



IN THE FIRST-TIER TRIBUNAL **Cases Nos. EA/2012/0049, 0085**
GENERAL REGULATORY CHAMBER
INFORMATION RIGHTS

ON APPEAL FROM:

The Information Commissioner's Decision Notices Nos: FS50384608 (1 February 2012),
FS50397683 (20 March 2012)

KING'S COLLEGE, CAMBRIDGE

Appellant

-and-

THE INFORMATION COMMISSIONER

1st Respondent

JOHN LEE

2nd Respondent

Determined on documents

Date of decision: 15 October 2013

Before

Andrew Bartlett QC (Judge)
Henry Fitzhugh
Andrew Whetnall

Representation:

For King's College Cambridge: Timothy Pitt-Payne QC

The Information Commissioner

Mr Lee in person

Subject matter:

Freedom of Information Act 2000 – s 3 - whether information held on behalf of College by individual Governors

Cases:

University of Newcastle v IC and BUAV [2011] UKUT 185 (AAC)

DECISION OF THE FIRST-TIER TRIBUNAL

Our decision on the further preliminary issue in appeals 0049 and 0085 is that information held by individual non-Fellow Governors of King's College School may be held on behalf of the College.

We further note and adopt the College's express concession that information held by Fellows of the College in relation to their role as School Governors would be held by the College for the purposes of FOIA. We take this concession to apply to the Chair and Deputy Chair of Governors, the Organist, the First Bursar, and three other Fellows who were Governors at the material times.

In the directions below, "Mr Lee's first request" means the requests identified in paragraph 16 of the Tribunal's decision dated 18 December 2012; and "Mr Lee's second request" means the request identified in paragraph 26 of the Tribunal's decision dated 18 December 2012.

The Tribunal orders and directs:

- (1) The College shall make inquiries with those persons who were Governors in the period November 2009 to December 2010 to identify information held by them, falling within the scope of Mr Lee's first request, held on behalf of the College.
- (2) The College shall make inquiries with those persons who were Governors in the period March 2010 to April 2011 to identify information held by them, falling within the scope of Mr Lee's second request, held on behalf of the College.
- (3) In determining for the purposes of steps (1) and (2) above whether the information is or was held on behalf of the College, in the case of non-Fellow Governors the College shall apply the guidance set out in paragraphs 31-32 of this present Decision as clarified by paragraph 37.
- (4) Within 28 days from the date of this decision the College shall complete the steps set out in (1)-(2) above and shall issue to Mr Lee (with a copy to the Information Commissioner) a fresh response under FOIA in respect of the information held and falling within the scope of one or other or both of Mr Lee's first and second requests.
- (5) Should Mr Lee be dissatisfied with the College's compliance with the above directions, he may submit a new section 50 complaint to the Information Commissioner.
- (6) The parties are to have liberty to apply. This means that direction (5) above shall not prevent Mr Lee or another party referring this matter back to the Tribunal to issue further directions in the light of this present decision, in the event that some further order of the Tribunal is required in order to give full effect to the present decision. See further paragraph 42 of the decision.

REASONS FOR DECISION

Introduction

1. This decision is concerned with whether information held by individual Governors of King's College School, Cambridge, who are not Fellows, is held on behalf of King's College.

The issue for decision

2. The background to the appeals is found in our decision dated 18 December 2012, which determined a number of preliminary issues.
3. The scope of the material requests made by Mr Lee is as set out in paragraphs 16 and 26 of our decision of 18 December 2012.
4. After the partial withdrawal of the appeals by the Appellant (the College), as approved by the Tribunal on 12 April 2013, the Appellant's appeals in cases 0049 and 0085 were continued only in relation to information held by individual Governors and not otherwise held by or on behalf of the College or the School.
5. Accordingly, the issue remaining in the appeals is whether information held by individual Governors of the School (but not otherwise held by the College or School) and which falls within the scope of the material requests made by Mr Lee was (or is) 'held' by the College or the School within the meaning of section 3(2) of the Freedom of Information Act 2000 (FOIA).
6. On 10 May 2013 we gave directions for this issue to be determined without an oral hearing.
7. At the time of making that order we noted the statement in the Appellant's email of 14 March 2013:

the College is unable to specify the exemptions that might be claimed because it has not seen the Governor-held information. The Governors have been unwilling, on a point of principle, to disclose any information (whether relevant or not) which they had not intended to disclose either to the College or the school at the time the information had been generated.

