First-tier Tribunal
(General Regulatory Chamber)
Information Rights

Appeal Reference: EA/2019/0335/V

Decided at a hearing held by CVP on 29 April 2021

Before: JUDGE ANTHONY SNELSON

Between

MR PETER BESWICK

Appellant

and

THE INFORMATION COMMISSIONER

First Respondent

and

PUBLIC HEALTH ENGLAND

Second Respondent

DECISION

On hearing Mr Stephen Kosmin, counsel, on behalf of the First Respondent and Mr Jonathan Scherbel-Ball, counsel, on behalf of the Second Respondent, and there being no appearance or representation by or on behalf of the Appellant, the Tribunal determines that the appeal is struck out.

REASONS

Introduction and procedural history

1. On 16 December 2018, The Appellant, Mr Peter Beswick, wrote to the Second Respondent ('PHE') requesting information under the Freedom of Information Act 2000 ('FOIA') about the Wiltshire Novichok poisonings in these terms:

> **Please could you tell me why the advice you have on Novichok is so far detached from the advice given by the OPCW[1].**
> **Eg**
> **PHE: There is only a low risk to the public authority**
> **OPCW: It is extremely dangerous in tiny doses**
> **And**
> **PHE: "This Stuff" (Novichok) presents its symptoms (through skin contact) between 3 (minimum) and 12 hours. The minimum 3 hours is for contact with a very high quantity.**
> **OPCW: Symptoms will appear through skin contact (Nerve agents in general) between 20 and 30 minutes."**

2. PHE replied to the requests on 8 January 2019, stating that it held the relevant information and explaining that its statements and those of OPCW had been correct and the apparent inconsistency was explained by the fact that they answered different questions. Some details were supplied in support of this explanation.

3. On 13 January 2019 Mr Beswick requested a review of PHE's response. He included the following comments.

> **I have asked why the advice PHE put out is so different from the advice promulgated by the OPCW and you have not answered that. For clarity I now want to know the information PHE has on the particular Novichok concerned and the toxicological properties it possesses [sic] that allow you to give the advice you do. I want to see the data you based your advice on.**
>
> **I would also like you to explain why you only give upper average time limits (whatever that means), for the poison to take effect and not lower time limits. And please explain why PHE advice does not make it perfectly clear that your advice now neglects lower limits for large and small doses. That was not the advice PHE gave in July, please explain why the advice has changed.**
>
> **My complaint has 2 parts 1) is that the advice you have given me here contradicts entirely with the advice given by a PHE director at a public meeting to address concerns in Amesbury 2) you have not answered my FoIR.**
>
> **I now want to know what information you are basing your advice on (the data) because it has clearly shifted from the Amesbury public meeting, why has it shifted? The data you had in July that formed that advice and the data you have now that forms your new advice.**

4. Following an internal review, PHE responded to Mr Beswick on 25 March 2019, stating *inter alia* that the information sought formed part of an ongoing police investigation and was exempt under FOIA, ss 24 (national security) and 40 (personal information).

5. On 26 March 2020, pursuant to FOIA, s50(1), Mr Beswick complained to the First Respondent ('the Commissioner') about the way in which PHE had dealt with his request.

[1] The Organisation for the Prohibition of Chemical Weapons

6. At the request of the Commissioner, PHE reviewed its position and, on 10 June 2019, wrote to Mr Beswick to convey the following points.

   (1) It had wrongly treated the request of 16 December 2018 as a valid request under FOIA and had accordingly been wrong to state that it held information within the scope of the request.
   (2) The requests for information made on 13 January 2019 had been wrongly treated as part of an internal review. They were fresh requests for information and should have been treated as such.
   (3) But in any event no information was held within the scope of those requests: the answer supplied on 8 January 2019 had been supplied following PHE being granted access to information held by other government agencies in an appropriate secure environment, from which it had not been at liberty to remove it.

7. The Commissioner proceeded to carry out an investigation. By a Decision Notice dated 12 August 2019, she decided as follows.

