



Neutral citation number: [2023] UKFTT 00668 (GRC)

Case Reference: EA/2023/0190

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

**Heard on the papers.
Heard on: 7 August 2023.
Decision given on: 10 August 2023.**

Before: Tribunal Judge: Brian Kennedy KC

Between:

JANNA LINDE

Appellant

and

THE INFORMATION COMMISSIONER

First Respondent

THE ROYAL BOROUGH OF KENSINGTON AND CHELSEA

Second Respondent

IN AN APPLICATION TO STRIKE OUT THE APPEAL

Representation:

For the Appellant: as a Litigant in person.
For the Respondent: Gemma Garvey, Legal Executive within the Information Commissioners' Office in writing in the Response dated 21 June 2023.

Decision: The application to Strike Out the Appeal is granted.

REASONS

Introduction:

- [1] This decision relates to an appeal brought under section 57 of the Freedom of Information Act 2000 (“the FOIA”) as, against the Commissioner’s decision notice 13 March 2023 with reference number IC-216072-P3D3 (the “DN”), which is a matter of public record.

Factual Background to this Appeal:

- [2] Full details of the background to this appeal, the Appellant’s request for information and the Commissioner’s decision are set out in the DN. The Appellant wrote to the Royal Borough of Kensington and Chelsea (“the Council”) on 6 December 2022 and requested the following information:

“I submitted an employment tribunal claim because of being discriminated against my race, supplemented by my disability and age during the application process for an Adult Social Worker’s role [role number] at the Royal Borough of Kensington and Chelsea (RBKC), which took place in spring 2021. To present my case to the Employment Tribunal I require the following information:

- 1. Please provide me with notes made by the panel on the interviews of all successful applicants who applied for the same role as I, as far as this information is available. In case these notes are no longer available, please explain the reason behind of it in each case.*
- 2. Please provide me with notes made by the panel on the interviews of all unsuccessful applicants who applied or the same role as I, as far as this information is available. In case these notes are no longer available, please explain the reason behind of it in each case.*
- 3 Please provide me with details of the ethnic origin, nationality, age and disability relevant to each candidate case where interview notes are available to be provided.*

4. Please provide me with model answers and scoring plan specifically developed to carry out interviews for the role I applied for. In case these were not developed specifically for the role I applied for, please state it clearly in your response (please do not send me the requested information for a different role)."

- [3]** The Council responded on 5 January 2023. It advised for points 1 and 2, that the information is only held for 6 months and, as such, had already been disposed of. For point 3, it advised that the Appellant had made a similar request for information which it had previously answered, and the previous response still remains; it contains personal information and therefore section 40(2) of FOIA applies. For point 4, the Council explained that the information is not saved post-interview and, as such, it had already been disposed of.
- [4]** Following an internal review, the Council wrote to the Appellant on 9 February 2023 and stated that it upheld its original position. However, it acknowledged that the Appellant had previously asked a similar question to point 3. The Council explained that the information requested in point 3 is not held as it is disposed of after 6 months; however, if the information were held, it would be personal information and section 40(2) would apply.
- [5]** On 11 February 2023 the Appellant complained to the Commissioner about the way the request for information had been handled as they considered that the Council should hold the information requested. The Commissioner considered that the scope of his investigation was to establish whether the Council holds (*not should hold*) information falling within the scope of the request. The Commissioner accepted that, in the circumstances of this case, on the balance of probabilities, the requested information is not held by the Council.
- [6]** The Tribunal received the appeal from the Appellant on 3 April 2023. The Commissioner has read the Appellant's Grounds of Appeal and has not reiterated them in full in his response. The Commissioner summarises the Grounds indicating the Appellant has said that Council policy only allows it to destroy information relating to unsuccessful candidates after 6 months. However, the Appellant argues that this information was not destroyed as the Council provided them in the

meantime with documentation which contained interview notes on unsuccessful candidates. Furthermore, the Appellant argues that Council policy in relation to successful candidates is that the requested information should be kept on staff records. The Appellant submits that they have been provided with interview notes on only one successful candidate, while nine candidates in total were offered a job. Therefore, information about a further eight successful candidates is still outstanding.

- [7] In connection to part 4 of this request, the Appellant has referred to a response by the Council to another similar FOI request made by them and has said that the information provided by the Council in that response *'was not designed for the same recruitment procedure'*. The Appellant does not therefore understand why the Council had insisted that they provided me with the requested information if the information they provided was outlined for a different role. This ground appears to relate to part '3D' of a previous FOI request allocated Council reference number 5718626.