8. Our order consequently stated:

In preparing its documents and submissions for the appeals the Appellant should keep in mind that the Tribunal does not exist in order to answer hypothetical questions. These appeals can only proceed on the basis that

Governors do (or did at the time of the requests) in fact hold information falling within the scope of the material requests made by Mr Lee, the principal issue being whether such holding by Governors amounts to holding by the Appellant within the meaning of FOIA s3(2). If no such information were held by Governors, the appeals would lack subject matter.

9. The appeals were pursued, and we accordingly inferred that the College knew or believed that the Governors do (or did at the time the requests were dealt with) in fact hold information falling within the scope of the material requests made by Mr Lee. We refer to this aspect further below.
10. In its written submissions dated 12 July 2013 the College (so far as we are aware, for the first time) conceded that information held by Fellows of the College in relation to their role as School Governors would be held by the College for the purposes of FOIA. We take this concession to apply to the Chair and Deputy Chair of Governors, the Organist, the First Bursar, and three other Fellows who are Governors.
11. We are therefore only required to decide the narrow issue whether the same is true of information held by other Governors who are not Fellows of the College.
12. For the meaning of "held" in FOIA s 3(2), we were referred by the parties to *University of Newcastle v IC and BUAV* [2011] UKUT 185 (AAC), [23]-[27].
13. Prior to finalisation of the present decision we sent it in draft to the parties, inviting not only clerical corrections in the usual way but also wider submissions as to the appropriate disposal of the appeal and appropriate directions in the light of the view at which we had arrived. All three parties responded. We understand that, as at the date of our decision, no information held and disclosable as a result of the concession has been disclosed to Mr Lee; we have therefore included an order concerning this in our decision.

Facts and evidence

14. The requests made by Mr Lee relevant to appeal 0049 were made in November 2009. The College's internal review was completed in December 2010. By appeal 0049 the College appealed to the Tribunal against Decision Notice FS50384608 (dated 1 February 2012).
15. The request made by Mr Lee relevant to appeal 0085 was made in March 2010, and the College's internal review was completed in April 2011. The College appealed to the Tribunal against Decision Notice FS50397683 dated 20 March 2012, by appeal 0085.

16. It is not necessary for us to describe here the events which resulted in the internal reviews being completed so long after the requests.
17. The governing body of the College is a public authority for the purposes of FOIA: see Schedule 1 to FOIA, at Part IV, paragraph 53(1)(e). The requests made by Mr Lee relate to King's College School. In a decision not under appeal in these proceedings the Information Commissioner ruled that the School is part of King's College for the purposes of FOIA.
18. We were provided with and have considered the Regulations of the College in force at the material time, together with an explanatory statement by the Dean, who is the current Chair of Governors of the School. Mr Lee also drew to our attention a commentary on the governance of the School issued by the Legal and General Purposes Sub-committee, dated 13 February 2012. This seems to show that the Governors conduct their business mainly in their formal meetings, whether meetings of the whole of the Governors or of their sub-committees. It also states: "Business conducted by individual governors outside meetings of the Governors must be brought to that body for formal approval before being circulated or disseminated."

The parties' submissions

19. Mr Pitt-Payne QC on behalf of the College submits:

12. The key points, as explained in the Dean's statement, are these.
 - Non-Fellow Governors are not officers of the College.
 - They are not employed by the College in any capacity whatsoever.
 - They do not receive any remuneration (even expenses) for their work as Governors.
 - They are not given any equipment by the College in connection with their work as Governors. For instance, they are not provided with computer equipment.
 - They are serving in a wholly voluntary capacity, contributing their specific expertise to the work of the Governors.
 - They have no security of tenure, and can be removed at will by the College Council.
13. Non-Fellow Governors may well hold information relating to their role as Governors. For instance, they may make notes for their own purposes in relation to the business of the School Governors. They may carry out correspondence in relation to the work of the School Governors, on paper or by email. Any information of this nature will be held by the non-Fellow Governors personally, rather than by the College.
14. There are four reasons why the College does not "hold" this information, within the meaning of FOIA section 3(2).
15. *First*, the nature of the role played by the non-Fellow Governors is material. It is a wholly voluntary role. As explained above, they are neither officers nor employees of the College.
16. *Secondly*, the institutional relationship between the non-College Governors and the College is material. The non-Fellow Governors are not subject to the direction or control of the College. They are not part of its organisational structures. They cannot be given directions or instructions by the College, except in the sense that College Council can remove them from their position as School Governors.
17. *Thirdly*, the College has no knowledge or awareness of the information that is held by non-Fellow Governors in relation to their role as School Governors. The College does not provide non-Fellow Governors with email accounts; it has no way of knowing

what information they may hold on their own personal email accounts. Likewise, it has no way of telling what other records they may hold about School business, or how those records are held.

