



Appeal number: EA/2020/0068/V

**FIRST-TIER TRIBUNAL
GENERAL REGULATORY CHAMBER
INFORMATION RIGHTS**

BETWEEN

ALEC MARTIN FRAHER

Appellant

- and -

THE INFORMATION COMMISSIONER

Respondent

JUDGE C GOODMAN

**Remote hearing by video on 19 January 2021
The Appellant appeared in person and was represented by Mr Andrew Choi
The Respondent did not appear**

© CROWN COPYRIGHT 2021

DECISION

1. The appeal is refused.
2. Decision Notice FS50873533 is in accordance with the law.

REASONS

3. The Appellant made a request for information to Sunderland City Council (“the Council”) under the Freedom of Information Act 2000 (“FOIA”) in July 2019.
4. The Council refused the request on 26 July 2019 on the basis that it did not hold any information of the description specified in the request.
5. The Information Commissioner issued Decision Notice FS50873533 on 26 May 2020 in which she found on the balance of probabilities that the Council did not hold the requested information.
6. The Appellant appealed Decision Notice FS50873533 to the First-tier Tribunal on 23 June 2020.
7. The background to the request is summarised below. References to page numbers in this Decision are to pages of the open Commissioner’s bundle.

Background

8. The Appellant’s request for information related to work which he carried out for the Safer Sunderland Partnership (“the Partnership”) from 2005 to 2009. He worked from November 2005 to June 2007 on the procurement of service providers for the treatment of adults with problematic drug use, and on a later review in 2008/2009. Key partners in the Partnership included the Council and the Sunderland Teaching Primary Care Trust (“the PCT”), an NHS body. The Appellant helped establish an Approved Preferred Provider Scheme (“APPS”), which was a list of accredited and preferred service providers. He has a background in social work, information management, safeguarding and procurement.
9. On 9 July 2019, the Appellant made the following request to the Council headed “Freedom of Information Act Request”:

“I am writing to ask that a data subject FOI request be made in my name. The period will be from Nov 2005 to date. This is because the EC DG GROW in Feb 2018 have said that "all of them [public authorities] have dismissed your grievances.”

10. He explained on 13 July 2019 that:

“Between November 2005 and June 2007, I worked as part of the Safer Communities Team, employed by both the Council and PCT to handle a bespoke public procurement exercise known and advertised as Better, Brighter Futures

or Approved Preferred Provider Scheme. This work then continued one year later, at a sub-regional level, as part of an annual review of contract decisions for the NHS SoTW. This was from May 2008 - February 2009 and the contacting authority was Gateshead PCT. The context for my inquiry is that work done in my name has not been reported correctly. This means that reports submitted to the Health Scrutiny Board in Summer/Autumn of 2007 did not represent the fact. Efforts made to (i) clarify and (ii) remedy this error have been thwarted and handled in a way that is outside any ordinary contractual obligations that would apply to any Local authority or the NHS. In Decision EO 136/JAS/2018 the EU Ombudsman decided that their Office could not open a Substantive Inquiry into the matters raised. This is because DG GROW had relied on information given to them by UK authorities and it was this detail that rendered the complaint outside their mandate to investigate.”

11. The Council treated the request as both a subject access request under the General Data Protection Regulation and a request for information under FOIA. This appeal concerns the FOIA request which I will refer to as “the Request”.

12. The Council conducted a search of its employment and procurement records for the information requested by the Appellant. It responded on 26 July 2019 that:

“The Council has no records of you being employed by Sunderland City Council. Whilst you may have worked for a period at the Civic Centre we understand that you were employed by the PCT. The Council also holds no records in relation to the work you refer to or any procurements associated with it.”

13. At the Appellant’s request, the Council carried out an internal review. The outcome was sent to the Appellant on 29 August 2019 (page C205). For the purposes of the review, the Council took the view that the Request was for:

“any information held by the Council from November 2005 onwards relating to, or referencing work undertaken by [the Appellant] between November 2005 and June 2007 on an exercise known as “Better, Brighter Futures” (otherwise known as the “Approved Preferred Provider Scheme”)”.

14. In the course of the review, the Council widened its search and identified several reports, documents and Committee minutes which referred to the APPS. The review concluded that the Council’s original response was incorrect because its search had been too limited. The Council provided the additional documents to the Appellant.

