



**IN THE FIRST-TIER TRIBUNAL
GENERAL REGULATORY CHAMBER
(INFORMATION RIGHTS)**

Appeal No: EA/2020/0103/A

ON APPEAL FROM:

**The Information Commissioner's Decision Notice No: FS50871882
Dated: 16 December 2019**

Appellant: Neil McDougall

First Respondent: The Information Commissioner

**Before
HH Judge Shanks
(sitting alone)**

Telephone hearing on 13 October 2020

Representation:

Appellant: in person

Commissioner: not represented

Subject matter:

Freedom of Information Act 2000 (FOIA)

Section 3(2): whether information held

DECISION OF FIRST-TIER TRIBUNAL

For the reasons set out below the Tribunal allows the appeal and issues the following substitute decision notice.

SUBSTITUTE DECISION NOTICE

Public Authority: Parliamentary and Health Service Ombudsman

Complainant: Neil McDougall

Decision:

The Public Authority held the information requested by the Complainant on 28 June 2019 but failed to communicate it to the Complainant as required by section 1(1)(b) of FOIA.

Steps to be taken:

The Public Authority must communicate the information to the Complainant by 1600 on 13 November 2020.

HH Judge Shanks

14 October 2020

REASONS FOR DECISION

Introduction

1. The Parliamentary and Health Service Ombudsman (PHSO) and the Local Government and Social Care Ombudsman (LGSCO) have established a Joint Working Team to handle complaints which involve both health and social care

issues. There is a Joint Working Team Manual¹ which “... sets out in one place guidance on key processes and on jurisdictional and policy considerations which have been agreed by the two Ombudsmen.” Unsurprisingly the Manual is regularly revised; according to the current version there were four previous versions between February 2019 and July 2020.

2. On 26 October 2018 Neil McDougall, the Appellant in this case, raised a complaint against East Cheshire Social Services relating to care his mother had received. As I understand it, his position is that under the terms of the Manual this complaint properly came within the remit of the Joint Working Team but an issue has arisen about who exactly should be dealing with it. This has led him to make the FOIA request which is the subject matter of this appeal.
3. On 28 June 2019 Mr McDougall issued his FOIA request to the PHSO in these terms:

I am trying to understand how the ... Joint Working Team Manual has been amended during the past year ...

... can you provide me with full pdf copies of the versions created in March and June 2019 ...

4. The PHSO responded by saying he did not hold the requested information, a position that was maintained on an internal review on 28 August 2019. Mr McDougall complained under section 50 of FOIA to the Information Commissioner who issued a decision notice on 16 December 2019 upholding the PHSO’s position. He has appealed to this Tribunal against that decision notice.

¹ I took the step of downloading the current version from the LGSCO’s website myself in advance of the hearing. I considered this justified given that the Commissioner was not likely to be in a position to assist the Tribunal and that the document was an official document relating to the functioning of two public authorities and freely and publicly available.

5. No application was made to join the PHSO to the appeal. The case was listed before me alone pursuant to para 6(a) of the Pilot Practice Direction on Panel Composition promulgated on account of the Covid-19 pandemic. It was listed to be heard by video-link but the Information Commissioner chose not to attend and Mr McDougall was only able to join by telephone. I am satisfied that the arrangements for determining the case were appropriate and fair.

The legal framework

6. The basic obligation laid on a public authority by section 1(1) of FOIA when a request for information is made is to inform the requester whether it holds the requested information and to communicate the information to him. Section 3(2) states that information is held by a public authority if it holds it otherwise than on behalf of another and also, by para (b), if “... it is held by another person on behalf of the authority.”
7. The question whether an authority does or does not hold information is one of fact to be decided on the evidence on the balance of probabilities; that of course includes the drawing of reasonable inferences by the decision maker.
8. Although the Commissioner in her decision notice found on the balance of probabilities that the PHSO did not hold the requested information, it is open to this Tribunal on an appeal to review any finding of fact on which the notice was based (section 58(2) FOIA).

Did the PHSO hold the requested information?

9. The PHSO informed the Commissioner in the course of her enquiries under section 50 of FOIA that the Joint Working Team is based with the LGSCO and that LGSCO management is responsible for the running of the Team and for the contents of the Manual and its “storage.” Searches within the PHSO’s organisation apparently indicated that the requested information was not held by the PHSO. The PHSO said that Mr McDougall had been provided with contact details at the LGSCO to enable him to request the information from that source.

Notwithstanding that offer Mr McDougall has, as is his right, persisted in this appeal.

10. I am bound to say that, like Mr McDougall, I find it inherently unlikely that the PHSO did not hold copies of the various versions of the Joint Working Team Manual somewhere in his organisation: the document is in the public domain, bears his logo and records that it sets out guidance which has been agreed between the two Ombudsmen; it must be one of a number of documents which are fundamental to the PHSO's operation.

11. However, I do not think it is necessary for me to make a finding which contradicts what the Commissioner has been told by the PHSO because, as I indicate above, information is "held" by a public authority for the purposes of FOIA where it is held by another on the authority's behalf. In this case, it seems to me plain that if the documents in question were "physically" under the exclusive control of the LGSCO they were being held on behalf of both sides of the Joint Working Team and thus on behalf of the PHSO. Indeed, leaving aside any technical arguments I am puzzled as to why the PHSO did not just get hold of the documents from the LGSCO and pass them over to Mr McDougall, thereby saving a great deal of unnecessary time and expense.

12. I therefore find that the documents requested were "held" by the PHSO and that the Commissioner was wrong to decide otherwise.

Disposal

13. In her Response document the Commissioner invites the Tribunal, if it finds that the PHSO does hold the information, to require him to provide a "fresh response" to the request so that he can raise any exemption to be relied on. I am not inclined to take that course. The Commissioner and the PHSO have had ample time to raise any exemptions which may seem appropriate in the context of the appeal; as I have indicated, a great deal of unnecessary time and cost has been expended already; and it hardly seems likely that any exemption will apply

given that the earlier versions of the Manual which Mr McDougall seeks were no doubt freely available on the LGSCO website until they were superseded.

14. In the circumstances I propose to allow the appeal and issue a substitute decision notice requiring the PHSO to supply the requested information within four weeks.

HH Judge Shanks

15 October 2020