



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

Appeal Reference: EA/2017/0196

**Determined, by consent, on written evidence and submissions
Considered on the papers on 28 March 2018 and 4 March 2019**

Before
Judge Stephen Cragg Q.C.

Tribunal Members
Mr Andrew Whetnall
and
Mr Nigel Watson

Between

Neil Wilby

Appellant

-and-

The Information Commissioner

First Respondent

-and-

Police and Crime Commissioner for North Yorkshire

Second Respondent

DECISION AND REASONS

BACKGROUND

1. The Appellant made a request for information on 1 July 2016 to the 2nd Respondent (the PCC) in the following terms:-

Copies of all Deeds of Delegations concerning the transfer of Appropriate Authority responsibilities of the Commissioner to any other member of her staff in respect of complaints against the Chief Constable, together with Decision Notices recording such Deeds broken down by financial year:

2012/12

2013/14

2014/15

2015/16

2. The PCC failed to respond to him within 20 days in relation to this request and on 2 August 2016 the Appellant requested an internal review. The request included queries by the Appellant in relation to whether his FOIA requests were considered vexatious and requests concerning the way FOIA applications are dealt with by the PCC.
3. On 5 August 2016 the PCC responded to the initial request, confirming that the information was held and providing internet links to the information. On 5 August 2016, the Appellant sought to add to his request for a review, complaining (amongst other things) about the delay in responding to him and stating that the response to his information request did not satisfy his request, and if the information sought was not available then the PCC should state this.
4. On 16 September 2016 the PCC responded to the points raised, accepting that there had not been a response within 20 days, and reiterating that the links had been provided to the Appellant to the information sought.

5. On 19 September 2016 the Appellant complained to the Commissioner about the way his complaint had been dealt with. This was responded to on 30 August 2017. The Commissioner noted the Appellant's view that the 'Deeds of Delegation he sought had either not been properly executed, or did not exist at all' but commented that the Commissioner did not have the legal remit to decide whether the information disclosed by a public authority is correct. A number of other points raised by the Appellant were said to be outside the scope of the request at issue.
6. The Commissioner decided that the PCC should have dealt with the request by applying the exemption under s21 FOIA (information which is reasonably accessible to the applicant otherwise than under section 1 FOIA), noting that the Appellant was a journalist who uses the internet, and that the PCC could provide directions to the Appellant to enable him to find the information. There had been a breach of s21 FOIA as it had not been cited. Section 21 FOIA reads:-
 - (1) Information which is reasonably accessible to the applicant otherwise than under section 1 is exempt information.
 - (2) For the purposes of subsection (1) -
 - (a) information may be reasonably accessible to the applicant even though it is accessible only on payment, and
 - (b) information is to be taken to be reasonably accessible to the applicant if it is information which the public authority or any other person is obliged by or under any enactment to communicate (otherwise than by making the information available for inspection) to members of the public on request, whether free of charge or on payment."
7. As section 21 FOIA is an absolute exemption it is not subject to public interest considerations.
8. The Commissioner found that there had been a breach of s10 FOIA (time for compliance). The Commissioner expressed concern about the delay in responding to the request for an internal review, as it took over 20 days to

do so. The Commissioner declined to deal with a further request for supplementary information linked to the original request.

THE APPEAL

9. The Appellant filed an appeal on 4 September 2017. His main point was that the deeds of delegation were not in place and therefore the correct response from the PCC should have been to have stated that the information was not held (rather than directing the Appellant to the information at the internet links).

10. In relation to the decision notice, the Appellant makes a number of points, some of which are to do with the way the Commissioner has dealt with and considered the complaint. In relation to this appeal the following points seem to us to be relevant in relation to the actual request for information and whether it has been dealt with by the PCC and the Commissioner:-
 - (a) The links provided by the PCC are generic and do not address the substance of the request;
 - (b) The Commissioner is wrong to say that she 'does not have the legal remit to decide whether information disclosed by a public authority is correct'.
 - (c) The Commissioner was wrong to decide that the material behind the weblink satisfies the request, and the s21 FOIA exemption applies.

11. It seems to us that the other matters raised in the appeal document either relate to matters irrelevant to the request for information, are to do with new and further requests for information which are not within the remit of this appeal, or are to do with the way the PCC and/or the Commissioner has responded to the request since 2016.

