



**IN THE FIRST-TIER TRIBUNAL**

**Appeal No: EA/2014/0307**

**GENERAL REGULATORY CHAMBER  
(INFORMATION RIGHTS)**

**MR EDWARD WILLIAMS**

**Appellant**

**- v -**

**INFORMATION COMMISSIONER**

**Respondent**

**Hearing**

Held on the papers on 30 April 2015 in Arnhem House, Leicester.

**Panel**

Judge Taylor, D Sivers, P De Waal

**Decision**

The appeal is dismissed for reasons set out below.

Decision

Promulgated: 21 July 2015

## Reasons

### Background

1. London Councils represents London's 32 borough councils and the City of London, working on behalf of them regardless of political persuasion.
2. Parking on Private Land Appeals ("POPLA") service is an independent adjudication service handling disputes by those wanting to challenge parking charge notices for vehicles parked on private land. It was created as a result of the Protection of Freedoms Act 2012. Schedule 4 of this Act requires that there is an independent adjudication or arbitration service for disputes concerning such charges.
3. The British Parking Association ("BPA") is a trade association. It is funded by the parking industry. It set up the POPLA service to fulfil the statutory requirements. London Councils currently provides the POPLA service on BPA's behalf pursuant to a contract between BPA and London Councils.
4. This appeal concerns a request made by the Appellant to London Councils and POPLA, concerning appeals handled by the POPLA service.

### The Request

5. On 13 August 2014, the Appellant wrote to both London Councils and POPLA, requesting information. The part of the request that is relevant to this appeal (referred to below as the 'request') was as follows:

*"Please provide all records:-*

*1) showing how many appeals ParkingEye has won and lost in calendar year 2014 to date and include the appeal reference number(s) and car park location...."*

6. On 9 September 2014, London Councils stated that it did not hold any information within the request scope for the purposes of the Freedom of Information Act 2000 (FOIA), because the information regarding the delivery and operation of POPLA was held by London Councils confidentially on behalf of BPA.
7. On 9 September 2014 the Appellant wrote to London Councils, asking whether POPLA would also respond to his request. London Councils replied on 10 September 2014, stating that their response was on behalf of POPLA and that POPLA was not a public body for the purposes of FOIA.
8. The Appellant progressed with his request, and the Information Commissioner's Office (ICO) investigated the matter. Its Decision Notice of 8 December 2014 concluded that London Councils held the information on behalf of 'another person'.
9. The Appellant appeals to this Tribunal contesting the finding that the public authority does not hold the requested information except for and on behalf of another.

## The Law

10. Generally, public authorities are under a duty under FOIA to disclose requested information that they hold at the time of the request unless certain provisions within the FOIA apply. (See *section 1 FOIA*).
11. For our purpose in this appeal, for a request to be successful it needs to be made to a body that is a 'public authority' that 'holds' the information within the meaning of the FOIA.
12. A public authority is:  
'(1)... (a) subject to section 4(4)...  
(i) is listed in Schedule 1, or  
(ii) is designated by order under section 5, or  
(b) a publicly-owned company as defined by section 6.'
13. Information is 'held' by a public authority when

See S.3 (1) FOIA

- (a) it is held by the authority, otherwise than on behalf of another person, or***  
***(b) it is held by another person on behalf of the authority***

See S.3(2) FOIA  
(Emphasis Added).

14. In essence, the question of whether London Council 'holds' the information is one of fact to be determined by the evidence. However, we have regard to the Upper Tribunal decision in *Newcastle upon Tyne v Information Commissioner and British Union for the Abolition of Vivisection [2011] UKUT 185 (AAC)* ('BUAV') finding that the word 'held' has its ordinary meaning:

*"The test that FOIA uses is whether the public authority "holds" the requested information. The test is not whether the public authority "controls" or "possesses" or "owns" the information in question; simply whether it "holds" it... "Hold"... is an ordinary English word and is not used in some technical sense in the Act... the [First-tier] tribunal ruled that "holding" is not a purely physical concept" ... 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)."*  
(BUAV, paragraphs 28-29, emphasis added.)

