



**Appeal number: EA/2020/0328P**

**FIRST-TIER TRIBUNAL  
GENERAL REGULATORY CHAMBER  
INFORMATION RIGHTS**

**D G CHOYCE**

**Appellant**

**- and -**

**THE INFORMATION COMMISSIONER**

**Respondent**

**TRIBUNAL PANEL: JUDGE ALEXANDRA MARKS CBE  
TRIBUNAL MEMBER NAOMI MATTHEWS  
TRIBUNAL MEMBER SUSAN WOLF**

- I. Pursuant to Rule 32(1) of the First-tier Tribunal (General Regulatory Chamber) Rules and by consent of the parties, this matter was determined on the papers because the Tribunal is satisfied it can properly determine the issues without a hearing.
- II. The papers which the Panel considered are set out in paragraph 19 of this Decision.
- III. The outcome of the appeal is stated at both the start and the end of this Decision.

**Mr Choyce was unrepresented**

**The Commissioner was represented by Ms Clare Nicholson, Solicitor**

## DECISION

The appeal is dismissed.

### REASONS

#### ***Background to Appeal***

1. The Appellant, Mr Choyce, made a request on 12 November 2019 to Woking Borough Council (the ‘Council’) for information about Brookwood Cemetery. His request was:

*“I understand from the Court of Appeal decision below that an order was made by Judge Kushner QC in or around November 2011 dealing with the assets of BCL [Brookwood Cemetery Limited]. Please could you send me a copy of the order (and any schedules, appendices, attachments and the like)? As the order was made following a hearing in open court, I imagine it should not be necessary to make a formal FOIA request.*

*[Musa & Ors v Holliday & Ors \[2012\] EWCA Civ 1268 \(15 October 2012\)](#)”*

2. As Mr Choyce had not received any response by 18 November 2019, he wrote to the Council again on that date, confirming that he was now making a request for information under the Freedom of Information Act 2000 (‘FOIA’). His request was:

*“In the absence of any reply from [name redacted] (not even an acknowledgement), please treat the request in my e-mail of 12 November below as a request under FOIA.”*

3. The Council responded on 12 December 2019, saying that after a search of its paper and electronic records, it does not hold the requested information.

4. On the same day, Mr Choyce requested an internal review. He argued that because the Council had referred to the court order, which was the subject of his request, in an email dated 9 May 2018, ‘...it is hard to see how [name redacted] could have done this without being in possession of or having access to the Order...’

5. The Council acknowledged the internal review request on 20 December 2019. However, despite the Commissioner’s intervention, the Council did not conduct an internal review.

6. Mr Choyce first contacted the Commissioner on 30 January 2020. He complained about the Council’s failure to provide a response to his request for an internal review.

7. The Commissioner contacted the Council on 14 February 2020 to remind it of its

responsibilities and asking for the outcome of its internal review to be provided to Mr Choyce within 10 working days.

8. Mr Choyce contacted the Commissioner again on 3 March 2020 to say that the Council had still not provided the outcome of its internal review. He asked for the Commissioner to order disclosure of the information.

9. The Commissioner responded on 4 March 2020 explaining that the Commissioner could not immediately order the disclosure of the information as, in this case, the relevant question was whether or not the Council actually held the information requested.

10. On 10 November 2020, the Commissioner issued Decision Notice IC-46954-W8Q1 which set out the Commissioner's conclusion that, on the balance of probabilities, the Council did not hold the requested information, and therefore the Council was not required to take any further steps.

11. On 11 November 2020, Mr Choyce telephoned the Commissioner, explaining that although the Council said it did not hold the information, it was held by *BCL*, a company which is owned by the Council. The Commissioner's office explained that if *BCL* was wholly publicly owned, then it would be a public authority in its own right, and Mr Choyce would need to make a request direct to *BCL* for information it held.

12. During the same telephone conversation, the Commissioner's office also explained that as the request was made to the Council, this was what was covered by the Decision Notice. Mr Choyce said that the Council had advised him to submit requests for information held by *BCL* directly to the Council. However, the Commissioner's office said they were unable to consider the matter any further so if Mr Choyce was dissatisfied with the decision, he had a right to appeal as set out at the end of the Decision Notice.

13. On 17 November 2020, the Tribunal received Mr Choyce's Notice of Appeal to the Tribunal.

### ***Appeal to the Tribunal***

14. Mr Choyce's ground of appeal is that both the Council and the Commissioner failed to consider whether *BCL*, which he describes as a subsidiary of the Council, holds the information. He complains that the Commissioner did not – despite a letter saying she would – consider whether the Council is responsible for FOIA requests made regarding the cemetery.