15. On 12 September 2019, the Appellant complained to the Commissioner, saying that the Council had failed to search email communications. He provided records, letters and copy emails in relation to the APPS which he had retained and identified six individuals whose email accounts might hold requested information (page D284).

16. The Commissioner opened an investigation and contacted the Council, which responded on 20 April 2020 (page D290). The Council explained the searches which

it had carried out. All but one of the individuals identified by the Appellant had now left the Council (one had since died). Their network home areas and email accounts had been deleted and were not recoverable. The one individual who was still working at the Council had confirmed that no records accessible by her contained information relating to the Appellant or the APPS. The Council provided copies of its Retention Schedules and some additional documents and archived material identified through further searches. This material referred to the APPS but the Council considered it not to be in scope of the Request.

17. The Council believed that the Appellant had been engaged as a consultant by the PCT and not the Council. The PCT was a separate public authority, which had been abolished in 2013. Paper records created by the Appellant while working for the PCT belonged to, and would be retained by, the PCT, not the Council. The Council said that it was not obliged by Public Contracts Regulations to keep records of procurement activity arising from the APPS. It was not the relevant contracting authority, and in any event, a contracting authority was only obliged to keep procurement records for 3 years.

The Decision Notice

18. On 10 January 2020, the Commissioner issued Decision Notice FS50873533. She considered the scope of the Request to be:

“any information held which evidences how work the [Appellant] did on the subject of Better Brighter Futures was subsequently reported to the Health and Scrutiny Board in 2007”.

19. The Commissioner concluded that on the balance of probabilities, the Council did not hold the requested information. She considered that the Council had contacted the relevant parties and departments to identify whether the requested information was held. She accepted the Council’s explanation in relation to records created by or for the PCT which she found to be comprehensive. The Commissioner noted that the information sought by the Appellant would be difficult to track down because it related to events which occurred over 10 years ago and because the PCT no longer existed. She agreed that the additional information found by the Council in response to the Appellant’s complaint fell outside the scope of the Request.

20. The Appellant appealed Decision Notice FS50873533 to the First-tier Tribunal.

The Appeal

21. In his Notice of Appeal, the Appellant said that he was satisfied that the Commissioner had reached the only decision available to hers. However, it was contrary to the design of the APPS for the Council to claim no responsibility for information recorded by the PCT. He was seeking a public acknowledgment that *“what was said to have happened did not”*.

22. The Commissioner applied for the appeal be struck out as having no reasonable prospect of success. The Commissioner submitted that the Appellant had identified no

reason why the Decision Notice was not in accordance with the law and that the Tribunal had no jurisdiction to make the requested declaration. In the alternative, the Commissioner submitted that the appeal should be dismissed because the Commissioner's enquiries were appropriate, she had received satisfactory answers from the Council and was satisfied on the balance of probabilities that the Council did not hold the requested information.

23. The Appellant submitted in response that he held information himself on behalf of the Council which was within scope of the Request. A Tribunal Registrar refused the Commissioner's application for strike out on 26 August 2020.

24. The Council was not joined as a party to the appeal.

Hearing of the Appeal

25. A remote hearing was conducted by video on 19 January 2021 by a Judge sitting alone in accordance with paragraph 11(3)(i) of the Practice Statement on the Composition of Tribunals dated 27 February 2015. It was appropriate to hold a remote hearing, having regard to paragraph 6(a) of the Senior President's Pilot Practice Direction of 14 September 2020 and the desirability of determining cases by the most expeditious means during the Coronavirus pandemic.

26. The Appellant was not able to attend by video due to technical difficulties. He was content to proceed by telephone while the judge, the Appellant's representative, Mr Choi, and his witness, Mr Beacon, attended by video. The parties were able to hear and communicate with each other throughout and, other than the Appellant, to see each other. The Commissioner elected not to attend or be represented.

27. The Appellant made submissions, gave evidence and examined his witness. Mr Choi is not a lawyer and in practice, his role was to support the Appellant. I took the Appellant's health conditions into account and made appropriate adjustments to facilitate his participation, including a break during which the Appellant consulted Mr Choi.

