



Appeal number: EA/2019/0278P

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

**DAVID THOMPSON
on behalf of
THE BRITISH BROADCASTING CORPORATION**

Appellant

- and -

- (1) THE INFORMATION COMMISSIONER**
(2) THE CHARITY COMMISSION FOR NORTHERN IRELAND
(3) THE NORTHERN IRELAND PUBLIC SERVICES OMBUDSMAN

Respondents

**Before:
JUDGE ALISON MCKENNA (CP)**

Determined on the papers, the Tribunal sitting in Chambers on 15 June 2020

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MODE OF HEARING

1. This determination was conducted by a Judge, sitting alone. The Tribunal was satisfied that it was appropriate to compose the panel in this way, having regard to paragraph 6 (a) of the Senior President’s Pilot Practice Direction dated 19 March 2020¹ and the desirability of determining all cases which are capable of determination by the most expeditious means possible during the pandemic.
2. The parties and the Tribunal agreed that this matter was suitable for determination on the papers in accordance with rule 32 Chamber’s Procedure Rules².
3. The Tribunal considered an agreed open bundle of evidence comprising pages 1 to 133, plus additional papers including the CMDs of 21 April and NIPSO’s final written submissions. It also considered a closed bundle comprising pages 1 to 22.

DECISION

4. The appeal is dismissed.

REASONS

Background to Appeal

5. The Appellant, who is an investigative journalist, made a request to the Charity Commission for Northern Ireland (“CCNI”) on 26 July 2018 for disclosure of *any communication between the Charity Commission (“CCNI”) and the Northern Ireland Public Service Ombudsman (“NIPSO”) in relation to the publication or withholding of NIPSO’s investigation report on [a named individual] and CCNI.*
6. CCNI refused on 16 August 2018 to confirm or deny whether the requested information was held in reliance upon s. 44(2) of the Freedom of Information Act 2000 (“FOIA”). CCNI confirmed its position following an internal review on 29 August 2018. The Appellant complained to the Information Commissioner.
7. During the course of the Information Commissioner’s investigation, CCNI amended its position so as to confirm that it held the requested information but to rely on s. 44(1) (a) of FOIA in refusing to disclose that information. The Information Commissioner issued Decision Notice FS50781777 on 11 July 2019, upholding the Council’s reliance on s. 44 (1) (a) FOIA. The Appellant appealed to the Tribunal.

¹ <https://www.judiciary.uk/publications/pilot-practice-direction-panel-composition-in-the-first-tier-tribunal-and-the-upper-tribunal/>

² <https://www.gov.uk/government/publications/general-regulatory-chamber-tribunal-procedure-rules>

The Law

8. Section 44 FOIA provides an absolute exemption³, so there is no applicable public interest balancing exercise.
9. Section 44 FOIA provides that information is exempt if its disclosure (otherwise than under FOIA) by the public authority holding it:
 - (a) *is prohibited by or under any enactment;*
 - (b) *is incompatible with any Community obligation; or*
 - (c) *would constitute or be punishable as a contempt of court.*
10. CCNI relied in this case on (a), by virtue of The Public Services Ombudsman Act (Northern Ireland) 2016⁴. This relevantly provides at s.49 as follows:

Disclosure of information

49— (1) *The information to which this section applies is—*

(a) *information obtained by the Ombudsman—*

(i) *in deciding whether to begin an investigation,*

(ii) *in the course of an investigation,*

(iii) *in resolving a complaint under section 10,*

(b) *information obtained by the Ombudsman which is obtained from a person mentioned in section 51(4),*

(c) *information obtained by the Ombudsman which is obtained from the Information Commissioner by virtue of section 76 of the Freedom of Information Act 2000 (disclosure between Information Commissioner and ombudsmen).*

(2) *The information must not be disclosed except—*

(a) *for the purposes of deciding whether to begin an investigation,*

(b) *for the purposes of an investigation,*

(c) *for the purposes of resolving a complaint under section 10,*

(d) *for the purposes of a statement or report made in relation to a complaint or investigation,*

(e) *for the purposes of any provision of section 51,*

(f) *for the purposes of proceedings for an offence under the Official Secrets Acts 1911 to 1989 alleged to have been committed in respect of information obtained by the Ombudsman,*

³ <http://www.legislation.gov.uk/ukpga/2000/36/section/44>

⁴ <http://www.legislation.gov.uk/nia/2016/4/contents>

(g) for the purposes of proceedings for an offence of perjury alleged to have been committed in the course of an investigation,

(h) for the purposes of an inquiry with a view to the taking of proceedings mentioned in paragraph (f) and (g),

(i) for the purposes of proceedings under section 33 or sections 54 and 55,

(j) in the case of information to the effect that a person is likely to constitute a threat to the health or safety of one or more persons, to any person to whom the Ombudsman thinks it should be disclosed in the public interest,

(k) in the case of information to which subsection (3) applies, to the Information Commissioner.

