dated, including some dated '04'.
58. We understand from the Board's email to the Commissioner dated 21 August 2020 that the Board had understood the request to relate to minutes and notes of meetings which took place 'up until 2003' and this is why they had not disclosed the information contained in the 'Selby Area IDB Minutes Summary' document. Given that the dates provided in the request include specific references to dates after the end of 2002, we have concluded that the Board was wrong in their interpretation of the scope of the request.
59. We find that the scope of the second request, objectively construed in the light of the surrounding circumstances, is fairly clear. It specifies that Mr. Crooks wants to see minuted Board documents in relation to certain decisions, and then it specifies those decisions, and in most cases, the approximate date of those decisions.
60. Does the Board hold information within the scope of the request? We find, on the balance of probabilities, that the Board does not hold any minutes for the meetings that took place before the end of 2002. We make that finding in the light of the amount of time that has passed, the Board's retention policy, the fact that it has undertaken searches and has consistently stated that it no longer holds those minutes.
61. In relation to the decisions minuted from 2003 onwards, we find that the Board did hold minutes which fell within the scope of the request. We have already found that

the majority of the minutes which appear in the 'Selby Area IDB Minutes Summary' fall within the scope of the first request. Many of them also fall within the scope of the second request. It is, in our view, relatively clear which minutes fall within the scope of the request. On this basis we find that the following minutes fall within the scope of the following parts of the request. Where we have been unable to identify any relevant minutes, we have concluded, on the balance of probabilities, that the Board did not hold any information within the scope of that part of the request:

Part 1

'the decision to appoint your firm of solicitors to act for the Board in providing relevant documents.'

Minutes dated 28.11.19

Part 2

'the 1984 decision to begin to deny the piece workers any annual cost of living wage award, this whilst the weekly paid workers and management continued to enjoy such an award. The randomised treatment which followed this decision, as described below, could not be reduced to any contract form for the Board to consider, therefore there was no contract to ratify and neither the Board nor any other party can know of the piece workers' treatment.'

Not held - pre 2003

Part 3

'the decision taken at fourteen meetings between 84 and 03 to deny the piece workers any wage award whatsoever.'

Not held

Part 4

'the decision taken at five meetings between 84 and 03 to allow the pieceworkers a meagre wage award.'

Not held in part - pre 2003

Held in part - minutes dated 26.11.03

Part 5

'The decision [*in 2003*] to tell the Inland Revenue that the piece workers were contractors.'

Not held - prior to the first minutes held dated 28 May 2003

Part 6

'The decision taken in 2003 to abolish contractor piece work, something which had not even existed since 1984.'

Held - minutes dated 28 May 2003 and 30 July 2003

Part 7

'The decision in 04 to allow the piece workers to return to work without giving them any explanation or apology, and for their pay rates to be based on those of the late 1980s, as they are to this day.'

Held - minutes dated 1 April 2004

Part 8

'The decision made in 04 to offer the piece workers a contract for the first time since the 1984 decision to deny the pieceworkers a contract.'

Held - minutes dated 1 April 2004

Part 9

'The decision to ask me to "put in a "Claim" for "The Board" to consider, as conveyed to me by two consecutive Board members, as at (2) and (7), and to not offer any explanation as to why this "Claim" was necessary.'

Not held

Part 10

'The decision to place Mr Price's submission, which asked for piece worker treatment to be considered by the full Board, to the end that restitution should be made to them for damage suffered as at (8) "In the hands of the Board's solicitor" rather than be placed before the full Board.'

Held - minutes dated 31 July 2014

Part 11

'The decision made in 2004 not to answer the District Auditor's questions at (14) which asked all questions asked here fifteen years ago.'

Not held

Part 12

'The decision to distribute these questions to all Board members.'

Not held

Part 13

'The multiple decisions made to ignore submissions to the Board re piece worker treatment made by myself and Nigel Adams MP.'

Not Held at the date of the request (minutes dated 25 November 2020)

Part 14

'The decision to advise Board members not to contact me, and to tell me not to contact Board members, on pain of legal action.'

Held - minutes dated 25 September 2014

Part 15

The decision to appoint a solicitor to contact me as per the above decisions.

Held - minutes dated 30 January 2014 and 25 September 2014

Part 16

The decision, as at (13), to authorise the solicitor to invite me to a meeting to discuss an unspecified matter, and, that if I did not comply in this, that any further contact would be forbidden on pain of legal action.

Held - minutes dated 28 May 2015

62. On the basis of the above, we conclude that the Board held information that fell within the scope of the requests and that the Commissioner did not err in concluding that the Board was in breach of s 10 (1) and s 1(1)(a) of FOIA.
63. Further, we do not accept that the second aspect of the appeal demonstrates any error of law. It is broadly correct that discussions between the Board's advisor and the Case Officer had, at one point, reached the stage where it was agreed that the Board would write to Mr. Crooks seeking clarification of the request. Thereafter however the Case Officer's change of view was clearly communicated to the Board's solicitor and the Board was explicitly asked to consider/reconsider its response.
64. However, our role is to exercise a full merits appeal and to stand in the shoes of the Commissioner and, as set out above, we have reached a different conclusion to the Commissioner in relation to the scope of the request. We disagree with the Commissioner's conclusion that the request is limited to minutes up to the end of 2004. As set out above, some of the decisions specified in the request are clearly recorded in later minutes in, for example, 2014 and 2015. On this basis we decide that the decision was not in accordance with the law because on the balance of probabilities the Board held further information within the scope of the appeal from 2005 onwards. In reaching this discussion we took account of the additional submissions provided by the Commissioner on this issue.
65. Accordingly the appeal is allowed in part.

Signed Sophie Buckley

Judge of the First-tier Tribunal

Date: 5 August 2021

Promulgated: 5 August 2021