IN THE UPPER TRIBUNAL
ADMINISTRATIVE APPEALS CHAMBER

Case No. GIA/3085/2011

Appellant:	Mr Ian Benson
First Respondent:	The Information Commissioner
Second Respondent:	Sheffield Hallam University

DECISION OF THE UPPER TRIBUNAL

A LLOYD-DAVIES

JUDGE OF THE UPPER TRIBUNAL

ON APPEAL FROM:

Tribunal Case No:	EA/2011/0061
Tribunal:	First-tier Tribunal (Information Rights)
Hearing date:	14 September 2011

IN THE UPPER TRIBUNAL **Case No.** GIA/3085/2011
ADMINISTRATIVE APPEALS CHAMBER

Before **A Lloyd-Davies Judge of the Upper Tribunal**

DECISION

My decision is that the decision of the tribunal made on 14 September 2011 involved the making of an error of law. I set that decision aside and remit the case for rehearing by a differently constituted tribunal.

REASONS

1. On 26 April 2010 the appellant, Mr Benson, requested the following information from the Governing Body of Sheffield Hallam University ("SHU"):-

> "FOIA requests – Staff E-Mail Addresses
>
> I would like to request the following information under the provisions of The Freedom of Information Act. I would ask you to send your response by e-mail.
>
> A list of the workplace e-mail addresses for all staff.
>
> By workplace I am referring to corporate e-mail addresses ending in .ac.uk.
>
> By staff I am referring to all individuals employed by your institution.
>
> Please note that I do not require any segmentation of the list or any associated details."

Mr Benson had made similar requests to every higher education institution in the UK. SHU had 5,291 staff e-mail addresses of which approximately 1,100 were published on SHU's website: these were not available in a list format.

2. SHU replied to Mr Benson's request on 20 May 2010. It confirmed that it held the requested information. It stated it believed that it was entitled to withhold the information under three provisions of the Freedom of Information Act 2000 ("FOIA"), namely section 31(1)(a), section 36(2)(c) and section 40(2). On 29 May 2010 Mr Benson wrote to SHU to request an internal review. He challenged the application of each of the exemptions. SHU on its review upheld its previous position. Mr Benson complained to the Information Commissioner on 15 August 2010. The Information Commissioner decided to consider section 36(2)(c) first, since if it had been correctly applied it would cover all the withheld information.

3. Section 36(2) provides as follows:

"(2) Information to which this section applies is exempt information if, in the reasonable opinion of a qualified person, disclosure of the information under this Act –

...

(c) would otherwise prejudice, or would be likely otherwise to prejudice the effective conduct of public affairs."

The exemption is a qualified exemption.

By virtue of section 36(5)(o)(iii) and the relevant ministerial order the qualified person is the vice-chancellor of SHU. He gave his opinion both for the purposes of the response to the initial request and for the purposes of the internal review.

4. On 14 February 2011 the Commissioner issued his decision notice. He found that SHU had correctly applied the exemption in section 36(2)(c): he did not consider the exemptions in section 31(1)(a) or section 40(2). The Commissioner found that SHU had not complied with section 17(3) of FOIA by failing to explain, by the time of its internal review, why the public interest factors that favoured the maintenance of a qualified exemption outweighed the public interest in disclosure of the information; however the Commissioner did not require SHU to take any steps as a result of this finding. Mr Benson appealed to the First-tier Tribunal (Information Rights) on 5 May 2011. The tribunal dismissed Mr Benson's appeal following a paper hearing to which all parties had agreed. Mr Benson applied for permission to appeal to the First-tier Tribunal, which was refused on 1 November 2011. I held an oral hearing of Mr Benson's renewed application for permission to appeal, following which I granted to Mr Benson permission to appeal on 10 December 2012. In my grant of permission to appeal I identified two issues which I then considered merited further consideration.

5. The first issue that I identified was whether the First-tier Tribunal had dealt adequately with Mr Benson's evidence that significant numbers of higher education institutions publicly provided e-mail addresses for their staff in what is conveniently described as "harvestable" form, that is to say in a form which meant that these addresses could be downloaded (either by use of specialist software or otherwise) so as to provide a proportionately bigger list of retrievable e-mail addresses than was provided by SHU: he provided a schedule showing that the University of Cambridge published 90.8% of its staff e-mail addresses and that the University of Sheffield (a neighbour of SHU) provided over 60% of its staff e-mail addresses in "harvestable" form and supplied a printout of those latter harvestable addresses (see pages 388 – 403 of the First-tier Tribunal bundle). This compared unfavourably with the 23% provided by SHU. ("Harvestable" e-mail addresses are to be contrasted with those e-mail addresses which are only obtainable in "searchable" form, namely by the searcher having the name of the target member of staff).

6. The Commissioner submitted to the First-tier Tribunal (paragraph 54 of its response on page 55 of the First-tier Tribunal bundle)

"However, [SHU] provided information to the Commission that other higher education institutions published staff directories in a searchable form where it was not possible to access the whole list and this was for the very reason that a list [i.e. a harvestable list] could lead to spam attacks (and therefore denial of service attacks)."

7. Mr Benson replied:

"I do not accept that the [SHU] submission made any reference to how other universities went about publishing e-mail addresses. In any case the figures I submitted initially to the ICO and subsequently with my appeal showed the numbers of e-mail addresses published openly without any restriction of access. I have not quoted any numbers for e-mail addresses that are available only in some restricted way such as via searchable databases."

8. On this issue SHU (at paragraph 5.5.2 on page 72 of the First-tier Tribunal bundle) stated:

"[SHU] acknowledges that other higher education institutions publish a higher percentage of e-mail addresses. However it would seek to highlight that these e-mail addresses are published in such a way that whole lists of staff e-mail addresses cannot be accessed. [Mr Benson] has confirmed that this is also his understanding."