...

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. First-tier Tribunals are bound as a matter of legal precedent by Decisions of the Upper Tribunal and higher courts, but not by Decisions of differently constituted First-tier Tribunals. See *O’Hanlon v Information Commissioner* [2019] UKUT 34 (AAC).⁵

13. 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. The relevant standard of proof is the balance of probabilities.

Submissions and Evidence

14. The Appellant’s Notice of Appeal dated 7 August 2019 relied on grounds of appeal that the Decision Notice erred in finding that the requested information was *obtained by NIPSO in the course of, or in connection with, its investigation* of the complaint made to

⁵ https://assets.publishing.service.gov.uk/media/5c7fb354e5274a3f8edc00cf/GIA_1680_2018-00.pdf

NIPSO, so that the prohibition on disclosure in s. 49 of the 2016 Act was not in fact engaged; secondly, even if the 2016 Act prohibition was engaged, the Decision Notice erred in relation to its finding that CCNI (as opposed to NIPSO) was entitled to rely on s.44 (1) (a) FOIA. The Appellant asked that the Tribunal examine the withheld information for itself and determine whether the exemption claimed by CCNI was properly engaged.

15. The Information Commissioner's Response dated 14 October 2019 submitted that, having considered the Appellant's grounds of appeal, the Decision Notice *may have reached the wrong conclusion* and that the engagement of s. 44 FOIA was now considered to be *borderline*. The Information Commissioner now considered that ss. 36 and 41 FOIA might be engaged. She asked the Tribunal to join CCNI as a party to this appeal.
16. CCNI was joined as a party to these proceedings. Its Response dated 25 November 2019 explained that NIPSO's practice is to invite comments from persons affected on its draft report, including asking for their representations as to whether the report should be published under s. 44 of the 2016 Act. In this case, NIPSO had not published a report. CCNI's representations and an exchange of correspondence about that matter is the information requested by the Appellant. CCNI submitted that NIPSO's investigation had not been concluded at the point where it seeks such representations, and further, that there is an expectation of confidentiality during the entire process, provided by s. 30 (5) of the 2016 Act, which provides for the investigation to be *conducted in private* and thus engages s. 41 FOIA.
17. CCNI also submitted that, if the Tribunal were not to uphold the Decision Notice's reliance on s. 44 FOIA, then the Tribunal should make a substituted Decision Notice in reliance upon s. 36 FOIA as the disclosure of the requested information would be likely to *prejudice the effective conduct of public affairs*.
18. CCNI applied for NIPSO to be joined as a party to these proceedings. NIPSO filed a Response to the appeal, which asked the Tribunal to uphold the Decision Notice. It submitted that:

The importance of the statutory prohibition cannot be overstated. It enables NIPSO to conduct all investigations in private and maintain the confidentiality of those investigations as is required by the 2016 Act. It is fundamental in providing members of the public with confidence in making complaints; encouraging candour on the part of those providing information to NIPSO ; encouraging cooperation with NIPSO; creating an environment in which the provision of information to NIPSO is not discouraged more generally by the knowledge that the confidentiality of information given to them may not be maintained and thereby facilitating the effective discharge of the functions of the Commissioner and the Ombudsman, in the public interest.

The intention of the legislature is that the prohibition continues to apply beyond the conclusion of all investigations requiring NIPSO and his staff to uphold the confidentiality of the 'information obtained' beyond their employment with NIPSO's office given that the NIPSO nor his staff can be compelled to provide information before a Court. To find in favour of the Appellant would create a back door to 'information obtained', undermining NIPSO's ability to conduct investigations in private and thereby prejudicing the discharge of his statutory functions.

