IN THE FIRST-TIER TRIBUNAL **Case No.** EA/2013/0190
GENERAL REGULATORY CHAMBER
INFORMATION RIGHTS

ON APPEAL FROM:
The Information Commissioner's Decision Notice No: FS50498491, dated 20 August 2013

Appellant: GOLDSMITH INTERNATIONAL BUSINESS SCHOOL

Respondent: INFORMATION COMMISSIONER

Heard at Fleetbank House, London EC4

Date of hearing: 13 January 2014

Date of decision: 27 January 2014

Date of promulgation: 28 January 2014

Before

Andrew Bartlett QC (Judge)
Rosalind Tatam
Melanie Howard

Attendances:

For the Appellant: Ladi Tokosi, with Emman Aluko

The Respondent did not attend the hearing.

Subject matter:
Freedom of Information Act 2000 – absolute exemption – personal data

Cases:
APPGER v IC and MOD [2011] UKUT 153 (AAC)
Corporate Officer of the House of Commons v IC [2008] EWHC 1084 (Admin)
Durant v Financial Services Authority [2003] EWCA Civ 1746
R (London College of Management Ltd) v Secretary of State for the Home Department [2012] EWHC 1029 (Admin)
R (New London College Ltd) v Secretary of State for the Home Department [2013] UKSC 51
Webber v IC and Nottinghamshire Health Care NHS Trust GIA/4090/2012, 12 September 2013

DECISION OF THE FIRST-TIER TRIBUNAL

The Tribunal dismisses the appeal.

REASONS FOR DECISION

The request

1. The background of the request which is the subject of this appeal is the Home Office's Tier 4 (General) points-based system for immigration. Under this system applicants who are prospective students have to provide evidence of their Confirmation of Acceptance for Studies (CAS), which is issued to them by a sponsoring college. The appellant College is a Tier 4 sponsor. For the purposes of our reasoning and decision it is not necessary for us to make any distinction between the Home Office and the UK Border Agency or to say anything about the organisational changes which took place during 2013.

2. On 22 January 2013 the College made a request to the Home Office concerning immigration decision notices. This was headed with the College's sponsor licence number and stated:

> Dear Freedom of Information Act policy team,

> I wish to make a request for information; specifically for copies of some GV51 (LRA) PBS T4 (General) – Notice of Immigration Decisions issued by your overseas posts.
>
> I have been directed to your team to ascertain the procedure necessary to make such a request and any related fee that may be charged for this service.
>
> Your kind assistance in this regard will be appreciated.

3. What lay behind the request was the College's desire to find out the reasons for immigration refusals issued to prospective students to whom the College had issued CAS numbers but who had failed to enrol for their courses at the college. This was a matter of importance to the College, because the continuation of its status as a sponsor, and hence its ability to continue in business, depended, among other things, upon meeting a target as regards the proportion of prospective students who successfully enrolled.

4. The Freedom of Information Act (FOIA) provides a time limit of 20 working days for issuing a response: s10(1). In breach of this time limit, the Home Office did not reply until three months later (22 April 2013).

5. The request made express reference to FOIA. It nevertheless should have been clear to the Home Office, in our view, that the College made the request not only as a member of the public but also in the College's capacity as a sponsor, and was asking for guidance on how to obtain the information. The Home Office was under a duty to provide advice and assistance so far as reasonable: FOIA s16. Instead of providing guidance the Home Office, without seeking clarification of the purpose of the request or exactly what information the College required, or why and in what capacity, simply refused the request.

6. The refusal was on the ground that immigration notices contained the personal data of applicants and were therefore exempt from disclosure under FOIA by reason of the exemption in s40(2).

7. Requesting an internal review by the Home Office, the College argued that the immigration decisions contained the name of the College, which had a legitimate right to obtain the information. The College suggested that the decisions could be anonymised by removing the personal information while retaining the CAS number, which it said would enable the College to relate the refusal notice to a particular

student.[1] Alternatively, anonymising the name of the individual would allow the College to identify the individual from their records, using the date of birth data, as no two individuals sponsored by the College shared a common date of birth. The College emphasized that it required the information because it was under a duty to provide validated information about the outcome of each application as part of its reporting duty as a 'Tier 4' sponsor.