9. Mr Benson responded to SHU in the following terms (page 75 of the First-tier Tribunal bundle):

"All the figures that I have quoted regarding proportions of staff e-mail addresses openly published by other universities referred to those e-mail addresses that can be harvested using automated methods. For the obvious reason that it would take me four years to assemble I have never attempted to gather or document the proportion of the university staff e-mail addresses which are only available through manual research.

I have read through the entirety of my previous submissions and am at a loss to understand how [SHU] could claim agreement to their statement. For the avoidance of doubt I entirely reject the SHU statement that other universities only publish higher proportions of e-mail addresses in ways that prevent whole lists being accessed."

For the avoidance of doubt I attach the list of 5,535 available staff e-mail addresses from the neighbouring University of Sheffield as gathered using automated methods on 8 May 2011. A more thorough automated search could have been undertaken and would have produced a larger total."

10. In essence, therefore, Mr Benson was arguing before the First-tier Tribunal that other universities provided a far larger proportion of staff e-mail addresses in "harvestable" form than did SHU. Each of the respondents, however, was seemingly seeking to say that those universities who published a greater proportion of their e-mail addresses than SHU did so in a manner which was non-harvestable.

11. The First-tier Tribunal dealt with this issue in the following manner in paragraphs 19 – 22 of its decision which were as follows:

> "19. Mr Benson's second ground relates to the lower percentage of e-mail addresses published by SHU on the Internet in comparison with other universities and the argument that the Commissioner did not take this into account. The Tribunal interpreted this as an argument that the Commissioner ought to have exercised his discretion differently.
>
> 20. In response the Commissioner argues that he did indeed take this into account, noting that other universities publishing a higher percentage of e-mail addresses deploy techniques to prevent disclosure of whole lists via the internet, such as links to searchable databases. He also considers the necessity of publishing whole staff e-mail address lists and notes that SHU do have addresses for staff with public facing roles on its site.
>
> 21. SHU state that based on their experience, publication of a higher percentage of e-mail addresses would lead to further "spam" and "phishing" attacks. They also indicate that [Mr Benson] himself has acknowledged the approach taken by other universities, designed to prevent access to whole lists.
>
> 22. The Tribunal concluded that the Commissioner has given appropriate weight to the potential disruption and prejudice to SHU's business, basing this on evidence of previous "spam" and "phishing" attacks following inadvertent disclosure of the e-mail address list."

12. Each of the respondents submits that paragraphs 20 and 21 which I have just cited are an accurate summation of the submissions made to the First-tier Tribunal. In my judgment, however, this misses the point: the First-tier Tribunal wholly failed to deal with Mr Benson's evidence as to the extent to which other universities had "harvestable" sites. It is nowhere mentioned. I would go further than this: by quoting only the submissions made by the respondents in paragraphs 20 and 21 above, the First-tier Tribunal was, in my view, tacitly adopting those submissions as a part of its decision. I recognise that paragraph 22 refers to "spam" and "phishing": but the Tribunal's conclusions on this might well have been affected by its unbalanced approach to the evidence and submissions which it had received.

13. I have considered carefully whether the failure on the part of the First-tier Tribunal which I have identified above is sufficiently material to mean that its whole decision must be set aside. I conclude that the failure is material: if the Tribunal had taken into account Mr Benson's evidence as to the extent of which other universities staff e-mail addresses were harvestable it might well have approached the question of both the reasonableness of the vice-chancellor's opinion and the question of the balance of public interest in a different fashion. I consider that Mr Benson is entitled to a fair evaluation of the evidence that he produced; this has not been given; and on this ground alone I set the decision of the First-tier Tribunal aside. (I add that I have ignored, for the purposes of this decision, the further evidence adduced by Mr Benson and attached to his skeleton argument which was before me when I granted

permission to appeal: this was not before the First-tier Tribunal, which cannot be faulted for not taking it into account).

14. There are two further points. First, I do not consider that this is a case where I should substitute my own decision since Mr Benson is entitled to have the benefit of the expertise of the lay members of the First-tier Tribunal, which expertise I only have in very much less measure. Secondly, the fact that Mr Benson has succeeded in his appeal before the Upper Tribunal is of no predictive weight as to what the newly constituted First-tier Tribunal may decide.

15. I can deal with the second ground on which I granted permission to appeal more shortly. I referred to the decision of the Scottish Information Commissioner in Benson v University of Glasgow, 8 December 2010, decision number 2006/2010. As has been pointed out by the respondents, the legislation corresponding to Section 36 of FOIA is markedly different in Section 30 of the Freedom of Information Act (Scotland) 2002. First, substantial prejudice or the likelihood of substantial prejudice has to be shown as opposed to merely prejudice. Secondly, there is no requirement for the reasonable opinion of a qualified person. Thirdly, on its facts this decision was markedly different. Glasgow University in fact published all staff e-mail addresses on its website, but in a format which it was accepted would have taken at least 25 hours to harvest. The Scottish Commissioner decided that there was no substantial prejudice in the University publishing a full list, since the list available was not reasonably accessible. In the event the Commissioner declined to make any order to the University, since Mr Benson had, by the time of the Scottish Commissioner's decision, successfully downloaded the e-mail addresses by automated means. I therefore consider that the Scottish decision, as a matter of law, does not take Mr Benson's appeal any further.

16. For the reasons given in paragraphs 12 to 13 above I allow Mr Benson's appeal.

(Signed)

A Lloyd-Davies
Judge of the Upper Tribunal

(Date) **11 December 2013**