



Neutral Citation Number

IN THE FIRST-TIER TRIBUNAL
GENERAL REGULATORY CHAMBER
INFORMATION RIGHTS

Case No. EA/2015/0221

ON APPEAL FROM:

The Information Commissioner's Decision Notice No: FS50585847

Dated: 7 September 2015

Appellant: Mr D Pole

Respondent: Information Commissioner

Public Authority: The Welsh Government

Heard at: Fox Court London

Date of hearing: 9 March 2016

Date of decision: 4 April 2016

Date of Promulgation 27th April 2016

Before

Angus Hamilton

Judge

and

Melanie Howard

and

Suzanne Cosgrave

Subject matter: s 1(1) Freedom of Information Act 2000

Cases considered:

Bromley v IC and Environment Agency IT 31 August 2007
Reed v IC IT 3 July 2009

DECISION OF THE FIRST-TIER TRIBUNAL

The Tribunal upholds the decision notice dated 7 September 2015 and dismisses the appeal.

REASONS FOR DECISION

Introduction

1. Under section 1(1) of FOIA (the Act) a person who has made a request to a public authority for information is, subject to other provisions of FOIA:
 - (1) entitled to be informed in writing by the public authority whether it holds information of the description specified in the request (section 1(1)(a)); and
 - (2) if the public authority does hold the information, to have that information communicated to him (section 1(1)(b)).

Request by the Appellant

2. On 1 March 2015 the appellant wrote to the Welsh Government (WG) stating that he was making a FOIA request and posing the following three questions:

- 1) *In numbers employed and whole-time-equivalents how many of those specifically employed by NHS Wales to provide spiritual care as described in the Standards for Spiritual Care in the NHS in Wales 2010 are not ministers of religion?*
 - 2) *What qualifications and training do these employees, who are not ministers of religion, have for duties they are required to perform.*
 - 3) *What has been done to make NHS patients in Wales aware of the existence of such spiritual carers who are not ministers of religion?*
3. The Welsh Government responded on 27 March 2015. The response stated that the Welsh Government did not hold any information meeting the description of this request and also advised the appellant that individual health boards may hold some of this information and that he may therefore wish to redirect his request for information to these health boards. The response also provided a list of contact details of the health boards.
4. The complainant wrote back to the WG on 27 April 2015 and requested an internal review of its handling of his request. The WG incorrectly treated this review request as a complaint. This resulted in the appellant writing on 27 May 2015 confirming that he was seeking a review of the WG's handling of his FOIA request.
5. The WG responded on 18th of June 2015. The WG confirmed that it did not hold any information *'to respond to your request. This is because the provision of spiritual care in NHS Wales is a responsibility of the health boards in Wales.'* The WG response also stated that it had complied with its duty under s.16 FOIA to be as helpful as possible in that it had provided the contact details of the relevant authorities. The response went on to say that the WG was *'aware that at least one health board provides non-religious spiritual care'*

6. The appellant complained to the Commissioner on on 15 June 2015 – i.e. prior to the WG responding properly to his request for a review. The appellant submitted a further letter to the Commissioner on 22 June. The appellant complained that the response from the WG was contradictory in that it stated that it held no relevant information but also stated that at least one health board provides non-religious spiritual care. The appellant also complained that he did not think that the WG had been as helpful as possible as required by s.16 FOIA and that his request for a review should not have been treated as a complaint.

The Commissioner's Decision

7. The Commissioner served a Decision Notice dated 7 September 2015 in relation to this matter in accordance with s. 50 of the Act. The Commissioner held that the WG had complied with its obligations under s1(1) of FOIA. The Commissioner found that, on the balance of probabilities the WG did not hold the sought information. The Commissioner considered that the search undertaken by the WG to establish if it did hold the information was reasonable and proportionate and that there was no compelling evidence as to why the information should be held by the WG as opposed to the health boards.
8. The Decision Notice also emphasised to the appellant that there were matters raised by the appellant that were outside of the Commissioner's jurisdiction – for example the appellant had complained to the Commissioner that the appellant had not received any response to his concerns about discrimination against non-religious patients.

The Appeal to the Tribunal

9. On 30 September 2015 the Appellant submitted an appeal to the Tribunal (IRT).
10. The Grounds of Appeal are quite lengthy and, as appears to have been the case with the complaint to the Commissioner, raise several issues which are completely outside the Tribunal's remit. Indeed, the Tribunal struggled to find any valid ground of appeal within the document drafted by the appellant and are surprised that the Commissioner did not ask for the appeal to be struck out on the basis that it stood no reasonable chance of success. The Tribunal noted in particular that in response to the question on the appeal form that reads 'please tell us what outcome you are seeking from your appeal', the appellant states – '*to require the WG to conduct a substantive consideration of my complaint of religious discrimination*'. This is an outcome which is completely outside of the IRT's powers. The Tribunal noted that in Paragraphs 2 and 3 of the Appellant's Final Submission document (dated 29th January 2016) the Appellant restated a wider set of issues around the treatment of his request as well as reiterating this desired outcome, but the Tribunal considered that these were largely dealt with by the WG's internal review.
11. The sole point of any possible merit identified by the Commissioner in his response to the appeal is that the appellant does appear to have been misled into thinking that the WG may have held the information that he sought because of its responses that '*not all spiritual carers were chaplains*' and '*at least one health board provides non-religious spiritual care*'.

The Questions for the Tribunal

12. This matter was considered on the papers only. The WG was joined as a party to the proceedings and submitted written representations to the Tribunal.

13. The Tribunal judged that the sole question for them was to consider whether the the Commissioner was correct to conclude that on the balance of probabilities the WG did not hold the sought information. That the test is on the balance of probabilities was established in *Bromley v IC and Environment Agency* IT 31 August 2007.
14. The Tribunal considered all the written material before it presented by the Commissioner, the public authority and the Appellant.
15. The Tribunal noted that when a request for information is made the public authority must search for that information. The search must be reasonable (*Reed v IC*, IT, 3 July 2009). The Tribunal has the right to review the adequacy of the search.
16. The Tribunal noted the information provided to the Commissioner by the WG in relation to the searches carried out (p5 Commissioner's Response to Appeal). The Tribunal considered that those searches were reasonable. The Tribunal also noted the WGs explanation for asserting that '*at least one Board provides non-religious spiritual care*', which was that this was a policy statement based on an understanding rather than recorded information. The Tribunal considered this explanation to be reasonable.
17. The Tribunal noted that beyond pointing out the possible inconsistencies referred to in paragraph 11 above, the appellant provided no other information as to why the searches carried out by the WG were not reasonable, or what other searches should have been conducted or why the WG's explanation for the apparent inconsistencies mentioned in paragraph 11 should be disbelieved. In short the appellant provided no grounds beyond raising the points in paragraph 11 – points which had been answered – which could enable the Tribunal to conclude that the Commissioner's analysis in this matter was at fault.

Conclusion

18. The Tribunal therefore concludes that the Commissioner was correct to conclude that on the balance of probabilities the WG did not hold the sought information.

19. Our decision to dismiss this appeal is unanimous.

Signed: Tribunal Judge

Date: 4 April 2016