18. *Fourthly*, the College has no way of directing or requiring non-Fellow Governors to provide it with information that they hold about the School. The College could direct that any non-Fellow Governors who refused to do so would be replaced as School Governors; but even this step would not compel them to disclose information to the College in relation to their work as School Governors. To treat information held by the non-Fellow Governors as being “held” by the College, would give rise to very severe practical difficulties: it would potentially impose obligations on the College, in relation to FOIA disclosure, that it had no practical means of fulfilling. FOIA ought not to be construed in a way that makes the statute unworkable.
19. Applying the fact-sensitive approach set out in the *Newcastle* case, above, these four considerations taken together should lead the Tribunal to conclude that information held by non-College Governors is not held by the College for FOIA purposes.
[End of quotation]

20. Mr Lee submits, in summary:

- a. The fact that non-Fellow Governors act voluntarily, are unpaid, and have no security of tenure has nothing to do with whether relevant information is held on behalf of the College.
- b. The College has ultimate control of the School. Governors are under the control of the College Council (which itself has delegated authority from the Governing Body) to the extent that the Governors are accountable to the Council.
- c. The College’s lack of awareness of what is held by Governors is not a relevant argument, as it is the information that matters, not the means of communication.
- d. The College could direct Governors to produce relevant information which they hold about the School.

21. The Information Commissioner maintains the view which he came to in his Decision Notices, that information falling within the scope of Mr Lee’s material requests and held by individual Governors was held by the College for FOIA purposes. The Commissioner draws attention to the fact that the College Council exercises its responsibility for the School through the Governors, who are a committee of the Council, and who have delegated authority to act on its behalf. He submits that pursuant to *BUAV* the issue is whether there is an appropriate connection between the information and the public authority. If the information is held by a Governor as a result of his or her role and relates to the business of the School, it is held by or on behalf of the College.

22. He also agrees with Mr Lee’s points that the use of private email accounts (see the Commissioner’s published guidance) and the non-Fellow Governors’ status as volunteers rather than employees make no difference.

Analysis

23. We respectfully adopt and follow the guidance given in *University of Newcastle v IC and BUAV* [2011] UKUT 185 (AAC), at [23]-[27].
24. We fully acknowledge the relevance of the nature of the role fulfilled by Governors who are not Fellows of the College. However, the fact that they are volunteers does not of itself rule out the possibility of their holding information on behalf of the College. All the circumstances must be considered.
25. Suppose, for example, that an individual non-Fellow Governor were delegated by a Governors' meeting to write to an outside body. It would be the duty of that individual to make the reply available to the Governors as a body. Information contained in the reply would plainly, in our judgment, be held by that individual on behalf of the Governors, and hence by the College.
26. We are unpersuaded by the argument that the College would have no means of enforcing the duty which would arise in such a case. In the ordinary course, we would expect Governors to fulfil their duties without the threat of legal measures to compel them to do so. In any event, where a non-Fellow Governor held information on behalf of the College, we consider it likely that there would be a legal basis for such compulsion, if necessary, whether by an implied contract or an equitable obligation.
27. While the individual non-Fellow Governors do not have a place within the institution of the College in the same way as Fellows or employees, and this greatly reduces the College's powers of direction and control, we are unable to accept the submission that it has no control at all over individual Governors other than to dismiss them. The Governors as a whole are accountable to the College Council. If individual Governors take actions in pursuance of their gubernatorial duties and within the scope of their authority, such actions are taken on behalf of the Governors as a body and hence on behalf of the College Council. This supports the conclusion that information held by an individual non-Fellow Governor may (depending on the circumstances) be held on behalf of the College. If information were so held, in our view it would be the duty of a Governor to supply that information to the College, if requested to do so.
28. For the above reasons, we reject Mr Pitt-Payne's submission that no information held by individual non-Fellow Governors is held by the College within the meaning of FOIA s3. The College's decision at an earlier stage not to make inquiries with individual Governors to discover whether they held, on behalf of the College, information falling within Mr Lee's request, was in our view based on an incorrect understanding of its duty under FOIA.
29. While the College's case in our view makes too much of the nature of the Governors' role and relationship with the College, the case for the Commissioner and for Mr Lee in our view makes too little of it. The nature and terms of the non-Fellow Governors' voluntary role are relevant factors which must be taken into consideration. We are unable to accept the

Commissioner's broad submission that, if information is held by a Governor as a result of his or her role and relates to the business of the School, it is necessarily held by or on behalf of the College.

