



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

**Case No. EA/2010/0152**

**ON APPEAL FROM:**

**The Information Commissioner's  
Decision Notice No: FS50252196  
Dated: 25 August 2010**

**Appellant: Alan Dransfield**  
**First Respondent: Information Commissioner**  
**Second Respondent: Devon County Council (Additional Party)**

**Heard at: 45 Bedford Sq. London**

**Date of consideration: 3 March 2011**

**Date of decision: 30 March 2011**

Before

**Christopher Hughes OBE**  
Judge

and

**Marion Saunders and Ivan Wilson**  
Members

**Appearances: This hearing was conducted on the papers.**

**Subject matter: FOIA S.3 whether information is held by a public authority.**

**DECISION OF THE FIRST-TIER TRIBUNAL**

The Tribunal rejects the appeal and upholds the decision notice dated 25 August 2010 on grounds other than those contained in the decision notice.

Christopher Hughes

Tribunal Judge

Dated this 30<sup>th</sup> day of March 2011

## **REASONS FOR DECISION**

1. On 10 February 2009 the Appellant, having previously made a more wide-ranging application for information concerning a large Private Finance Initiative project, applied to the Second Respondent in the following terms:  
*"I now wish to downgrade my FOI request for the Operations Maintenance Manual (OMM) for the ISCA College only. I don't mind if it is via CD or electronic transfer."*
2. On 12 May 2009 the Second Respondent informed the Appellant that it did not hold the requested information in electronic form, stated that to comply with his request would mean the location and retrieval of a substantial number of documents and that the costs of so doing would exceed the statutory limit of £450 and consequently the information would not be provided.
3. On 9 June 2009 the First Respondent accepted the Appellant's complaint and commenced an investigation of this decision and confirmed to the Appellant the precise scope of his investigation on 31 July 2009 in the light of the Appellant's desire to expand the scope to reflect his broader concerns.
4. During the course of the investigation (and indeed before the Tribunal) the Appellant strenuously argued that in the light of his interpretation of various statutory requirements and guidance the Second Respondent was obliged to maintain these records in an accessible electronic format and therefore the Second Respondent was obliged to provide the information.
5. The Second Respondent initially maintained the position of the cost of collating and providing widely dispersed paper records; however during the course of the investigation it adopted the argument that the request was vexatious and accordingly under S14(1) of FOIA it was not obliged to comply with the request.
6. In his Decision Notice of 25 August the First Respondent found that FOIA did not require public authorities to adopt a system of electronic document and records management, that the Operations and Safety Manual did not form part of the health and safety file and made the following findings with respect to the Second Respondent's use of "Buzzsaw" which appeared to hold some of the requested information:-

*“This is a data storage and project management application, understood to be hosted on a university server in the United States, which enables contractors to upload and amend documentation and plans relating to projects, and thereby permit their staff and clients to have access to up-to-date versions of the documents as necessary. Buzzsaw was introduced by the contractors after the contract was signed. Access to documents was largely confined to the build phase of the project and is granted at the contractors’ discretion and under their control. DCC also understands that it may be charged for access in some circumstances.”*

7. In considering the application the First Respondent concluded that on an objective reading it was wide ranging in its scope. He reviewed the available evidence concerning the request in the light of relevant factors in determining whether the request was vexatious. He concluded that complying with the request would create a significant burden, that the request had the effect of harassing the Second Respondent and its staff and that the request was obsessive. He concluded that the request was vexatious and the Second Respondent was entitled to rely on S14(1) of FOIA.

8. The Appellant was dissatisfied with the decision notice and appealed against it on 26 August 2010. The matter came before the Tribunal on 24 January 2011.

9. At that hearing from the evidence submitted to the Tribunal and in particular an e-mail sent by the Additional Party to the Appellant on 23 January 2011 it became clear that there was a substantial issue which none of the parties had considered. From the evidence and arguments it appeared possible that the Second Respondent might not currently be entitled as of right to have access to this information. The Tribunal therefore decided to adjourn to consider as a preliminary issue whether the information sought, held by persons other than the Second Respondent, is held by those other persons on behalf of the Second Respondent or alternatively that such information did not come within the ambit of FOIA and gave directions accordingly.

