



Appeal number: EA/2016/ 0108

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

RAYMOND CARTWRIGHT

Appellant

- and -

**THE INFORMATION COMMISSIONER
THE PUBLIC SERVICES OMBUDSMAN FOR
WALES**

Respondents

**TRIBUNAL: JUDGE ALISON MCKENNA
ANDREW WHETNALL
DAVID SIVERS**

**Determined on the papers, the Tribunal sitting in Chambers
on 9 November 2016**

DECISION

1. The appeal is dismissed.

REASONS

Background to Appeal

2. The Appellant made a request to the Public Service Ombudsman for Wales for information related to the investigation of his complaint against Monmouthshire County Council.

3. The Ombudsman refused the information request in reliance upon s.44 of the Freedom of Information Act 2000 (and regulation 12 (5) (d) of the Environmental Information Regulations 2004 – but see paragraph [4] below).

4. The Information Commissioner issued Decision Notice FS50606058 on 31 March 2016, upholding the Council's decision. She did not require any steps to be taken by the Council. The Decision Notice explained that she had excluded the "environmental information" from the investigation because it consisted entirely of information that had already been sent to the Appellant and which he had therefore confirmed he did not require.

Appeal to the Tribunal

5. The Appellant's Notice of Appeal dated 18 April 2016 referred to his bemusement as to the reason why the Ombudsman refused to investigate his complaint against the Council.

6. The Information Commissioner's Response dated 17 May 2016 maintained the analysis set out in the Decision Notice, namely that s. 44 (1) (a) of FOIA applied to the withheld information. The Information Commissioner had confirmed that the withheld information consisted of e-mails sent to and from the Council during the course of the Ombudsman's consideration of whether to investigate the Appellant's complaint. It is submitted by the Information Commissioner that the Appellant's grounds of appeal fail to set out why the Decision Notice is said not to be in accordance with the law.

7. The Ombudsman supported the Information Commissioner's Decision Notice, albeit that it corrected the Information Commissioner as to the precise legislative provision relied upon.

8. The parties and the Tribunal agreed that this matter was suitable for determination on the papers in accordance with rule 32 of The Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules 2009, as amended. The Tribunal considered an agreed open bundle of evidence comprising some 270 pages,

including submissions made by the parties, for which we were grateful. We also considered a Closed Bundle, consisting of the withheld information.

The Law

9. Section 44 of FOIA provides an absolute exemption from disclosure under FOIA for information which is prohibited from disclosure by other legislation.

10. Section 34X of the Public Service Ombudsman (Wales) Act 2005 provides that information obtained by the Ombudsman in the discharge of her functions must not be disclosed.

11. 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.”

12. As s. 44 FOIA is an absolute exemption, this means the Information Commissioner's role is confined to satisfying herself that the exemption applies. There is no question of balancing the public interest in this case. The Tribunal has no power to review the reasonableness of the Information Commissioner's decision.

13. We note that the burden of proof in satisfying the Tribunal that the Commissioner's decision was wrong in law or involved an inappropriate exercise of discretion rests with the Appellant.

Conclusion

14. We conclude that the information is exempt from disclosure under s. 44 FOIA. This is because of the effect of s. 34X of the Public Service Ombudsman (Wales) Act 2005. For this reason we must dismiss this appeal.

15. We have no discretion to direct the disclosure of this information. However, we note that the Public Service Ombudsman for Wales indicated in its Response to the Tribunal that material evidence relied upon in reaching a decision not to investigate a complaint may generally be disclosed to a person privately, although the statutory

provisions prevent it being disclosed under FOIA, which is regarded as public disclosure to the world at large rather than private disclosure to an individual.

ALISON MCKENNA

PRINCIPAL JUDGE

DATE: 21 November 2016

DATE PROMULGATED: 22 November 2016