



**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**

**1<sup>st</sup> Respondent**

**JOHN LEE**

**2<sup>nd</sup> Respondent**

**Determined on documents**

**Date of decision:** 26 February 2014

**Date of promulgation:** 27 February 2014

**Before**

Andrew Bartlett QC (Judge)  
Henry Fitzhugh  
Andrew Whetnall

## **DECISION OF THE FIRST-TIER TRIBUNAL**

Item (i) of the application is refused.

No order on item (ii) of the application.

### **REASONS FOR DECISION**

#### The background

1. This final decision follows on from the decision on a preliminary issue which the Tribunal made in these appeals on 15 October 2013.
2. The background to the appeals is found in our decision dated 18 December 2012, which determined a number of earlier preliminary issues. The scope of the material requests made by Mr Lee was set out in paragraphs 16 and 26 of our decision of 18 December 2012. 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.
3. Accordingly, the issue remaining in the appeals was whether information held by individual Governors of the School (but not otherwise held by the College or School) and which fell within the scope of the material requests made by Mr Lee was 'held' by the College or the School within the meaning of section 3(2) of the Freedom of Information Act 2000 (FOIA).
4. In the preliminary issue decision on 15 October 2013 we stated as follows:

*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.*

5. Following upon the directions set out above, the College made inquiries concerning whether the non-Fellow Governors held any information which fell within the scope of Mr Lee's requests on behalf of King's College and which complied with the description set out in our decision.
  
6. On 11 November 2013 the College wrote to Mr Lee. The College confirmed that, so far as concerned information held by Fellow Governors of the School, the information had been disclosed to Mr Lee as described in the Commissioner's Decision Notice FS50384608 dated 1 February 2012 and on 3 May 2013. The College stated that, so far as concerned information held by non-Fellow Governors, it had carried out the inquiries required by directions (1)-(3) of the Tribunal's Order, and that no information was held.
  
7. In his reply on 18 November 2013 Mr Lee stated:

If what you say is correct, it looks as if the College has not only wasted money in obtaining legal representation for documents that appear not to exist, but it has also wasted both the time and resources of the Information Tribunal and myself. What the letter does not clarify is whether the information requested did exist at some point, but has since been deleted from email accounts. I would also be grateful if you could summarise the process used by the College in requesting such information from non-fellow governors. Before I consider the matter further, I would be grateful for clarification on these points.

8. The College's solicitors replied on 10 December 2013. The reply included the following:

Following the Tribunal's decision on 15<sup>th</sup> October 2013, the College approached the non-Fellow Governors and asked them whether they held any disclosable information, i.e., any information that fell within the description at §§31 and 37 of the Tribunal's decision. The College also asked whether they held any non-disclosable information: i.e., information that fell within the scope of your request but not within the relevant description in the Tribunal's decision.

The non-Fellow Governors replied that they held no disclosable information. They said that they declined to confirm whether or not they held non-disclosable information, and that they were under no obligation to answer this question.

The College does not accept that it has acted unreasonably or improperly in the conduct of these proceedings. It has sought to respond to a difficult situation, not of its own making, described above.

Nor does the College accept that these proceedings have been an abuse of process, or have lacked subject matter.

Under the Freedom of Information Act 2000 ("FOIA") a public authority is obliged to do two things. First, it must confirm or deny whether it holds information falling within the scope of the request. Secondly, if it holds such information, it must disclose it, unless an exemption applies.

Your request for information therefore gave rise to two issues, in relation to information held by non-Fellow Governors: was the College obliged to confirm or deny whether information was held by non-Fellow Governors; and, if so, was there any information that the College was required to disclose. The first question arose, and required to be answered, regardless of whether there was in fact any information falling within the scope of the request.

If the College had succeeded in its arguments to the Tribunal, the answer to the first question would have been that the College was not obliged to give the relevant confirmation or denial. The College did not succeed: the outcome of the appeal was that the College was required to confirm or deny whether certain information was held by non-Fellow Governors; the College duly did so.

Moreover, the Tribunal's decision of 15<sup>th</sup> October 2013 was limited in scope. It distinguished between disclosable and non-disclosable information held by non-Fellow Governors. You had made no such distinction; you were seeking disclosure of *all* information held by non-Fellow Governors and falling within the scope of your request. It may be, in fact, that there is non-disclosable information held by the non-Fellow Governors that would fall within your request; for the reasons explained above, the College does not know whether this is the case, and has no means of finding out.

