



Tribunals Service
Information Tribunal

Information Tribunal Appeal Number: EA/2007/0046
Information Commissioners Ref: FS50140862

Freedom of Information Act 2000

Heard on the papers
on 11 October 2007

Decision Promulgated: 15 October 2007

BEFORE

INFORMATION TRIBUNAL DEPUTY CHAIRMAN

Anisa Dhanji

and

LAY MEMBERS

Gareth Jones and Ivan Wilson

BETWEEN

MR COLIN PARKER

Appellant

and

THE INFORMATION COMMISSIONER

Respondent

and

THE PARLIAMENTARY AND HEALTH SERVICE OMBUDSMAN

Additional Party

The parties are referred to in this determination as the Appellant, the Commissioner, and the Ombudsman, respectively.

DECISION

The Tribunal finds that the Decision Notice was in accordance with the law. This appeal is therefore dismissed.

REASONS FOR DECISION

Introduction

1. This is an appeal by the Appellant, against a Decision Notice issued by the Information Commissioner ("the Commissioner"), dated 17 May 2007.

The Request for Information

2. In 2004, the Appellant made a complaint to the Ombudsman against the South West Yorkshire Mental Health Trust and West Yorkshire Metropolitan Ambulance Service NHS Trust.
3. During the course of investigating that complaint, the Ombudsman interviewed certain individuals. On 12 May 2006, the Appellant wrote to the Ombudsman requesting copies of the transcripts of those interviews (the "Transcripts").
4. The Appellant did not receive a reply and wrote to the Ombudsman again on 10 September 2006. The Ombudsman's office replied on 11 September 2006. They confirmed that two individuals had been interviewed, and that the Ombudsman's report on the investigation would contain such evidence from those interviews as she regarded relevant. However, they refused to supply the Appellant with copies of the Transcripts on the basis that section 15 of the Health Service Commissioners Act 1993 ("HSCA") contains a statutory bar on the release of information obtained during or for the purposes of an investigation, except in the limited situations set out in that section. They said that the Transcripts are therefore exempt under section 44 of the Freedom of Information Act 2000 ("FOIA").
5. They went on to say that insofar as the Transcripts contain personal information relating to the Appellant, they were also exempt under section 31 of the Data Protection Act 1998, because disclosure at that stage would be likely to prejudice the Ombudsman's investigation.
6. On 12 September 2006, the Appellant requested a review of the decision not to release the Transcripts. On 12 October 2006, the Ombudsman's Review Team replied, confirming the original decision.
7. On 4 December 2006, the Ombudsman issued a report on her investigation into the Appellant's complaint referred to in paragraph 2,

above (“the Report”). The Report reproduces a significant portion of the Transcripts.

The Complaint to the Commissioner

8. On 15 October 2006, the Appellant wrote to the Commissioner requesting him to review the Ombudsman’s decision.
9. The Commissioner undertook inquiries, after which he reached the following findings:
 - Section 15(1) of HSCA amounts to a statutory prohibition on disclosure of the Transcripts. On that basis, the information is exempt from disclosure under section 44 of FOIA;
 - The Ombudsman was in breach of section 17 of FOIA for failing to issue a refusal notice within 20 working days of the request; and
 - The requested information does not amount to personal information of which the Appellant is the data subject, and accordingly, the Ombudsman was correct to treat the information as not being subject to disclosure to the Appellant under the Data Protection Act.
10. The Commissioner issued a Decision Notice to this effect. He did not require the Ombudsman to take any steps.

The Appeal to the Tribunal

11. By a Notice of Appeal dated 23 May 2007, the Appellant appealed to the Tribunal against the Decision Notice. In the Grounds of Appeal, the Appellant says that:
 - section 15(1)(c) of HSCA permits disclosure for the purpose of an inquiry with a view to taking proceedings for the offence of perjury;
 - the Commissioner has not shown that the Appellant is not a person with the necessary power to conduct such an inquiry; and
 - disclosure of the Transcripts to the Appellant is beneficial for the purposes of the investigation.