   (1) PHE's response to the request of 16 December 2018 had been sufficient, given the way in which the request had been phrased.
   (2) As PHE had maintained, the requests of 13 January 2019 were new requests for information, and those requests were the focus of the Decision Notice since it was to them that Mr Beswick's complaint (to the Commissioner) had been directed.
   (3) On a balance of probabilities, the requested information was not held by PHE.

8. By a notice of appeal dated 6 September 2019, Mr Beswick challenged the DN on a number of grounds. Two salient contentions were these.

   (1) PHE's response to the request of 16 December 2018 had been "unintelligible" and "dishonest".
   (2) It also failed to explain why the information supplied was "so at odds with the OPCW advice" or why PHE was no longer in possession of the information.

9. On 26 September 2019 Mr Beswick wrote directly to the Tribunal. His message included the following.

> **My experience is that there is a concerted effort among HMG's agencies to limit as much as possible the amount of information that is publicly available, it is my contention that the MPS (*i.e.* the Metropolitan Police Service), Public Health England, the South Western Ambulance Service and now the ICO are deliberately frustrating and stalling information that has been hidden and should by law not have been hidden.**

10. On 4 November 2019 the Commissioner filed a response to the appeal contending that Mr Beswick had failed to explain clearly the grounds on which he challenged the Decision Notice and reserving the right to respond more fully in the event of those grounds being clarified.

11. On 19 November 2019 PHE filed its response to the appeal. At paragraph 15, that document stated as follows.

> **… PHE does not hold the Requested Information. In order to formulate its public health advice, PHE was granted access to information held by other government agencies in an appropriate secure environment. In light of the security classification of the information which it had viewed, it was not able to take the data away from that secure environment.**

12. PHE filed a witness statement dated 2 October 2020 in the name of Dr Robert Gent, PHE's Principal Scientific and Clinical Adviser to SAGE, which confirmed that the requested information was not held and the reason why.

13. In a further 'Submission' filed on 21 January 2021 Mr Beswick included the following points.

> **8. … I accept that in my request for an Internal Review my Request contained Novel Requests which probably should have been dealt with as a New FoI Request. The New Requests may even have been eventually dealt with by Dr Gent's evidence. The original request has not been dealt with honestly by Dr Gent's evidence, it only acts to distract from the issue at hand.**
>
> **9. To be clear I am not seeking, through this Appeal, to get answers to the additional questions posed by my Internal Review Request. I am not pursuing at this stage answers to those additional questions.**

14. The appeal was listed for hearing before me (by CVP) on 11 February 2021. Shortly before that date I was persuaded that it was necessary to convert the hearing to a case management appointment because of a want of clarity as to the scope of Mr Beswick's case.

15. In a note prepared in advance of the case management hearing by Mr Scherbel-Ball on behalf of PHE, three possible constructions of Mr Beswick's information requests were canvassed.

> **a) The Appellant is asking the Tribunal to order PHE to provide the Appellant with an explanation (or alternatively to correct its explanation) as to purported differences between PHE and OPCW in their advice on the risks to public health caused by the Novichok agent used in the Wiltshire incidents. If that is the case, PHE submits that request is (i) outside the scope of FOIA and (ii) outside the scope of the Tribunal's jurisdiction in this Appeal;**
>
> **b) The Appellant is asking PHE to provide him with any information which it holds concerning the toxicological properties of the Novichok agent in question and which informed its advice on the risks to public health. If so, PHE accepts that that is a valid request for information … However, it does not hold this information for the reasons set out in its Response and in the witness statement of Dr Gent …**

> **c) The Appellant is asking PHE to provide him with any information at all which informed PHE's advice in respect of the risks to public health. If so, PHE's position is that (i) objectively judged that was not the scope of the Appellant's request … and (ii) was not the scope of the request as determined by the Decision Notice.**

As to construction c), the note further pointed out that if PHE's primary position was wrong, some relevant information was held but it was exempt under various FOIA exemptions.

16. At the case management hearing on 11 February 2021, which was attended by Mr Beswick and counsel for both Respondents, I listed a preliminary hearing for 29 April 2021 to determine the scope of the case and directed Mr Beswick to deliver no later than 19 February 2021 "clear and precise written confirmation" of the information sought by this appeal. I also made provision for brief written representations in reply from each Respondent and ordered the represented parties to deliver to each of the other parties' skeleton arguments no later than 22 April. In my commentary accompanying the directions, I included this.