We recognise that the Tribunal has given you some encouragement to make a costs application; but we thought it would be helpful, before you decided whether to do so, to explain to you the basis on which it would be resisted.

9. On 2 January 2014 Mr Lee responded by email. His response included:

Given that my email of 18th November 2013 asked about the process used by the College in requesting the information from non-fellow governors, I was surprised that your reply seemed to centre on resisting an application for costs. It is not my current intention to make this an issue of costs and nothing could have been further from my mind when I sent the email.

What does strike me about your letter is the surprisingly high-handed and arrogant response from non-fellow governors, who are quite willing and prepared to refuse reasonable instructions from the College. What are the boundaries for this recalcitrant behaviour? Taking into account the deliberately and substantially misleading letter sent by the Provost - on the advice of the headmaster and a non-fellow governor - to all parents in November 2009, the libellous statements made about me by one non-fellow governor and the failure of non-fellow governors to protect our children from the abuse (ie withdraw your complaints or your children will be removed from the school) that the headmaster was subjecting them to, the school governors' reputations have been badly tainted. This only serves to confirm my fears about the ongoing breakdown in governance at the School. The fact of the matter is that, based on history, some of the non-fellow governors cannot be trusted to be straightforward and honest.

The College has done everything it can over the last four years to delay, obstruct and mislead in order to cover up the dysfunctional organisation that is holding the school to account. I find it, therefore, very difficult to believe some of the governors when they say that they have no disclosable information falling within the remit of the Tribunal decision and I am astounded that they refuse to provide (for example to the ICO or your firm) what in their view may be non-disclosable information so that this can be tested. Furthermore, the College and School is thought to have incurred in excess of £250,000 in overcoming regulatory failings and fighting my FOIA requests, so I find your arguments in resisting any award of costs surprising and, if you don't mind me saying, petty.

I therefore propose to send a copy of this email to the Information Tribunal and request that the Tribunal decision be amended by ordering the non-fellow governors to provide all disclosable and non-disclosable information to the Information Commissioner so that the ICO can judge what is disclosable. This way, the College would avoid being in the position of holding such information.

I shall reserve my position on costs until I receive your reply.

#### Mr Lee's application

10. On 9 February 2014 Mr Lee referred to the matter to the Tribunal. He stated:

... ... The Tribunal, myself and the Information Commissioner have all spend considerable amounts of time in dealing with this matter and it is therefore extremely frustrating to find out after nine months of effort and inconvenience that the non-Fellow School Governors claim they hold no disclosable information. This is precisely the position that was considered by the Tribunal and why paragraph 42 was included in the final judgement. There has been an abuse of process.

Over the past 4 years, the College and School have done everything possible to delay, obstruct, mislead and prevent FOIA disclosure, including

the concealment of information as referred to in ICO Decision Notices. Furthermore, it has now been confirmed that the School's headmaster and its Governors were involved in deceiving parents by writing a deliberately misleading letter to all parents. I therefore find it very difficult to believe or accept the response of the non-Fellow School Governors, particularly given the amount of email activity that would have taken place relevant to my FOIA requests at the time of the failed ISI inspection. The fact of the matter is that, based on history, some of the non-Fellow School Governors regrettably cannot be trusted to be transparent, straightforward and honest. There has been no test of independence as to whether the non-Fellow School Governors are telling the truth and it would clearly be in their interest to continue to conceal information. In my view, what should have taken place - well before the case went to Tribunal - was an open disclosure of all relevant information either to the ICO or the School's solicitors. If that had happened, it would have saved us all a huge amount of inconvenience.

I have written to the College (copy enclosed) making similar arguments to those contained in this email. The propose [*sic*, means 'purpose'] of this email is to request:

(i) that the Tribunal decision be amended by ordering the non-Fellow governors to provide all disclosable and non-disclosable information to the Information Commissioner or some other party, so that an objective view can be made as to what is disclosable under the terms of the Tribunal decision; and

(ii) the Tribunal consider what sanctions, if any, it can apply to the abuse of process.

