



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

Appeal Reference: EA/2017/0239

ON APPEAL FROM:

The Information Commissioner's Decision Notice No: FS50653084

Dated: 23 August 2017

Date of Hearing: 22 March 2018

Before

JUDGE ROBERT GOOD

TRIBUNAL MEMBER(S)

MRS ANNE CHAFER AND MR PAUL TAYLOR

Between

SIMON PRICE

Appellant

and

THE INFORMATION COMMISSIONER

Respondent

Subject Matter:

Freedom of Information Act 2000 (FOIA)

Section 31 (Law Enforcement)

DECISION OF THE FIRST-TIER TRIBUNAL

For the reasons set out below the Tribunal dismisses the appeal.

REASONS FOR DECISION

Factual background

1. The appellant, Mr Simon Price is concerned that Wakefield Prison has a policy of anonymising all information from its Mercury system before that information is provided following a request from a prisoner.
2. Mr Price applied to the Ministry of Justice (MoJ), under FOIA, on 18 July 2016, for the following information:
 - a. All recorded data that explains why as a matter of policy and practice all entries on Mercury are automatically anonymised.
 - b. The instructions/guidance given to those members of staff who are charged with posting entries on Mercury.
 - c. The steps taken to ensure that the instructions/guidance complies with the publicly stated guidance of the Ministry.
3. This request arose following a response to his application to see his records under the Data Protection Act. When the records were provided they had all been anonymised. In conversation with prison officers he had been told that this was an automatic procedure.
4. His request was not dealt with within the time required under FOIA. Almost seven months after the request, and following an intervention from the Information Commissioner, the MoJ replied. Mr Price was not satisfied by the response and, following a review, applied to the Information Commissioner.

5. The response of the MoJ to Mr Price's requests were: a) there was no policy of automatically anonymising information before disclosure; b) the guidance given to staff who were putting material onto the Mercury system was not being disclosed under Section 31; and c) the guidance required users to have regard to the Data Protection Act.
6. In his letter of appeal, Mr Price states that the policy of not automatically anonymising entries when disclosing them to prisoners is not, in fact, followed at HMP Wakefield, that he does not agree that the guidance on anonymising could possibly come within a Section 31 exemption.

The Hearing

7. Mr Price suffers from health issues and because of this can never be sure, how his MS will affect his ability to participate in a hearing. The hearing took place by video link from HMP Wakefield to Leeds Magistrates Court. This appeal was one of three appeals heard between 10.am and 12.45pm. Mr Price was able to participate.
8. At the outset, he was concerned that the room he was in was so small that he would not have sufficient space to manage his papers. However, he agreed for the hearing to proceed with the proviso that he may need to request an adjournment because of the physical limitations of the room. Despite these problems, no request for an adjournment was made and the hearings were completed.
9. At the end of each hearing, the panel withdrew to establish the end of one hearing and the beginning of the next. This appeal was considered second.
10. The decision was reserved.

Request, decision notice and appeal

11. On 18 July 2016 Mr Price made a request under FOIA as set out in paragraph 2 above.
12. The MoJ responded on 13 February 2017 stating that it is not a matter of policy and practice that all entries on Mercury are automatically anonymised, that in respect of the guidance this would be withheld under Section 31 FOIA, and in respect of the last question, the user is required to take into account the eight principles contained in the Data Protection Act 1998.
13. In reply to Mr Price's request for an internal review, the MoJ accepted that it had not complied with the FOIA timescales. There was also an elaboration of the answer to the first question. The MoJ stated that "some entries do not require to be anonymised or redacted/sanitised. The anonymising is not automatic but the consideration to redact is an automatic consideration. It is not routine or a matter of course that intelligence reports are anonymised however they are redacted to protect the provenance of the information or the identity of the source, particularly when disclosure is considered likely or where the information has to be shared with other shareholders."
14. Mr Price complained to the Information Commissioner under Section 50 of FOIA. In a decision notice dated 23 August 2017 the Commissioner held that the information requested in respect to the first and third question had been provided and that the MoJ correctly relied on Section 31 to withhold the information requested in the second request.
15. Mr Price appeals to this Tribunal because he believes that in HMP Wakefield the names of staff are automatically redacted when the data is posted on the

Mercury information system. This belief comes from the result of a Subject Access Request (SAR) he made. All the information provided to him under this request had been anonymised. In addition, conversations with staff and other prisoners indicated a policy of automatic anonymisation .