> **If there is a dispute about jurisdiction at the preliminary hearing, the question will arise as to whether the appeal should be struck out under the First-tier Tribunal (GRC) Rules 2009, r8. A striking-out order brings an appeal to an end.**

17. On 11 February 2021 (the day of the case management hearing), in purported compliance with the Tribunal's direction, Mr Beswick stated that the request on which he relied was that made on 16 December 2018. He insisted that he was not looking to PHE to create new information and it was only seeking an honest answer to the question he had posed. Counsel called this the 'First Clarification.'

18. On 18 February 2021, Mr Beswick presented a materially different formulation of his case as to the information requested ('the Second Clarification'). This document included the following.

> **3. The Appellant's Request should reasonably be interpreted as:**
> **a) Please could you provide me with recorded information Held by PHE which informed the statements PHE made on and around 11 March 2018 and repeated thereafter that: There is only a low risk to the public from Novichok, having particular regard to the fact that other expert authorities such as OPCW describe Nerve Agents as Lethal in tiny quantities.**
> **And**
> **b) Please could you provide me with the recorded information which PHE Held that informed Dr Cosford's statement to a public meeting in Amesbury on 10 July 2018 having regard to the fact that other expert authorities describe the time for onset of symptoms (latency period) for Nerve Agents dramatically differently.**
>
> **…**
>
> **7. The Appellant does not seek the information Held by PHE that informs the conflicting opinions, he only seeks the recorded Held information that informed PHE's advice:**

"There is only a low risk to the public" (from Novichok).
What information did PHE Hold which supported that advice?
And
"This Stuff" (Novichok) presents its symptoms (through skin contact) between 3 (minimum) and 12 hours. The minimum 3 hours is for contact with a very high quantity."
What information did PHE Hold which supported that advice?

19. The preliminary hearing came before me and was conducted by CVP. Mr Beswick did not attend, having given prior notice that in his view the hearing would be illegal. As before, Mr Kosmin and Mr Scherbel-Ball appeared for the First and Second Respondents respectively. I had before me a large bundle of documents, which included the witness statement of Dr Gent, a bundle of authorities, the skeleton arguments prepared by counsel and sundry other papers.

The law

20. Subject to certain exceptions, a person who makes a request for information to a public authority is entitled to be informed whether the authority holds the information and, if so, to have it communicated to him or her (FOIA, s1)[2]. 'Information' means information which is recorded in any form (s84). A 'request for information' must be in writing and must identify the applicant and "describe the information requested" (s8(1)).

21. The appeal challenges the Commissioner's determination of his complaint under s50(1). It is brought pursuant to s57. The Tribunal's powers in determining the appeal are delineated in s58 as follows:

> **(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 [she] ought to have exercised [her] 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.**

22. The interpretation of a request for information "depends on the objective meaning of the words used, read in their context and in the light of relevant background facts" (*Independent Parliamentary Standards Authority v Information Commissioner & Leapman* [2014] EWCA Civ 388, para 57 *per* Richards LJ).

[2] All section numbers hereafter refer to FOIA.

23. In *Coppel on Information Rights,* 5th edition (2020), para 22-007, the following passage appears.

> **Where a request does not describe the information requested with sufficient particularity, the recipient public authority ought to consider whether it should advise or assist the applicant in relation to the proper particularisation of his request, whether it should inform the applicant that it requires further particulars, or both. Public authorities should take care to look beyond the language or tone of a request for information and should focus on the substance of what is being requested. … The Tribunal takes a fairly liberal, rather than literal, approach to requests.**

First-instance decisions are cited in support of these propositions, but I take the passage as a whole to reflect the trend of the case-law, including authority binding on me. It is in keeping with the evident purpose of the legislation, which is to confer on citizens the important constitutional right of access to information. That right would be undermined if the Tribunal allowed form to trump substance and permitted requests to be defeated on the strength of technical or legalistic objections based on their wording.