8. From this it was clear, if it was not clear before, that the request was not made by the College only as a member of the general public but also in its capacity as sponsor of particular students. The Home Office seems to have belatedly understood this. In its response of 16 May 2013 after internal review it stated, under the heading 'Advice and Assistance' that the College's contact details had been forwarded to the relevant department, who would be in touch to clarify the Tier 4 sponsor duties. However, the evidence before us was that such contact did not take place. At some point after this the Home Office intended to make a visit to the College to discuss the sponsorship duties, but this was cancelled at some date before 31 July 2013. Mr Tokosi told us, and we have no reason to doubt, that the College did not know of the Home Office's intention to make a visit. Ms Millar informed us that she understood it had been cancelled because of judicial review proceedings in progress by the College against the Home Office.

9. In its internal review response (16 May 2013) the Home Office said:

> ... the sponsor is required to tell the Home Office if a student they have issued a Confirmation of Acceptance for Studies (CAS) fails to enrol and the reason for this, which may be that they have been refused entry. The sponsor is not required under the Tier 4 sponsor duty to report the refusal in itself. ... It is the duty of the Tier 4 sponsor to liaise with their own student to understand if an individual has been refused entry clearance or not – and it is at the discretion of the student if they wish to inform the sponsor. The sponsor's sole duty in relation to this is to report that a student has failed to enrol ...

10. This is an inaccurate over-simplification of the position, as we explain below.

11. The internal review response maintained the refusal on the basis of s40(2).

[1] In fact, the CAS number would have needed to be added, as it was not contained on immigration decision forms.

The complaint to the Information Commissioner

12. The College complained to the Information Commissioner, who upheld the refusal for the reasons set out in the Decision Notice dated 20 August 2013 FS50498491.

13. In the course of the Commissioner's investigation, the College identified two particular immigration notices which it wished to see, relating to student applicants to whom it had issued CAS numbers. These were treated as the subject of the complaint to the Commissioner, and are the subject of the appeal to the Tribunal.

14. The essence of the Commissioner's reasoning in the Decision Notice was:

    a. The information contents of the immigration notices were personal data of the individual applicants.

    b. This remained the case even if the notices were anonymised in one or other of the ways suggested by the College, because the relevant test was whether 'any member of the public' would be able to identify the individuals and relate them to the data; the College would be able to do so.

    c. The individuals had no expectation that their personal information would be disclosed to the public or to the College. Disclosure would infringe their privacy.

    d. Sponsors did not need to know the reasons for immigration refusals in order to fulfil their sponsorship duties. The legitimate interests of the College in wishing to verify and know the reasons for refusals were largely private interests, and attracted little weight.

    e. Thus disclosure, even in anonymised form, would be unfair and breach the first data protection principle, primarily because of the applicants' reasonable expectations of privacy.

The appeal to the Tribunal

15. The College appealed to the Tribunal. The appeal was listed for a half day oral hearing. We received a bundle of relevant documents, a skeleton argument from the College, and written submissions from the Commissioner. The Commissioner also provided to us, as closed

material, the two immigration notices which were the subject of the appeal.

16. At the hearing Mr Tokosi was able to give us additional explanations. The Commissioner did not appear. Ms T Millar attended as an observer on behalf of the Home Office. She was able to inform us that the Home Office had decided that it did not wish to become a party to the appeal. After the hearing, at our request, the Commissioner supplied to us and to the College the case of *Webber v IC and Nottinghamshire Health Care NHS Trust* GIA/4090/2012, 12 September 2013, which was relied on in the Commissioner's written submission, and the College provided further written submissions on that case and on *APPGER v IC and MOD* [2011] UKUT 153 (AAC), to which we drew attention at the hearing. The Commissioner responded in writing to the further submissions.