30. The significance of the nature of the Governors' role may be highlighted by comparing it with other possible relationships. In the case of an employee, it might be true that information relating to the business of the School, held by the employee as a result of his or her role, would almost necessarily be held by or on behalf of the College. But in the case of other relationships this would certainly be too sweeping a statement. We find it instructive to compare the situation of a solicitor engaged to carry out a transaction on behalf of the College. Some information held by the solicitor as a result, and relating to the business of the College, would be held by him on behalf of the College, and some would not. For example, a reply from a third party, to a letter sent on behalf of the College, would be held by the solicitor on the College's behalf, and the College would be entitled to call for it. But the solicitor's own notes on how to proceed, made in order to assist him in carrying out his duties effectively, would not be held on behalf of the College, and the College would not be entitled to call for delivery up of the notes, or of the information contained in them. The mere facts that the information in the notes related to the business of the College and that it was held as a result of the solicitor's role would not be sufficient to establish that it was held by him for the College.

31. What is done by the Governors as a group, or by a sub-committee of the Governors as a group, is done on behalf of the College. Information contained in agendas, minutes, and other documents prepared for submission to such meetings, is held by the College, through the hands of individual Governors. Similarly, authorised actions taken by individual Governors on behalf of the whole group, or on behalf of a sub-committee, are taken on behalf of the College, and information prepared or received as part of such actions is held by such Governors on behalf of the College. But notes or jottings by individual non-Fellow Governors, or communications to or from individual non-Fellow Governors by way of informal discussion outside meetings, and not intended for submission to such meetings, are not made on behalf of the College, and information within them is not held by the College. In our view this analysis is consistent with the understanding of the Governors' role evident in the guidance issued by the Legal and General Purposes Sub-committee.

32. By way of further explanation, we would emphasize that our decision does not stand for the proposition that, where a private individual serves on a public authority, the public authority has a general right to instruct that individual to hand over emails or other materials held on private email accounts. In our view the right is confined to those particular items (if any) which are held on behalf of the public authority. Depending on the circumstances, the latter are unlikely to include informal discussions among volunteers not intended for submission to the relevant decision-making body. We would endorse the principle identified in the Commissioner's published guidance on official information held in private email accounts (15 December 2011 Version 1.0), where it states: "FOIA applies to official information held in private email accounts (and other media formats) when held on behalf of the public authority" [our emphasis].

33. We also agree, as stated in that guidance, that, where a public authority considers that a relevant individual's personal email account may include information which falls within the scope of the request and which is not held elsewhere on the public authority's own system, it will need to ask that individual to search their account for any information falling within the scope.
34. The Commissioner's guidance on official information held in private email accounts further states:

Public authorities should also remind staff that deleting or concealing information with the intention of preventing its disclosure following receipt of a request is a criminal offence under section 77 of FOIA. For example, where information that is covered by a request is knowingly treated as not held because it is held in a private email account, this may count as concealment intended to prevent the disclosure of information, with the person concealing the information being liable to prosecution.

35. We consider this to be prudent guidance, which is as relevant to officers or governors as to employees. We note that there is no suggestion that the present case is one where there was deliberate use of private e-mails for official business in order to keep them off the official e-mail system. In such a case FOIA might well reach further into informal communications than it otherwise would.

36. In a response to our draft decision, Mr Lee stated:

I would appreciate the Tribunal's further guidance in connection with the wording contained in the penultimate sentence of Para 31 of the Draft Decision. In particular, the references to "informal discussion" and "not intended for submission to Governors' meetings" might be interpreted in varying ways by different individuals. My concern about the guidance given in Para 31 is that Governors may argue that their correspondence on the failed inspection, misleading letter and breakdown in governance simply constituted informal discussion outside meetings of the Governors and as a result, provide no information. Because many Governors live a long way from the school and, in the very fast and frenzied environment (following the failed inspection) email exchanges between governors would by necessity have been the norm. In addition, the Provost has consistently maintained that much of the Governors business is carried out by email because many school Governors live a long way from the school. Does, for example, the Para 31 guidance mean that Governors' emails relating to the substantially misleading letter need not be disclosed simply because Governors given an opinion that they were in the form of an informal discussion outside a Governors' meeting and not submitted to formal Governors' meetings? I, therefore, respectfully ask for greater clarity on the wording of the penultimate sentence.