28. I took into account all the evidence before me, even if not specially referred to in this Decision. I had before me the open Commissioner's bundle of 404 pages together with a bundle submitted by the Appellant on 27 December 2020.

29. I considered it fair and in the interests of justice not to adjourn for further representations from the Commissioner in response to the evidence produced by the Appellant at the hearing. The Commissioner elected not to attend and have the opportunity to respond to evidence produced at the hearing.

The Appellant's Evidence and Submissions

30. The Appellant accepted that the Council no longer held information itself within the scope of the Request. However, he submitted that the Commissioner had failed to consider whether the Appellant himself held such information on the Council's behalf. He had retained information about the APPS and the award of contracts by the

Partnership when he stopped working for the Partnership in 2009. (I will refer to this as the “Retained Information”.) The Appellant regards himself as the “*producer, controller, holder and processor*” of the Retained Information which he says includes commercially sensitive information about spend analysis, service provider evaluation, minutes and emails.

31. The Appellant kept the Retained Information because he believes that it proves that minutes of Committee meetings between June 2007 and December 2007 are inaccurate and that contracts were wrongfully awarded. As a result, the Partnership failed patients and the general public, resulting in harm to vulnerable adults and children. The Appellant hoped that his concerns would be investigated and that he would be asked to produce the Retained Information as evidence.

32. The Appellant said that he did not have a written contract for his work on the APPS. He worked first through an agency, and then later invoiced and was paid by the PCT direct. He worked with both PCT and Council staff and submitted time sheets to both. He spent more time working for the PCT, approximately 3-4 days a week, with the remaining 1-2 days for the Council. The Appellant was based at the Council’s offices but reported to a PCT manager. He used his personal laptop and had email accounts with both the Council and the PCT. The Appellant felt that he would have been “inside IR35” if assessed (in other words, treated as an employee for tax and National Insurance purposes), most likely for the PCT, but possibly also the Council.

33. The Appellant said that he was not sent formal notice of termination when he stopped working for the Partnership nor asked to return or destroy information or documents. He said that the PCT and the Council simply “*dumped me*”. His PCT and Council email accounts were closed. He has not been contacted by the Council or the PCT about the APPS since 2009 nor asked about the Retained Information. He commented that the Council’s response to the Request indicated that it did not even know who he was.

34. The purpose of the Request was to draw the Council’s attention to its failure to comply with statutory record keeping obligations. While the service providers appointed through the APPS contracted with the PCT or other NHS bodies, the Appellant submitted that they were also accountable to the Council and the Council had since inherited some of the PCT’s public health functions. The Council had statutory obligations to retain information in relation to the wrongful award of contracts until at least 2028. It also had statutory obligations to retain information in relation to the safeguarding of vulnerable adults and children and a statutory duty to investigate allegations of wrongdoing.

35. The Appellant said that he had brought his concerns about the wrongful award of contracts to the attention of his MP, the Council’s Internal Audit team, the NHS Counter Fraud Authority and the European Ombudsman. Mr Beacon gave evidence about a meeting with the NHS Counter Fraud Authority in February 2010 which he attended with the Appellant.

The Law

36. Section 1(1) of the Freedom of Information Act 2000 (“FOIA”) provides that subject to exemptions:

“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.”

37. Section 3(2) FOIA provides that:

“For the purposes of this Act, information is held by a public authority if –

(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.”

38. In *University of Newcastle upon Tyne v IC and BUAV* [2011] UKUT 185 (AAC), the Upper Tribunal accepted the following analysis:

“The effect of [subsection 3(2)] is to confirm the inclusion of information within the scope of FOIA s1 which might otherwise have been arguably outside it. The effect of paragraph (a) is that information held by the authority on behalf of another is outside s.1 only if it is held solely on behalf of the other: if the information is held to any extent on behalf of the authority itself, the authority ‘holds’ it within the meaning of the Act. The effect of paragraph (b) is that the authority ‘holds’ information in the relevant sense even when physically someone else holds it on the authority’s behalf.” [21]