19. The Appellant filed a Reply, in which he reiterated his submission that information relating to a discussion about whether a report should be published is out-with the scope of NIPSO's statutory investigation as it concerns a separate procedural issue. In such circumstances, the statutory bar on disclosure did not, in his submission, apply. Secondly, he reiterated his submission that the statutory bar relied on by NIPSO did not extend to providing CCNI with an exemption under FOIA.
20. The Appellant also made submissions as to ss. 36 and 41 FOIA, to the effect that neither was engaged. In particular, he noted that no Qualified Person's opinion seemed to have been obtained by CCNI in respect of s. 36 FOIA.
21. NIPSO alone made final submissions for the Tribunal, dated 28 May 2020. It helpfully brought the Tribunal up to date by confirming that it has now decided to publish the report to which the withheld information relates. This decision was taken following the conclusion of related court proceedings. There has also been a disclosure to the Appellant of an unredacted version of page 109 of the hearing bundle.
22. It is submitted by NIPSO that there is no distinction to be found in the language of the 2016 Act as between the different categories of information described by the Appellant. Further, that the proper approach to statutory interpretation does not permit of the approach to construction of the 2016 Act for which the Appellant contends. NIPSO refers the Tribunal to the Explanatory Notes to the 2016 Act⁶ which, in its submission, support a 'literal interpretation' of s. 49 of the 2016 Act. NIPSO also referred the Tribunal to the High Court's judgment in *R (oao Kay) v Health Service Commissioner* [2008] EWHC 2063 (Admin)⁷ in which it was held at [59] that the statutory bar on disclosure in s. 15 of the Health Commissioners Act 1993 also applied to third party recipients of information obtained during that Ombudsman's investigation. It is submitted that the Tribunal is bound to adopt the same approach to its construction of the 2016 Act.
23. None of the parties relied on witness evidence. The Appellant produced in evidence a redacted letter from the Attorney General for Northern Ireland expressing his opinion about the law. NIPSO produced in evidence a copy of a Memorandum of Association with the ICO which pre-dated the events in this appeal, but which informed it understanding of the law.

Conclusion

24. I have considered the withheld material in the closed bundle but, in view of my conclusions below, I do not need to refer to it further.
25. All parties to this appeal have spent a considerable amount of time discussing first-instance Decisions of this Tribunal, and its predecessor, which have no precedential value. With the greatest of respect, this Tribunal is also not bound to follow the opinion of the Attorney General expressed in correspondence.

⁶ <http://www.legislation.gov.uk/nia/2016/4/notes/contents>

⁷ <https://www.bailii.org/ew/cases/EWHC/Admin/2007/2063.html>

26. I was surprised that none of the parties referred me to the Supreme Court's judgment in *Kennedy v Charity Commission* [2014] UKSC 20⁸, which considered the ambit of a different section of FOIA, but which is nevertheless instructive on the question of FOIA and statutory investigations.
27. The Appellant has made submissions about the intention of Parliament in enacting s. 49 of the 2016 Act, however it does not seem to me that this is a case involving an ambiguous or absurd result arising from the interpretation of a statutory provision so as to fall within the rule in *Pepper (Inspector of Taxes) v Hart* [1992] UKHL 3⁹. In any event, the Appellant has not sought to rely on any extraneous evidence as an aid to his proposed construction of the 2016 Act. In the circumstances, I must consider his submissions as to the intention of Parliament to be speculative.
28. I have adopted the usual approach to statutory interpretation which is to adopt a plain reading of the measure. In doing so, I find that s. 49 of the 2016 Act is of broad scope in referring to *information obtained in the course of an investigation*, and I am not persuaded that there is any statutory basis for finding that the withheld information falls into a category of information which is outside the ambit of s. 49 of the 2016 Act.
29. I accept CCNI's submission that, as it was invited to submit its representations on the question of publication of the report under s. 44 of the 2016 Act, the withheld information fell within the scope of NIPSO's statutory role. I do not discern, within the 2016 Act, any provision which distinguishes information obtained during the s. 44 process from information obtained at any other part of the NIPSO process. This observation supports my view that the withheld information is within the ambit of s. 49 (1) of the 2016 Act. It follows that I am satisfied that the statutory bar to disclosure in s. 49 (2) of that Act applies to the withheld information and on this basis, I reject the Appellant's first ground of appeal.
30. I accept NIPSO's submission that this Tribunal is bound to apply the approach taken in *Kay v Health Service Commissioner*. I respectfully agree with Mrs Justice Dobb's analysis at [60]:
- This is a jurisdiction where the majority of the information obtained is likely to be confidential and section 15 is clearly in place to protect the confidentiality of the material. It would be an absurd position if the ombudsman was restricted as to the situations in which she could disclose the material, only for the material to be used by others for reasons outside the ambit of the ombudsman's investigation and report...*
31. In reliance upon this judgment, by which I am bound as a matter of precedent, I conclude that CCNI is also subject to the statutory bar on disclosure under s. 49 (2) of the 2016 Act. I therefore reject the Appellant's second ground of appeal.

⁸ <https://www.bailii.org/uk/cases/UKSC/2014/20.html>

⁹ <https://www.bailii.org/uk/cases/UKHL/1992/3.pdf>

32. For these reasons, I conclude that the requested information is exempt from disclosure under s. 44 (1)(a) FOIA. I am not persuaded that the Decision Notice erred in law and I dismiss the appeal.

33. In view of my conclusion as to the engagement of the absolute exemption in s. 44 FOIA, I do not need to consider the engagement of ss. 36 and 41 FOIA.

(Signed)

ALISON MCKENNA

DATE: 17 June 2020

CHAMBER PRESIDENT

PROMULGATION DATE: 19 June 2020