15. The ICO also referred us to two decisions, which being from the first-tier tribunal, are not binding on us. In *Digby-Cameron v Information Commissioner EA/2008/0016* ('Digby-Cameron'), the tribunal stated:

*"13. The matter is not however to be judged solely on appearances. The Tribunal reminded itself by reference to a decision of the Scottish*

*Information Commissioner (Mr Shields and the Scottish Parliament (008/2005) that mere possession of the information would not be determinative of whether the information was held by the Council in its own right. The key issues were as described in that case:*

*“31. If an authority holds information on behalf of another person or organisation, it will not control that information in the same way as it would with information held in its own right. The authority would not have power to delete or amend that information without the owner’s consent; it would not be able to apply its own policies or procedures to it. It may have restricted access to it”.*

(Emphasis added.)

16. The *Digby* case referred to *McBride v Information Commissioner (EA/2007/0105)* where the Tribunal had found that the Privy Council Office (PCO) held the information in its own right, and not on behalf of the University Visitor, stating:

*“This is not a situation where the information was simply on the PCO’s premises because, for example, the Visitor had left it there. The PCO managed and controlled the information, and in fact the PCO itself produced much of the information contained in the Visitor files. The PCO could edit or delete the information, and it could decide whom to send it to or whom to withhold it from. Indeed, in response to the Appellant’s requests, it could have provided the information to the Appellant, and in fact, did provide some information.”*

*15.. As part of this deliberation, it asked itself whether the Council had the right to amend or delete the information. The Tribunal noted first that it is the Coroner’s statutory duty under rule 56pf the Coroner’s Rules 1984 to retain inquest documents for at least fifteen years”*

(*Digby-Cameron*, paragraphs 13-15, emphasis added.)

### **The Task of the Tribunal**

17. The Tribunal’s remit is governed by s.58 FOIA. This requires the Tribunal to consider whether the decision made by the Commissioner is in accordance with the law or, where the ICO’s decision involved exercising discretion, whether he should have exercised it differently. The Tribunal may receive evidence that was not before the Commissioner, and may make different findings of fact from the Commissioner.
18. For the benefit of the Appellant who may not have received legal advice or legal experience, we note that the Tribunal’s role is to be fair and independent, and to try to ensure that appellants are not unfairly prejudiced by not being legally represented. As such, we try to reach the right decision and may ask questions of the parties in order to ensure the relevant arguments are considered, including any pertinent issues or arguments that we are aware of, that an appellant might make were they legally represented. We would also note that this tribunal is independent

of the ICO. We do not simply accept arguments from the parties without their proper consideration, considering the veracity of their arguments on their merits, and their supporting evidence.

19. We have received a bundle of documents and submissions from the parties, all of which we have considered, even if not specifically referred to below. Having reviewed arguments provided by the parties, we considered it necessary to ask for the contract referred to below - as it had not been provided in the bundle, and for the parties to more fully address certain points that were pertinent to take into account before being able to come to a decision.

### **Issues for the Tribunal**

20. The Appellant makes the following contentions in support of his position that the ICO came to the wrong decision:
  - a) POPLA is a public authority for the purposes of FOIA because it is staffed and controlled by London Councils' staff. ('Contention 1')
  - b) Alternatively, POPLA and London Councils are one and the same. ('Contention 2')
  - c) The Tribunal is asked to consider if POPLA was prosecuted for Health and Safety breaches, then who would be prosecuted? If a party wished to sue POPLA for defamation then who would be sued? The answer is London Councils in both cases because POPLA does not exist in law. ('Contention 3')
  - d) Decisions made by POPLA are passed to the parking company and the appellants, therefore the information is not held solely for BPA but also for appellants and respondents. ('Contention 4')
  - e) London Councils has attempted to construct a legal paper wall between itself and POPLA. This is an artificial construct. If this Tribunal refuses this appeal then any public body could create a 'special vehicle' similar to POPLA and use it to withhold information. This would fly in the face of the spirit of the FOIA. ('Contention 5')

