



**First-tier Tribunal
(General Regulatory Chamber)
Information Rights
Decision notice FS50790769**

Appeal Reference: EA/2019/0175

**Considered on the papers
On 23 August 2019**

Before

JUDGE CHRIS HUGHES

TRIBUNAL MEMBERS

NIGEL WATSON & ANDREW WHETNALL

Between

NIGEL MEADOWS

Appellant

and

INFORMATION COMMISSIONER

Respondent

DECISION AND REASONS

1. The Appellant in these proceedings has brought a number of complaints to the Parliamentary and Health Service Ombudsman (PHSO) and has been disappointed with the outcome of these complaints. He is concerned at the possible impact of changes to the arrangements for the review of its handling of complaints against itself. The background is set out in Appendix 1. On 6 June 2018 he sent a six part request for information to PHSO (Appendix 2) .

2. In the subsequent process PHSO confirmed that FOIA only gave the right to information in a recorded form. It gave links to information related to part 1, stating that the information was reasonably accessible, that the cost of replying to Part 2 would exceed the cost limit, it did not hold information in recorded form in response to part 3, although it provided some general information and that 4,5,6 had been dealt with in reply to a previous request when it had explained that FOIA did not require it to provide opinions and explanations. In response the Appellant submitted an 8-part request for information (Appendix 3) exploring the PHSO response, repeating parts 4-6 and seeking further information. In the request he argued that PHSO must be able to reply to 4-6 *as sufficient recorded information no doubt exists between PHSO and bodies who are highly critical of the service:- namely the Patient's Association, pressure group PHSO the Facts and the PASC [Public Administration Select Committee of the House of Commons] to enable your office to answer these questions.* PHSO responded to the request, treating it in part as a request for a review of its previous decision largely maintaining its position and providing some responses, confirming it held no recorded information with respect to 3-6 of the first request or 4-6, 8 of the second, provided a link as a response to 3 of the second, an explanation with respect to 7.
3. The Appellant complained to the Respondent IC who investigated whether the the reliance of PHSO on s21(1) with respect to part1 of the first and part 3 of the second request were justified, and whether PHSO holds recorded information falling within the scope of part of request 1, requests 3, 4, 5 and 6 (6 June 2018) and requests 1a, 1b, 4, 5, 6 and 8 (20 July 2018).
4. The IC in her decision notice reviewed the use of s21(1) FOIA (that information is reasonably available to the Appellant through other means - in this case through links to documents on the PHSO website) by PHSO. The IC found that request 1 first bullet point of 6 June was a request for an opinion. The link provided detailed PHSO's current procedures, Service Model and Service Charter she found (DN paragraph 31) the above published information broadly addresses that request, that information was already accessible to the complainant and that PHSO can therefore rely on section 21(1). Similar reasoning applied to request 3 of 6 June DN paragraph 32). She noted the explanations given by PHSO as to how the working arrangements of its Customer Care Team (CCT) had changed and that the Appellant was seeking an opinion. She found that:-

"36. With regard to question 1 and the first bullet point, in its response to the complainant PHSO had said that information had been published on its website about the changes to PHSO, its ways of working including the introduction of the CCT and its function, and guidance on the review request process.

37. If held, this information might broadly address the complainant's request for the reason/justification for the changes PHSO had made to its external review process. This particular information is not published on PHSO's website any longer and the

Commissioner approached PHSO to see if it still holds a copy of the information that had been published.

38. PHSO made further enquiries with its Governance Team and identified information that it acknowledges falls within the scope of question 1 and the first bullet point: an External Review Quality Committee Paper and the minute from a Quality Committee meeting. PHSO confirmed it had been unable to locate any further relevant information. The Commissioner finds that PHSO breached section 1(1) and section 10(1) of the FOIA with regard to this information; it did not confirm it holds this information or communicate it to the complainant within 20 working days."

5. The IC then considered the PHSO argument that requests 3-6 were requests for an opinion not for recorded information and that following investigations and searches PHSO had concluded (decision notice paragraph 40)

"PHSO's view is that there is no requirement under FOIA to provide an opinion or answer general questions if information is not held. "

6. IC noted that:

41. Request 3 includes a request for "What criteria did a complaint have to meet in order for the PHSO to carry out an external review..." The Commissioner queried PHSO's response to this part with PHSO – she considered that it might be the case that PHSO could hold recorded information that addresses this part of request 3.