12. The Commissioner has responded to the appeal. We agree, as stated in paragraph 32 of the response that the Commissioner has ‘properly confined her investigation to matters relating to the Request [of 1 July 2016]’ and whether it had been dealt with according to Part I of FOIA.
13. As the Commissioner recognises the point of the appeal is that it is said that the information was not available through the weblink at the time of the request, and thus it is said that s21 FOIA is not applicable.
14. The Commissioner’s response to the appeal indicates that the Commissioner does not know whether the specific delegations were included behind the relevant weblinks because she says ‘the information sought by the Appellant, which concerned delegation in the specific context of the complaints against the chief constable, is to be found on those webpages (if it exists)’. This allows for the possibility that the weblinks do not take the Appellant to the information. The Commissioner also accepts that the information might not be available through the website links and ‘it may well be that it is not held by the OPCC’. The Commissioner did ask a series of questions about other information that might be held, but does not seem to have asked whether the weblinks would have actually have taken the Appellant to the information sought.

CONSIDERATION BY THE TRIBUNAL

15. As a result of this, when the Tribunal first considered the case, it found that it was impossible to resolve the issues in the appeal by finding that the information was available elsewhere or that the information was not held by the PCC. The Tribunal found that, at the time it first considered the case, in April 2018, it was fairly straightforward, following the up-to-

date weblinks to see details of the overall scheme of delegation and to see that there is information about the fact that delegation has taken place to the Chief Executive Officer (CEO) of functions relating to complaints about the chief constable. However, the relevant page does not indicate when the delegation happened and when it was accessible on the website. The Tribunal was also not able to locate the actual delegation deed to the CEO, or reference to any delegated decision notices, through the further links on the website.

16. The PCC also made a response that the Tribunal did not find assisted its determination of the appeal. The response confirmed (as of 7 November 2017) that the *scheme* of delegation including complaints about the chief constable can be found on the website (which was true when the Tribunal first considered the case, but does not confirm that the relevant scheme on the website contained details of this specific delegation or the deed of delegation at the time the request was made). There was a link to all decision notices (which are not extensive, at least in relation to the CEO), as the response says, but it was not said whether any decision notices (available at the time of the request) relate to the information requested.

17. As a result of these findings, the Tribunal adjourned the consideration of the appeal and made the following directions:-

The Police and Crime Commissioner for North Yorkshire is joined as a party to this appeal (2nd Respondent)._

The 2nd Respondent to file with the Tribunal and serve on the other parties further submissions by 4pm on 6 June 2018 setting out (so far as is possible):-

- When the delegation deed (or other instrument) in relation to complaints concerning the Chief Constable was made.
- If, and when, this information was placed on the website.
- Whether the information would have been accessible at the time of the Appellant's request on 1 July 2016.
- When the current information about the scheme of delegation was placed on the website.

- Whether this information would have been accessible on the website at the time of the Appellant's request.
- Whether there were any delegated decisions relating to complaints against the chief constable available on the website at the time of the request.
- If any of the above requested information is not available, an explanation as to why this is the case.

By 4pm on 20 June 2018 the Appellant and the 1st Respondent to submit any further representations to the Tribunal and serve on the other parties, with the 1st Respondent explaining whether it is her case that the actual information sought was, in fact, reasonably accessible to the Appellant at the date of his request.

18. The response of the PCC can be described as follows:-

- (a) The Joint Corporate Scheme of Delegation and Consent for functions of the PCC for North Yorkshire has always been published on the PCC's website... The previous version of this website also contained the same information but was accessed by a different link and the date of transfer of all documents to the newly designed website was 14 February 2017.
- (b) The current version of the Scheme of Delegation was signed by the PCC on 1 April 2014 with one amendment approved in December 2014 (which did not alter the delegations to the CEO) so this version was in force at the time of the Appellant's request on 1 July 2016 and therefore would have been accessible through the web link at the time of that request and therefore the s21 FOIA response is appropriate.
- (c) The specific delegation to the CEO to deal with matters of complaint and conduct issues against the Chief Constable is at Section 5 of the Scheme of Delegation and is worded as follows:-

In addition to the authorisation in the Commissioner's Financial Regulations (and/or Contract Regulations/Property Procedure Rules) the Chief Executive Officer has the following delegated powers:

5. Complaints

5.1. In connection with complaints and conduct issues against the Chief Constable:

5.1.1. to determine (and respond to the complainant accordingly) wherever possible within 5 days of a complaint being received whether or not the Commissioner is the appropriate authority to consider such a complaint;