The Commissioner's Response:

- [8] The Commissioner resists this appeal. Generally, the Commissioner relies on the DN as setting out his findings and the reasons for those findings, and repeats the matters stated therein and notes further observations in respect of the Appellant's Grounds of Appeal.
- [9] The Appellant has provided evidence as to why they consider the requested information should be held by the Council. However, the Council has addressed the Appellant's submissions in two witness statements provided on 26 May 2023 by Sita Rangunath Kotilingam (Team Manager in the Adult Social Care Department) and Romilly Tollhurst (Strategic HR Lead in the Human Resources Department). Both witness statements quote the *"Recruitment Step by Step Guidance"* which was attached to the Appellant's grounds of appeal, in particular it states:

"You must retain (locally) unsuccessful candidates shortlisting and interview decision sheets/documentation for 6 months from the closing date of the advert. For successful candidates you must retain all shortlisting/interview documentation during their service

and upload to the successful candidate's Electronic Personnel File (EPF) once hired.

You can find the candidate's EPF on their tile in the IBC portal."

[10] The witness statement of Sita Ragnath Kotilingam, specifically addresses the Appellant's assertion that information had previously been provided to her and therefore should be held. The witness explained that: *"I note that the Appellant has stated that she has previously been provided with some of the information which she has sought in her request dated 6 December 2022. I am aware that the Appellant has made previous requests for information. As the Appellant's requests were made before the period of 6 months had expired the information available to the Council at that time was provided in accordance with the provisions of the Freedom of Information Act. The request for information dated 6 December 2022 was made after the period of six months, during which the documents requested are retained, had expired. The documents have therefore been disposed of. The council no longer holds this information."*

[11] The witness statement of Sita Ragnath Kotilingam makes clear that whilst she was on the interview panel another member of staff was the panel chairperson (the chairperson is no longer available to provide input into these proceedings). This witness has however said that: *"Interview records are normally uploaded onto the successful candidates electronic personnel files by the manager and the hard copies and or electronic copies are only retained in this department for 6 months."* In this case it would have been for the chairperson to upload this information however it is the witness' understanding that this was not done. This witness further commented that the *"Recruitment Step by Step Guidance"* is only a guidance document, and it is her understanding that interview notes are not always uploaded to an employee's electronic file across all the Council's departments. This witness further confirmed that: *"I have checked the records of the Adult Social Care Department and can confirm that the hard/electronic copies of the interview notes for both successful candidates and for unsuccessful candidates are no longer held in this department and have been disposed of as these would only be retained for a period of 6 months from the closing date of the advert."*

[12] In relation to part 4 of the request the witness confirmed that model answers and score plan are no longer held as they had been disposed of.

- [13] The second witness statement of Romilly Tollhurst also confirms that “Recruitment Step by Step Guidance” sets out that interview records for unsuccessful candidates should be retained for a period of 6 months and for successful candidates’ interview records should be uploaded to the electronic personnel file once hired and hard copy records retained for a period of 6 months. In this instance she confirms it would have been the responsibility of the Council’s Adult Social Care Department to upload the interview records to the successful candidate’s electronic personnel files. It is the witness’ experience that interview records are not always uploaded to electronic personnel files in accordance with the guidance. Finally, the witness has confirmed that she has checked the personnel files of the successful candidates and that interview records were not uploaded.
- [14] Whilst the Commissioner understands the Appellant’s position given the “*Recruitment Step by Step Guidance*”, the Commissioner made his decision based upon what recorded information the Council holds under FOIA rather than what the Appellant considers should be held. Furthermore, noting precedent, the Commissioner submits he was entitled to accept the word of the Council in this regard.
- [15] For all these reasons, the Commissioner remains of the view, on the balance of probabilities, the requested information is not held by the Council.
- [16] The Commissioner does not address the Appellant’s grounds regarding the Council’s response to a separate FOI request (Council reference 5718626) as this is the subject of a separate appeal under the reference EA/2022/0225. However, the Commissioner notes that in the grounds the Appellant appears to be disputing the Council’s response to part 3D of that request and the Commissioner’s understanding is that the appeal on EA/2023/0225 is limited to parts 4C, 4D and 4E of request 5718626. So far as this has any bearing upon the request, which is the subject of this appeal, the Commissioner reiterates that the Council has confirmed in relation to part 4 of the request that model answers and score plan are no longer held as they had been disposed of.

- [17] It is the Commissioner's case that the Appellant has advanced no argument which challenges his findings given the request in this case was made over 18 months after the recruitment process took place and the Council has confirmed that its *"Recruitment Step by Step Guidance"* is only a guide and in this instance was not followed.
- [18] The Commissioner invites the Tribunal to Strike Out the appeal as it has no reasonable chance succeeding. The Tribunal agrees. I accept and endorse the reasoning in the DN and can find no error of Law, nor flaw in the exercise of any discretion in the DN. The accepted test is whether or not on, the balance of probabilities the Public Authority hold information that has not been disclosed. There is no authority arising from the FOIA to determine what a Public Authority should hold. The papers submitted by the Appellant indicate a misconception about the function, and the depth and width of, investigative powers emanating from the FOIA. It is my view that even at an oral hearing of this appeal, the credible evidence provided by the witnesses already engaged herein, would be as it has been presented to the Commissioner and the Tribunal Panel would dismiss the appeal.
- [19] Accordingly, I Strike Out the appeal.

Brian Kennedy KC.

7 August 2023.