37. Where emails were sent or copied by individual Governors to Fellows or Officers of the School or College, these will have been held by the College in any event, so we understand Mr Lee's question to refer to emails between non-Fellow Governors. In line with the reasoning that we have set out in

paragraphs 23-32 above, in our view informal emails between such Governors would not generally be held on behalf of the College unless they were part of a process which was carried out in substitution for a formal meeting of the Governors. In the latter event they would be records of a meeting held by email instead of by meeting in person, and would therefore be held on behalf of the College. We have here used the qualifier “generally” because we cannot completely rule out the possibility that other informal emails might be generated in circumstances which would make them held on behalf of the College. For example, it is conceivable that some particular informal notes or emails of an individual Governor might be held on behalf of the College if that Governor was delegated to carry out a specific task and the task included the preparation of those notes or emails for the College. However, we consider that the usual status of Governors’ informal notes or emails, when not either intended for submission to a formal Governors’ meeting or as a substitute for such a meeting, would be more akin to the solicitor’s notes in our example in paragraph 30 above, ie, merely notes written to help the person carry out his or her duties effectively.

38. We wish to add that we firmly disagree with the Commissioner’s submission that the issue is whether there is an “appropriate connection” between the information and the public authority. We are confident that in *BUAV* the phrase “appropriate connection” was not put forward as a test to replace the statutory wording, or as a definition of the issue to be decided, but was used by way of shorthand explanation in the discussion of the statutory words and of the examples given in paragraph [47] of the First-tier decision. As the Upper Tribunal said at [29]:

I do not regard the tribunal’s reference to the need for “an appropriate connection between the information and the authority” as a misguided attempt to replace the statutory language with its own “rather nebulous” test On the contrary, the tribunal was simply pointing to the need for the word “hold” to be understood as conveying something more than the simple underlying physical concept, given the intent behind section 3(2).

Conclusion and orders

39. Our decision on the further preliminary issue in appeals 0049 and 0085 is that information held by individual non-Fellow Governors of King’s College School may be held on behalf of the College, but we find in favour of the Commissioner and Mr Lee only to the limited extent indicated above – in particular, in paragraphs 31-32, as clarified by paragraph 37.
40. Having considered the parties’ responses to our draft decision, we order and direct as set out at the head of this decision.
41. Following the issue of our draft decision to the parties, we were concerned to receive a response from the College taking issue with paragraph 9 above, as originally drafted. The College stated:

Paragraph 9 states that the College “knows or believes that the Governors do (or did at the time the requests were dealt with) in fact hold information falling within the scope of the material requests made by Mr. Lee”. The College has repeatedly made clear, most recently through Mr. Pitt-Payne’s submissions, that the College does not in fact possess this knowledge. All it can state is that the Governors may hold such information.

42. Paragraph 1 of Mr Pitt-Payne’s submissions referred to information held by individual Governors and falling within the scope of Mr Lee’s material requests.¹ But the College’s response seems to indicate that the College wholly disregarded the warning in paragraph 13 of the Tribunal’s directions order made on 10 May 2013, and has so far not even asked the non-Fellow Governors whether they hold any information which, if held on behalf of the College, would fall within Mr Lee’s requests. If no such information is in fact held, the appeal will have been in our view an abuse of process, being merely theoretical, and a waste of Mr Lee’s time, of the time and costs of the Tribunal and the Commissioner, and indeed of the College’s own legal costs. We therefore reserve for potential future consideration whether there should be a special order as regards costs, pursuant to rule 10 of the Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules 2009. Any party wishing to apply for such an order should do so promptly after learning of the true position as regards what was held by the non-Fellow Governors and in any event not later than 6 months from the date of this present decision. The latter time limit is an extension of the period allowed in rule 10(4), the extension being made pursuant to rule 5(3)(a).

Signed on original:

Andrew Bartlett QC

Tribunal Judge

¹ We had accordingly understood paragraph 17 of his submissions to be a general argument, rather than a statement that the College still did not know in this particular case whether the Governors held relevant information.