



IN THE FIRST-TIER TRIBUNAL **Case No. EA/2014/0102**
GENERAL REGULATORY CHAMBER
INFORMATION RIGHTS

ON APPEAL FROM:

The Information Commissioner's Decision Notice No: FS50506705

Dated: 31 March 2014

Appellant: The Governing Body of the University of Kent

Respondent: Information Commissioner

Additional Party: Christopher Mark Perkins

Heard at: Fleetbank House, London

Date of hearing: 9 September 2014

Date of decision: 15 September 2014

Before

Angus Hamilton

Judge

and

Alison Lowton

and

Roger Creedon

Subject matter: Freedom of Information Act 2000 s 3(2)(a)

Cases considered:

University of Newcastle upon Tyne v Information Commissioner & BUAV [2011] 2
Info LR 54

McBride v Information Commissioner & Ministry of Justice EA/2007/0105

Digby-Cameron v Information Commissioner EA/2008/0010

DECISION OF THE FIRST-TIER TRIBUNAL

The Tribunal dismisses the appeal for the reasons given below.

REASONS FOR DECISION

Introduction

- 1 s.3(2)(a) of the Freedom of Information Act provides that:
*For the purposes of this Act, information is held by a public authority if —
it is held by the authority, otherwise than on behalf of another person,*

- 2 The Upper Tribunal decision in *University of Newcastle upon Tyne v Information Commissioner & BUAV* [2011] 2 Info LR 54 held that the effect of s.3(2)(a) is that *'information held by the authority on behalf of another is outside s.1 [FOIA] only if it is held solely on behalf of the other: if the information is held to any extent on behalf of the authority itself, the authority 'holds' it within the meaning of the Act.'* The Upper Tribunal decision is binding on a First Tier Tribunal and may only be overturned by the Upper Tribunal or a higher court.

Request by Mr Perkins

- 3 On 27 April 2013 the complainant requested information from the appellant in the following terms: *'Could you please supply me with all information held by the University of Kent, through the services provided by the Kent Law Clinic, on communications with the Wickhambreaux parish council (WPC) or the councillors of the WPC ... or with third parties about Seaton Meadow in Wickhambreaux, where the communication did not specifically provide legal advice to the WPC or the listed officers of the*

council.'

- 4 The Appellant informed Mr Perkins on 10 May 2013 that solicitors of the Kent Law Clinic (KLC) act for the WPC but that the Appellant considered that it did not hold the information, and that if it did it would be exempt under sections 41 and 42 of FOIA and/or Regulations 12(5)(b), (d) and (f) of the EIR.

- 5 Mr Perkins sought an internal review on 21st of June 2013. The appellant replied on 22nd July 2013 with conclusions of the internal review, which upheld the original decision.

- 6 The complainant complained to the Commissioner on 26 July 2013. That complaint resulted in the Decision Notice which contained a number of conclusions:
 - a) In relation to the sought information both FOIA and the EIR should be considered.
 - b) It was now conceded by the Appellant that KLC was not a separate legal entity distinct from the University of Kent. However the Appellant's view was that any information held was held on behalf of another person (the Clinic's client). The same approach applied under FOIA and the EIR.
 - c) The Commissioner accepted that information held by KLC may be held on behalf of its client but this did not equate to

the client having exclusive rights to that information where the Appellant retained the information for its own purposes.

- d) The Appellant held the information for a variety of its own purposes, such as: administrating the legal case, providing an audit trail, and as a learning resource for students.
- e) The real issue was whether the Appellant held the information to any extent for its own purposes. Any information held by the clinic, and therefore the Appellant, would be held to some extent for the Appellant's own purposes. The Appellant was required to reconsider its position and issue an appropriate response under FOIA and/or the EIR

The Appeal to the Tribunal

- 7 On 28 April 2014 the Appellant submitted an appeal to the Tribunal (IRT). The Grounds of Appeal asserted a number of points which can be summarised as claiming, first, that the Commissioner had erred in finding that the Appellant held the information to any extent for its own purposes and, secondly, that even if the information was held to some extent for the University's own purposes this did not inevitably mean that the University held the information as defined in s.3(2)(a) FOIA.
- 8 The latter assertion mentioned above of course meant that the appellant was asserting that the decision in *University of Newcastle upon Tyne v*

Information Commissioner & BUAV was wrong in law and should not be followed.