15. The Commissioner's Response dated 25 January 2020 maintained the analysis set out in the Decision Notice.

## ***The Law***

### ***Section 1(1) FOIA: general right of access to information held by public authorities***

16. Public authorities' duty to disclose information is set out in s.1(1) FOIA:

*'1 (1) Any person making a request to a public authority is entitled –*

*(a) to be informed in writing by the public authority whether it holds information of the description specified in the request, and*

*(b) if this is the case, to have that information communicated to him.'*

### ***The powers of the Tribunal***

17. The powers of the Tribunal in determining appeals against the Commissioner's decisions are set out in FOIA, as follows:

#### ***'s.57 Appeal against notices...***

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

#### ***s.58 Determination of appeals***

*(1) If on an appeal under section 57 the Tribunal considers -*

*(a) that the notice against which the appeal is brought is not in accordance with the law, or*

*(b) to the extent that the notice involved an exercise of discretion by the Commissioner, that he ought to have exercised his discretion differently,*

*the Tribunal shall allow the appeal or substitute such other notice as could have been served by the Commissioner, and in any other case the Tribunal shall dismiss the appeal.*

*(2) On such an appeal, the Tribunal may review any finding of fact on which the notice in question was based.'*

### ***The burden of proof***

18. The burden of proof rests with Mr Choyce in satisfying the Tribunal that the Commissioner's decision was wrong in law or involved an inappropriate exercise of discretion.

## ***Evidence***

19. Before the hearing, both parties had submitted written material. This was contained in an Open Bundle of 113 pages (including an Index).

## ***Submissions***

*Mr Choyce's submissions in his Appeal Notice received 17 November 2020*

20. In summary, Mr Choyce's appeal is on the basis that:

- (a) As a subsidiary of the Council, BCL is a public authority for FOIA purposes.
- (b) The request was made to the Council as, in making a previous request to BCL, the Council advised that FOIA requests to BCL are handled by the Council.
- (c) The Commissioner accepted the Council's position that it did not hold the information requested, and this is reflected in the Decision Notice.
- (d) Unfortunately, however, the Commissioner investigated only whether the *Council* held the information, not whether *BCL*, its wholly owned subsidiary did.
- (e) As the requested information is more relevant to BCL than the Council, it is more likely that the information will be held by BCL.
- (f) When Mr Choyce spoke to the Commissioner's caseworker, and explained BCL's status as a public authority, the caseworker said it was something that needed looking into further, and she would raise it with the Council. Mr Choyce understood from this that BCL's position would be investigated. However, it is clear from the Decision Notice that this did not happen.
- (g) The Commissioner's investigation, and therefore her Decision Notice are flawed as Mr Choyce's complaint about *BCL's* failure to give him the information requested was not investigated as it should have been.

*Submissions on behalf of the Commissioner dated 25 January 2021*

21. In summary, the Council's response is that:

- (a) The Commissioner decides whether a public authority 'holds' information based on the adequacy of the public authority's searches, and any explanation why the information is not held.
- (b) The Commissioner is entitled to accept the public authority's word and is not obliged to carry out her own searches.

- (c) In this case, the Council advised the Commissioner that it had undertaken a thorough search of its records and did not hold the requested information.
- (d) The Council explained to the Commissioner that its reference to a ‘court order’ in its email of 9 May 2018 was incorrect: the document was in fact a deed entered into on 18 June 2014 – and that deed could be provided (and was in fact later provided) to Mr Choyce subject to redaction of third-party personal information.
- (e) The Council told the Commissioner there had been significant litigation in respect of the cemetery before the Council acquired it in December 2014. Mr Choyce had asked for a *court order* so it was reasonable for the Council to look for a court order rather than a deed.
- (f) The court case to which Mr Choyce now referred – in 2011 – was a family matter about inheritance which included the cemetery but did not relate to its day-to-day running.
- (g) Based on the Council’s submissions, the Commissioner concluded that the Council had conducted adequate searches and that, on the balance of probabilities, the Council did not hold the requested information.
- (h) As for Mr Choyce’s grounds of appeal, the Council says that BCL is owned by WNML which is in turn owned by Thameswey Group.
- (i) It was reasonable to assume that Mr Choyce was directing his request to the Council alone, and not BCL, because:
- (1) there was nothing on the face of the request which indicated it was intended for BCL;
  - (2) Mr Choyce’s correspondence did not suggest that it was being made to the Council *and* BCL as distinct public authorities;
  - (3) the request for information was made direct to a named employee of the Council (who had previously written the May 2018 email);
  - (4) if Mr Choyce understood the information he sought had been described in the *Council’s* May 2018 email, it would seem reasonable for him to approach the Council rather than BCL;
  - (5) when Mr Choyce sought an internal review it was whether “*WBC [i.e. the Council], whether in its own right or as the owner of BCL, does not hold the information.*”
- (j) If Mr Choyce believed that the Council responds to FOIA requests on behalf of BCL, the Commissioner would have expected him to make very clear to which particular public authority his request was directed.
- (k) Mr Choyce complained to the Commissioner about the Council, not BCL, so it was within the Commissioner’s powers to issue a decision notice only about the Council.