#### The Commissioner's response

#### 11. The Commissioner responded:

The Commissioner's position in his DN was that any information held by governors falling within the scope of Mr Lee's requests for information (v) and (viii) in DN FS50384608, and (xi) in DN FS50397683 was held by the College under FOIA. In its decision the FTT decided, in summary, that any information held by the Fellow Governors was held by the College. For Non-Fellow Governors, the FTT decided that some kinds of information that would be held on behalf of the College (the disclosable information) while other kinds of information would not be held on behalf of the College (the non-disclosable information). The FTT set out that the College had to comply with steps (1)-(3) of its decision of 15 October 2013.

... ..

Mr Lee has asked the FTT that:

“(i) the Tribunal decision be amended by ordering the non-Fellow governors to provide all disclosable and non-disclosable information to the Information Commissioner or some other party, so that an objective view can be made as to what is disclosable under the terms of the Tribunal decision; and

(ii) the Tribunal consider what sanctions, if any, it can apply to the abuse of process.”

Application (i)

At §32 of its decision, the FTT stated its view that ‘a public authority [does not have] a general right to instruct [an] individual to hand over emails or other materials held on private email accounts’. In view of this it would not be possible for the FTT to make the direction sought by Mr Lee at (i) above.

The College says that the Non-Fellow Governors have confirmed that no disclosable information is held by them, and the Commissioner has seen no evidence that any such information is held. However, it may be open to the Tribunal to pursue with the College the quality of the Governors’ searches for disclosable information.

As regards the non-disclosable information, notwithstanding Mr Lee’s concerns about the situation, it does not seem possible for the Tribunal to make a direction for such information to be provided to it (or the Commissioner).

Application (ii)

The Commissioner notes that the FTT did not uphold any party’s submissions in their entirety. In such circumstances, the Commissioner does not intend to take any issue as regards costs or ‘abuse of process’.

### The College’s response

12. The College responded:

In relation to item (i), the College’s position is that the Tribunal does not have any jurisdiction to make the order sought. It is noted that the ICO (in its email of 14th February 2014) takes the same position. The non-Fellow governors are not themselves public authorities, and are not parties to these proceedings in their own right. The requested order extends to information which, on the Tribunal’s findings, is held by the non-Fellow governors personally and not by the College as a public authority. The College does not see on what basis the Tribunal could make an order against individuals who are neither parties nor public

authorities, in respect of information that is not held by a public authority and that would fall outside FOIA.

There is a further reason why the Tribunal does not have jurisdiction to make the order that is sought. The Tribunal proceedings have now been completed, save in relation to any question as to costs. The Tribunal has dealt with the issues arising on this appeal. Mr. Lee is asking for the Tribunal to extend the proceedings and to embark upon further enquiries. There is no basis on which the Tribunal could do so, having now completed its task.

In relation to item (ii), it is not clear whether Mr. Lee is making an application for costs. If the Tribunal proposes to consider making a costs order then the College asks for an opportunity to make written submissions as to why such an order should not be made. As a matter of procedural fairness, the College should have an opportunity to respond to the points made at §42 of the Tribunal's decision dated 15th October 2013. The general nature of the points that the College would wish to make is explained in Hewitsons' letter of 10th December 2013 to Mr. Lee (which is attached hereto); but the College would like to amplify and explain those points more fully in a written submission to the Tribunal, before any decision is made in relation to costs.

#### Discussion and decision

13. As regards item (i) of Mr Lee's application, we agree with the Commissioner and the College that we have no relevant jurisdiction. The liberty to apply which was given in direction (6) would enable us to make a further direction required for the implementation of our decision, but does not enable us to assert jurisdiction over persons who were not parties to the appeal and who are not themselves public authorities within FOIA.
14. Accordingly, in our view the Tribunal does not have jurisdiction to make the order which is sought, and item (i) of the application is refused.
15. As regards item (ii) of the application, there is no support from the Commissioner for any sanction. It seems to us that in the circumstances the only sanction which could be available to the Tribunal would be some kind of special order concerning costs. We note, however, that there is no specific claim by Mr Lee for such an order.
16. We therefore make no order in relation to item (ii).
17. Given the nature of the preliminary issue decision which we made on 15 October 2013, and the nature of the subsequent response from the College, these appeals are now concluded. As a matter of procedure, if Mr Lee continues to be dissatisfied with the College's response, his remedy would be under direction (5). We make no comment on the substantive merits or demerits of a new section 50 complaint to the Information Commissioner.



Signed on original:

Andrew Bartlett QC

Tribunal Judge