The Questions for the Tribunal

- 9 The Tribunal judged that the only question for them to consider was whether the Appellant held the information as defined in s.3(2)(a) or whether it only held the information on behalf of another person. As already stated the Tribunal considered itself to be bound by the decision in *University of Newcastle upon Tyne v Information Commissioner & BUAV* – that if the information is held to any extent on behalf of the authority itself, the authority ‘holds’ it within the meaning of the Act. Although invited to reject this finding by the Appellant the Tribunal was not in a position to accept such an invitation.
- 10 Consequently the only question for the Tribunal to consider was whether the information was to any extent held on behalf of KLC and consequently the Appellant.

Evidence & Submissions

- 11 This matter was considered by the Tribunal by way of an oral hearing on 9 September 2014 with one live witness – Professor Fitzpatrick – from the University of Kent. The Tribunal also received and heard oral and written submissions from the parties and the Tribunal members are grateful to all the parties for the effort they had clearly put into the preparation of their

submissions.

- 12 Having said that the Tribunal did consider that the approach adopted by the Appellant in its submissions was unnecessarily complex and confusing in relation to what was a simple and straightforward question. For example the Tribunal did not consider it necessary to make findings of fact in relation to the relationship between KLC and the Appellant – it having been conceded by the Appellant that KLC was not a separate legal entity and that any information held by KLC would consequently be held by the Appellant
- 13 The Appellant also presented quite lengthy submissions to the effect that *University of Newcastle upon Tyne v Information Commissioner & BUAV* was wrongly decided although for reasons already given the Tribunal was bound to reject those submissions.
- 14 Otherwise the Appellant submitted that the relevant information was at all times held on behalf of WPC – that organisation retaining ownership and control of the information and that organisation's express permission being required for access to and disclosure of the information. Any procedures which might have the appearance of the Appellant holding the information for its own purposes were a natural and inevitable consequence of KLC providing legal services to WPC.

- 15 The Commissioner submitted that it was clear that the information was held to some extent for the Appellant's own purposes. The Commissioner pointed out that KLC is part of the Appellant, which funds it. It is staffed by members of the Appellant's law school. The Clinic's information, including that provided by clients, is held in the Clinic's offices and storage space within the Appellant's law school. Electronic files are held on the Appellant's computer servers. The staff of the Clinic correspond using the Appellant's email addresses. The only non-practising volunteers of the Clinic are students of the Appellant. Moreover, students at the Appellant are able to take a course as part of their degree working in the Clinic. The Appellant is the only registered data controller.

- 16 The Commissioner also pointed out that the appellant had not challenged the Commissioner's finding that it holds information produced or received through the Clinic in order to generate learning resources for the law school. Similarly, the Commissioner submitted, the appellant did not dispute the information produced and received to the clinic is used for audit trails.

- 17 Again the Tribunal considered that some of these submissions went to the relationship between KLC and the Appellant rather than to the central question the Tribunal had to answer and were not therefore particularly relevant – given the concession made by the Appellant with respect to that relationship.

18 Mr Perkins adopted the Commissioner's submissions

19 Conclusion

The Tribunal considered that the evidence that the Appellant held the information to some extent on its own behalf was rather overwhelming. The Tribunal noted that Professor Fitzpatrick himself accepted that if *University of Newcastle upon Tyne v Information Commissioner & BUAV* was correctly decided then the University of Kent would hold the information. Professor Fitzpatrick is a professor of law although not, as emphasised by counsel for the Appellant, an expert in FOIA. Professor Fitzpatrick readily conceded that the information was held both for the purposes of providing legal advice and for purposes relating to the education of the law department's students. He acknowledged that, for some students, records of their work at KLC actually contributed to their degree. Professor Fitzpatrick also acknowledged that colleagues in his department held the view that the University did hold the information. The Tribunal also noted that the authorisation agreement that every KLC client entered into explicitly provided that details of their case could be disclosed for educational purposes and for the 'purpose of publicizing legal issues' raised by a case.

20 The Tribunal consequently readily concluded that the Appellant did hold the information to some extent on its own behalf and, following *University*

Reference: FS50442125

of Newcastle upon Tyne v Information Commissioner & BUAV, concluded that the Appellant held the information as defined by s3(2)(a) FOIA.

- 21 It should be noted at this point that although the wording of the relevant provision in the EIR (Regulation 3(2)) is different to the wording of s.3(2) FOIA and although this is a case where the information may be covered by either FOIA or EIR, no party sought to challenge the Commissioner's approach that there is no substantive difference in the tests to be applied under FOIA and EIR in this type of case. Thus the Tribunal's analysis will apply equally to any part of the information that is in fact covered by EIR rather than FOIA.

- 22 Our decision to dismiss this appeal is unanimous.

Signed:

Angus Hamilton DJ(MC)

Tribunal Judge

Date: 15 September 2014