



NCN

Case Reference: EA/2021/0373

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

Heard: By determination on the papers

Heard: On 13 June 2022

Decision Given on: 21 June 2022

MICHAEL RICHARDSON

Appellant

- and -

THE INFORMATION COMMISSIONER

Respondent

**Before:
JUDGE ALISON MCKENNA
SUSAN WOLF
DAN PALMER-DUNK**

DECISION

- 1. The appeal is allowed.**
- 2. Substituted Decision Notice:**

- A. The Tribunal finds that Decision Notice IC-109451-SIM2 dated 26 November 2021 was erroneous and that information within the scope of the information request is held by LSE;**
- B. LSE must within 28 days issue a fresh response to the Appellant’s original information request which confirms that information within the scope of his request is held and either disclose it or claim any exemptions to disclosure on which it relies.**

REASONS

Mode of Hearing

3. The parties and the Tribunal agreed that this matter was suitable for determination on the papers in accordance with rule 32 of the Chamber’s Procedure Rules¹.
4. The Tribunal considered an agreed open bundle of evidence comprising pages 1 to 86. It also considered submissions from the public authority, the Council of the London School of Economics and Science (‘LSE’) and further evidence and submissions from the Appellant.

Background to Appeal

5. The Appellant made a request to LSE on 2 May 2021 for the names of the examiners who examined the then Miss Tsai Ing-Wen (now President of Taiwan) for her PhD and the report from her viva.
6. LSE responded on 4 May and 26 May 2021 that it did not hold the requested information because at the relevant time (1984), it was the University of London which awarded degrees to LSE students.
7. The Information Commissioner issued Decision Notice IC-109451-SIM2 on 26 November 2021. It concluded on the balance of probabilities that the requested information was not held by LSE.
8. The Appellant appealed to the Tribunal. LSE was sent the appeal papers and invited to make submissions or to apply to be joined as a party to the appeal. It chose only to make submissions, but also supplied evidence.

The Law

9. S. 1(1)(a) of the Freedom of Information Act 2000 (‘FOIA’) provides that a person making an information request is entitled to be informed in writing whether the public authority holds information within the scope of the request. Where information within the scope of the request is held, it must either be disclosed or an exemption claimed.

¹ <https://www.gov.uk/government/publications/general-regulatory-chamber-tribunal-procedure-rules>

10. Where there is a dispute about whether information is held, the Tribunal makes a finding of fact on the evidence before it, applying the civil standard of proof, the balance of probabilities.
11. The Upper Tribunal's Decision in *Malnick v IC and ACOBA* [2018] UKUT 72 (AAC)², confirmed that a public authority must pass through the 'gateway' of compliance with ss. 1, 2 and 17 FOIA before being entitled to raise a late exemption before the Tribunal. As the public authority in this case stated that it did not hold the requested information, it has not yet claimed any applicable exemptions to disclosure. This means that the Tribunal cannot in this appeal decide whether any exemptions to disclosure apply.
12. 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."

Submissions and Evidence

13. The Appellant's Notice of Appeal dated 14 December 2021 relied on grounds that (i) the Decision Notice was erroneous in concluding on the balance of probabilities that information was not held; (ii) that President Tsai's office has provided consent to the disclosure of any personal data on her student file; and (iii) that LSE has failed to comply with its legal obligations under FOIA. He requested that the Tribunal remits the matter to the Information Commissioner and directs a more thorough investigation.
14. The Information Commissioner's Response dated 19 January 2022 resisted the appeal and maintained the analysis set out in the Decision Notice. It is also submitted that, in another case on the subject of President Tsai's PhD (in which the public authority was the University of London), the Tribunal found that the names of the examiners were exempt from disclosure under s. 40 (2) FOIA. The Information Commissioner invited the Appellant to withdraw his appeal.

² [2018_AACR_29ws.pdf \(publishing.service.gov.uk\)](#)

