What does it mean to 'hold' information? The Upper Tribunal clarifies

Simon Ridding, Barrister practising in information, data protection, artificial intelligence, public law, human rights, international human rights and discrimination law, 33 Bedford Row Chambers,

examines how a recent Upper Tribunal judgment materially clarifies the analytical framework for one of FOIA's most contested questions: when does a public authority actually 'hold' the information it has?

Readers are advised that the author appeared for Dr Siller-Farfán in this case.

The deceptively short word 'held' has done a great deal of heavy lifting in Freedom of Information Act 2000 ('FOIA') litigation since the Act came into force. Whether information is 'held' for the purposes of section 1(1) and in particular, whether it is held by a public authority 'otherwise than on behalf of another person' within section 3(2)(a), determines whether a request even gets off the ground.

In *Dr Jesús Antonio Siller Farfán v Information Commissioner and the Governing Body of the University of Central Lancashire* [2026] UKUT 16 (AAC), ('Farfán'), Upper Tribunal Judge Stout materially clarified the analytical framework for that test by emphasising that the section 3(2)(a) inquiry should be addressed in two stages. Although Dr Siller-Farfán lost the appeal on its facts, the judgment restores the language of 'appropriate connection' as the preferred formulation; casts significant doubt on aspects of the reasoning in two recent decisions from the Inner House of Scotland's Court of Session; and provides helpful guidance on when information can change status through internal use. For practitioners on both sides of an FOI request, and for in-house teams asked to issue or defend a 'not held' response, the case compels careful study.

Background

On 6th August 2023, Dr Siller-Farfán requested from the University of Central Lancashire (now University of Lancashire) ('ULAN') all sent and received communications of Professor Graham Baldwin, the University's Vice-Chancellor, that related 'however tangentially' to Queen's University Belfast ('QUB'), limited to exchanges after 1st March 2023.

The factual context is important. Professor Baldwin sat on the board of the University and Colleges Employers Association ('UCEA') as Director and Deputy Chair. UCEA is an employers' association whose subscribing institutions include ULAN, and one of its corporate members is Universities UK ('UUK'), the membership of which is comprised of UK university vice-chancellors. In 2023, the UCEA board terminated QUB's subscribing membership, a decision plainly of interest to the wider higher education sector. Professor Baldwin used his ULAN email account for his UCEA correspondence (with the University's permission) and claimed UCEA-related expenses through the University, which he then recouped from UCEA.

ULAN's position was that it did not 'hold' any information within the request. The Information Commissioner ('Commissioner') agreed that although such communications might exist on the University's systems, they were held on UCEA's behalf rather than the University's. The First-tier Tribunal ('FtT') upheld that view in October 2024.

The First-tier Tribunal's decision

The FtT directed itself by reference to *BUAV v Information Commissioner and University of Newcastle* [2011] UKUT 185 (AAC), *Department of Health v Information Commissioner* [2017] 1 WLR 3330, and the Inner House decisions in *Ian Graham v Scottish Information Commissioner* [2019] CSIH 57 and *The Scottish Ministers v Scottish Information Commissioner* [2023] CSIH 46. It concluded that the requested information was held by the University solely on behalf of UCEA or for Professor Baldwin in his UCEA capacity. Two aspects of its reasoning loomed large on appeal:

- at paragraph 57 of the judgment, the FtT appeared to invert the statutory test by stating that information must be held solely on behalf of someone else in order to fall within section 3(2); and
- the conclusion at paragraph 67 that there was an 'insufficient connection' between the University and the information.

The Grounds of Appeal

Permission having been granted by Judge Stout, Dr Siller-Farfán pursued three grounds before the Upper Tribunal ('UT'):

- the FtT had reversed the statutory test at paragraph 57: information falls within FOIA unless it is held solely on behalf of another, not the

other way around;

- the FtT had applied a 'sufficient connection' test rather than asking whether there was an 'appropriate' or 'rational' connection between the University and the information, thereby setting the bar too high; and
- the FtT had failed to grapple with the corporate relationships between ULAN, UUK, UCEA and Professor Baldwin and/or had reached a perverse conclusion on the facts.

The Upper Tribunal's analysis

The decision clarifies the proper analytical approach in several significant ways.

Ground 1 — a slip that didn't slip: Judge Stout accepted that, read in isolation, paragraph 57 did indeed reverse the statutory test. However, read as a whole, the FtT had in substance posed and answered the right question: was the information held solely on behalf of UCEA or Professor Baldwin? It had answered 'yes' at paragraph 67 of the judgment. The UT added the helpful observation that section 3 (2)(a) is a deeming provision that operates as an exception, which makes formulating it precisely a slippery exercise.

Ground 2 — the central clarification: This was the ground that prompted Judge Stout to direct an oral hearing of an appeal originally listed on the papers. The decision makes three particularly significant moves.

First, the analysis is split into two distinct statutory questions, to be addressed separately:

- is the public authority 'holding' the information at the time of the request; and
- if so, is it doing so 'otherwise than on behalf of another person'?

In most cases, the first question is uncontroversial: 'holds' is an ordinary English word and will normally encompass everything physically or electronically in the authority's possession, including data on its servers and cloud facilities (indeed, that is what the Dr argued). Judge Stout noted however, that there may still be room for dispute in cases involving accidentally deposited information or information whose status has changed over time.