(l) The Tribunal does not have jurisdiction to consider how the Commissioner investigates, nor to direct the Commissioner to investigate, nor to remit a matter to the Commissioner.

(m) In this case, the Commissioner's findings about the Council are not challenged – rather the appeal seeks to argue that a different public authority holds the information.

*Mr Choyce's response dated 1 February 2021*

22. In summary, Mr Choyce argues that:

(a) the Commissioner appears to accept that:

- (1) the Council is the ultimate parent of BCL;
- (2) there is no evidence to challenge that the Council told Mr Choyce that it dealt with FOIA requests on behalf of BCL; and
- (3) she has not investigated whether BCL holds the requested information.

(b) The background leading up to his present request is important. In May 2019, Mr Choyce's email exchanges with the Council's lawyer about his previous request made clear more than once that he was seeking *'information held by its [i.e. the Council's] subsidiary BCL.'* The Council's lawyer then responded on behalf of BCL. When, therefore, Mr Choyce made his present request on 12 November 2019, the lawyer would have understood that request to be directed to information held by BCL, as was the previous request.

(c) When the lawyer did not respond, the Council likewise would – in view of the previous history – have regarded Mr Choyce's FOIA request as a continuation of him asking for information held by BCL.

(d) Consistently with this, all exchanges with the Council were under the subject heading *'Brookwood Cemetery Limited (BCL).'*

(e) Consequently, the Commissioner is wrong to state in the Decision Notice that there is *'nothing on the face of the request which indicated it was for BCL.'*

(f) The Commissioner underplays the significance of Mr Choyce's conversation with the Commissioner's caseworker on 28 July 2019 when he had explained the relationship between BCL and the Council, and that the Council had advised that requests for information held by BCL should be made to the Council which acted on behalf of BCL. The caseworker apparently understood the point, as confirmed by her letter the same day that *'This is something I will need to look into further and raise with the Council.'*

(g) The Commissioner undermines Mr Choyce's interpretation of his request by mentioning references in his correspondence to 'the Council'

rather than BCL – but this does not take account of the above background that the Council deals with FOIA requests on BCL’s behalf.

(h) On the balance of probabilities, the request for information was for information held by BCL but was made *to* the Council because that is how the Council had said such requests should be made.

(i) The Commissioner’s failure to investigate BCL was not in accordance with the law and/or was an incorrect exercise of the Commissioner’s discretion.

23. Mr Choyce asks the Tribunal to set aside the Commissioner’s Decision Notice so that she will then be able to start an investigation into whether BCL still holds the information requested. This, he says, would be both speedier, and better administration of the Commissioner’s powers, than Mr Choyce making a new request to BCL for the information.

### ***Discussion***

*Did the request for information comprise (or at least include) a request for information from BCL rather than the Council alone?*

24. There is apparently no dispute in this case that, due to the ownership of BCL by a public authority, BCL is itself pursuant to s. 6(1)(b) FOIA a ‘publicly-owned company’ for the purposes of s. 3(1)(b). Consequently, BCL is a ‘public authority’ of which requests for information can be made under s. 1 FOIA.

25. It is also not disputed that the Council had no ownership of BCL at the time of the events about which Mr Choyce made his present request (relating to litigation in 2011): the Council purchased the companies which owned the Brookwood Cemetery in December 2014.

26. Nor is it disputed that neither the Council nor BCL were parties to the 2011 litigation.

27. Mr Choyce does not suggest that he made his present request of BCL itself; instead he made his request to the Council on the basis that he had been told that the Council deals with FOIA requests on BCL’s behalf.

28. Mr Choyce’s first request to the Council for information - in April/May 2019 – was about a 2002 court case to which BCL was a party. Mr Choyce explained in his request that he had been told that the Council responds to FOIA requests for information held by BCL, a wholly owned company.

29. In response to that request, the Council confirmed that it did not hold the information requested. Mr Choyce replied that his request was to BCL, and he would have made the request directly *to* BCL but had been told that it should be made to the Council, as BCL’s parent. He asked whether the Council’s response meant that BCL did not hold the information requested.



