

Freedom of Information Act 2000

Heard at Procession House
On 10 April 2006
Prepared on April 2006

Decision Promulgated
27th April 2006

Before

JOHN ANGEL
Chairman

and

Hugh Fitzhugh and Suzanne Cosgrave
Lay Members

Between

MR T PRIOR

Appellant

and

THE INFORMATION COMMISSIONER

Respondent

Decision

The Tribunal finds that the Information Commissioner's Decision Notice was in accordance with the law so far as the application of the exemption is concerned and to that extent dismisses the appeal.

As far as Commissioner's finding in relation to the refusal notice is concerned we find that the notice was served out of time and to that extent we uphold the appeal.

Reasons for Decision

Background

1. Mr Prior has been trying since early 2002, in very difficult circumstances, to ascertain the background and details of why and under what legal basis his mother Mrs M Prior was removed from hospital to a residential home, where she subsequently died. Mr Prior was dissatisfied with the information he received prior to 2005 and made requests under the Freedom of Information Act 2000 (the Act) when it came into force on 1st January 2005. The Tribunal was given much background correspondence between Mr Prior and Hertfordshire CC (the Council), as well as the benefit of several internal and external inquiries initiated by or on behalf of Mr Prior.
2. Mr Prior's requests for information had by early 2005 been distilled down to two queries, paraphrased as:
 - 2.1 on what legal basis did the Council act when Mrs Prior was detained in hospital and subsequently removed to a care home; and
 - 2.2 evidence that the Council had followed proper legal procedures.
3. These requests made by letter of 1st January, 2005 (incorrectly stated as being dictated on 1 January 2004) and clarified in subsequent letters in January and February 2005 were treated by the Council as an FOI request and they responded on 26 January 2005 with a letter that was subsequently accepted by the Information Commissioner (the Commissioner) as a Refusal Notice. This was effectively repeated by a final Refusal Notice dated 10 June, 2005. In summary, these refusals were based on applying the exemption under section 21 of the Act – information accessible to Mr Prior by other means. In the Council's view they had already supplied all of the information requested.
4. In a Decision Notice dated 25th August, 2005 (the Decision Notice), the Commissioner stated that he had been satisfied with "five specific documents including correspondence from the Council to the complainant and reports into formal complaints submitted by the complainant." The Commissioner was satisfied that the information requested "had indeed been supplied to the complainant previously and on several occasions." Specific references and dates of all of the relevant correspondence are provided in the Decision Notice. The Commissioner was also

persuaded that the second query of Mr Prior (evidence of proper procedures) was supplied by an Independent Investigator's Report dated 18th December, 2002.

5. In summary, the Commissioner upheld in the Decision Notice the view of the Council that the information requested in paragraphs 2.1 and 2.2 above had been supplied to Mr Prior and was thus exempt under section 21 of the Act.

Grounds of appeal

6. Mr Prior was not satisfied with the Decision Notice, and gave Notice of Appeal to this Tribunal by letter dated 13th September, 2005. The grounds for appeal, as understood by the Tribunal, amount to these:

- a. the "peculiar decision" of the Commissioner "without the provision of evidence" [by the Commissioner];
- b. unreasonable time taken over the matter;
- c. failure of the [Commissioner] to update [Mr Prior] as to progress of the complaint;
- d. failure to furnish Mr Prior with copies of documentation by the Council "as promised by the [Commissioner]".

7. Grounds b., c. and d. in the Tribunal's view relate to the way the Commissioner handled the complaint and therefore are not matters which we have considered in this appeal, except to the extent that ground b. relates to the time it took to issue the refusal notice, which is dealt with below. In any case we are informed that the Commissioner is undertaking an internal review in relation to these complaints.

8. Ground a. namely the "peculiar decision", was taken by the Tribunal to be the ground upon which this appeal is based and although not providing any details indicates Mr Prior's disagreement with the Decision Notice and an expectation that further evidence would be supplied by the Commissioner. Is this sufficient to bring an appeal under section 57 of the Act? Under rule 4 of the Information Tribunal (Enforcement Appeals) Rules 2005 an appellant is required to provide "grounds of appeal". The Tribunal is of the view that we must look at all the documents submitted with the appeal notice and that where these show substantive grounds for the appeal then these should be taken as part of the notice. This is particularly the case where

the appellant is a litigant in person, as in this appeal, where the Tribunal cannot expect the appellant to set out the grounds of appeal in the way a lawyer might do on behalf of a client.