Evidence and Submissions

12. We have considered all the documents received from the parties (even if not specifically referred to in this determination), including in particular, the documents in the agreed bundle, and the parties’ written submissions and replies. No witness statements have been submitted.

13. The Tribunal has also been provided with copies of the Transcripts. In accordance with directions made by the Tribunal, the Transcripts are to be kept confidential from the Appellant since disclosure to him, would defeat the purpose of this appeal.

The Tribunal's Jurisdiction

14. The scope of the Tribunal's jurisdiction in dealing with an appeal from a Decision Notice is set out in section 58(1) of FOIA. If the Tribunal considers that the notice is not in accordance with the law, or to the extent the notice involved an exercise of discretion by the Commissioner, the Tribunal considers that he ought to have exercised the discretion differently, the Tribunal must allow the appeal or substitute such other notice as could have been served by the Commissioner. Otherwise, the Tribunal must dismiss the appeal.
15. Section 58(2) confirms that on an appeal, the Tribunal may review any finding of fact on which the notice is based. In other words, the Tribunal may make different findings of fact from those made by the Commissioner, and indeed, the Tribunal will often receive evidence that was not before the Commissioner.
16. At the request of the parties, this appeal has been determined without an oral hearing, pursuant to Rule 16 of the Information Tribunal (Enforcement Appeal) Rules 2005. Having regard to the nature of the issues raised, the Tribunal was satisfied that the appeal could be properly determined without an oral hearing.

Findings

17. The key question for determination in this appeal is whether the Transcripts are exempt from the disclosure requirements in FOIA.
18. Under section 1 of FOIA, any person who has made a request for information to a public authority is entitled to be informed if the public authority holds that information, and if it does, to be provided with that information. Under section 2, the duty on a public authority to provide the information does not arise if the information is exempt under Part II of FOIA.
19. The exemptions under Part II are either qualified exemptions or absolute exemptions. Information which is subject to a qualified exemption is only exempt from disclosure if, in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information. Where, however, the information requested is subject to an absolute exemption, then, as the term suggests, it is exempt regardless of the public interest considerations.
20. In the present case, the Ombudsman has invoked the exemption contained in section 44(1) of FOIA. This section provides as follows:

44. (1) *Information is exempt information if its disclosure (otherwise than under this Act) by the public authority holding it –*

(a) is prohibited by or under any enactment,

(b) is incompatible with any Community obligation, or

(c) would constitute or be punishable as a contempt of court.

21. The Ombudsman says that disclosure of the Transcripts is prohibited by section 15(1) of HSCA, and that therefore, the Transcripts are exempt under section 44(1)(a) of FOIA.

22. By virtue of section 2(3) of FOIA, the exemption in section 44(1) is absolute. The only issue before this Tribunal, therefore, is whether disclosure of the Transcripts is indeed prohibited by or under section 15(1) of HSCA.

23. Insofar as it is relevant, section 15(1) of HSCA provides as follows:

15. Confidentiality of Information

(1) Information obtained by the Commissioner or his officers in the course or for the purposes of an investigation shall not be disclosed except –

(a) for the purposes of the investigation and any report to be made in respect of it,

(b) for the purposes of any proceedings for -

(i) an offence under the Official Secrets Act 1911 to 1989 alleged to have been committed in respect of information obtained by virtue of this Act by the Commissioner or any of his officers, or

(ii) an offence of perjury alleged to have been committed in the course of the investigation,

(c) for the purposes of an inquiry with a view to the taking of such proceedings as are mentioned in paragraph (b),

24. The Appellant does not dispute that the Transcripts were obtained “*in the course or for the purposes of an investigation and any report to be made in respect of it*”. The Appellant, says, however, that the information can be disclosed to him under section 15(1)(c), because he is a person capable of conducting an inquiry, and specifically, that he has the power to conduct inquiries with a view to taking criminal proceedings for perjury.