> ***"Businesses operating alongside the public sector, including sector representative bodies, trade associations, joint ventures and contractors whose communications pass through public authority systems, gain some shelter from this decision, but it is not absolute."***

Second, on the 'on behalf of' question, the UT restores the language used by Judge Wikeley in BUAV and the Court of Appeal in Department of Health i.e 'appropriate connection'. The judgment indicates that 'appropriate connection' is the preferable formulation, while making clear that the use of 'sufficient connection' is not itself an error if the tribunal applies the correct analysis in substance. Charles J's borrowing of 'sufficient connection' from *Sugar v BBC* [2012] UKSC 4 is identified as an unfortunate import from a different statutory context. The distinction matters: 'appropriate' implies a qualitative evaluation of the nature of the connection, whereas 'sufficient' suggests a quantitative one. The question is not how strong the link is, but what kind of link it is, and, in particular, whether it is the kind of link Parliament intended to bring information within FOIA at all.

Third, Judge Stout observes that it is not helpful to talk about the public authority's 'interest' in the information, as this risks spreading the net of FOIA wider than was intended. Public authorities will almost always have an interest in information sitting on their IT infrastructure i.e they are responsible for its security, retention and (for personal data) deletion. To equate that interest with 'holding on its own behalf' would render section 3(2) 'nugatory'. The reasoning in Graham that an agent has an interest in performing its role for its principal also fails to respect the statutory architecture: an agent, by definition, acts on behalf of someone else.

This is a significant moment for practitioners advising in cross-border FOI work. Although FOIA and FOISA are materially identical on the meaning of 'held', the judgment casts significant doubt on aspects of the reasoning in two recent Scottish cases, *Dr Ian Graham v The Scottish Information Commissioner* ([2019] CSIH 57) and *The Scottish Ministers v The Scottish Information Commissioner* ([2023] CSIH 46), especially where they rely on 'interest' or agency-based reasoning.

Ground 3 — the perversity challenge: Having taken the right approach in principle, the FtT's factual conclusion stood unless perverse. Judge Stout candidly acknowledged she had been 'initially doubtful', particularly about the FtT's distinction between Professor Baldwin acting 'in his capacity as a vice-chancellor of a university rather than as the vice-chancellor of the University'. That distinction, while 'fine' and 'technical', was held to be one open to the FtT given its findings that Professor Baldwin had been nominated to UCEA by UUK rather than by ULAN, that the role was not one that automatically came with being ULAN's Vice-Chancellor, and that he was not, in that role, representing ULAN.

What the judgment clarifies

Several points of practice emerge with new clarity:

- the two-stage test. Practitioners advising on a 'not held' response should now expressly address (i) whether the information is held in any sense by

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the authority; and (ii) whether it is held solely on behalf of another. Conflating the two has been the source of much error;

- the preferred formulation of 'appropriate connection' over 'sufficient connection', emphasising that the focus should be on the nature of the connection rather than its quantitative strength;
- that bare 'interest' is not the touchstone. What matters is the nature of the link between the authority and the information, not whether the authority has some general interest in its security or management;
- a higher threshold for finding that information is held on a public authority's own behalf merely because its officers occupy roles in separate organisations, even where those roles flow from their public office, are funded through the authority and involve use of the authority's IT estate. The capacity in which the officer was acting when the information was generated or received remains the central question; and
- a practical observation that information can change status. Information held solely on behalf of a third party can become held on the authority's own behalf if it is 'passed on...to other colleagues' or if 'the University itself exercises the power it has over the IT infrastructure to access and use that information' for its own purposes.

Practical implications

For public authorities, the decision provides both reassurance and a warning. Reassurance, because section 3(2)(a) retains real bite in the era of cloud servers and dual-hatted senior officeholders: the bare fact that a Chief Executive's or Vice-Chancellor's external work is conducted across the authority's network does not, of itself, bring it within FOIA. Warning, because the moment the authority crosses from custodian to user, when external-board documents are circulated internally, or accessed by HR for a grievance, or fed into the authority's own decision-making, the picture may change. The observation at paragraph 75 of the judgment suggests that logging, retention and access policies would benefit from being drafted with this potential tipping point in view. Authorities defending 'not held' positions may also wish to ensure they can evidence the capacity in which dual-role correspondence sits on their systems; absence of such evidence is unlikely to assist the defence.

Businesses operating alongside the public sector, including sector representative bodies, trade associations, joint ventures and contractors whose communications pass through public authority systems, gain some shelter from this decision, but it is not absolute. Anyone whose privileged or commercially sensitive material reaches a public authority's mailbox should not assume that section 3(2)(a) will hold the line if the authority later begins to use that material for its own purposes. The contractual and governance frameworks that record on whose behalf such information is being held, i.e. board terms of reference, secondment agreements, IT-use protocols, will increasingly carry evidential weight in any disputed FOI request.

For requesters, the case is a pragmatic reminder to direct requests to the body that actually generates and uses the information. Where the request truly relates to UCEA, UUK or any analogous body, asking that body (if itself a public authority) or the authority whose officers are using the information in their official capacity is more likely to bear fruit. The judgment's observations about internal use also suggest it may be worth addressing, at the outset, the use to which the information has been put within the authority, that line of inquiry is most likely to defeat a section 3(2)(a) defence.

Concluding thoughts

Although Dr Siller-Farfán lost the appeal, the judgment accepts some criticisms of the FtT's formulation and clarifies the proper analytical approach. The preferred language of 'appropriate connection' has been restored; the Scottish authorities have been questioned on specific aspects of their reasoning; and the analytical framework has been sharpened into a two-stage inquiry that should prove helpful to practitioners and tribunals alike. On its facts, however, the case turned on the unusual position of a Vice-Chancellor whose UCEA seat sat just outside the perimeter of his university role.

For FOI practitioners, the practical takeaway is brief but important: ask, separately, whether the information is held and on whose behalf it is held, treat 'interest' as a red herring, and focus on the capacity in which the information was generated and the use to which it has since been put. For boards, governance teams and information managers, the decision is a prompt to revisit IT-use policies and assumptions about what sits inside, and what sits beside, the authority's information estate.

Simon Ridding
33 Bedford Row Chambers
sr@33br.co.uk