



Case Reference: FT/EA/2024/0069
Neutral Citation Number: [2024] UKFTT 00896 (GRC)

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

**Heard by Cloud Video Platform
Heard on: 25 September 2024
Decision given on: 18 October 2024**

Before

**JUDGE SOPHIE BUCKLEY
MEMBER PAUL TAYLOR
TRIBUNAL MEMBER DAVE SIVERS**

Between

DR JESUS ANTONIO SILLER FARFAN

Appellant

and

**(1) THE INFORMATION COMMISSIONER
(2) THE GOVERNING BODY OF THE UNIVERSITY OF CENTRAL LANCASHIRE**

Respondents

Representation:

For the Appellant: In person

For the First Respondent: Did not appear

For the Second Respondent: Leo Davidson (Counsel)

Decision: The appeal is dismissed.

REASONS

Introduction

1. This is an appeal against the Commissioner's decision notice IC-260483-T4L2 of 26 January 2024 which held that the Governing Body of the University of Central Lancashire (the University) did not hold the requested information for the purposes of the Freedom of Information Act 2000 (FOIA) and that the University is entitled to rely on section 3(2)(a) FOIA.

Background to the appeal

2. The University and Colleges Employers Association ("UCEA") is the employers' association for higher education institutions in the UK. It is a non-profit company limited by guarantee established for the following purposes:
 - 2.1. To promote and carry on the activities of an employers' association for subscribing universities and other higher education institutions in the UK and any of their representative bodies or associations by the provision of a framework within which representatives of institutions can discuss salaries, conditions of service, employee relations and all matters connected with the employment of staff and employees.
 - 2.2. To act as a consultant and advisor to subscribing institutions and other bodies and persons on employment matters.
3. 'Subscribing universities and other higher education institutions' means universities and other higher education institutions which are paid up subscribers to any 'Member' of the UCEA for the purposes of benefiting from the services provided by the UCEA. The UCEA is funded through Members' subscriptions and fees.
4. The 'Members' of the UCEA are Universities UK (UUK), GuildHE, CUC and Universities Scotland.

5. UUK describes itself as the 'collective voice of universities' bringing them together to pursue a common cause by influencing policy and opinion and to take collective action. The members of UUK are the vice-chancellors or principals of UK universities. The vice-chancellor of the University of Central Lancashire is a member of UUK.
6. The UCEA holds an annual general meeting and can hold extraordinary general meetings. Each Member is entitled to nominate one person to represent it at general meetings and each Member attending the general meetings has a certain number of votes.
7. The UCEA board is nominated by the Members, who can nominate a certain number of board members each. The UCEA website states that this is to 'ensure that our Board is representative of the diverse range of higher education institutions in our membership'. The board consists of, at present, heads of institutions and chairs of governing bodies from 18 institutions. It is a voluntary role, but UCEA can and does pay expenses. All board members are directors of the UCEA.
8. If a Member withdraws its nomination that person ceases to be a member of the board. The board appoints a person to be Chief Executive of the UCEA. The members of the board can elect a chairperson. The UCEA website describes the function of the board as providing 'organisational oversight, corporate governance, strategic direction and leadership of collective pay negotiations'
9. The UCEA board manages the business of the UCEA and may exercise all the powers of the UCEA and on behalf of the UCEA and act on behalf of the UCEA.
10. Every year the Board is required to invite all subscribing Universities and other institutions of higher education to a meeting to discuss matters relating to the UCEA.
11. In 2023 the UCEA board terminated the membership of Queen's University Belfast (QUB). The reasons that it gave were that QUB opted into collective pay negotiations for 2023-24 and was expected to follow the UCEA Code but had made a local agreement on pay with the University and College Union (UCU) outside the collective pay agreements.

12. Professor Graham Baldwin has at all relevant times been Vice-Chancellor of the University of Central Lancashire. Professor Baldwin is also a Director of UCEA and Deputy Chair of the board of UCEA.
13. The University allows Professor Baldwin to use his University email account for correspondence in his role of Deputy Chair of the board of UCEA. Professor Baldwin's expenses incurred in his role as Deputy Chair of the board of UCEA are initially paid by the University which claims them back from UCEA.

Request, Decision Notice and appeal

14. This appeal concerns a request made to the University on 6 August 2023:

"All the sent and received communications (whether internal, external, and regardless of the platform) of Professor Graham Baldwin that are related, however tangentially, to Queen's University Belfast. Such search can be limited to exchanges that took place after the 1st of March 2023. The nature of this request includes, but it is not limited to: e-mail, physical correspondence, chat exchanges, messaging exchanges, etc"

15. In its response on 9 August 2023 the University stated that it did not hold the requested information. It upheld its position on internal review.
16. In a decision notice dated 26 January 2024 the Commissioner concluded that were any requested information held the University would not use it for its own purposes and that it would be a private communication between the Professor and the UCEA. The Commissioner was satisfied that the University did not hold the request information and was entitled to rely on section 3(2) to refuse the request.