Further facts

17. The College currently retains its Tier 4 sponsor status, but is not able to take any students because its quota has been set to zero, as a result of failure to comply with Home Office requirements, as interpreted by the Home Office. The College considers that the Home Office has acted unfairly and mistakenly. The College commenced judicial review in May 2012, permission was granted in December 2012, and the hearing is due to take place in the Administrative Court in March 2014. Our jurisdiction relates solely to the information request. Within the judicial review proceedings the Home Office has disclosed to the College 62 relevant notices of immigration decisions, with all personal details (name, date of birth and nationality) removed. We were shown two examples. The anonymised notices do not contain the CAS number, but the Home Office also supplied to the College a separate schedule showing the CAS number relating to each immigration decision, so that the College could tie up the notices with its own records.

18. The Home Office stated, and the Commissioner accepted, that-

    a. whether a student informs the sponsor of the immigration decision is at the discretion of the student;

    b. the sponsor does not need to know the reasons for immigration refusals in order to fulfil their sponsorship duties, because the sponsor's sole duty in relation to this is to report that a student has failed to enrol.

19. On the evidence before us, this is not an adequate summary of the position.

20. The published material regarding the sponsorship system and the duties of sponsors is not straightforward. Much of it is contained in Sponsor Guidance published by the Home Office. In *R (New London College Ltd) v Secretary of State for the Home Department* [2013] UKSC 51 the Supreme Court described the Sponsor Guidance as a large and detailed document 'which may be amended at any time and has in fact been amended with bewildering frequency'. This comment related to the four versions issued from October 2009 to September 2010. It appears applicable also to later versions. At the time of the hearing the latest version was that in force from 11 December 2013.

21. As regards the 'discretion' of the student to provide information to the sponsor, the evidence before us was that in an October 2013 document there is a statement addressed to the prospective student, which says:

> You must give your Tier 4 sponsor all the information they need to be able to meet the duties above. If you do not, we may investigate you and take action against the Tier 4 sponsor which may affect your status.

22. We infer that a similar statement was contained in earlier literature addressed to the student; no one suggested to the contrary. It suggests that there is a duty on the student, not merely a discretion, to provide information to the sponsor. But we note that it contains no suggestion that the Home Office will itself provide immigration information on the student to the sponsor.

23. What the sponsor needs to know in order to fulfil its duties is driven in part by the Guidance and in part by the Sponsor Management System (SMS). The latter is a compulsory online system which enables the sponsor to carry out its duties, including assigning CAS numbers and fulfilling reporting requirements.

24. Where a student, to whom a CAS has been issued, fails to enrol, the sponsor must report that fact within 10 working days from the end of the enrolment period. The report must include any reason which the student gives, which may include the refusal of permission to come to or stay in the UK. We were shown screen prints from the SMS relating to reporting student activity. In order to make the report, the sponsor has to select an option from a drop-down menu. The appropriate option in this menu where a student has not enrolled is 'Sponsorship withdrawn; sponsor has stopped sponsoring the student'. The next screen then provides a further drop-down menu from which the

sponsor has to choose. The most relevant options are 'Information received that the application has been refused' and 'Student has not enrolled'. The first of these applies where the student has informed the sponsor that the visa application has been refused. Mr Tokosi explained that according to published information, the second is intended for situations where the application was granted but the student did not show up. We have not seen any independent verification of this explanation. If it is correct, it would mean that, in a situation where a student has not given a reason for failing to enrol, and the sponsor does not know whether the visa application has been granted or refused, the sponsor is unable to fulfil its reporting duty because there is no appropriate option for use in the second drop-down menu.

25. Mr Tokosi further argued that 'Information received that the application has been refused' meant that the College had some reliable evidence of the refusal, not merely the say-so of the student. In our view this argument is not correct. If the student tells the College that the application has been refused, the College has received information to that effect. Whether the information is reliable or backed by supporting evidence is a different question.