“‘Hold’ is an ordinary English word. In our judgment it is not used in some technical sense in the Act. We do not consider that it is appropriate to define its meaning by reference to concepts such as legal possession or bailment, or by using phrases taken from court rules concerning the obligation to give disclosure of documents in litigation. Sophisticated legal analysis of its meaning is not required or appropriate. However, it is necessary to observe that ‘holding’ is not a purely physical concept, and it has to be understood with the purpose of the Act in mind. Section 3(2)(b) illustrates this: an authority cannot evade the requirements of the Act by having its information held on its behalf by some other person who is not a public authority.” [23]

39. Whether information is or is not held by a public authority is a question of fact to be determined on the evidence.

40. The powers of the Tribunal in determining this appeal are set out in s.58 of FOIA, as follows:

“If on an appeal under section 57 the Tribunal considers -

(a) that the notice against which the appeal is brought is not in accordance with the law, or

(b) to the extent that the notice involved an exercise of discretion by the Commissioner, that he ought to have exercised his discretion differently,

the Tribunal shall allow the appeal or substitute such other notice as could have been served by the Commissioner, and in any other case the Tribunal shall dismiss the appeal.

On such an appeal, the Tribunal may review any finding of fact on which the notice in question was based.”

41. The Tribunal has no power under FOIA to order that information be corrected or declared inaccurate.

42. The burden of proof in satisfying the Tribunal that the Commissioner’s decision was wrong in law, or involved an inappropriate exercise of discretion, rests with the Appellant.

Conclusion

43. My powers in this appeal are to consider whether the Decision Notice is in accordance with the law (see paragraph 40 above). I do not have jurisdiction to consider whether any wrongdoing took place in relation to the awarding of contracts nor whether the Council is in breach of its statutory duties. Section 1(1) of FOIA applies only to information which is “held” by a public authority. If the Council does not “hold” the requested information, FOIA does not apply even if the Council had a duty or statutory obligation to do so.

44. I accept and adopt the Commissioner’s interpretation of the Request set out at paragraph 18 above. The Appellant did not dispute this interpretation. However, my conclusions below would be the same even applying the wider interpretation proposed by the Council at paragraph 13.

45. I find that on the balance of probabilities the Council does not hold the requested information itself. I accept the finding of the Commissioner that the Council made appropriate and comprehensive enquiries to identify the requested information and that it was reasonable to conclude that it no longer holds the information, given the passage of time, staff turnover, its retention policies and the abolition of the PCT.

46. The Appellant also accepts that the Council does not hold information within the scope of the Request. However, he submits that he holds information within scope of the Request himself and that because he holds this Retained Information “on behalf of” the Council, the Council also holds it by virtue of section 3(2)(b) FOIA.

47. In considering whether the Appellant holds the Retained Information on behalf of the Council, I have applied the guidance of the Upper Tribunal in *University of Newcastle upon Tyne v IC and BUAV* (see paragraph 38 above). The fact that the Retained Information is not physically held by the Council does not necessarily mean that the Council does not hold it for the purposes of FOIA. A contractor may hold information on behalf of its public authority client.

48. The Appellant referred me to a decision of the Commissioner that training materials created and delivered by Inspection Service Providers (“ISPs”) who were contracted by Ofsted to carry out school inspections, were held on behalf of Ofsted pursuant to section 3(2)(b) (Decision Notice FS50483519). The Commissioner relied in particular on the fact that the outsourced service was a core function of Ofsted, training was a requirement of the contract, the ISPs were required to maintain records of contracted activities and Ofsted had the right to access those records.

49. The Appellant also referred me to the First-tier Tribunal decision in *Willem Visser v the Information Commissioner and London Borough of Southwark Council* EA/2012/0125, 11 January 2013, where the Tribunal found that attendance registers for swimming lessons created by Fusion Lifestyle, a contractor managing leisure centres for the local authority, were held on behalf of the local authority. Although the contract did not require Fusion to keep the registers, the Tribunal relied on the fact that they were used by Fusion to satisfy its contractual obligations to the local authority and to monitor and report on performance, and were retained by Fusion in case of audit, at least until the end of the relevant contract year.

50. I am not bound by these decisions of the Commissioner and the First-tier Tribunal. However, I note that in both cases, emphasis was placed on the terms of the contract between the contractor and the public authority. As another First-tier Tribunal observed in *Chagos v Information Commissioner and Foreign and Commonwealth Office* (EA/2011/0300) “*in some cases it will be important to determine the exact nature of the legal relationship between a person holding information and the public authority, or to determine the legal structure pursuant to which information was created and held*” [61].

