



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

Case No. EA/2010/0152

ON APPEAL FROM:

**The Information Commissioner's
Decision Notice No: FS50252196
Dated: 25 August 2010**

Appellant: Alan Dransfield
First Respondent: Information Commissioner
Second Respondent: Devon County Council (Additional Party)

Heard at: 45 Bedford Sq. London

Date of consideration: 3 March 2011

Date of decision: 30 March 2011

Before

Christopher Hughes OBE
Judge

and

Marion Saunders and Ivan Wilson
Members

Appearances: This hearing was conducted on the papers.

Subject matter: FOIA S.3 whether information is held by a public authority.

DECISION OF THE FIRST-TIER TRIBUNAL

The Tribunal rejects the appeal and upholds the decision notice dated 25 August 2010 on grounds other than those contained in the decision notice.

Christopher Hughes

Tribunal Judge

Dated this 30th day of March 2011

REASONS FOR DECISION

1. On 10 February 2009 the Appellant, having previously made a more wide-ranging application for information concerning a large Private Finance Initiative project, applied to the Second Respondent in the following terms:
"I now wish to downgrade my FOI request for the Operations Maintenance Manual (OMM) for the ISCA College only. I don't mind if it is via CD or electronic transfer."
2. On 12 May 2009 the Second Respondent informed the Appellant that it did not hold the requested information in electronic form, stated that to comply with his request would mean the location and retrieval of a substantial number of documents and that the costs of so doing would exceed the statutory limit of £450 and consequently the information would not be provided.
3. On 9 June 2009 the First Respondent accepted the Appellant's complaint and commenced an investigation of this decision and confirmed to the Appellant the precise scope of his investigation on 31 July 2009 in the light of the Appellant's desire to expand the scope to reflect his broader concerns.
4. During the course of the investigation (and indeed before the Tribunal) the Appellant strenuously argued that in the light of his interpretation of various statutory requirements and guidance the Second Respondent was obliged to maintain these records in an accessible electronic format and therefore the Second Respondent was obliged to provide the information.
5. The Second Respondent initially maintained the position of the cost of collating and providing widely dispersed paper records; however during the course of the investigation it adopted the argument that the request was vexatious and accordingly under S14(1) of FOIA it was not obliged to comply with the request.
6. In his Decision Notice of 25 August the First Respondent found that FOIA did not require public authorities to adopt a system of electronic document and records management, that the Operations and Safety Manual did not form part of the health and safety file and made the following findings with respect to the Second Respondent's use of "Buzzsaw" which appeared to hold some of the requested information:-

“This is a data storage and project management application, understood to be hosted on a university server in the United States, which enables contractors to upload and amend documentation and plans relating to projects, and thereby permit their staff and clients to have access to up-to-date versions of the documents as necessary. Buzzsaw was introduced by the contractors after the contract was signed. Access to documents was largely confined to the build phase of the project and is granted at the contractors’ discretion and under their control. DCC also understands that it may be charged for access in some circumstances.”

7. In considering the application the First Respondent concluded that on an objective reading it was wide ranging in its scope. He reviewed the available evidence concerning the request in the light of relevant factors in determining whether the request was vexatious. He concluded that complying with the request would create a significant burden, that the request had the effect of harassing the Second Respondent and its staff and that the request was obsessive. He concluded that the request was vexatious and the Second Respondent was entitled to rely on S14(1) of FOIA.

8. The Appellant was dissatisfied with the decision notice and appealed against it on 26 August 2010. The matter came before the Tribunal on 24 January 2011.

9. At that hearing from the evidence submitted to the Tribunal and in particular an e-mail sent by the Additional Party to the Appellant on 23 January 2011 it became clear that there was a substantial issue which none of the parties had considered. From the evidence and arguments it appeared possible that the Second Respondent might not currently be entitled as of right to have access to this information. The Tribunal therefore decided to adjourn to consider as a preliminary issue whether the information sought, held by persons other than the Second Respondent, is held by those other persons on behalf of the Second Respondent or alternatively that such information did not come within the ambit of FOIA and gave directions accordingly.

10. The panel met again on 3 March. the supplemental information filed with the Tribunal in accordance with the directions of 23 January by the Second Respondent was that by a contract dated 26 March 2004 the Council entered into a project agreement with Modern Schools (Exeter) Limited (the Contractor) whereby the design, construction, completion and commissioning of a number of schools in the Exeter area was agreed pursuant to the Private Finance Initiative. In this contract relevant provisions were:-

11. Clause 32 of the Contract which provides:-

“32. OPERATING MANUAL

32.1 Maintenance of Manual

The Contractor shall throughout the Operational Period maintain and update an operating and maintenance manual setting out the procedures for providing the Services which if complied with would constitute compliance by the Contractor with its obligations in respect of the Services (the “Operating Manual”).

32.2 Access to Manual

The Contractor shall at the request of the Authority provide the Authority with access to the Operating Manual in order to demonstrate that the Contractor has complied with its obligation to maintain and update the Operating Manual under clause 32.1.

32.3 Copy on Termination

On termination of this Agreement (howsoever arising including expiry) the Contractor shall within 10 Working Days provide a copy of the Operating Manual to the Authority.”

12. The contract remained in operation and therefore the rights of Access to the manual for the Second Respondent were as laid down in paragraph 32.2. In addition the contract provides at Clause 57:

“57. INFORMATION AND CONFIDENTIALITY

57.1 Duty of Confidentiality

The parties shall keep confidential all matters relating to this Agreement and the Project Documents and shall use all reasonable endeavours to prevent their employees and agents from making any disclosure to any person of any matters relating to this Agreement.”