10. The panel met again on 3 March. the supplemental information filed with the Tribunal in accordance with the directions of 23 January by the Second Respondent was that by a contract dated 26 March 2004 the Council entered into a project agreement with Modern Schools (Exeter) Limited (the Contractor) whereby the design, construction, completion and commissioning of a number of schools in the Exeter area was agreed pursuant to the Private Finance Initiative. In this contract relevant provisions were:-

11. Clause 32 of the Contract which provides:-

“32. OPERATING MANUAL

32.1 Maintenance of Manual

The Contractor shall throughout the Operational Period maintain and update an operating and maintenance manual setting out the procedures for providing the Services which if complied with would constitute compliance by the Contractor with its obligations in respect of the Services (the “Operating Manual”).

32.2 Access to Manual

The Contractor shall at the request of the Authority provide the Authority with access to the Operating Manual in order to demonstrate that the Contractor has complied with its obligation to maintain and update the Operating Manual under clause 32.1.

32.3 Copy on Termination

On termination of this Agreement (howsoever arising including expiry) the Contractor shall within 10 Working Days provide a copy of the Operating Manual to the Authority.”

12. The contract remained in operation and therefore the rights of Access to the manual for the Second Respondent were as laid down in paragraph 32.2. In addition the contract provides at Clause 57:

“57. INFORMATION AND CONFIDENTIALITY

57.1 Duty of Confidentiality

The parties shall keep confidential all matters relating to this Agreement and the Project Documents and shall use all reasonable endeavours to prevent their employees and agents from making any disclosure to any person of any matters relating to this Agreement.”

13. The Second Respondent submitted in the light of this that the Operating Manual was held by the contractor and not by the Second Respondent. The Second Respondent was entitled to access to the document for the sole purpose of determining whether the contractor had complied with its obligations with respect to the compilation and maintenance of the document. It was not entitled to a copy and the confidentiality clause further restricted its actions. Furthermore the Second Respondent had had no input into generating the information, no control over it and no right to deal with it in any way. In the circumstances the information was not held by the Second Respondent.

14. In his submissions on the preliminary issue the First Respondent was critical of the Second Respondent for the late stage at which this issue had been identified. He

reviewed the evidential and legal issues raised by the submissions by the Second Respondent. In the event that the Tribunal was unable to determine on the evidence whether the information was held at the time of the request, the Tribunal was invited to uphold the decision notice that the request was in any event vexatious.

15. In his response to the contractual information put forward the Appellant attempted to broaden the issue and made a number of assertions. In particular he claimed that the operating manual was not the same as the operations maintenance manual. The Tribunal could not accept this argument – from the whole history of the request it was abundantly apparent that these terms were used for the same information in this context. He made a number of assertions as to health and safety law and asserted numerous breaches of the law by the Second Respondent. He alleged systematic criminal conduct by the Second Respondent and by necessary implication by identifiable officers of the Second Respondent.

16. FOIA provides guidance as to whether information is held by a public authority. It provides at section 3(2):-

“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”

17. The Tribunal was satisfied by the evidence of the contract submitted by the Second Respondent that at the relevant time the requested information was held on an American computer system on behalf of the contractor, not of the Second Respondent. Under PFI arrangements until 2033 the contractor will have wide ranging responsibilities with respect to the maintenance of the ISCA school and during that period the only substantive right which the Second Respondent has over the information is to inspect it for the purpose of satisfying itself that the information is properly maintained. After 2033 the position will change and the Second Respondent will have direct responsibility for the school and will then have full right of access to the information. The Second Respondent is not entitled to copy that information or use its access for other purposes. It does not hold the data and has not held it at any relevant date and therefore it was not obliged to make it available to the Appellant. The Tribunal is concerned that the Second Respondent failed to identify this fundamental issue when the Appellant requested the information.

18. The Tribunal has in accordance with S58(2) of the Act conducted a review of the factual basis upon which the decision notice was based. It has concluded that the information sought was not held by the Second Respondent. For this reason it dismisses the Appeal on grounds other than those set out in the First Respondent's Decision Notice of 25 August 2010.

Judge Christopher Hughes

30 March 2011