26. More generally, the College is concerned about having to rely solely on such information as its prospective students choose to provide to it, since such information (a) may not be given or (b) if given, may not be accurate. As to the latter, it has been known for persons, who are keen to enter the UK for reasons unrelated to any course of studies, to apply for a course, pay their fees, obtain their entry clearance, tell the sponsor that the application was refused, and then enter the country. Without sight of the immigration decision notice, the sponsor cannot know whether the information that it is being given by the student is correct. This point is supported by *R (London College of Management Ltd) v Secretary of State for the Home Department* [2012] EWHC 1029 (Admin), at [46]-[47]. Some students may even provide to their college a forged immigration refusal notice, so that they can receive a refund of their fees, while using the genuine entry clearance to enter the country.

27. Moreover, the reliance upon information provided by students means that the College has no comprehensive way of checking whether visa applications are being properly dealt with, so far as concerns matters for which the College is responsible. This is of considerable significance. The College discovered, as a result of some copy refusals sent in by prospective students, that the overseas units dealing with applications had turned down many of the College's prospective students on the stated ground that the CAS number had been incorrectly allocated, being a single allocation for two proposed courses, instead of two allocations. This related to students undertaking the ACCA course offered by the College, linked with

Oxford Brookes University. The College is of the view that this was a mistake by the immigration officials, based on a failure to appreciate that it was a single course for which the allocation of a single CAS number was appropriate. The consequence for the College is that it has not met its targets for enrolment. The consequence for the applicants is that their immigration status is prejudiced by a refusal having been issued.

28. Many students have claimed the return of fees but have not provided evidence of the reasons why their visa application was refused. Sight of immigration decision notices would enable the College to validate the refund claims in these instances. It may be that the College, when asked to make a refund, could request a written consent from the student to authorise the release of personal data by the Home Office; but this possibility was not investigated at the hearing and we make no finding about it.

29. The two refusal notices which are the subject of the appeal were selected by the College as examples relating to students who had applied for the ACCA course and had not enrolled. Disclosure of the notices to the College would be expected to confirm that there had been a refusal and would be expected to show whether the reasons for refusal in those cases were related to the College's sponsorship or were other unrelated reasons.

30. It follows from the above, irrespective of the uncertainties over some points of detail, and irrespective of whether it is the Home Office or the College which has the correct understanding of the ACCA course, that the College has legitimate reasons, both for its own purposes, and for the public purposes of supporting the integrity of the sponsorship and immigration system, for wishing to see the contents of immigration decisions issued to its prospective students.

31. There is a further dispute between the College and the Home Office over the timing of the introduction of reporting requirements relating to immigration refusals. The gist of this as we understood it was as follows. The College's position is that it had to apply for Highly Trusted Status by 5 October 2011. In order to apply, it had to have fulfilled certain reporting requirements for 12 months. But the reporting requirements were only introduced in September 2011, so it was impossible to comply.[2] We need not consider whether this is right or wrong or say any more about it, because it does not affect our reasoning.

[2] The College supplied to us after the hearing a copy of the Tier 4 Sponsor Guidance dated 5 September 2011, which (the College said) introduced the reporting requirement at paragraph 463 for the first time. We were not shown the version in force immediately before that date.

32. The Home Office makes available to Highly Trusted Sponsors a premium service at a cost of £8,000 per annum. The College alleges that, as part of the premium service, the Home Office notifies Highly Trusted Sponsors of the outcome of immigration applications, and that this is inconsistent with its reliance on FOIA s40(2).

33. The rather scanty available information concerning the premium service does not show that the reasons for refusal are notified to the Highly Trusted Sponsor, except where the prospective student has given express consent, but it does appear probable that the outcomes of visa applications (presumably without the reasons) are notified to the Highly Trusted Sponsor. If that is so, it is not clear to us how that is done consistently with the Home Office's data protection obligations, but this does not affect our decision, because we have to apply the law to the circumstances of the case before us, not to a different set of circumstances. (We comment on this further at paragraph 56 below.)

34. The College also alleges that publication of information by the Home Office to the Highly Trusted Sponsor is publication effectively to the world at large. We do not consider that there is anything in this point. Publication of information to a Highly Trusted Sponsor in return for a large fee is not publication to the general public.