21. We have considered these points below.

#### Contention 1

22. The Appellant argues that POPLA is a public authority for the purposes of FOIA because it is staffed and controlled by staff from London Councils.
23. The ICO responds that POPLA is not a public authority for the purposes of FOIA, because:
  1. Neither POPLA nor BPA are public authorities for the purposes of FOIA, as defined in s.3(1) FOIA: neither POPLA nor BPA are listed in

Schedule 1 to FOIA (s.3(1)(a)(i)), designated by order under s.5 FOIA (s.3(1)(a)(ii)), or publicly-owned companies as defined in s.6 FOIA (s.3(1)(b)).

2. POPLA is a service established by BPA and delivered by London Councils. The 2014 Annual Report of the Lead Adjudicator of POPLA confirms that POPLA is funded by the parking industry.

24. Our Finding: We accept the ICO's arguments, because POPLA does not fall within the meaning of a public authority which is clearly defined in s3(1) FOIA.

## Contention 2

25. The Appellant argues that POPLA and London Councils are not distinct bodies. Presumably, the Appellant is seeking to argue that this indicates that the authority is not holding the information 'on behalf of another person' within s3(2) FOIA, as this would assist his case. (See *paragraph 11, 13 and 17*). His statement that POPLA is staffed and controlled by the authority might support this contention, so we have considered that argument here.

26. The ICO maintains that London Councils holds the information requested by the Appellant solely on behalf of BPA, and does not hold the requested information for the purposes of FOIA. Its reasoning in support of this contention included:

- a) Whether information is held is not a question of purely physical possession. In determining whether information is held by a public authority solely on behalf of another person, it may be relevant to consider the nature of the public authority's control and use of the information, including the extent to which consent of the other person is required. (See *BUAV and Digby-Cameron extracts above*).
- b) London Councils had tendered for (and been awarded) the contract to deliver the POPLA service on behalf of BPA.
- c) The control and use of the requested information is subject to the direction of BPA. London Councils does not have access to the information for its own purposes. Its access, use and interest in the requested information was undertaken for the sole purpose of delivery of the POPLA service including the requirement under the contract that London Councils provide BPA with appeal statistics on a weekly basis. Although London Councils provides storage facilities for the information, it does so for the sole purpose of delivering the POPLA service under the terms of the contract.

27. We asked the parties to consider the extent to which (a) it might be argued that, where London Councils in performing the contract it is by definition performing a legitimate function in its own interests, and therefore holding the information on its own behalf as well as BPA's, or (b) whether instead, London Councils is fulfilling the adjudication service on a commercial basis to generate revenue, and not for a public function that it was required to perform as a public authority.

28. The Appellant's response included:

- a) 'On behalf of' means the information is held as agent or representative of a third party with the holder public authority having no further interest in that information. This cannot be applied here as London

Councils has an interest in the information as it is paid to produce the information. It therefore has an interest and gains a benefit from the production of the information and cannot 'distance itself' from the information for the purposes of FOIA.

- b) There is a clear public interest in the information requested being released. It is possible that London Councils/POPLA may be favouring or disfavouring a particular private parking company or appellant when dealing with appeals to POPLA. This could, of course, be a corrupt practice, and it is not possible to find out if this is true without sight of the requested data.

29. The ICO responded that when considering whether the public authority holds the information only on behalf of another, or whether it also holds it for its own purposes, the correct approach is to determine whether or not the information in question goes to the public authority's statutory functions and interests, as opposed to some wider, more diffuse definition of interest. Its arguments included that:

- a) the requested information is held by London Councils purely as the result of and in relation to a commercial contract of a type which the public authority has no obligation (statutory or otherwise) to enter into and entered into with a view to generating revenue. It is not held in connection with the performance of its statutory duties or functions.
- b) However, the ICO acknowledged that the issues are not clear cut in that whilst, in his view, a purely commercial activity such as that in the present case doesn't fall within a public authority's statutory duties, any profits generated may, of course, be used to further the public authority's statutory duties (and therefore, its legitimate interests). Therefore, the use to which *income* deriving from the performance of the commercial contract is put, the resources deployed by the public authority in order to fulfil the commercial contract and other such ancillary matters may well be held for the purposes of FOIA. Nevertheless, the Commissioner maintains that those questions do not arise in the present case: here the specific disputed information is not held.