42. Having approached its Governance Team again, PHSO identified a Review Guidance document that was in place at the time and which details criteria for reviews. The Commissioner understands that PHSO considers that this information broadly addresses request 3. PHSO has explained that the Guidance document is the criteria for all reviews and does not detail separately what criteria a complaint had to meet in order for PHSO to carry out an external review, except when joint working with the Local Government Ombudsman. It advised that removing the external review function has not changed its actual process in terms of what it reviews and says that PHSO's Review and Feedback Team (formerly CCT) still regularly upholds reviews and reaches impartial decisions.

43. As with the information at paragraph 38, the Commissioner finds that PHSO breached section 1(1) and section 10(1) of the FOIA with regard to this information; it did not confirm it holds this information or communicate it to the complainant within 20 working days.

7. The IC then reviewed the requests of 20 July and concluded that Requests 1b, 4, 5 and 6 of 20 July 2018 were repeats of requests 1 (first bullet), 4, 5 and 6 of 6 June 2018 and that she had dealt with them. With respect to requests 1, 1a and 8 she noted the PHSO argument that these were requests for an opinion.

"1) The reason why the FOI Office were previously unable to answer parts of this question in the detail they have currently provided.

a) How the removal of an external review process and reliance on the Customer Care Team to handle reviews can avoid the potential for bias with their judgement and on the decisions they reach on complaints.

..

8) In light of the criticisms the PHSO has received for being an ombudsman service that is unfit for purposing dealing with complaints fairly, openly and transparently -- Please explain how the PHSO can assure service users that their complaints have been dealt with properly and in accordance with those principles."

8. The IC took a somewhat different view of how these requests should be considered (DN paragraph 47):-

"But in order to release relevant information to the complainant, between 13 July 2018 and 20 July 2018 PHSO would need to have considered whether or not it had answered all of the parts of the 6 June 2018 request, identified why it had been unable to answer any parts and recorded this information. This is not a scenario that the Commissioner considers is likely to have taken place. She is therefore satisfied that PHSO does not hold recorded information falling within the scope of request 1."

9. With respect to 1a she approached the PHSO who explained (DN paragraph 49)

"the information it has identified at paragraph 38 also addresses part 1a of the 20 July 2018 request, and that it has identified no further relevant information.

50. The Commissioner considers that request 8 does read as a request for an explanation. However, she again notes that PHSO carried out searches for any relevant information with senior staff and asked staff for their recollection as to whether PHSO might hold relevant information. The searches and discussion did not identify relevant information. As with the requests of 6 June 2018 therefore, given the particular nature of request 8, the Commissioner is satisfied on the balance of probabilities that PHSO does not hold information in recorded form that would address it."

10. The IC concluded

"51. The Commissioner has carefully considered all the relevant parts of the complainant's requests, PHSO's response and its submissions to her. On the balance of probabilities she is satisfied that PHSO holds no further information that is relevant to the complainant's requests and that, once it has released the additional information it has now identified, it will have fully complied with section 1(1) of the FOIA."

11. In his notice of appeal the Appellant argued that the IC had failed to obtain meaningful answers to his requests, , while he had been provided with links to

information it doesn't mean to say that the information they published was able to answer my questions. The PHSO had been evasive:-

"to support this view I would refer you to questions 1a, 1b, 3,4,5,6 and 8 in my information requests of 20 July 2018 as I fail to accept that an health ombudsman service which has received numerous complaints and criticisms from dissatisfied users of the service and staged meetings with the agencies mentioned in my complaint are unable to provide answers to the questions I have raised as the PHSO no doubt have records of those meetings and the concerns of those agencies both past and present to provide the information I have requested."

12. The Appellant stated that the outcome of the appeal he was seeking was:-

"Acknowledgement from the PHSO that their failure to provide answers to service related issues and not informing the complainant whether the information they required was accessible and was able to answer their questions offers no assurance to complainants that their policies, procedures and guidance for dealing with complaints are open, transparent and fit for purpose and shows there are serious flaws and deficiencies with their methods of operation that undermines trust in the health ombudsman service"

13. In resisting the appeal the IC set out the role of the tribunal in considering an appeal set out in s58 FOIA:-

"58 Determination of appeals.

(1)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.

(2) On such an appeal, the Tribunal may review any finding of fact on which the notice in question was based."

14. In the light of that statutory definition she submitted that the issue for the tribunal was whether the decision notice was wrong in law whereas the outcome that the Appellant was seeking was not within the powers of the tribunal. She stated that she had found breaches by PHSO in handling the request. She noted that the issue was whether the decision notice was correct in law – i.e. the outcome of the decision notice which it was the tribunal's task to determine not how the IC had conducted her investigation.