16. Mr Price states that such a policy would be contrary to the judgement in the case of Lord – R(on the application of Alan Lord) v The Secretary of State for the Home Department [2003] EWHC 2073 (Admin). His request for the instructions/guidance is necessary to check whether these instructions are consistent with the stated policy because Mr Price’s experience is that there is a discrepancy. In respect of his third request, Mr Price did not consider it credible that officers were applying the DPA principles.

17. The Information Commissioner has stated that she does not wish to attend a hearing and considers that a decision can be made on the appeal papers provided. Mr Price requested an oral hearing which was conducted by a video link. No-one from the ICO attended. Mr Price provided a skeleton argument. The appeal bundle consisted of 158 pages. In addition, the Tribunal were provided with a closed bundle.

Conclusions

18. Mr Price has sought information under FOIA. From the appeal papers and from hearing Mr Price’s evidence and submissions, he is concerned that the staff at HMP Wakefield may not be following the stated policy and instead pursuing their own local practices in breach of that policy.

19. He provides examples from his own request and accounts of conversations with other prisoners and prison officers to support this claim.

20. FOIA does not deal with alleged breaches of policy. The MoJ has provided information as to the policy which should be followed when it comes to providing prisoners with information about them contained on the Mercury System. There is nothing in the appeal bundle which causes the Tribunal to doubt the Commissioner's conclusion that the MoJ has disclosed the information requested in relation to this policy.

21. Mr Price has produced his anonymised entries and he makes a valid point that it is not apparent why some of his entries have been anonymised. This possibly relates to the implementation of the policy. However, it remains the situation that Mr Price requested information about this policy under FOIA and that information has been disclosed. Mr Price's complaint is not with the policy but the implementation of that policy in HMP Wakefield.

22. Mr Price sought information as to the policy and guidance given to Prison Officers making entries onto the Mercury System. The Information Commissioner accepted that a S31 exemption applied to this information because Mercury is the system used by prisons for collecting all kinds of information which is then used to detect crime and to keep good order and keep prisoners and staff safe in prison. The Information Commissioner accepted that disclosure of the policy and guidance around the creation of intelligence on the Mercury system would jeopardise its effectiveness and undermine the ability to detect crime and maintain order and safety.

23. Mr Price in his evidence and submission is not seeking this information but rather information which would confirm his belief that at HMP Wakefield there is a policy of anonymising entries. He has personal experience of that taking place when he requested his information and his request was to see if the policy of making entries was the reason why this was taking place.

24. As the Information Commissioner states at paragraph 18 of her response –
‘However the Second Request was not for the instructions and guidance with regards to any disclosure of Mercury entries, but rather the instructions/guidance given to staff who are responsible for posting entries on Mercury.’
25. His request to see the policy and guidance issued to those who are making entries is inextricably bound up with the policy and guidance as to the sort of information, the provenance of it and the purpose for collecting it. All these matters are sensitive and go directly towards detecting possible crime and maintaining good order. If this information is disclosed it may assist prisoners seeking to commit crime, avoid detection and disrupt order. The Tribunal is satisfied that the Information Commissioner is correct in applying the S31 exemption.
26. The exemption is a qualified exemption. The Tribunal considered the public interest test for disclosure and against disclosure of this information. There is a public interest in not revealing instructions and guidance for making entries onto Mercury as set out in the preceding paragraph.
27. The argument for disclosure is that transparency of the actions of a public body through disclosure of its policies promotes accountability and trust in that public body. However, the Tribunal is satisfied that the public interest in non disclosure outweighs any public interest benefit derived from disclosure.
28. In respect of Mr Price’s third request, the Information Commissioner was satisfied that the MoJ policy was to apply the Data Protection principles in its decisions concerning disclosure and that this policy is achieved through the training of staff.

29. In his appeal Mr Price states that in his experience staff in prisons are not familiar with the Data Protection principles. The Tribunal is satisfied that the evidence shows that, as a matter of policy and information, the Information Commissioner is correct in accepting that the information has been disclosed.
30. In the circumstance, the Tribunal unanimously upholds the Commissioner's decision and dismisses the appeal.

Signed

R Good

Judge of the First-tier Tribunal

Date: 12 April 2018