



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

Appeal Reference: EA/2020/0276

Considered on the papers on 1 April 2021 and subsequently

Before

JUDGE CHRIS HUGHES

TRIBUNAL MEMBERS

DAVE SIVERS & DAVID WILKINSON

Between

DAVID PLATTS

Appellant

and

INFORMATION COMMISSIONER

First Respondent

DECISION

The appeal is upheld, The Parliamentary and Health Services Ombudsman should disclose the withheld material within 35 days subject to the redaction of the personal information contained within it.

REASONS

1. Mr Platts submitted a complaint about the Pensions Ombudsman to the Parliamentary and Health Services Ombudsman (PHSO). PHSO notified him on 14 September 2018 that it would take no further action on the complaint. The same day Mr Platts made a request for information from PHSO.

"... I telephoned to ascertain progress, yet was advised my caseworker was awaiting guidance as to whether "delay" could be investigated or not. My outcome does not confirm whether admitted delays could be investigated under your remit.... I would like to see your internal guidance why issues cannot be investigated further"

2. PHSO did not respond to the request and on 29 August Mr Platts resubmitted the request for information to PHSO. PHSO responded on 26 September confirming that it did not hold such guidance but held legal advice and withheld that advice relying on s42(1) FOIA. It maintained that position on internal review and Mr Platts complained to the Information Commissioner.

3. In her decision notice the IC considered the effect of s42(1) which provides:-

"Information in respect of which a claim to legal professional privilege or, in Scotland, to confidentiality of communications could be maintained in legal proceedings is exempt information."

4. She noted the history of the specific document which was being withheld:-

14. The Commissioner notes that it is recorded on the document that is being withheld that its author was a (former) Legal Advisor and its owner is a Legal Advisor. The document includes a discussion of the relevant legislation, what is in and out of remit in respect of the PHSO and the Pensions Ombudsman and a summary. The document was written in 2008 and, while the Commissioner has noted the PHSO's view on this (below), she considers that the advice the document contains was still 'live' at the time of the request, and currently, in that it may well be drawn on in the future.

5. Since this is a qualified exemption, she considered the competing public interests and the importance of clients being able to explore issues with their legal adviser in confidence. While Mr. Platts had not identified a specific argument in favour of disclosure PHSO had identified:-

- There is an argument for transparency over information created and held by public authorities. It allows the public to gain knowledge of how a public authority functions in relation to a specific matter.
- There is also a public interest argument in knowing that PHSO is producing reasonable legal advice. If not, knowing what was created and who was involved increases accountability in PHSO.
- The information is several years old and is not currently being relied on by PHSO for its complaint function. This reduces the protection that can be afforded to legally privileged information.

6. Against disclosure PHSO identified:-

- LPP carries a strong inherent argument against disclosure due to the importance of the principle behind it. It is designed to promote open communications between client and lawyer to ensure robust advice can

be provided, which is vital to the administration of justice. Disclosure of the information would likely inhibit the openness of these communications and so affect the administration of justice.

- The advice is no longer live and is several years old, which diminishes the arguments for transparency and accountability. This information does not impact on discharge of the Parliamentary Commissioner's function, so there is a much reduced need to understand what is contained within the advice.
- The information, even when live, did not affect a large proportion of complaints or have a vast impact upon PHSO's work. This adds further detail which highlights that the arguments for transparency and accountability in this instance are much reduced.

7. The Commissioner concluded that the exemption applied, and the balance of public interest lay in non-disclosure.

8. Mr Platts appealed against this decision formulating his appeal:-

I ask the Tribunal to reconsider such disclosure and whether the Section 42 exemption is reasonable or otherwise, given the documentation is old; also the disclosure may enable the public to understand what matters in relation to the Pension Ombudsman, such as administrative delays, or administrative mistakes which may be investigated by the Parliamentary and Health Services Ombudsman.

9. The Commissioner resisted the appeal and sought to strike it out. In resisting this Mr Platt argued:-

The PHSO appears able to investigate Pension Ombudsman ADMINISTRATIVE FUNCTIONS under Parliamentary Commissioner Act 1967 under Section 5(7). The FOIA information which is withheld might allow Complainants to better understand scope of such ADMINISTRATIVE FUNCTIONS in the interests of good public administration from the various public bodies specified within Schedule 4.

Once documentary evidence has been examined, a FOIA Tribunal may consider disclosure serves the public interest, or alternatively, may order parts of such document (with suitable redaction) to be released, since Members of the Public need to understand the scope(s) of Administrative Functions in the above Parliamentary Commissioner Act 1967 legislation given the PHSO always declines Pension Ombudsman investigation due to the content(s) of such internal guidance.

10. While the appeal was initially struck out it was restored by a judge who observed:-

(a) The Registrar has not given sufficient weight to the investigatory function of the Tribunal. This is particularly important in cases that turn mainly on legal issues and in which a party is unrepresented. This is such a case.

(b) In the context of an appeal under s.57 FOIA, there is a risk that the Tribunal's early application of the public interest test inherent in s.42 could effectively operate as a bar to admission.

(c) Given description of the age of the legal advice and absence of currency set out in the Decision Notice, I agree with Mr Platts that the Tribunal is likely to be best placed to consider public interest once it has had an opportunity to consider the requested information.

Consideration

11. Legal Professional Privilege is a significant underpinning of the rights of citizens and organisations which enables them to seek legal advice in confidence. It is protection of rights which is not lightly set aside and is recognised in the regime which allows access to information held by public authorities in the UK (FOIA/FOISA). It is not an absolute right in FOIA and may be outweighed by other more pressing matters of public interest. The issue for this tribunal is to evaluate these competing claims.
12. The Ombudsman has a constitutionally significant role in potentially providing redress to citizens who have suffered injustice through maladministration by Government departments or by maladministration or failures of service in the NHS. These are significant rights for citizens. The practical limits of these rights are matters of importance for citizens to understand. In this case the substratum of the information request relates to the circumstances in which PHSO can investigate possible maladministration by the Pensions' Ombudsman. The limits of the scope of PHSO to investigate another Ombudsman is a matter of public interest. While the advice may be old and applicable in limited circumstances it has been incorporated in general guidance to staff of PHSO as being a matter of general applicability in appropriate circumstances and not related to an individual case. It therefore appears to be a statement of the law defining when a citizen can have access to redress. In the circumstances of this case the question of transparency to a citizen as to their rights outweighs the need to protect legal professional privilege.
13. The appeal is allowed.

Signed Hughes

Judge of the First-tier Tribunal

Date: 9 June 2021