15. In resisting the Appellant's claim that further information must be held in relation to 1a, 1b, 3,4,5,6 and 8 of the second request she noted that he had not provided any concrete evidence of what should be held. She had reached her conclusions based on searches carried out by the PHSO and the explanations

and reasons for why information was not held. The issue was decided on the balance of probabilities.

16. In resisting the claim that *PHSO has offered no clear direction where information he requires is located* she noted that PHOS had provided direct hyperlinks to sections of its websites where the information was held, the IC had tested these links and was satisfied *these work and also broadly satisfy the Appellant's request*.
17. In seeking to rebut the claims of the IC in her response the Appellant argued that PHSO responses to FOIA requests failed to provide direct answers to questions or provided no answers to questions, criticised PHSO for not giving a specific reason why information is not held in a recorded form, argued that the PHSO or IC should have specified precisely where the information was held in claiming s21 applied and argued that all the questions asked "are within scope of PHSO to answer". In support of these claims the Appellant submitted a Parliamentary report critical of PHSO, a paper by a lobby group critical of PHSO headed PHSOtheFACTS, a paper by the Patients Association critical of PHSO, a listing of FOI requests about PHSO compiled by PHSOtheFACTS, an extract from a Parliamentary debate and the IC guidance on s21 FOIA.

Consideration

18. The purpose of FOIA is to give individuals access to recorded information held by public authorities. This is logically distinct from a requirement on public authorities to answer questions. While the Appellant criticises PHSO for "*partially answering some of the questions and failing to answer the majority*"; that is beside the point. People may well want a public authority to answer a question relevant to its work but that is not a right directly given by FOIA, the right is to have recorded information which is held. That information may or may not be sufficient to answer a question that people wish to pose but there is no requirement under FOIA to formulate answers to questions or to enter into a debate or policy discussion. The question of how adequately or inadequately the PHSO carries out its statutory functions is a question for Parliament and not one for the IC or the tribunal. The question of whether or not individuals are satisfied with the PHSO is again outside the jurisdiction of the tribunal. Whether a public authority holds in recorded form the answer to a particular question put to it is a matter of fact. The Freedom of Information Act does not create an obligation to construct an answer. As the prehistory summarised in Appendix 1 demonstrates, the information requests in this case were an extension of a prolonged series of exchanges with the PHSO in which the Appellant expressed his extreme dissatisfaction with the outcome of a long running complaint and application for redress, and used it to illustrate his views on the PHSO's general shortcomings. The purpose was to sustain his challenge to decisions he did not accept, press his case that there should be a facility for independent review of the PHSO's decisions, and use FOIA in a

way which, he believes, leaves the PHSO no option but to continue to engage in debate about what he perceives to be its many and abject failures.

19. The problems which these boundaries present for the Appellant in seeking answers may be illustrated by looking at key parts of the requests identified by the Appellant in his notice of appeal where the response is a matter of concern (omitting 3 where the IC's investigation elicited some information relevant to the request see paragraph 6 above DN paragraphs 41-43) provided:-

"1) *The reason why...*

a) *How the removal of an external review...can avoid the potential for bias*

b) *How the PHSO justify the removal of this process ...*

4) *Whether the PHSO consider...*

5) *Whether the PHSO recognise...*

6) *...an answer is sought whether the PHSO recognise the negative impact...*

8) *In the light of the criticisms...please explain how the PHSO*

20. The PHSO argued that 4,5 and 6 were requests for opinion and not recorded information however it carried out searches *with its Operations Manager – Review and feedback team (previously CCT), Assistant Director of Strategy and Partnerships and the Senior Change and Delivery Officer. PHSO's view is that there is no requirement under FOIA to provide an opinion or answer general questions if information is not held.* (DN paragraph 39). While the Appellant has submitted documents relating to the critics of PHSO identified in his request (see paragraph 3 above and appendix 2) these do not amount to evidence that PHSO has formulated in recorded form responses to the questions posed by 4,5 and 6. In the light of the PHSO's response to IC the tribunal is not satisfied that the Appellant has discharged the evidential burden on him to show that the IC erred.

21. Similar considerations apply with respect to the reliance on s21. In her decision notice the IC identified that the PHSO had supplied links which for the second point of request 1 of 6 June the information *broadly addresses this point* and that for request 3 the request for the arrangements currently in place, PHSO had provided links to a number of policies and that this information together with the information in response to request 1 *addresses the question.*

22. The role of FOIA is to require public authorities to disclose recorded information. There is a mismatch between the Appellant's expectations of what FOIA can provide and rights it in fact confers. These do not include a right to have answers to questions or a right to insist that a public authority enters into or sustains its engagement with debate, perhaps particularly after the authority has said all it has to say. The question whether there is a need for independent review of the Parliamentary and Health Service Ombudsman's decisions is of course ultimately a matter for Parliament.