Analysis

35. Given what we have to decide, the relevant provisions of FOIA s40 are as follows:

> (2) Any information to which a request for information relates is … exempt information if-
> (a) it constitutes personal data …, and
> (b) … the first … condition below is satisfied.
> (3) The first condition is-
> (a) … that the disclosure of the information to a member of the public otherwise than under this Act would contravene- (i) any of the data protection principles …
> (7) In this section-
> "the data protection principles" means the principles set out in Part I of Schedule 1 to the Data Protection Act 1998, as read subject to Part II of that Schedule and section 27(1) of that Act; …
> "personal data" has the same meaning as in section 1(1) of that Act..

36. The definition of personal data in s1(1) of the Data Protection Act is-

> "personal data" means data which relate to a living individual who can be identified-
> (a) from those data, or

(b) from those data and other information which is in the possession of, or is likely to come into the possession of, the data controller,

and includes any expression of opinion about the individual and any indication of the intentions of the data controller or any other person in respect of the individual.

37. The meaning of "personal data" as defined was discussed in *Durant v Financial Services Authority* [2003] EWCA Civ 1746, paragraphs 21-31. To constitute personal data the information should have the data subject as its focus and affect the subject's personal privacy.

38. The first data protection principle is that personal data shall be processed fairly and lawfully and, in particular, shall not be processed unless at least one of the conditions in Schedule 2 to the Data Protection Act is met. Schedule 2, in effect, gives examples of fair and lawful processing. (We are not concerned in this case with the further requirements of Schedule 3 in the case of 'sensitive' personal data.)

39. The relevant legal provisions are far from easy to interpret and apply. They were considered by the Upper Tribunal in *APPGER v IC and MOD* [2011] UKUT 153 (AAC), in a case on which two of the constitution of the present Tribunal sat. We have reminded ourselves of what was said in that case at [103]-[132], and especially [113]-[115]. We have also considered the case of *Webber*, but agree with the submission of the College that it does not affect what we have to decide.

40. The College's request was clarified as relating to immigration decision notices issued to two particular students, in an anonymised form. We infer that the College would be able to identify the students, whether the decision notices had all personal details removed or whether the dates of birth were left in place.

41. The s40(2) exemption applies if the information requested constitutes personal data and disclosing it to 'a member of the public' (otherwise than under FOIA) would contravene the first data protection principle.

42. What 'member of the public' must be considered for the purposes of deciding whether the exemption applies? If we consider only members of the public other than the actual requester in the present case, the information would not be personal data, because successfully anonymised. Once it is anonymised, the fulfilment of a Schedule 2 condition is not relevant. And in any event disclosure would not be unlawful or unfair, because the anonymisation would prevent any intrusion on privacy or any other impact on the data subject. On this basis the exemption would not apply.

43. However, for the reasons given in *APPGER* [2011] at [113]-[115], our understanding is that we should consider the particular member of the public making the request, ie, the College.

44. If we consider the College as the relevant member of the public, the analysis is quite different. The information is personal data, because not successfully anonymised. Disclosure would also constitute an intrusion on the privacy of the data subject, because the College would learn what had been said about the data subject in the immigration decision notice. The application of the exemption depends on whether or not a Schedule 2 condition is satisfied. This falls to be considered at the period when the request was made and dealt with by the Home Office (January to May 2013).

45. Condition 1 is not satisfied, because there is no evidence that the students consented to the Home Office making disclosure to the College.

46. So far as we can tell, condition 2 is not satisfied. It has not been suggested that there is any feature of the contract between the College and the student that renders disclosure necessary for the performance of the contract.

47. Condition 4 and conditions 5(aa), (b), (c) and (d) are of no relevance.

48. The College relies in its further submission dated 18 January 2014 on Conditions 3 and 5(a). Condition 3 is that the processing 'is necessary for compliance with any legal obligation to which the data controller [here, the Home Office] is subject, other than an obligation imposed by contract'. Condition 5(a) is that the processing is necessary for the administration of justice. It could be argued that each of these conditions is satisfied on the basis that the judicial review proceedings were in being at the date of the request, so that the Home Office was under a legal obligation to disclose to the College relevant documents for the purposes of the proceedings, which included the two requested immigration decision notices.