15. The Appellant's Reply made clear that he would not be withdrawing his appeal. He submits that the Information Commissioner had not informed him that it had any concerns about the provenance of a copy email he had provided dated 16 December 2020 and had simply failed to take it into account in reaching the conclusions in the Decision Notice. So that the Tribunal would not have similar concerns, he produced a further copy exhibited to an affidavit (see below). He addressed the question of the examiners' names being their personal data.
16. In response to the Registrar's Directions of 7 March 2022, LSE declined to be joined as a party to this appeal but made submissions and provided evidence. Its submission to the Tribunal dated 14 March 2022 it stated that "*...the information we hold on file is only there accidentally...we cannot be certain that this information is accurate*".
17. LSE confirmed to the Tribunal that it holds President Tsai's student file, comprising 278 pages. It stated that there is a letter on this file in which a person appears to self-identify as one of the Viva examiners, but that it has no official notification from University of London whether this information was correct, and it holds no information on the identity of the co-examiner. Commenting on the email of 16 December 2020 (see below), LSE states that its review found that the information provided by LSE in that email was "*likely inaccurate. This was based on a hurried view of a scanned file that cannot be key word searched. The email chain...is attached*".
18. The Appellant made final submissions in which he asked the Tribunal to direct LSE to disclose pages from President Tsai's student file.
19. The Tribunal considered the following evidence, produced by the Appellant.
 - (i) An email dated 16 December 2020 in which a senior employee of LSE stated in an email that he had reviewed President Tsai's student file and "*...it appears from her student file that [XX]³ and [YY] examined President Tsai's thesis in October 1983*".
 - (ii) The 16 December 2020 email was provided by the Appellant to the Information Commissioner's Office during its investigation, but it did not ask LSE about it, apparently being uncertain of its provenance. The Appellant provided the Tribunal with a further copy of the email, exhibited to an affidavit dated 24 January 2022 signed by journalist Dennis Peng, who states he obtained it via disclosure during defamation proceedings brought against him by President Tsai and that the addressee of the email is "*the inquiry of the Taiwanese Judiciary Institution*" which is investigating President Tsai's PhD.

³ We have here anonymized the persons named as a precaution in view of the Tribunal's Decision referred to in paragraph 14, although we note we are not bound to take the same view. We understand that the Appellant has seen these names in full because they were provided to the Tribunal unredacted.

- (iii) The Appellant also relied on evidence in the form of an email dated 12 June 2019, in which President Tsai’s office gave LSE consent to the disclosure of personal data in her student file.
 - (iv) The Appellant produced an email dated 14 June 2019 from a member of staff at LSE to President Tsai’s office in which there is a reference to “fending off” enquiries about President Tsai’s PhD. The Appellant relies on this as evidence that LSE is reluctant to comply with its duties under FOIA.
20. The Tribunal considered the following evidence, provided by LSE with its submissions of 14 March 2022:

An internal email dated 31 March 2021, addressed to the member of staff who sent the 16 December 2020 email, as follows:

Looking at it again, I was wondering where in the student file you got the information that she had two internal examiners – [XX] and [YY] – and one external examiner – [ZZ].

As far as I can see the only examiners referred to in the file are:

-[ZZ], named as external examiner in a letter from Pres Tsai to ...Sec of Graduate School at LSE, 5 December 1983

-[XX], who refers to ‘my co-examiner and myself’ in a memo ...dated 16/1/1983. This also suggests there were only two examiners, [XX] and one other.

I see [YY] is mentioned in the file but couldn’t find him specifically named as an examiner.

21. We have not seen the reply to that email. We note that LSE has not disputed that the email of 16 December 2020 was sent, only that it now doubts the accuracy of its contents.

Conclusion

22. The Decision Notice concluded on the balance of probabilities that LSE did not hold the requested information. The Tribunal has had the benefit of additional evidence provided by the Appellant and by LSE itself with its submissions.
23. We conclude on the basis of all the evidence before us and on the balance of probabilities that information within the scope of the request is held by LSE in President Tsai’s student file. That information has been referred to in email correspondence between LSE and others (including apparently being supplied to a judicial inquiry) and is also referred to in its submission to the Tribunal. We understand that LSE doubts the accuracy of this information, but we conclude that this is not a basis for stating that information is not held under FOIA.

24. It may be that exemptions will be claimed, but we conclude that LSE must now issue a fresh response in which that issue is addressed. As we have concluded that information is held, the correct course is for LSE to issue a fresh response on the basis that information within the scope of the request is held, and at that stage either disclose the requested information (with contextual commentary, if necessary) or claim any exemptions to disclosure that it considers apply. If the Appellant disagrees with that response, he may complain to the Information Commissioner. The Tribunal may only become involved if a further Decision Notice is issued.
25. We allow this appeal on the basis of the Appellant's first ground of appeal, that the Decision Notice was erroneous in its conclusion that information was not held.
26. As to the Appellant's second ground of appeal, we note that President Tsai may only give permission to disclose her own personal data and may not override the privacy rights of third parties. In any event, this Tribunal may not determine the applicability of exemptions which have not yet been claimed and have not been considered in a Decision Notice.
27. As to the Appellant's third ground, this Tribunal's jurisdiction extends only to considering the Decision Notice. It is not our role to comment on LSE's handling of the request.
28. We now allow the appeal and make the substituted Decision Notice above.

(Signed)

JUDGE ALISON MCKENNA

DATE: 20 June 2022

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