Notice of Appeal

17. The Grounds of Appeal are, in essence, that the Commissioner was wrong to conclude that the University did not hold the requested information.
18. The appellant raises the following points:
 - 18.1. The request was for correspondence of Graham Baldwin that are related to QUB. Graham Baldwin is the University's vice-

chancellor and the director and deputy chair of the board of the UCEA.

- 18.2. The information is more likely than not to be held in Professor Baldwin's institutional email account for the University. The University controls that account and is responsible for the Data Schedule.
- 18.3. UCEA is not a completely separate legal entity to the University.
- 18.4. The University has deemed Professor Baldwin's activities to be official university business as defined in its expenses policy.
- 18.5. Professor Baldwin's address as director of UCEA is the address of the University.
- 18.6. The University has an interest in the information.
- 18.7. 'Hold' should be given a plain meaning relying on persuasive decisions from the Court of Session.

The Commissioner's response

19. The Commissioner stated that it is not disputed that UCEA is not subject to FOIA.
20. The Commissioner remains satisfied that the University carried out appropriate searches to determine whether or not the University held any correspondence that fell within the scope of the request. Any information that fell within the scope of the request is not considered to be held by the University for the purposes of the FOIA because it would be a private communication between Professor Baldwin in his role as a Director and Deputy Chair of the Board of UCEA. It would not be used by the University for any University business purposes.

The appellant's reply

21. The appellant submitted that correct test is whether the information is held on the balance of probabilities and invited the tribunal to consider the persuasive arguments of the Court of Session.
22. The appellant states that it is not admitted that UCEA is not subject to FOIA, and does not see how this is relevant to the appeal.

The University's response

23. The University relies on its reasons in its response to the request and internal review.

24. In relation to control of the emails in question, the University states that its email use policy allows some personal use of the email system. It submits that it does not then use the information in those emails for business purposes.
25. The University rejects the Appellant's assertion that it holds the requested information for the purposes of the FOIA simply because the email may be stored in its email system because it was sent to Professor Baldwin's University email address. If the information is a private communication between UCEA and Professor Baldwin as a UCEA Board member and has not been used in any way by the University (which the University maintains is the case) then the University cannot be said to hold the information for the purposes of the FOIA simply because the email was sent to its email system.
26. In relation to the assertion that the University and UCEA are not completely separate legal entities, the University submit that the UCEA Articles of Association set out how UCEA is structured and how it operates. It states that the UCEA website further explains - with reference to the Articles of Association - that UCEA has four Members, which are CUC, GuildHE, Universities Scotland and Universities UK (UUK). The same web page goes on to say that UCEA's full subscribing members are, by reference to the Articles of Association, all UK Higher Education providers eligible for full membership of the four Members of UCEA: UUK, Universities Scotland, GuildHE and CUC. It states that the University is a subscribing member of UUK but it does not own any part of it. The University is not a "Member" of UUK for company law purposes. UUK is a charitable company limited by guarantee and its Articles of Association say that its Members for company law purposes are the individual Vice Chancellors of "Eligible Institutions." The institutions subscribe to UUK for membership services but do not have any of the rights of ownership in relation to UUK. Those vest in the individual Vice Chancellors.
27. On this basis, the University submits that the Appellant's assertions that the University owns part of UUK so in turn owns part of UCEA are not factually correct. The statements made by the Appellant cannot be used to demonstrate that the relationship between the University and UCEA means that the University must hold the requested information for the purposes of the FOIA.

28. The University submits that UCEA business cannot in any sense be considered University business, irrespective of who pays the expenses for attending meetings. UCEA is an employers' association which has a duty to act in the collective interest of its members; some of its decisions and acts do not necessarily align with the interests of individual members e.g. where it recommends pay increases higher than certain institutions may wish to agree. It is submitted that the information the Appellant has obtained about Professor Baldwin's expenses claims does not support his view that UCEA business is University business.
29. It is submitted that information received by the University's Vice Chancellor in his capacity as a Director of UCEA is subject to the usual duties of confidentiality owed by directors to their companies and it would be a breach of that duty if he were to permit the University to use his correspondence for its own purposes. It could also be a breach of the University's implied duty of trust and confidence to the Vice Chancellor to require him to share this information in such circumstances.
30. The University submits that it is not correct to say that the information is being used by the University simply because the Vice Chancellor is a UCEA Board member. The University submits that it is Professor Baldwin in his personal capacity as a serving Vice Chancellor of a UK university who is a UCEA Board member.
31. If the information Professor Baldwin has access to as a UCEA Board member is 'University information' for the purposes of the FOIA it is submitted that this would put the University at an unfair advantage over any other subscribing member of UCEA because it would have access to confidential information of the UCEA Board to use for its business purposes when other subscribing members would not.
32. It is submitted that the appellant's argument could have significant implications for any private sector organisations which have serving Board members who are also employees of a public authority.