49. We are unable to accept the College's contention that Condition 3 or Condition 5(a) assists the College, for two reasons. The first is that disclosure of 62 immigration decision notices has been made to the College for the purposes of the judicial review proceedings, and it has not been demonstrated to us that disclosure of the further two requested notices was or is legally required for those purposes. The second reason arises from the nature of the issue which arises for our decision. For the purposes of the FOIA exemption the issue is not whether the Home Office could lawfully disclose the documents to the College for the purposes of the judicial review proceedings, relying on

condition 3 and/or condition 5(a). Rather, the issue is whether disclosure to the College as 'a member of the public' would contravene the data protection principles. Disclosure to the College as a party to the proceedings (and subject to certain obligations in that capacity not to use the disclosed documents other than for the purposes of the proceedings) is not in our view disclosure to the College as 'a member of the public'.

50. The College also relies on DPA s35(2), which permits disclosures required by law or made in connection with legal proceedings. In our view the same obstacles apply here as apply to the reliance on conditions 3 and 5(a).

51. This leaves for consideration condition 6:

> The processing is necessary for the purposes of legitimate interests pursued by the data controller or by the third party or third parties to whom the data are disclosed, except where the processing is unwarranted in any particular case by reason of prejudice to the rights and freedoms or legitimate interests of the data subject.

52. The word 'necessary' is to be understood in the sense discussed in *Corporate Officer of the House of Commons v IC* [2008] EWHC 1084 (Admin) at [43]. The word is stronger than 'reasonable' or 'desirable' but not as strong as 'indispensable'. There must be a pressing social need and the interference must be both proportionate as to means and fairly balanced as to ends.

53. We have considerable sympathy with the College, and with the difficulties that it has faced. But we are not persuaded that Condition 6 is satisfied. Our factual finding is that the College has legitimate reasons, both for its own purposes, and for the public purposes of supporting the integrity of the sponsorship and immigration system, for wishing to see the contents of immigration decisions issued to its prospective students. Based on this finding, we can see the desirability, even the strong desirability, that the College should have been given access to the notices of immigration decisions in response to its request. But desirability is not necessity.

54. As regards the two particular notices in question, if they were of substantial significance for the College's position we would expect them to be sufficiently disclosed in the judicial review proceedings. We were not given any reason to believe that they are in some way more important or more significant than the 62 which the College was able to obtain in the judicial review proceedings. There are other ways in which the legitimate interests of the College can be or could have been advanced. The judicial review proceedings are one way. In addition,

we see no reason why it was not open to the College to require prospective students, at the time of applying to the College, to provide their consent to disclosure, so that condition 1 would be satisfied. It would also have been possible for the contract with the student to be so framed as to bring into play condition 2.

55. Given our conclusion on the question of necessity, we do not need to go on to consider the balance under condition 6 between the legitimate interests of the College and the rights and freedoms or legitimate interests of the data subjects.

56. We would add that it seems conceivable that the Home Office's disclosure of visa application outcomes to Highly Trusted Sponsors could be made pursuant in some way to condition 6, given the legitimate interests of the Home Office, as data controller, in running a tight regime with the Highly Trusted Sponsors. If this were the case, it would not be inconsistent with our decision that condition 6 cannot be relied on by the College to escape the impact of the exemption in FOIA s40(2). It merely underlines that the Home Office should have advised the College at the outset that the appropriate procedure would be for the Home Office to consider the College's request not in relation to a member of the public under FOIA but as part of its dealings with a Tier 4 sponsor.

Conclusions

57. For the above reasons, which differ in some respects from those of the Commissioner, we conclude that the exemption in s40(2) was correctly applied and the appeal must be dismissed. In the circumstances explained above, we have reached this conclusion with a degree of regret, since it seems to us that there are at least serious question marks over the system with which the College was required to comply.

Signed on original:

Andrew Bartlett QC

Judge