23. The tribunal is satisfied that the IC's decision notice appropriately stated the law and correctly applied it to the facts of the case.
24. The appeal is dismissed.

Signed Hughes

Judge of the First-tier Tribunal

Date: 23 September 2019

"Appendix 1: The context of the Information Requests

1. In exchanges with the Commissioner's office during the course of its investigation the Appellant submitted earlier correspondence with the PHSO which he felt illustrated its failure to remedy "serious flaws and deficiencies" and showed responses to complaints which "consistently breached the principles of good complaint handling and proceeded to stonewall my attempts at handling its flawed decisions":
2. In a letter of 30 May 2016 to the PHSO, complaining about the inadequacy of an earlier response to an earlier complaint, the Appellant set out 20 points of failure which, in his view, "clearly show that my complaint has been subjected to the same flaws and inadequacies with its handling as those identified by the bodies I refer to [see paragraph 2 above], and in doing so it will immediately become apparent that the recurring theme with the ombudsman service is its abject failure to do anything for the complainants and to all intents and purposes is seen as a way to avoid any liability for the damage caused by the NHS . . ."
3. A response from PHSO on 23 August 2016 declined to comment further on the points raised on the grounds that "We have previously explained our view on your questions, and the remaining points you make are your view, rather than any information which shows that our decision or case handling is wrong." "Continuing to state our position on the same concerns does not help achieve anything further for you."
4. The Appellant responded on 23 August 2016 saying that the PHSO's "failure to offer new explanations in response to comments in my previous letter . . . can only be seen as way of concealing the flaws and deficiencies in the way the PHSO has dealt with this complaint and to avoid the need to carry out an investigation in to matters that would no doubt reveal substandard aspects of care and treatment by NHS health providers which the PHSO has chosen to

overlook" "One of the key issues at the centre of this complaint which the PHSO has neglected to answer is how a patient who was owed a duty of care suffered fatal consequences from a routine hospital admission." "Because all of the responses I have received from the PHSO to date have lacked substance and failed to provide any meaningful answers to account for this tragedy" the Appellant finds "the PHSO unable to lawfully justify closing down a complaint that has been compromised by their own flawed processes and gross inattention to detail" including "their failure to listen to and address the concerns of the complainants." As a result the PHSO has "betrayed the trust of another one of its users by failing to obtain any form of apology, accountability, redress or resolution - all of which is patently at odds with the aims of a properly functioning ombudsman service." The letter concludes "if the PHSO considers itself an open, transparent and trustworthy ombudsman service, instead of their attempts at forcing the closure of this complaint, the PHSO could start by responding to the 20 points in my letter of complaint dated 20 February 2016, the 23 points that were listed in my earlier letter of complaint dated 20 February 2014 and have no problem in honouring my request for an external review of this complaint."

5. Further correspondence between the Appellant and the PHSO customer care team followed, including references to the Appellant's claim for compensation to the NHSLA in 2012, on which the PHSO observed that the correct route to challenge the outcome of that process would lie through the Courts. The PHSO say that when a case worker contacted the Appellant to explore what the NHSLA had done badly in handling the complaint "you did not give any specific information about what you felt NHSLA did wrong" and because no specific concerns were given "I have not found that you provided any information which shows that our decision is wrong."

(Summarised from pp162 to 189 of the bundle.)

Appendix 2 The first request

"1) The reason why the PHSO has removed the external review process they originally had in place for dealing with individual complaints and decisions and why this is not made clear on the PHSO website

How the PHSO justify the removal of this process and aim to build confidence and trust in the ombudsman service when their Service Model Policy and Guidance states there is no organisation that can specifically look into an individual complaint unquote, and there is na [sic] automatic right to the review of a decision the ombudsman service may have got wrong

How the current system the PHSO have in place for dealing with complaints by means of their Customer Care Team can reassure dissatisfied users of the service that the review of their complaints and the decisions they reach are fair and unbiased.

2) How many external reviewers were originally employed by the PHSO, whether they could be considered truly impartial and independent knowing they were hired under a contract with the PHSO, and whether the number they employed was sufficient to deal with the high volume of complaints the PHSO failed to resolve where the service user requested an external review of their complaint.

