



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

Appeal No: EA/2013/0187

ON APPEAL FROM:

**The Information Commissioner's Decision Notice No:
FS50490124**

Dated: 31st. July, 2013

Appellant: David Black

Respondent: The Information Commissioner ("the ICO")

**Before
David Farrer Q.C.
Judge
and
Michael Hake
and
Andrew Whetnall**

Tribunal Members

Date of Decision: 30th. January, 2014

Date of Promulgation: 3rd. February, 2014

Representation:

This was a paper determination.

Subject matter:

Whether information was held by another person on behalf of the public authority

FOIA s.1(1)(a)

Environmental Information Regulations 2004 (“EIR”) Reg.3(2)(b).

Reported cases:

Chagos v ICO and FCO EA/2011/ 0030

University of Newcastle upon Tyne v Information Commissioner and

BUAV [2011] UKUT185 (AAC):

DECISION OF THE FIRST-TIER TRIBUNAL

The Tribunal dismisses the appeal.

Dated this 30th day of January, 2014

David Farrer Q.C.

Judge

[Signed on original]

REASONS FOR DECISION

The Background

- 1 On 1st. December, 2010 English Heritage held a symposium at Kenwood House, Hampstead devoted to Adams` neo – classical furniture. It consisted of a series of papers, one of which was presented by a member of English Heritage`s staff but the others by external, entirely independent speakers, They were invited by English Heritage and may have been paid a fee and expenses..
- 2 English Heritage did not retain any of the papers after the event.

The request for information

- 3 On 26th. October, 2012 the Appellant made a request in the following terms –

“Can you please confirm that English Heritage has been provided with copies of the papers presented at the above Symposium at Kenwood House on December 1st. 2010 and referred to in the extract from the symposium information prospectus as below;”

(He proceeded to quote the description of the subject matter of the symposium)
- 4 On 1st. December, 2012 English Heritage provided some relevant information but indicated that, as to most of the papers presented, it held no copies and the

speakers were external. It is not clear whether it treated the request as governed by FOIA s. (1) or EIR regulation 5(1) at that stage.

- 5 That is, however, immaterial, since the test whether a public authority holds information is the same in each case.”Holds” in FOIA s.1(1) is not defined elsewhere in the Act. EIR Regulation 3(2)(b) expressly provides that a public authority holds information where it “*is held by another person on behalf of the authority*”. We agree with the Tribunal in *Chagos v ICO and FCO EA/2011/0030* that that slight difference does not represent any variation in meaning.
- 6 However, since the Appellant builds a detailed argument on the foundation of EIR, it is perhaps worth stating that, in the Tribunal`s view, the requested information clearly falls within FOIA s.1(1)(b). Regulation 2(1) of the EIR provides a comprehensive definition of environmental information corresponding to that in Article 2(1) of Council Directive 2003/4/EC (“The Directive”). In summary, it includes six categories of information, of which extensive examples are specified, relating to -
- (a) the state of the elements of the environment,
 - (b) forces, releases and substances likely to affect those elements,
 - (c) measures and activities affecting, likely to affect or designed to protect those elements,
 - (d) reports on the implementation of environmental legislation,
 - (e) analyses and assumptions used in (c),
 - (f) the state of human health and safety, including, where relevant, conditions of cultural sites and built structures, in so far as they may be affected by (a)

or (c).

Information as to the design, construction, decoration of or materials used in furniture does not fall within any part of that definition. Even if that interpretation were too narrow, the question is still : did English Heritage hold the requested information at the date of the request.

FOIA. S.1(1) applies to all other information. It reads –

“Any person making a request for information to a public authority is entitled –

(a) to be informed in writing by the public authority whether it holds information of the description specified in the request, and

(b) if that is the case, to have that information communicated to him.”

- 7 As to the remaining papers, English Heritage replied, in the course of exchanges in early December, 2010, that it did not hold them and that the external speakers did not hold them on its behalf. An internal review confirmed its position.

The Complaint to the ICO

- 8 The Appellant complained to the ICO on 18th. March, 2013. He asserted that the external speakers held their copies of the papers presented on behalf of English Heritage. Notwithstanding careful arguments relating to the Aarhus Convention, that remains the issue on this appeal.

- 9 By his Decision Notice the ICO ruled that such speakers did not hold the information on behalf of English Heritage since there was no contractual relationship between them. It had disclosed all the responsive information that it held

The Appeal to the Tribunal

- 10 The Appellant appealed to the Tribunal against that determination and

asked the Tribunal to set aside the Decision Notice.

- 11 In his Grounds of Appeal and a Reply to the ICO's Response he argues, in essence, that English Heritage owes a duty under the Directive to ensure public access to environmental information and that the ICO failed to take steps to ensure that it did so by securing possession of the requested papers. He supported such submissions with extensive references to the Directive and to the information to which the symposium related. He demonstrated that a fee and expenses were payable by English Heritage to those external speakers. We are prepared to proceed on the basis that they accepted such payments.

Our Decision

- 12 The only question is whether English Heritage held the information in October, 2012. Questions as to the duties of English Heritage or the ICO to promote public access to environmental information under EIR regulations 3 and 4 are not matters for the Tribunal. They arise only where English Heritage holds the information. We are satisfied – indeed it was not really in dispute – that it did not have direct possession of the further requested papers. It could only hold them if the speakers held them on its behalf.
- 13 “Hold” is an ordinary word to which no legalistic analysis should be applied. The test, whether under FOIA or EIR, is whether anybody would say, on the facts of a particular case, that the public authority holds the information – see paragraph 23 of *University of Newcastle upon Tyne v Information Commissioner and BUAV [2011] UKUT185 (AAC.)*
- 14 Did the speakers hold them on behalf of English Heritage ? Clearly not. The speakers were neither employees nor agents of English Heritage. They were independent scholars invited to make presentations. There is no evidence that they transferred copyright in them to English Heritage, even if that were relevant. That they received a fee and expenses is neither here nor there. They

owed no further obligation to English Heritage when they left Kenwood after delivering their talks.

15 For these reasons we dismiss this appeal.

16 Our decision is unanimous.

David Farrer Q.C.

Tribunal Judge

30th. January, 2014