51. In this case, the Appellant submits that he had no formal contract with the Council or the PCT and there were no contract terms before me. I have limited evidence of the arrangements between the partners to the Safer Sunderland Partnership from 2005-2009. I make the following findings of fact on the balance of probabilities and based on the evidence before me.

52. The Appellant was not formally employed by the Council. It is most likely that he worked as a contractor of the PCT because he invoiced, was paid by and reported to the PCT, and spent more time working for the PCT than the Council. Much of his work related to the appointment and accreditation of service providers who were contracted by the PCT or other NHS bodies. Much of the Retained Information was created for use by the PCT. While the Appellant was working for the Partnership, the PCT would have been entitled to access the Retained Information for audit and compliance purposes and it is likely that the PCT could have demanded its return or

destruction at the end of his contract. The Appellant's right to use the Retained Information was and remains subject to obligations of confidentiality to the PCT.

53. The Appellant also worked and produced information and documents for the Council. Even if he was primarily contracted to the PCT, I find that the Council would also have had rights to access and use Retained Information which the Appellant created for the Council. The Appellant's right to use the Retained Information was and remains subject to obligations of confidentiality to the Council.

54. However, the Request which is the subject of this appeal was made ten years after the Appellant stopped working for the Partnership. This differs from the situation in the *Ofsted* and *Visser* cases where the contractor was still working for the public authority at the time of the request.

55. By contrast, the *Chagos* case (reference at paragraph 50) concerned a request under FOIA for papers retained by consultants who had worked on a Feasibility Study for the Foreign and Commonwealth Office ("FCO") eight years before. Under the contract between the FCO and the consultants, intellectual property rights in the papers belonged to the FCO and the consultants remained bound by express confidentiality obligations. However, the Tribunal found that information retained by the consultants was not held on behalf of the FCO. The Tribunal observed:

"Any copies of drafts which the consultants retained after the conclusion of the appointment would be for their own records, as would their copies of letters written. It is very common for professional advisers to keep their own copies of drafts, letters or final reports for a period of time, in case of any future dispute over fees or over the quality of the work. The consultants were free to destroy or delete such copies as they might wish, without asking the FCO. That there were restrictions on the consultants' right to use or disclose the information which they kept is not to the point. The existence of the restrictions does not mean that the information was kept on behalf of the FCO." [64]

56. While the Appellant was working for the Partnership, it is likely that he held information on behalf of the PCT and the Council in the same way as in the *Ofsted* and *Visser* cases. However, after he stopped working for the Partnership, the Appellant kept the Retained Information, not at the direction or request of the Council or the PCT, nor pursuant to a contractual obligation, but for his own purposes, because of his concerns about wrongdoing and his hope that those concerns would be investigated. Whatever its statutory obligations might have been, the Council chose not to retain copies of the Retained Information itself. Like the consultants in *Chagos*, the Appellant was free to destroy or delete his copies. The Council did not know that the Appellant had kept the Retained Information; indeed, as the Appellant recognised, by the time the Request was made, the Council did not appear to know he had ever worked for them.

57. I conclude on the balance of probabilities that at the time of the Request, the Appellant did not hold the Retained Information on behalf of the Council.

58. As UTJ Wikeley observed in the *University of Newcastle* case, a key feature of the FOIA regime is “*the need to balance the interests of the requester and the public interest in the free flow of information with the legitimate interests of public authorities and third parties.*” [41]. In my view, this balancing exercise does not require the Council, on receiving a request for information under FOIA, to track down a contractor who worked for them 10 years before to enquire whether they have retained information relevant to the request.

59. Given my conclusion that the Appellant did not hold the Retained Information on behalf of the Council, I have not gone on to consider whether that information was exempt under section 21 FOIA as accessible to the Appellant by other means nor whether the Retained Information included information within scope of the Request.

60. For all these reasons, I dismiss the appeal and uphold the Decision Notice.

(Signed Digitally)

MS C L GOODMAN

DATE: 03/02/2021

DISTRICT TRIBUNAL JUDGE