9. Mr Prior indicated during the preparation for this hearing that it would not be possible for him to attend an oral hearing and therefore it was agreed by both parties that the hearing should be by way of a 'paper' hearing, whereby the Tribunal would consider all communications, other documents and witness statements put before us, without the parties being present.

The Commissioner's evidence

10. Mr Philip Boyd, Assistant Commissioner, (Mr Boyd) gave evidence for the Commissioner by way of witness statement of 21st March, 2006.
11. Mr Boyd in his evidence stated that in response to the two questions put to the Council in the Mr Prior's original request dictated on 1st January, 2005, the Council stated that the information requested was held but had already been provided to Mr Prior in previous correspondence and reports produced in response to complaints previously submitted by Mr Prior. The Council stated that since the information had already been provided to Mr Prior, it was covered by the absolute exemption set out in section 21 of the Act relating to information accessible by other means.
12. Mr Boyd continues that in letters to the Commissioner dated 15th June and 11th July 2005 Mr Prior did not consider that the answers to his questions were in fact contained in the information previously sent to him. On request the Council then provided the Commissioner with copies of the correspondence and reports previously supplied to Mr Prior. Inspection of these documents revealed to the Commissioner that the information requested had indeed been supplied to Mr Prior previously and on several occasions.
13. On 25th August 2005 the Commissioner's office served a Decision Notice on Mr Prior which "upholds the view that the public authority in this case, that the information requested was available to the complainant by other means and was thus exempt under section 21 of the Act". Amongst other things the Commissioner was satisfied, for example, that a letter to Mr Prior dated 15th May 2002 from the Area Manager E&PD Services-Dacorum, which describes the obligations under section 47 of the National Health Service and the Community Care Act 1990

and the effect of section 21 of the National Assistance Act 1948 (the 1948 Act), and which explains the interaction of the 1948 Act with the Human Rights Act 1998 constituted a proper reply to Mr Prior's first question, which was phrased as:

“On what clear legal basis did HCC act when my mother was detained at Watford General Hospital, removed in secret and incarcerated in a care home.”

The Decision Notice also found that the Independent Investigator's Report into Mr Prior's complaint about the treatment of his mother, dated 18th December, 2002 (the Investigator's Report) dealt extensively with this question. In particular Part B (Legislation, Departmental Policy and Practice as relevant to the Complaint") of the Stage 2 of, the Investigator's Report dealt with the second part of the request (paragraph 2.1 above).

14. The Investigator's Report also gave a full account of the treatment of Mr Prior's mother including, in particular, information as to the conduct of members of the Council's staff. Sections C ("Précis of Background Information relevant to the Complaints"), Section D ("The Investigation"), Section E ("Chronology of Main Events from Records") and the Section headed, "Findings" document covered in considerable detail the actions of members of the Council's staff and the extent to which proper procedures were followed.
15. In the circumstances the Commissioner upheld the view of the Council that as the Council had already provided the requested information to Mr Prior it was therefore available by other means and was thus exempt under section 21 of the Act.
16. In this context it is relevant to note that the Act gives a right to have information communicated to the requester (section 1(1)(b) of the Act) rather than the right to have copies of particular documents as such. Although it may have been possible for the Council to have provided the same information in a different form, for example copies of other documents containing the same information, the Commissioner had no reason to suppose that any information had been withheld when it was originally provided prior to the request and the Commissioner was satisfied that the information contained in the Independent Investigator's report dated 18th December, 2002 in particular met the second of the complainant's requests under section 1 of the Act, namely:

“Please furnish documentary evidence that all proper procedures were followed by HCC ACS.”

Other evidence

17. The Tribunal has before it correspondence with the Local Government Ombudsman, in particular letters to Mr Prior dated 2nd December 2003 and 4th February 2004. Although the Ombudsman considered that most of the matters raised with him were outside his jurisdiction in coming to that conclusion he considered in some detail matters relating to the requests the subject of this appeal, which support the Commissioner’s view that Mr Prior had received the information.
18. Despite this, Mr Prior has maintained throughout, in effect, that he does not agree that the information he has received answers his request properly. This is until Mr Prior sent a letter to the Tribunal dated 12th December, 2005 where he states that “I have now received the information that I originally sought from [the Council]. It is correct to say that I have the information now, but not from [the Council] via the [Commissioner]. I eventually obtained the information from the Health Service Ombudsman, Ann Abrahams.” Until this date the Tribunal was unaware of the involvement of the Health Ombudsman.
19. The Tribunal is unaware of the detailed content of the information received by Mr Prior from the Health Ombudsman. It is possible that it relates to the different requests for information made by Mr Prior to the Council which were not considered as part of the Decision Notice. Alternatively it is possible that the information he received from the office of the Health Service Ombudsman is the same as the requested information, the subject of this Appeal, but in a different form. Although Mr Prior had the opportunity to put this evidence before the Tribunal he did not do so and therefore we have been unable to take it into account.