5.1.2. Wherever possible and appropriate in consultation with the Commissioner, to make decisions in dealing with complaints and conduct matters against the Chief Constable including:

5.1.2.1. Recording decisions (for conduct matters);

5.1.2.2. Initial assessments;

5.1.2.3. Suitability for local resolution;

5.1.2.4. Referral to the IPCC;

5.1.2.5. Referral to the Crown Prosecution Service;

5.1.2.6. Application to the IPCC for dispensation or discontinuance;

5.1.2.7. Appointment and briefing of the investigator;

5.1.2.8. Appointment of misconduct hearing or meeting members (and related determinations);

5.1.2.9. Settling the terms of the Commissioner's representations (or the decision not to make representations) to misconduct proceedings in accordance with regulation 35(10) of the Police Conduct Regulations 2008;

5.1.2.10. Securing representation at proceedings, meetings, appeals, hearings and for other such related matters.

- (d) With reference to complaints about the Chief Constable the following was published on 5 July 2017 and is still extant as at 6 June 2018 at <https://www.northyorkshire-pcc.gov.uk/how-can-we-help/complaints/complain-chief-constable/>:

Complain about the Chief Constable

- If you would like to complain about the Chief Constable please contact Julia Mulligan
- As Police and Crime Commissioner, it is Julia's job to hold the Chief Constable to account regarding complaints.

Complaints against Chief Constable:

Julia Mulligan has received 22 potential complaints against the Chief Constable, Dave Jones, since his appointment in June 2013. Six of those have been appropriately recorded as actual complaints.

There have been no substantiated complaints against the Chief Constable since his appointment.

- 16 were not recorded as they fell outside the definition of being a complaint
- Two were recorded and then dis-applied (meaning a complaint was recorded but discharged because they did not meet the requirements for any further action to be taken)
- Two were recorded as a complaint and resolved via Local Resolution
- Two were investigated independently and found that the Chief Constable had no case to answer

For a complaint to be recorded it must fall within the description of complaints specified by the Police (Complaints and Misconduct) Regulations 2012 at paragraph 3(2)(c), and where complaints do not fall within these descriptions there is no requirement for them to be recorded. Some complaints are required to be recorded but no action is required to be taken in respect of them for example due to being repetitious, these types of complaints can be dis-applied. This information will be updated every six months.

Updated 05 July 2017

- (e) With regard to any delegated decisions relating to complaints against the Chief Constable, it would be difficult to ascertain what exactly was on the equivalent page of the previous version of the website on 1 July 2016. However the Delegated Decision log has always been published and is currently at: <https://www.northyorkshire-pcc.gov.uk/police-oversight/governance/decisions/delegated-decisions/delegated-decisions-log/>

This shows the Delegated Decision log of all those authorised to make such decisions, including the CEO, so can be searched for when the CEO has used the delegation under Section 5 of the Scheme of Delegation by the Quarter of each year from July 2013 including 2016 when the original request was made.

(f) All other Decision Notices can be found at <https://www.northyorkshire-pcc.gov.uk/decision-notice/>

(g) It is therefore submitted that the information requested was in fact accessible through the links provided at the time of the original request.

DECISION

19. It seems to the Tribunal that it now has the best information it can get in relation to the question as to whether the information sought was reasonably accessible to the Appellant at the time of the request in July 2016. Now that we have the PCC's response, it is our view on the balance of probabilities that the information sought by the Appellant was reasonably accessible online for the Appellant (who is a journalist and clearly has access to the internet) for the purposes of s21 FOIA at the time he made his request.

20. In relation to the specific grounds of appeal from the Appellant, from the information provided about access, it does not appear that only generic links were provided by the PCC and the information was available.

21. The Commissioner is clearly right in deciding that she 'does not have the legal remit to decide whether information disclosed by a public authority is correct'. We agree that that function is not included in FOIA or elsewhere.

22. We conclude that the Commissioner was correct to say that the s21 FOIA exemption applies to the request, and there is no basis or evidence upon

which we could conclude that the Commissioner and/or the PCC's approach to the request should have been to say that the information was not held by the PCC.

23. On that basis we dismiss the Appellant's appeal.

Stephen Cragg QC

Judge of the First-tier Tribunal

Date: 9 April 2019