



**First-tier Tribunal
(General Regulatory Chamber)
Information Rights**

Appeal Reference: EA/2019/0394P

**Determined, by consent, on written evidence and submissions
Considered on the papers on 3 February 2021.**

Before
Judge Stephen Cragg Q.C.

Between

Derek Richardson

Appellant

and

The Information Commissioner

Respondent

DECISION AND REASONS

DECISION

1. The appeal is dismissed.

MODE OF HEARING

2. The parties and the Tribunal agreed that this matter was suitable for determination on the papers in accordance with rule 32 Chamber's Procedure Rules.
3. The hearing was conducted by a Judge, sitting alone. The Tribunal was satisfied that it was appropriate to conduct the hearing in this way.
4. The Tribunal considered an agreed open bundle of evidence comprising pages 1 to 75.

BACKGROUND

5. On 18 February 2019 the Appellant wrote to University College London (UCL) and requested information in the following terms:
 - "A copy of the last agreement for the provision of security services between CIS Security Ltd and UCL that was in force during 2018.
 - A copy of all amendments, supplements and alterations to this agreement.
 - A copy of all emails regarding the holiday entitlement and the change in method of calculation and implementation during January 2018, for the security staff employed by CIS Security Ltd."
6. On 11 March 2019 UCL responded and confirmed that it did hold some of the information relating to the request. There was some confusion as to what this referred to but after the Appellant referred the case to the Commissioner on 12 March 2019 it was clarified that the information held referred to part 2 of the request. The Appellant asked UCL for an internal review and on 25 March 2019 UCL explained that due to changes in personnel it was unable to locate

information to some parts of the request, namely the security services agreement or emails regarding holiday entitlement.

7. The Appellant told the Commissioner that he considered that UCL would hold information with regards to a contract agreement. He believed that there must be information held "in a filing cabinet" or on a hard drive or that a copy of the information is held by UCL's legal department, specifically "given the size of the contract."

THE DECISION NOTICE

8. The Commissioner produced a decision notice dated 29 September 2019 which explained what happened during the Commissioner's investigation.
9. UCL provided the Commissioner with a copy of the correspondence which confirmed UCL's request to its contractors, for an extension to the contract (which was due to expire in August 2018) to November 2018. UCL was also asked how the contract was terminated and it said that the contract came to an end on 1 November 2018.
10. The Commissioner asked UCL:-
 - (a) A series of questions to determine whether any recorded information was held. This included questions about the searches UCL had conducted to locate the requested information.
 - (b) Whether any information relevant to the scope of the request had been deleted or destroyed.
 - (c) To provide any general explanations or arguments as to why it should not be expected to hold information relating to the request.
11. The Commissioner recorded UCL's reply as follows:-

22. UCL described the searches which had been conducted by its Procurement and Estates teams. UCL said that the Procurement team

would have managed the negotiation of the agreement, and that the agreement was in respect of security services provided to the Estates team. UCL also engaged with another department based in the Information Services Division, and they were able to search all UCL's electronic records for information relating to the scope of the request.

23. UCL informed the Commissioner that its FOI team had consulted with the Security Manager for UCL Estates – Facilities and Infrastructure and also a Senior Procurement Manager within the Procurement Services. Both managers carried out searches of the relevant network drives of their own team using the key term “security” for the requested information. UCL added that the physical document archive record was also consulted.

24. With regards to personal computers, UCL stated that these had not been searched. It explained that this is because the relevant individuals that had dealt with the agreement at the time it was negotiated and signed, no longer work at UCL.

12. The Commissioner made further inquiries and these, and the responses, are worth setting out in detail as they provide important details for the case:-

25. During the investigation, the Commissioner asked UCL some additional questions regarding its searches carried out by its legal department for information relating to the request. UCL said that it had conducted a search of the emails sent and received by individuals from its legal team that were involved with the negotiation of the contract. Keywords used in the search were “security services” and/or “agreement for the provision of security services”. The date range it searched was between 1/5/13 – 30/10/13, which UCL believes covers the period of time which the contract was signed. UCL confirmed that no relevant information was found as a result of the searches. UCL made clear to the Commissioner that its legal department does not retain copies of finalised agreements and said that the responsibility to do this lies with the instructing department.

26. If the information requested was held, UCL stated that the contract is likely to have originally been executed in hard copy. It explained that a scanned version of the completed copy “may have been made”. However, UCL reported that there is no longer a record of either the hard copy or of the soft copy of the information requested.

27. UCL acknowledged that a copy of the contract agreement would likely to have been retained at the time it was signed. UCL said that it does not dispute that there was a binding agreement in place, and therefore, it would have been under an obligation to hold a copy of the agreement in order to sign it. UCL stated that it assumes this agreement was destroyed at some point following signing. However, UCL said that it does not have a record of the contract being destroyed.