30. Our Finding: We accept and adopt the ICO's arguments that have been set out above. In particular, we also note:

- a) The question of whether the information the Appellant requests is or is not 'held' by London Councils is a question of fact for us to determine within the meaning of the FOIA. Under the Act, information is 'held' by a public authority when '*(a) it is held by the authority, otherwise than on behalf of another person*'. (See S.3(2) FOIA). Case-law indicates that 'held' is not simply a question of whether the material is physically held by the authority. (See *paragraph 14 above*).
- b) London Councils holds the information solely on behalf of another person, and that this other person is BPA, and not POPLA. BPA is not a public authority.

- c) The only reason that London Councils physically holds the information is to perform and satisfy the terms of the contract between it and BPA, so that BPA can perform BPA's statutory requirements. Factors in support of this are:
1. It is clear that London Councils has contracted with BPA to provide an adjudication service, and that the statutory requirement for that service belongs to BPA and not London Councils. London Councils performs that service on behalf of BPA.
  2. London Councils has most likely decided to fulfil the adjudication service to generate revenue, as we have not seen any indication that it is doing so to fulfil any public or statutory functions that it is required to perform. Therefore, the only reason that London Councils physically holds the information is in order to perform and satisfy the terms of the contract between it and BPA, so that BPA can perform BPA's statutory requirements.
  3. BPA is privately funded, such that the funds provided to London Councils to perform the contract are not public funds. This supports the conclusion that it is not providing the service in order to satisfy any of London Councils' public or statutory functions as a public authority.
  4. Whilst London Councils physically holds the information, it does not control that information in the same way as it would with information held in its own right. The ICO indicated above clauses in the contract in support of this. (*See paragraph 26(c)*). The contract additionally contains an intellectual property clause, which makes clear that all materials and work generated by London Councils in providing the arbitration service is the property of BPA and cannot be used by it for other purposes.
  5. The Appellant has argued that POPLA is staffed and controlled by London Councils. We accept this. However, we consider that it does so purely for it to satisfy the contract and not to perform some public function of the public authority.
  6. The Appellant has argued that there are public interest arguments for disclosing the information. This may be so, but we are not able to consider these as they are not pertinent to the issue of whether the information is held by London Councils.

### Contention 3

31. The Appellant posed the question: if POPLA were to be prosecuted for breaching health and safety requirements, who would be prosecuted?
32. Our finding: We do not think this argument assists the Appellant's case. The issue before us is not whether POPLA is independent of London Councils, but whether the requested information physically held by London Councils is also 'held' by it for the purposes of the FOIA. It is clear that London Councils performs the



adjudication service through POPLA, but the ICO argues that it does so purely as an agent of BPA. We note that questions of legal liability for health and safety matters are outside our remit.

#### Contention 4

33. The Appellant also argues that decisions made by POPLA are passed to the parking company and relevant appellants, therefore the information is not held solely for BPA but also for appellants and respondents.
34. Our finding: The question for us to address is not whether the information is held solely for BPA, but whether it is 'held' by London Councils for the purpose of FOIA. It is only if it holds it for its own purposes that the Appellant might or would have a right to have the information disclosed to him, and not if it is holding it solely on behalf of another or others that are not public authorities.

#### Contention 5

35. Finally, the Appellant argues that London Councils has attempted to construct a wall between itself and POPLA as an artificial construct, and if we dismiss the appeal then any public body could create a 'special vehicle' similar to POPLA and use it to withhold information.
36. Our finding: Whilst we do not agree with the Appellant's contention, it is not in any event a valid ground of appeal because our remit is restricted to that described above in paragraph 17.
37. In conclusion, we unanimously find in favour of the ICO.

Judge Taylor  
21 July 2015