24. It is of interest that the Commissioner's Guidance, "*Recognising a request made under the Freedom of Information Act (Section 8)"* (of course not binding on me) includes, at para 75, the following.

> **A request in the form of a question will be valid … provided it still describes distinguishing characteristics of the information, as in the examples below where the information is differentiated by its subject matter (sickness absence policy, overseas aid spending, and measures to tackle vandalism respectively):**
> **'Why has the Council changed its policy on sickness absence?'**
> **'How much money did the Department spend on overseas aid last year?'**
> **All 'What is being done to tackle vandalism in the local park?'**

25. Any question as to whether requested information is 'held' is to be decided on a balance of probabilities (*Bromley v Information Commissioner and Environment Agency* EA/2006/0072).

26. Under the First-tier Tribunal (General Regulatory Chamber) Rules 2009 (as amended, rule 8(2)(a) and (3)(c) the Tribunal has power to strike out the whole or part of proceedings, respectively, for want of jurisdiction or where it considers that there is no prospect of the appellant's case, or any relevant part of it, succeeding. The Tribunal may not make a striking-out order under these powers without first giving the appellant an opportunity to make representations in relation to the proposed striking-out (rule (8)(4)).

27. In countless contexts across numerous civil jurisdictions, the higher courts have stressed that striking-out is a Draconic measure, since it deprives the party affected of the opportunity to litigate his or her claim or defence. Accordingly, the power should be exercised with caution and only in very clear cases.

The rival arguments

28. Intending no disrespect to counsel, I prefer to leave their careful and comprehensive skeleton arguments to speak for themselves. What follows is a potted summary, which is all that is necessary in order to give proper context to my conclusions which follow. I will take PHE's case first since it was presented first to me.

29. Mr Scherbel-Ball submitted as follows.

    (1) The request of 16 December 2018 was a request for an explanation and was not a valid request for information under FOIA.
    (2) Mr Beswick's subsequent attempts to remedy the defects in the request of 16 December 2018 were not effective to do so. Moreover, those efforts included an impermissible attempt retrospectively to change the original request.
    (3) Accordingly, the Tribunal has no jurisdiction to require PHE to supply any information to Mr Beswick.
    (4) On that basis, the appeal should be struck out under the 2009 Rules, rule 8(2)(a).
    (5) Alternatively, if PHE's primary position was wrong, the request should be interpreted as proposed by the Commissioner.[3]
    (6) On that footing, PHE supported the Commissioner's submission that the appeal should be struck out under the 2009 Rules, rule 8(3)(c).

30. Mr Kosmin's contentions were as follows.

    (1) The request of 16 December 2018 read in its proper context and in the light of the Second Clarification can properly be seen as a request for information within the meaning of FOIA.
    (2) The request is "properly to be construed as a request for the recorded information held by PHE (if any) about the toxicological properties of the nerve agent in question supporting the statements made as to the risk to the public and the period in which symptoms would present, and recorded information held by PHE concerning differences between the advice given by PHE and that given by OPCW".[4]
    (3) On the basis of the construction proposed at (2), there is compelling evidence that PHE did not (and does not) hold the relevant information and Mr Beswick has put forward no plausible case to the contrary.
    (4) Accordingly, the appeal has no reasonable prospect of success and should be struck out under the 2009 Rules, rule 8(3)(c).

[3]Following an exchange between counsel, Mr Scherbel-Ball withdrew the only caveat to this submission in his skeleton argument, para 7(f).
[4] Mr Kosmin's skeleton, para 42.

31. Although he neither attended nor responded to the skeleton arguments served ahead of the preliminary hearing, I take Mr Beswick's key points to be these.

(1) He has adequately identified the scope of his request of 16 December 2018, through the Second Clarification if not before.
(2) The request is properly to be seen as a request for information within the scope of FOIA.
(3) PHE has supplied inconsistent and implausible answers about the facts to which the request is directed.
(4) PHE appears to be involved in collusion or conspiracy designed to suppress the important information to which the request as directed.
(5) The purpose for which the preliminary hearing was set up was met well before the hearing date and the hearing was accordingly invalid and potentially illegal.
(6) There is no proper basis for striking out the appeal and such an outcome would be unjust and contrary to law.