Reply of the appellant

33. The appellant asserts that it is dubious that conversations conducted by G Baldwin in his role as Vice-Chancellor of the University and UCEA Deputy Chair would be subject to the 'private life' protection outlined in Article 8 of the ECHR. Further the appellant challenges that Professor Baldwin would even think of labelling all the communications under dispute with any

marker related to the supposedly “Personal” or “Private” nature of the messages under article 8 of the ECHR which is a mandatory requisite under section “F” of the e-mail use policy.

34. The appellant submits that the University, as a subscribing member of the UCEA has more than a de minimis interest. Further the University is a member of CUC, which is a member of UCEA. Professor Baldwin is a member of UCEA only in his capacity as vice-chancellor. Vice-chancellors that resign or are forced out from their institutions are immediately terminated as directors of UCEA. A de minimis link is enough to establish interest and ownership in information for the purposes of FOIA.
35. The appellant asserts that by choosing to be an owner and subscribing member of UCEA this means that the University has a stake and a natural interest in the dealings that take place within UCEA whether or not their specific interest align.
36. For an expenses claim to be approved, expenditures must be necessary, unavoidable and related to business conducted on behalf of the University, even if they are later claimed back, if the tribunal accepts that they were.
37. The appellant submits that provisions about ‘fairness’ are irrelevant in the context of FOIA and in any event, a ‘union of employers’ would not operate without sharing information. It is irrelevant whether Professor Baldwin belongs to other boards.
38. The appellant submits that in bodies as closely intertwined as the UCEA and Universities there is no conflict of interest or breach of confidence. He highlights examples of University Chairs providing updates on UCEA meetings with no adverse consequences.

Legal framework

39. Section 1(1) FOIA provides:

“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.”

40. Section 3(2) FOIA provides:

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.

The role of the tribunal

41. The tribunal's remit is governed by section 58 FOIA. This requires the tribunal to consider whether the decision made by the Commissioner is in accordance with the law or, where the Commissioner's decision involved exercising discretion, whether he should have exercised it differently. The tribunal may receive evidence that was not before the Commissioner and may make different findings of fact from the Commissioner.

Issues

42. The issue for the tribunal to determine is whether the University held the requested information otherwise than on behalf of another person.

Evidence

43. The tribunal read an open bundle.

Oral submissions by the appellant

44. The appellant submitted that the case law supported a simple approach to assessing whether information was held or not, and that the bar in determining whether or not information is held is relatively low. He submitted that all that is needed is a de minimis interest between the public authority and the information requested. He submitted that the information would only not be held by the University if it was wholly and unequivocally held on behalf of another body.

45. He submitted that in addition to the degree of connection and the interest in the information there are other factors, including the degree of access, control over the information and the power to redact or delete such data and if the authority could use it for their own purposes.

46. The appellant submitted that the University belongs to UCA as a subscribing member and as an owner for the purposes of the private limited company. He submitted that when individuals engage in UCEA's business they do not do so in a private capacity they do so as a representative of their own university. It is not possible for an individual in a private capacity to have input into UCEA.
47. The appellant submitted that the information was in the University's servers and is of interest to the University because it relates to a fellow member of UCEA being expelled.
48. The University has a collective interest in anything that happens in UCEA, they are the owners of UCEA and they are bound by a set of rules and codes.
49. The appellant submitted that he had given examples of cases where information about UCEA was shared freely between UCEA board members and Universities.
50. He submitted that it had not been determined if UCEA or UUK were public authorities within FOIA, on the basis that they were wholly owned by public bodies.

Oral submissions/skeleton argument by the University

51. The University states that on occasion, Professor Baldwin would correspond using his University email account on UCEA business. It is submitted that such business was not conducted on behalf of the University, nor was any information received or created on behalf of the University. The University state that this was permitted by the University's Email Use Policy.
52. It is submitted that this was a matter of pure convenience on the part of Professor Baldwin, and therefore entirely a matter of happenstance that the information came to be present on the University's systems, as opposed to any other private email platform.
53. It is submitted that none of the Appellant's arguments establishes the necessary connection between the information and the authority so that it would be "held" by the University. The authorities are clear that the focus must be on the reasons why the information is present. The Appellant's focus on peripheral or ancillary connections is misconceived and, if adopted, would undermine the statutory limitation set out at section 3(2) of FOIA.