28. UCL considers the possibility that it ceased to retain this information when the previous Head of Facilities & Security Services left the organisation approximately 3 years ago. UCL explained that the individual may have stored this information on their laptop, or N:drive which is personal storage and consequently was lost when their accounts were closed. Alternatively, the information may have been destroyed during the time the Estates Team moved offices in June 2015.

29. UCL informed the Commissioner that this type of document should usually be retained for six years from the termination of the agreement, in accordance with UCL's record retention schedule. It said that UCL cannot explain why this was not the case in this instance.

30. UCL reported that it had conducted a search of the centralised UCL (electronic) records and it had not found any further information. UCL said that it understands that, ordinarily, copies of an agreement of this type, should be kept for audit purposes. With regards to statutory requirements upon UCL to retain the requested information, it stated that to its knowledge, the only statutory requirements to retain this information stem from any audit requirements which may apply to UCL.

13. As a result of all this the Commissioner recognised that UCL should hold a copy of the contract. However, the Commissioner noted that it is also important to recognise that even where information should be held, that does not necessarily mean that it is in fact held. Further, the Commissioner accepted that UCL recognised that the information should have been retained for six years from the termination of the agreement, in accordance with its record retention schedule.

14. The Commissioner concluded that having considered UCL's response and on the basis of the evidence provided to her, the Commissioner was satisfied that on the balance of probabilities, UCL does not hold the requested information.

THE APPEAL AND SUBSEQUENT EVENTS

15. The Appellant's appeal is dated 17 October 2019. In it he expresses his view that the contract (as requested in part 1 of his request) must exist as it was still active in October 2018 and wants further questions put to UCL about it. He does not believe that the contract has, in effect, been lost.
16. In relation to Part 2 of his request a similar approach is taken in relation to the changes to the contract. In relation to Part 3 the Appellant disputes the contention that relevant conversations and email correspondence did not take place.
17. The Commissioner's Response was that she was entitled to accept UCL's explanation in relation to these issues in the decision notice and that further questions to UCL might be explored if UCL were joined as a respondent to the appeal.
18. The Tribunal joined UCL to the appeal on 29 November 2019. UCL issued a form of response on 26 February 2020. This document set out further information about searches made and also how UCL was able to operate without a copy of the contract. These answers were later rehearsed in a witness statement which is set out more fully below. It was said that no amendments were made to the contract. Further responses were also made about the emails and correspondence sought by the Appellant to the effect that searches had been made but nothing found.
19. On 17 March 2020 there was an email on behalf of the Appellant to the Tribunal to say 'if, for all practical purposes, this process has come to a close

then so be it'. Further dissatisfaction with UCL's record keeping was expressed.

20. However, that was not the end of the matter. It does seem that the appeal was formally withdrawn, and the Tribunal originally considered the case on the papers on 29 June 2020. The Chamber President (CP) who considered the case made the following directions having adjourned the case:-

(1) UCL is to file with the Tribunal and send to the other parties a witness statement made by a relevant individual (containing a signed statement of truth) which gives details of their searches for the agreement for the provision for security services which is the subject-matter of the request.

(2) In particular, UCL is to explain whether external legal or other professional advice was taken on the creation of the agreement. If so, it is to state whether searches have been made to establish whether any third party holds the requested information on behalf of UCL.

16. The CP explained that in relation to the request:-

3...UCL responded that it did not hold a copy of the contract, but it is clear from the Decision Notice and its submissions that it only made internal searches.

4. It is also clear that the contract was of significant value (the Appellant says £4 million), and it therefore seems likely that external advice may have been sought in relation to the drafting of such a contract. However, the Information Commissioner did not consider whether an external body, such as a solicitor or other adviser acting on behalf of UCL, may have retained a copy of the contract which it holds on behalf of UCL. If such a person does hold a copy of the contract on behalf of UCL, the Appellant has the right to be informed. If UCL, having located the document, seeks to rely on an exemption to disclosure, then that is another matter and it must issue a fresh response to the information request.

5. ..

6. S. 3 (2) of FOIA provides that 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.

7. The Decision of the Upper Tribunal in *University of Newcastle upon Tyne v Information Commissioner and Another* [2011] UKUT 185 (AAC)¹ in which

Judge Wikeley at [22] supported the First-tier Tribunal's analysis of s. 3 (2) FOIA, was as follows:

"[47] The effect of this subsection is to confirm the inclusion of information within the scope of FOIA s.1 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.

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".

8. ...

9. I have concluded that it is fair and just to adjourn this hearing because it seems to me that there is a key question of evidence that the Information Commissioner did not consider in reaching a conclusion and issuing the Decision Notice. In making a fresh determination, the Tribunal would benefit from UCL's evidence on the point.

17. As a result of these directions, a witness statement dated 18 September 2020 from Alexandra Potts of UCL was filed. Ms Potts is the Data Protection and Freedom of Information Officer at UCL and is responsible for considering, investigating and responding to Subject Access Requests and Freedom of Information requests.