Analysis and conclusions

32. I must begin with the question of the proper construction of the request of 16 December 2018. I direct myself in accordance with *Leapman* and the other (non-binding) sources from which I have quoted above, all of which seem to me to speak with one voice.

33. Both counsels pointed out that Mr Beswick has not helped himself in the way in which he has conducted his case. I can only agree. His various attempts to explain or formulate his request have been bedevilled by inconsistency, confusion of thought and opacity of expression. That said, my function is to attempt to do justice to the dispute notwithstanding Mr Beswick's deficiencies, rather than to penalise him for them.

34. Having considered the persuasive arguments of both counsels, I am satisfied that those of Mr Kosmin are to be preferred. I agree with him that it obviously accords with fairness and common sense to treat the Second Clarification as superseding the First Clarification. To state the obvious, the Second was later in time. Moreover, the First was written in haste on the very day of the case management hearing, whereas the second was written after Mr Beswick had had time to collect his thoughts.

35. I do not accept Mr Scherbel-Ball's contention that the Second Clarification amounted to or entailed an impermissible attempt to change the nature of the original request. That submission was premised on an unreasonably narrow reading of the original request. In its form, the request asked a 'why' question (to use Mr Scherbel-Ball's terminology) but it can and, in my judgment, should be interpreted as asking for recorded information (if any) about the science underpinning the statements to which the request referred. Had Mr

Beswick not muddied the waters with his copious communications after 16 December 2018, I would have taken the view that the original request was permissible under FOIA and could stand without further clarification. Regrettably, the litigation has had a somewhat tortured history but, after much avoidable confusion (the which PHE has undoubtedly contributed), I am satisfied that, following the Second Clarification, the interpretation which would have been appropriate to the original request viewed in isolation, can be seen to be correct.

36. My interpretation of the request, which corresponds closely with that of Mr Kosmin, is that it asks for the recorded information (if any) held by PHE relating to (a) the scientific or toxicological properties of the nerve agent in question, (b) PHE's statements prior to 16 December 2018 as to the risk to the public occasioned by the agent and the period in which symptoms would present, and (c) the difference between the advice given by PHE and that given by OPCW on those matters.

37. It follows that the request is within the scope of FOIA and Mr Scherbel-Ball's submission that the appeal is outside the jurisdiction of the Tribunal is unfounded.

38. I turn the question of disposal. Having read the witness statement of Dr Gent with care, I am satisfied that it amounts to cogent evidence explaining why recorded information within the scope of the request was (and is) not held by PHE and why PHE initially, and in error, admitted that it held such information (the error being the commonplace misunderstanding, which seems to have been shared by Mr Beswick until recently, that for the purposes of FOIA, 'information' extends to knowledge carried in a person's head but not reduced to any recorded form).

39. Against this plausible case, Mr Beswick raises a simple denial and the assertion (apparently) that PHE's 'not held' defence is a lie mobilised in pursuance of a conspiracy, involving a battery of state agencies, to suppress relevant material.

40. I agree with Mr Kosmin that, on the face of it, Mr Beswick's appeal is fanciful. In my judgment, the prospects of the Tribunal at a final hearing rejecting Dr Gent's evidence and finding that relevant information was held are vanishingly small. It is plain and obvious to me that this appeal has no reasonable prospect of success.

41. Mr Beswick has been on notice since 11 February 2021 that (on one ground or another) the Respondents envisaged seeking an order for the appeal to be struck out at this preliminary hearing and that that was a possible outcome. And since a week before the hearing he has had the skeleton arguments containing the grounds on which it was intended that such an order should be sought. He has not engaged with those grounds, let alone raised an arguable

challenge to them. I am satisfied that the requirements of rule 8(4) of the 2009 Rules have been met.

42. In all the circumstances, I am in no doubt that it is just and in accordance with the overriding objective[5] to strike out this appeal.

(Signed) Anthony Snelson
Judge of the First-tier Tribunal

30 April 2021

[5] See the 2009 Rules, rule 2.