The Commissioner’s decision on the application of the exemption

20. Mr Prior made a valid request for information under section 1(1) of the Act. The Commissioner upheld the Refusal Notice issued by the Council, which refused to provide the information on the basis that Mr Prior had already been supplied with the information and therefore could claim

the section 21(1) exemption that “information which is reasonably accessible to the applicant otherwise that under section 1 is exempt information”.

21. Mr Prior did not agree that the information he had been supplied with answered his request properly, which no doubt accounted for his repeated requests for the information and references to various Ombudsman, complaint to the Commissioner and appeal to this Tribunal. Section 1 of the Act does not give a right to the requester to get the information he or she thinks he should receive. It gives a right “to be informed in writing by the public authority whether it holds information of the description specified in the request”, (section 1(1)(a)). The Commissioner found that the Council provided the information it held to Mr Prior which included a very detailed Investigator’s Report, albeit it was exempt under section 21.
22. In our view the Commissioner was correct in law in coming to this finding. The fact a complainant does not accept the substance of the information provided is not a matter for consideration under the Act. The only obligation under the Act is for the public authority to provide the information it holds of the description specified in the request. The Commissioner was satisfied, in effect, that the Council did provide such information prior to the date of the request, thereby finding the exemption applied.

The refusal notice

23. Mr Prior's request involved a personal and very sensitive matter concerning the health and treatment of a close family member and in the documents before the Tribunal he makes it clear how concerned he was about this matter and his wish to have his request dealt with promptly and efficiently. The Tribunal notes with concern the time it took for the Council to issue a final Refusal Notice on 10th June 2005 (the June Letter) over 6 months after Mr Prior’s request. An initial response was made by the Council in a letter to Mr Prior dated 26th January 2005 (the January Letter). It described Mr Prior’s various requests as a ‘complex request’ and that a number of exemptions might apply, without specifying which, and claiming a reasonable extension of time to comply in accordance with section 10(3) of the Act. In the Decision Notice the Commissioner found that:
- a. the January Letter “constitutes a refusal notice, albeit one that fails to provide an estimate of the date by which the authority expected to have made a decision in respect of the application of the public interest”; and

- b. the June Letter “constitutes a proper refusal notice as required by s.17 of the Act, albeit one issued considerably later than the required timescale.”

24. The Tribunal would expect the Commissioner to ensure that extensions of time are only permitted in accordance with the Act. Section 10(3)(b) of the Act allows public authorities to have a reasonable extension of the 20 day time limit to comply with section 1(1)(a) or (b) to the extent that sections 2(1)(b) and 2(2)(b) are satisfied. These latter sections provide for the situation where a qualified exemption might apply and the public authority needs additional time to determine whether the public interest in maintaining the exemption outweighs the public interest in disclosing the information. However in this appeal the exemption being applied was not a qualified exemption, but an absolute exemption under section 21, which did not require the application of the public interest test. Therefore section 10(3) does not apply and the Council should have complied with Mr Prior’s request within the section 10(1) time limit of 20 days.

25. It is not clear from the Decision Notice that the Commissioner appreciated this interpretation of the Act and that his finding in paragraph 23.b. above related to the application of section 10(3) as if it applied in the same way to both absolute and qualified exemptions. Despite this the Tribunal appreciates that both the January letter and the June letter related to a number of requests of which only two are the subject of this appeal. Qualified exemptions were claimed for some of those other requests and therefore a reasonable extension of time under section 10(3) would have been appropriate. The complication here is that the Council treated them together rather than separately as it should have done in order to deal with the different time compliance requirements.

26. The Commissioner therefore erred in law in finding that the January Letter and the June Letter were Refusal Notices in accordance with section 10 of the Act so far as the requests in paragraph 2 above were concerned. This is particularly unfortunate due to the circumstances of Mr Prior’s request when compliance with the time limits in section 10 would, no doubt, have

been helpful. We have decided not to substitute this part of the notice with a new decision notice because a proper refusal notice, albeit out of time, was subsequently served on Mr Prior and because of the finding by the Information Commissioner, which the Tribunal accepts, that Mr Prior had received the information, the subject of this appeal, sometime before the actual request was made.

Signed

Date

26th April 2006

John Angel
Chairman

