



**Appeal number: EA/2016/0163**

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

**RHYS MORTON**

**Appellant**

**- and -**

**THE INFORMATION COMMISSIONER**

**Respondent**

**TRIBUNAL: JUDGE ALISON MCKENNA  
ROSALIND TATAM  
ANDREW WHETNALL**

**Determined on the papers, the Tribunal sitting in Chambers on 25 October 2016**

## DECISION

1. The appeal is dismissed.

## REASONS

### *Background to Appeal*

2. The Appellant applied for admission onto an academic course at King's College London ("KCL") but was not offered a place because he failed to achieve the A level grades required to meet the terms of his conditional offer. He made an unsuccessful appeal citing mitigating circumstances. He firstly put in a FOIA request, asking KCL for the number of students who did not meet their conditional offer but were allowed onto the course. This was provided. He secondly requested the grades of applicants who did not meet their conditional offer but were accepted onto the course. This was provided. He thirdly requested the reason why the candidates who did not meet their offer grades were accepted onto the course in 2013 and 2014. The third request was made on 26 November 2015.

3. KCL sought clarification of the third request and, once this had been provided, informed the Appellant on 18 December 2015 that his request was refused because the requested information was not "held" pursuant to s. 1 (1) of the Freedom of Information Act 2000. KCL upheld its decision on internal review.

4. The Appellant complained to the Respondent, who issued Decision Notice FS50610162 on 16 June 2016, upholding KCL's response and requiring no steps to be taken by KCL. The Decision Notice considers the background to the request, and accepts KCL's explanation that, for those who do not meet their conditional offer, selection is conducted on a case-by-case basis at a management meeting of which there are no formal minutes (or that a strategic decision may be taken to accept all those who apply in 'confirmation and clearing week'). It is noted that an administrative instruction is given (to accept or reject the applicant) but that this is destroyed after being put into the computer system and that no record is made or kept of the reason for the decision to offer a student a place because there is no business need to create or keep any record other than the fact a place was offered or refused. This approach was stated to be in accordance with guidance from the Quality Assurance Agency for Higher Education.

### *Appeal to the Tribunal*

5. The Appellant's Notice of Appeal dated 9 July 2016 does not specify any particular alleged error of law made by the Respondent in the Decision Notice, but it is clear that he thinks the Decision Notice is wrong and it is implicitly argued that the Respondent made an error of law in reaching the conclusion she did on the facts before her.

6. The Respondent's Response dated 9 August 2016 maintained her analysis as set out in the Decision Notice. This is, in summary, that KCL had satisfied the Respondent on the balance of probabilities that the requested information was not recorded (and consequently not held) either centrally or on the individual students' records. The Respondent notes that KCL had provided compelling evidence of its position but that the Appellant had provided no evidence in support of his appeal.

7. The Appellant's Reply (undated but received by the Tribunal on 8 October 2016) emphasised his unhappiness with KCL's internal processes and submitted that there were several inconsistencies in KCL's replies to correspondence which made it inappropriate to rely on the facts there stated. These were, firstly, that having informed him that no information was held, KCL had also replied (with regard to his parallel use of the complaints procedure) to the effect that no student who missed their conditional offer but had mitigating circumstances had been admitted in the last admissions cycle. He therefore concluded that relevant information must have been held. Secondly, that KCL had told him that the admission decision was taken by the admissions tutor but also by the management team, and both statements cannot be correct. Thirdly, that procedures for selection decisions are systematically operated so as to allow KCL to provide feedback to a prospective student, which cannot be correct if the requested information is not held.

8. The parties and the Tribunal agreed that this matter was suitable for determination on the papers in accordance with rule 32 of The Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules 2009, as amended. The Tribunal considered an agreed open bundle of evidence comprising just under 90 pages, including submissions made by both parties, for which we were grateful.