13. The Second Respondent submitted in the light of this that the Operating Manual was held by the contractor and not by the Second Respondent. The Second Respondent was entitled to access to the document for the sole purpose of determining whether the contractor had complied with its obligations with respect to the compilation and maintenance of the document. It was not entitled to a copy and the confidentiality clause further restricted its actions. Furthermore the Second Respondent had had no input into generating the information, no control over it and no right to deal with it in any way. In the circumstances the information was not held by the Second Respondent.

14. In his submissions on the preliminary issue the First Respondent was critical of the Second Respondent for the late stage at which this issue had been identified. He

reviewed the evidential and legal issues raised by the submissions by the Second Respondent. In the event that the Tribunal was unable to determine on the evidence whether the information was held at the time of the request, the Tribunal was invited to uphold the decision notice that the request was in any event vexatious.

15. In his response to the contractual information put forward the Appellant attempted to broaden the issue and made a number of assertions. In particular he claimed that the operating manual was not the same as the operations maintenance manual. The Tribunal could not accept this argument – from the whole history of the request it was abundantly apparent that these terms were used for the same information in this context. He made a number of assertions as to health and safety law and asserted numerous breaches of the law by the Second Respondent. He alleged systematic criminal conduct by the Second Respondent and by necessary implication by identifiable officers of the Second Respondent.

16. FOIA provides guidance as to whether information is held by a public authority. It provides at section3(2):-

“For the purposes of this Act, information is held by a public authority if-

- (a) It is held by the Authority, otherwise than on behalf of another person, or
- (b) It is held by another person on behalf of the Authority”

17. The Tribunal was satisfied by the evidence of the contract submitted by the Second Respondent that at the relevant time the requested information was held on an American computer system on behalf of the contractor, not of the Second Respondent. Under PFI arrangements until 2033 the contractor will have wide ranging responsibilities with respect to the maintenance of the ISCA school and during that period the only substantive right which the Second Respondent has over the information is to inspect it for the purpose of satisfying itself that the information is properly maintained. After 2033 the position will change and the Second Respondent will have direct responsibility for the school and will then have full right of access to the information. The Second Respondent is not entitled to copy that information or use its access for other purposes. It does not hold the data and has not held it at any relevant date and therefore it was not obliged to make it available to the Appellant. The Tribunal is concerned that the Second Respondent failed to identify this fundamental issue when the Appellant requested the information.

18. The Tribunal has in accordance with S58(2) of the Act conducted a review of the factual basis upon which the decision notice was based. It has concluded that the information sought was not held by the Second Respondent. For this reason it dismisses the Appeal on grounds other than those set out in the First Respondent's Decision Notice of 25 August 2010.

Judge Christopher Hughes

30 March 2011



**IN THE FIRST TIER TRIBUNAL
(INFORMATION RIGHTS)**

**RULING on an APPLICATION for PERMISSION to APPEAL
By**

Mr Alan Dransfield

1. This is an application dated 30 March 2011 by Mr Alan Dransfield (The Appellant) for permission to appeal against and to seek judicial review of the decision of the First Tier Tribunal (Information Rights) ("FTT") dated 30 March 2011.
2. That decision of the FTT dismissed the appeal and upheld the Information Commissioner's (IC) Decision Notice FS 50252196 of 25 August 2010 on grounds other than contained in the Decision Notice.
3. The right to appeal against a decision of the FTT is restricted to those cases which raise a point of law. The FTT accepts that in form this is a valid application for permission to appeal under rule 42 of the Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules 2009 as amended ("the Rules").
4. The FTT has considered whether to review its decision under rule 43(1) of the Rules, taking into account the overriding objective in rule 2, and has decided not to review its decision because the grounds of the application do not raise an error of law for the reasons stated below.
5. The Appellant considers that the Tribunal came to a perverse decision and erred in law in coming to its decision without holding a full oral hearing and without hearing evidence from his expert witness. His appeal makes assertions as to the content of a number of provisions of statute law which, he claims, require the public body to hold this information.
6. At an oral hearing on 23 January 2011 at which the Appellant was present the Tribunal made a ruling with the consent of all the parties that the preliminary issue of whether or not the information was held by the public body having arisen, that question be resolved.
7. The issue arose in the form (not previously explored between the parties) of the question that since the information sought was held by another person, whether the terms on which it was held were such that it was held by that other person on behalf of the authority. The tribunal gave directions for disclosure of the relevant contractual terms upon which the information was held and for submissions on the effect of those contractual provisions. In the consent order the Tribunal directed "In the event that the Tribunal determines that the information is not held by the Additional Party such decision will be determinative of this appeal".
8. The Tribunal determined that as a question of law the information requested was not held by the public authority.

9. The preliminary issue which was by consent viewed as determinative of whether the case needed to proceed to an oral hearing was a question of contractual interpretation, the directions of the 24 January did not make provision for expert evidence and the subject matter of the preliminary issue was not susceptible to illumination by expert evidence.
10. The submissions by the Appellant as to alleged breaches of law do not fall within the jurisdiction of the FTT and do not go to the issue of whether or not the information was as a matter of law held by the public authority.
11. The Tribunal is not persuaded that its original decision was incorrect in fact or in law.
12. It follows that the appeal has no prospect of success and that permission to appeal is refused. For like reasons an application for judicial review has no prospects of success and leave to apply is refused.
13. Under rule 21(3) the Tribunal Procedure (Upper Tribunal) Rules 2008 as amended the Appellant has one month from the date this Ruling was sent to it to lodge the appeal with the Upper Tribunal (Administrative Appeals Chamber).

C Hughes OBE

Information Rights Judge

12 April 2011