Because questions three, four and five relate to a specific complaint the PHSO have on record and was ongoing at a time when an external review process was in place, meaningful answers are required to each of the following questions:-

3) What criteria did a complaint have to meet in order for the PHSO to carry out an external review and whether the PHSO could be considered to breach the principles of good complaint handling by refusing to carry out an external review of a complaint where the service user had provided evidence of maladministration in the way the PHSO handled their complaint and found their requests for an external review had been ignored.

4) Whether the PHSO consider they have an obligation to carry out an external review of longstanding complaints where the ombudsman service has failed to provide remedy, accountability or resolution to a complaint over the space of more than 5 years and where the service user has had continuing need to complain to the PHSO about their handling of the complaint and raised questions the PHSO has largely failed to answer.

5) Whether the PHSO recognise the need for an unbiased external review process in light of the criticisms they have received from various bodies as an ombudsman service that is unfit for purpose in dealing with complaints fairly, openly and transparently - and why as part of their strategy to deliver an exemplary ombudsman service and to allay concerns of bias by its users there are no future plans for an external review process to address this imbalance.

6) In view of the improvements the PHSO intend to make to the service over the course of the next 3 years because their objectives highlight many of the flaws and deficiencies with the service they provide and have been criticised for, an answer is sought as to whether the PHSO recognise the negative impact those flaws and deficiencies would have had on their findings and decisions on past complaints and whether they intend to revisit and reassess complaints they have failed to resolve where the service user has had continuing need to raise concerns with the PHSO about their decisions and complaint handling processes."

Appendix 2 The second request/the request for an internal review

"1) The reason why the FOI Office were previously unable to answer parts of this question in the detail they have currently provided.

a) How the removal of an external review process and reliance on the Customer Care Team to handle reviews can avoid the potential for bias with their judgement and on the decisions they reach on complaints.

b) How the PHSO justify the removal of this process and aim to build confidence and trust in the ombudsman service when their Service Model Policy and Guidance states there is no organisation that can specifically look into an individual complaint unquote, and there is na [sic] automatic right to the review of a decision the ombudsman service may have got wrong

2) Please clarify why a record of the number of external reviewers originally employed by the PHSO either in the past year or from the period 2010 to 2016 is not easily accessible without a manual review of your reports and records as the reason you provide in answering this question effectively disallows the service user from obtaining full disclosure of the information they have requested and prevents them from obtaining resolution to their queries.

3) Following the removal of the external review process what process dies the PHSO currently have in place for dealing with complaints about the Customer Care Team when they have failed to apply the principles of good complaint handling and the service user provides evidence of maladministration in the way they have handled their complaint which they subsequently ignore.

N.B. Because questions 4, 5 & 6 highlight some of the serious flaws and deficiencies with the Parliamentary and Health Service Ombudsman and its functioning, if the Guiding Principles of the PHSO are claimed to be openness and transparency It should not preclude the FOI office from answering these questions as sufficient recorded information no doubt exists between the PHSO and bodies who are highly critical of the service namely:- the Patient's Association, pressure group PHSO the Facts and the PASC to enable your office to answer these questions. On that basis I seek meaningful answers to those questions which have been necessary to repeat.

4) Whether the PHSO consider they have an obligation to carry out an external review of longstanding complaints where the ombudsman service has failed to provide remedy, accountability or resolution to a complaint over the space of more than 5 years and where the service user has had continuing need to complain to the PHSO about their handling of the complaint and raised questions the PHSO has largely failed to answer.

5) Whether the PHSO recognise the need for an unbiased external review process in light of the criticisms they have received from various bodies as an ombudsman service that is unfit for purpose in dealing with complaints fairly, openly and transparently - and why as part of their strategy to deliver an exemplary ombudsman

service and to allay concerns of bias by its users there are no future plans for an external review process to address this imbalance.

6) In view of the improvements the PHSO intend to make to the service over the course of the next 3 years because their objectives highlight many of the flaws and deficiencies with the service they provide and have been criticised for, an answer is sought as to whether the PHSO recognise the negative impact those flaws and deficiencies would have had on their findings and decisions on past complaints and whether they intend to revisit and reassess complaints they have failed to resolve where the service user has had continuing need to raise concerns with the PHSO about their decisions and complaint handling processes.

7) Please explain how the PHSO Guidance on Financial Remedy aims to compensate complainants for the frustration and distress caused by the ombudsman service when it has failed to provide justice, remedy, accountability nor resolution for the service user owing to the known flaws and inadequacies with the service.

8) In light of the criticisms the PHSO has received for being an ombudsman service that is unfit for purposing dealing with complaints fairly, openly and transparently -- Please explain how the PHSO can assure service users that their complaints have been dealt with properly and in accordance with those principles."