#### *The Law*

9. Section 1 (1) of FOIA states that:

*“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”.*

10. 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."*

11. We note that 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.

12. There is no "public interest" test to be applied to the question of whether information is or is not held by a public authority. The question of whether the information requested was "held" by KCL on the date it was requested is one of pure fact. The relevant standard of proof is the balance of probabilities.

13. We note that "information", for the purposes of FOIA, is recorded information, and that there is no obligation on a public authority to take steps to record what is known. It follows that there may well be knowledge about a matter within a public authority (for example, in the memory of its officials) which does not constitute "information" to which a person requesting it is entitled under the auspices of FOIA.

#### *Conclusion*

14. The Decision Notice sets out at paragraphs 15 and 16 the Respondent's approach to deciding a question of fact before her. The Appellant has not challenged that approach. We are satisfied that the Respondent's approach was correct in law, but have gone on to consider whether she misdirected herself in applying that approach to the facts of this case, as this is the focus of the Appellant's appeal.

15. The Tribunal is not, of course, concerned with whether a public authority *ought* to have recorded certain information. The Appellant takes the view that it is "astonishing" that KCL does not record the reasons for its admissions decisions, but that is not a matter for us to express an opinion on. We do consider that the question of whether there is an obligation on any public authority to keep certain records may be relevant to the assessment of whether it is more likely than not that the requested information was in fact held. In this case, we note that the Respondent accepted KCL's statement that it had no business need to record the information requested and that this was relied on as evidence to support KCL's assertion that the information was not held. We see no error of law in the Respondent's approach in this regard.

16. We have considered the total evidential basis from which the Respondent accepted KCL's case that the information was not held. This seems to us to have been four-fold, as follows: (i) that the requested information was never recorded; (ii) that there was no obligation or business need to record the information requested by the Appellant; (iii) that any administrative instructions following discussion of an individual's case were subsequently destroyed; and (iv) that KCL had searched for any such information but found none. The Respondent concluded that, taking all these

factors into account, KCL had persuaded her on the balance of probabilities that the information requested was not held.

17. The Appellant's case to the contrary consists of an assertion that KCL did, in fact, hold the requested information. We do not criticize him for being unable to put forward positive evidence to support that assertion, as he obviously does not have access to KCL's files. We note that he makes his case by asking us to draw the inference that KCL's case may not safely be relied upon because of alleged internal inconsistencies (see [7] above) so that the Respondent's acceptance of KCL's case may be impugned.

18. We are not persuaded by the Appellant's submissions that KCL's case is unreliable for the following reasons, following the order of submissions in [7] above. Firstly, we draw the distinction referred to at [13] above between "being informed" (in KCL's response to the second stage Admissions Appeal procedure) that no mitigating circumstances offers were made in 2013, and there being "information held" within the auspices of FOIA of the reasons for such decisions. Secondly, it is our understanding that the admissions tutor may or may not put a student's case forward to the management team but that in neither case is there a record of the reasons for the decision by either decision-maker, and that these procedures are consistent with the guidance from the Quality Assurance Agency for Higher Education. Thirdly, we are satisfied by KCL's explanation that feedback to an individual student would not include providing that student with information about the circumstances of others, so it is possible for there to be a consistent approach to feedback which does not rely on the information requested. In all the circumstances we conclude that it was reasonable for the Respondent to rely on the evidence provided by KCL in support of its case that the information was not held.

19. The Appellant also refers in his Reply to there being a public interest in the release of the information he requested. However, (as noted at [12] above) a public interest test is not applicable in this case. The Appellant also suggests that he needs access to this information to bring legal proceedings against KCL. This is not a matter with which we can assist him.

20. In reaching our conclusion, the Tribunal discerns no error of law or inappropriate exercise of discretion by the Respondent in the Decision Notice. For the above reasons, the appeal is dismissed.

**(Signed on the original)**

**ALISON MCKENNA**

**DATE: 1 November 2016**

**PRINCIPAL JUDGE**