54. It is submitted that the University and UCEA are distinct entities and none of the Appellant's points can displace this central obstacle to his appeal. The University submits that the fact that the University is a subscribing member of a body (UUK) which in turn is a member of UCEA is neither here nor there, nor is the fact that one body may have an interest in, or be affected by, the activities of the other. They are different bodies with different functions and objectives.
55. It is submitted that the apparent reimbursement of expenses is administrative, rather than substantive: UCEA reimburses the University in turn for any expenses paid on UCEA business. But even if this were not so, and the repayment of expenses did reflect some interest which the University had in Professor Baldwin's UCEA activities, it is submitted that that would not render those activities University-business.

Discussion and conclusions

56. The appellant has referred the tribunal to two decisions of the Court of Session (**The Scottish Ministers v The Scottish Information Commissioner** [2023] CSIH 46 and **Ian Graham v The Scottish Information Commissioner** [2019] CSIH 57). Although those decisions are not binding on the tribunal, the tribunal has read them and they reflect and apply the principles applied by the Upper Tribunal in **University of Newcastle v Information Commissioner** [2011] UKUT 185 (AAC) and **Department of Health v Information Commissioner** [2017] 1 WLR 3330.
57. Information must be held by the public authority solely on behalf of someone else in order to fall within section 3(2) FOIA.
58. We do not need to determine if UCEA is a public authority within FOIA. This request was made to the University, not to UCEA.
59. The information in question consists of correspondence sent or received by Professor Graham Baldwin relating to Queen's University Belfast (QUB) after the 1st of March 2023. It is common ground that the correspondence at which this request is aimed, and the only correspondence that Professor Baldwin would have entered into relating to QUB, would be correspondence in his capacity as deputy chair of the board of UCEA.

60. We accept that there is a relationship between the University and UCEA. The University is a 'subscribing university' of UCEA. It is, by its vice-chancellor, a member of UUK. We accept that the Vice-chancellor of the University is a member of the UUK for company law purposes and that UUK is a member of UCEA for company law purposes. In our view this underlying corporate structure does not assist in answering the question as to whether or not the requested information is held by the University solely on behalf of UCEA.
61. UCEA is an employers' association. It represents the interests of universities and higher education institutions. It negotiates collective pay agreements with unions which bind its subscribing universities and institutions. It acts, in part, on behalf of the University, and all subscribing universities, in the same way that a Trade Union acts, in part, on behalf of an individual employee.
62. UCEA is a non-profit company and has a board. The board provides organisational oversight, corporate governance, strategic direction and leadership of collective pay negotiations. It is an unpaid role. They are nominated by the Member (UUK, CUC etc.). Each Member gets to nominate a certain number of board members.
63. The board members are heads of subscribing institutions but not all the heads of subscribing institutions are on the board. For example, currently there are 18 board members, 8 of which were nominated by UUK. The board is intended to 'represent the diverse range of institutions'. Conversely the board is not intended to represent each one of those institutions.
64. The UCEA articles of association does allow for the involvement of individual institutions, but it is not through board membership. For example, every year the Board is required to invite all subscribing Universities and other institutions of higher education to a meeting discuss matters relating to the UCEA.
65. For those reasons we find that Professor Baldwin was not sitting on the board of UCEA as a representative of, or on behalf of, the University any more than he was doing so on behalf of any other university. He was on the board in his capacity as a vice-chancellor of a university rather than as the vice-chancellor of the University. This is not altered by the fact that expenses are initially claimed by Professor Baldwin from the University then reclaimed by the University from UCEA.

66. His work as deputy chair and as a board member was not part of the business of the University, even though as a subscribing member it had an interest in the success of UCEA and benefitted from its actions and its services. The fact that a board member might report back to their institution on matters that took place at UCEA meetings does not alter that.
67. In the light of that factual context, it is clear to us that the correspondence covered by the request was sent and received by Professor Baldwin in his capacity as the deputy chair and board member of UCEA. Professor Baldwin was permitted by the University to use his email account for those separate purposes. That is the only reason why the University has the relevant information. It was not sent and received in Professor Baldwin's capacity as the vice-chancellor of the University. There is insufficient connection between the University and that information.
68. For those reasons, we accept Mr. Davidson's submissions that the information was held by the University solely on behalf of either UCEA or on behalf of Professor Baldwin in his capacity as board member or director or deputy chair of UCEA.

Signed Sophie Buckley

Date: 4 October 2024

Judge of the First-tier Tribunal

Promulgated on: 18 October 2024