18. Ms Potts rehearses the information UCL has already provided to the Commissioner. She goes on to say:-

13. As part of UCL's response to the Order, we have reviewed the searches and enquiries previously carried out and carried out further enquiries of Mark West and Matthew Keenan as well as enquiries of an external consultant, Roy Miller (see paragraph 16). Having done so, and to be transparent about the documents which are available, it may be helpful for me to clarify the position with regard to the tender which led to the award of this contract to CIS Security and the documents which are now available.

14. As part of the tender process, an invitation to tender document ("ITT") would have been prepared, with a view to being sent to those parties who had expressed an interest in bidding, including the successful bidder, CIS Security. The ITT would have included certain draft documents which,

after the tender process had been completed, and any finalisation of the documents with the successful bidder had taken place, ultimately may have formed part of the Contract, as finally executed. These documents include, by way of example, terms and conditions, specifications and pricing schedules.

15. In addition, at about the same time as the tender process, the legal team at UCL prepared a draft document titled "Agreement for the Provision of Services". This was a simple document, intended to be the front end of what would ultimately become the Contract. Key commercial and operative provisions of the Contract would have been contained in the schedules to the draft "Agreement for the Provision of Services" document (these schedules are all blank in the draft agreement).

16. Currently, UCL has in its possession various draft documents, including the ITT, the Agreement for the Provision of Services, together with iterations of specifications, pricing schedule documents, as well as various tender submission and other documents circulated internally at UCL and between UCL and the tendering parties. I simply do not know whether the documents in UCL's possession include all of the information and documents which ultimately formed the Contract as executed and whether further changes were made which do not appear in the documents in our possession. What is clear is that there is not a single set of documents which, taken together, can be said with any confidence to represent "the Contract" as we have been unable to locate the executed Contract.

19. Specifically in relation to the CP's directions, Ms Potts says as follows:-

17. In relation to external legal advice, I am informed by Kati Kaarlehto that external solicitors were instructed in relation to certain procurement issues relating to the procurement of the security services covered by the Contract. I am also informed that so far as Mrs Kaarlehto recalls or has been able to confirm by review of her email inbox, the external solicitors did not review or draft the Contract, had no involvement with the negotiation or execution of the Contract and the Contract was drafted in house by UCL. I am informed by Mrs Kaarlehto that her recollection is that the external solicitors will not have received a copy of the Contract and therefore no enquiries have been made of them.

18. UCL did retain the services of a consultant, Roy Miller, who provided advice on certain matters, including security services matters. Enquiries have been made of Mr Miller to see if he has a copy of the Contract. In his

response Mr Miller said that he too has a copy of the ITT document. He says that it would be unusual for him to have a copy of the final version of an executed agreement. Further, that he has carried out searches of his relevant email folders and does not have a copy of the Contract.

20. I am told that neither the Commissioner nor the Appellant have made further submissions in response to the statement.

DISCUSSION

21. The majority of section 1 FOIA is worth setting out in this case:-

1. — *General right of access to information held by public authorities.*

(1) 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.

(2) Subsection (1) has effect subject to the following provisions of this section and to the provisions of [sections 2, 9, 12](#) and [14](#).

(3) ...

(4) The information —

(a) in respect of which the applicant is to be informed under subsection (1)(a), or

(b) which is to be communicated under subsection (1)(b),

is the information in question held at the time when the request is received, except that account may be taken of any amendment or deletion made between that time and the time when the information is to be communicated under subsection (1)(b), being an amendment or deletion that would have been made regardless of the receipt of the request.

(5) A public authority is to be taken to have complied with subsection (1)(a) in relation to any information if it has communicated the information to the applicant in accordance with subsection (1)(b).

(6) In this Act, the duty of a public authority to comply with subsection (1)(a) is referred to as "*the duty to confirm or deny*".

22. Section 3(2) FOIA states that:-

(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.

23. The Commissioner and now this Tribunal must apply the civil standard of proof in deciding whether UCL holds the information requested which has not been disclosed. This is a case where it is surprising, as UCL accepts, that the information is not held. However, the Commissioner engaged extensively with UCL to ensure that this was the position and was satisfied that that was the case.

24. When the Appellant appealed, the Tribunal took up the baton of enquiry, UCL was joined to the appeal and the CP noted that there were areas that had not been explored by the Commissioner. That has now been followed up with a long witness statement from UCL which both reviews again the searches carried out by UCL and also addressed the specific points as to whether the information might be held by other persons on behalf of UCL.

25. The result of these further enquiries is the same: UCL does not hold the requested information.

26. The Appellant has not challenged anything in Ms Potts' statement. Now the Tribunal has this further explanation, and in accepting it, in my view a

conclusion can be reached that, on the balance of probabilities, UCL does not hold the requested information in the form of the contract. I accept UCL's explanation that there were no amendments to contract, and that the emails and correspondence sought has been searched for and found not to be held.

27. On that basis the appeal is dismissed.

Stephen Cragg QC

Judge of the First Tier Tribunal

Date of Decision: 15 February 2021

Date Promulgated: 25 February 2021