30. The Council responded that BCL had also searched its records and did not hold the requested information. The Council also, at Mr Choyce's request, asked BCL's former solicitors if they held the information. The Council then reported to Mr Choyce that the solicitors had replied, saying they had destroyed their file over 10 years previously.

31. In the present case, however, Mr Choyce sought information relating to a *different* court case in 2011, and to which BCL was *not* a party. Mr Choyce did not frame his request as being directed *to* BCL, or even to the Council in its capacity as ultimate parent of BCL.

32. We consider that:

(a) by continuing the previous email string, using the same subject heading and reference number, Mr Choyce may not have appreciated that the Council would – and in fact did – treat his request in November 2019 as a new request;

(b) however, the present request was separated in time and subject matter from the previous request, and did not indicate that the information now being sought was *from* BCL rather than relating to BCL;

(c) had Mr Choyce wished the Council not only to respond on its own account but also make enquiries of BCL, he could have said so as he had done previously. His experience with his first request demonstrated that the Council was willing to ask BCL to search its own records if it was made clear that this was what was being sought; and

(d) when Mr Choyce complained to the Commissioner, he named only the Council about the handling of his request, not BCL.

33. Mr Choyce described the Council lawyer with whom he had been corresponding in relation to his first request as '*the Council's lawyer who deals with requests for information held by BCL*'. This appears to the Tribunal to overstate the position: we consider it more likely that the Council's lawyer dealt generally with FOIA requests made to the Council and – in the case of the first request – only raised enquiries about information held by BCL as that was expressly asked for.

34. The Tribunal accepts that there may have been a misunderstanding by Mr Choyce about the extent to which the Council could, and therefore did, handle FOIA requests on BCL's behalf. Since the Council and BCL are separate legal entities and each is a public authority in its own right, we consider the Council had no reason to respond on BCL's behalf unless the request was addressed *to* BCL or the request to the Council made explicit that the information sought comprised, or included, information held by BCL.

35. Overall, the Tribunal considers it reasonable that Mr Choyce's second request, made six months after his first request and relating to quite separate litigation, was treated by the Council as a new request to which they gave a new reference number. Without any explicit indication about information being sought *from* BCL, we do not

consider that the Council should have inferred that because of the previous request, the present request was *to* or included BCL rather than the Council alone.

36. On this basis, taking into account also that Mr Choyce complained to the Commissioner about the Council - not BCL - we do not consider that the Commissioner made an error of law, nor that she exercised her discretion wrongly, in finding that there was nothing on the face of the present request to indicate that it was *for* BCL – nor do we find any fault with the Decision Notice in addressing solely the Council’s position as a public authority and not BCL’s.

*On the balance of probabilities, was the information requested held by the public authority?*

37. Noting that the Council satisfactorily answered the Commissioner’s questions about the actions they had taken to find the information Mr Choyce sought, the Tribunal considers that the Commissioner was entitled to find that the Council had carried out sufficiently thorough searches to satisfy her that, on the balance of probabilities, the Council does not hold the information requested.

38. It is striking that, although not sought by Mr Choyce, the Council volunteered to the Commissioner that they had discovered another document which appeared to contain information which would be of interest to him. This document, namely the deed mentioned in paragraph 21(d) above was, the Council believed, actually the information Mr Choyce sought because it outlines how BCL is to deal with so-called ‘Off-Site Interests’ of the cemetery.

39. The Tribunal considers that the Council’s identification of this deed, and supplying it to Mr Choyce at his request, demonstrates the Council’s willingness to engage with Mr Choyce – and even go beyond its strict duties under FOIA in its efforts to be helpful when responding to requests for information.

40. The Tribunal also notes that, whereas Mr Choyce’s previous request asked for information about a court case to which BCL had been a party in 2002, the court order of which Mr Choyce sought a copy arose from unrelated litigation in 2011 to which BCL was not a party.

41. Notably too, the 2011 litigation was about a family matter, specifically inheritance following the death of the former owner of BCL who died intestate. BCL was amongst the assets of the deceased. One of the parties involved in the 2011 litigation was a minor child of the deceased. Until 2014 when the President of the Family Division gave Practice Guidance changing the position, family law cases were normally held in private and judgments involving children were not published.

42. Overall, we consider that the Commissioner was entitled to decide that, on the balance of probabilities, the public authority to whom the request was made does not hold the information under FOIA s. 1(1).

***Conclusion***

43. For the above reasons, we uphold the Commissioner's Decision Notice and dismiss the appeal.

**(Signed)**

**ALEXANDRA MARKS CBE**

**DATE: 28 July 2021**