25. The Tribunal considers that the Appellant’s position is entirely misconceived. The interpretation which he puts forward, if correct,

would entirely negate the effect of section 15(1). Section 15(1) does not authorise disclosure of information to members of the public. Although HSCA does not define the term “inquiry” as it appears in section 15(1)(c), and also does not expressly identify the type of person or body which may conduct such an inquiry, we consider that it is clear from the section, read as a whole, and within the context of the HSCA that disclosure can only be to those individuals or bodies who have the power to conduct the proceedings referred to in paragraph 15(1)(b). Clearly, the Appellant does not. It follows, therefore, that disclosure to him is prohibited by section 15(1).

26. In any event, no allegation has been made that any of the individuals who were interviewed by the Ombudsman have committed perjury, nor could any such allegation be sustained. We note that under section 1(1) of the Perjury Act 1911, perjury is committed when :

“...any person lawfully sworn as a witness or as an interpreter in a judicial proceeding wilfully makes a statement material in that proceeding, which he knows to be false or does not believe to be true”.

Leaving aside the other requirements of section 1(1) above, the Ombudsman says, and it is not disputed, that the individuals in question were not interviewed under oath. Therefore, they cannot have committed perjury. For this reason too, the Appellant’s claim must fail.

27. As already noted, the Ombudsman has released parts of the Transcripts by their inclusion in her Report. She was entitled to do so under section 15(1) (a) which allows disclosure for the purposes of any report made in respect of an investigation. For the avoidance of doubt we should say that this does not in any way alter the position as regards the remaining parts of the Transcripts. Disclosure of the remaining parts of the Transcripts, not included in the Report, would not be for the purposes of the investigation or report made in respect of the investigation. Such disclosure is therefore not permitted by section 15.
28. The Appellant also says, in his Grounds of Appeal, that disclosure of the Transcripts to him would be beneficial for the purposes of the investigation. We take this to be a reference to the Ombudsman’s investigation (although we note the investigation had been concluded by the time he submitted the Notice of Appeal). In his written submissions, the Appellant says that he needs the whole of the Transcripts to judge the relevance and significance of those parts selected for publication in the Report. The question of whether the Transcripts may have been beneficial and whether the Appellant needs them better to understand the Report, are not relevant considerations in this appeal. They do not overcome the statutory bar on disclosure contained in section 15(1).
29. Finally, the Appellant says, in his written submissions, in what we take to be an alternative argument, that the Ombudsman’s investigation has

now concluded (the Report was published in December 2006), and therefore, the Ombudsman no longer has any reason to refuse to disclose the Transcripts. We consider that this argument, too, is misconceived. There is nothing in section 15 which limits the restriction on disclosure only until the investigation for which the information was obtained, is concluded, or any report in respect of the investigation, is published. The Appellant points to the Ombudsman's letter dated 22 January 2007 to the Commissioner, which states: "*Given that we have now issued the report of our investigation, we will look afresh at whether any of the information personal to Mr. Parker contained in those transcripts that has not previously been released to him, should now be*". However, we agree with the Ombudsman that this statement relates only to the provision of personal information under the Data Protection Act and that there is, in fact, no personal information about the Appellant in the Transcripts.

30. For all the reasons set out above, we find that disclosure of the Transcripts is prohibited by the HSCA, and therefore, the Transcripts are exempt information under section 44 of FOIA.
31. There are two other matters which we should briefly address. As noted in paragraph 9 above, the Commissioner found that the Transcripts do not amount to personal information of which the Appellant is the data subject, and that accordingly, the Ombudsman was correct to treat the information as not being subject to disclosure to the Appellant under the Data Protection Act. This finding has not been challenged by the Appellant. For the avoidance of doubt we would say that we entirely agree with the Commissioner's findings on this issue.
32. Second, the Appellant has taken issue with the inclusion of only part of the Report in the bundle of documents prepared by the Commissioner because in his view, the Report shows many failures and shows the unreliability of the evidence obtained by the Ombudsman. Having considered the Commissioner's submissions on the issue, we find that there was no impropriety on the part of the Commissioner in the preparation of the bundles, and in any event, we consider that we would not have been assisted further by having the full Report.

Decision

33. The Decision Notice against which the appeal is brought is in accordance with the law. This appeal is dismissed.

Anisa Dhanji

Deputy Chairman

Date: 15 October 2007