



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

Case No. EA/2010/0188

ON APPEAL FROM:

The Information Commissioner's
Decision Notice No: FS50265456
Dated : 26 July 2010

Appellant: Lloyd Purser
First Respondent: The Information Commissioner
Second Respondent: The Local Government Ombudsman

Heard at: Field House, London

Date of Consideration: 6 May 2011

Date of Decision: 24 May 2011

Before

**Christopher Hughes
Judge**

And

**Narendra Makanji and Steven Shaw
Members**

Representation:-

The Appellant Represented himself,
The First Respondent was represented by Mark Thorogood,
The Second Respondent by Tony Child of Beachcroft LLP.
The hearing of this matter was conducted in the absence of the parties.

**Subject matter: Section 44 Freedom of Information Act – prohibitions on disclosure,
Section 32 Local Government Act 1974**

DECISION OF THE FIRST-TIER TRIBUNAL

The Tribunal rejects the appeal and upholds the decision notice dated 26 July 2010.

Signed

C Hughes OBE
Judge

Dated this 24th Day of May 2011

REASONS FOR DECISION

Introduction

1. In about 2006 the Appellant purchased a leasehold property in the London Borough of Hillingdon. The property formed part of an estate owned by the Borough and managed on its behalf by Hillingdon Homes. In May 2007 the Appellant was consulted by Hillingdon Homes with respect to the re-roofing of the property. The Appellant was concerned with respect to the quality of Hillingdon Homes' management of its building works and sought information from them. The Appellant was dissatisfied with the response from Hillingdon Homes and complained to the Local Government Ombudsman.
2. By a letter dated 12 March 2008 an Assistant Ombudsman wrote to the Appellant setting out the Ombudsman's position. He had identified four elements of complaint which had been raised by the Appellant:-
 - The absence of consultation on the principle of having works done,
 - Procedure
 - The calculation of charges
 - The adequacy of the tender specification.
3. The Assistant Ombudsman expressed views with respect to these four points:-
 - Citing and enclosing with his letter relevant regulations he stated "It is evident the Council met the consultation requirements"
 - "With regard to your complaint about procedure, it seems to me that you have been provided with the relevant details"
 - "Finally it is clear to me that I cannot consider your latter two concerns because the cost and standard of the works and liability are issues which the Leasehold Valuation Tribunal can consider and are at the heart of its work. While I recognise you do not consider it reasonable to pay the fee the Tribunal requires, this is a matter upon which Parliament has decided and I see no exceptional reasons which make it unreasonable to expect you to pursue this remedy. I therefore will not conduct an investigation into these matters."

The Request for Information

4. The Appellant was dissatisfied with this response and wrote to the Assistant Ombudsman on 29 March 2008 raising various issues of criticism of how the Ombudsman had conducted the matter and stating:-

"Finally, I am concerned that my case is not being looked into objectively. I therefore request that I am copied any correspondence, note or files regarding this case or myself, either internally within the confines of the Ombudsman or externally between yourselves and HH; this includes any notification if any have been deleted."
5. A reply was sent on 1 April dealing with the request for correspondence etc. The Assistant Ombudsman stated:-

“The information you have requested is the contents of a complaint file. Although the public do generally have rights to see information held by public bodies under the Freedom of Information Act, this does not override any restriction on the release of information covered by earlier law. Such a restriction applies to the Ombudsman’s complaint files under the Local government Act 1974 the Ombudsman is not permitted to disclose any information obtained in the course of, or for the purposes of, the investigation of a complaint, unless he or she considers it is necessary for the purposes of the investigation (or for other very limited reasons mostly related to legal proceedings). As I have closed the investigation of your complaint, I cannot comply with your request.”

6. The letter also indicated that it would be treated as a complaint and dealt with through the Ombudsman’s complaints procedure. On 13 May 2008 the Ombudsman wrote to the Appellant indicating there would be no further review of how the Ombudsman had dealt with the case and dealing with the substantive questions around disclosure under the Freedom of Information Act and identifying “Internal notes, including Annette Davison’s note of the telephone conversation with you” as being the material falling within the exemption claimed by the Assistant Ombudsman.

The Information Commissioner

7. On 26 May 2008 the Appellant complained to the Information Commissioner. He raised two issues of complaint:-
 - “The Ombudsman has refused to assess the administration documents of Hillingdon Homes in a complaint that centres upon maladministration”
 - “The refusal to forward internal notes, ad notes between the Ombudsman and Hillingdon Homes”

8. In subsequent correspondence there were clarifications by the Ombudsman of the precise extent and nature of the material that the Ombudsman stated was held and disclosure of some parts of it. In a letter to the Information Commissioner dated 16 November 2009 the Appellant stated his position:-

“As a layman I see this request in simple terms. Notwithstanding the [Local] Government Ombudsman response and Section 44(1) of the Act. I believe there remains a strong case for the LGO to disclose the information they currently refuse to offer. I believe that the complaint I forwarded to the LGO regarding Hillingdon Homes was not assessed objectively. I base this opinion upon telephone conversations and letters received from the LGO. It is my intent to prove that my complaint was assessed subjectively, the only way I can do so is to have sight of all the information.”

9. In a letter dated 2nd February 2010 the Information Commissioner wrote:-

“I would note my awareness of your concern about the conduct of the LGO. However the extent of my investigative remit is limited to whether the LGO can be said to have complied with the Freedom of Information Act 2000 (“The Act”) in its handling of your request.”

10. Following subsequent correspondence the Information Commissioner issued a Decision Notice on 26 July 2010. This concluded that the Ombudsman had correctly applied S44(1) of the Freedom of Information Act to the withheld information.

The Appeal

11. The Appellant appealed against the decision of the Information Commissioner. He advanced three arguments:-

- The Ombudsman did not conduct an investigation and therefore the information was not subject to the information exemption
- The Ombudsman had not assessed the complaint objectively and unless he were permitted to survey the facts “how can I satisfy myself that their assessment was objective?”
- The Ombudsman had disclosed information to Hillingdon Homes, therefore there was a precedent for giving the information to him and the Ombudsman was in breach of his own statute.

12. In his evidence the Appellant emphasised the complexity of the case and gave considerable background information concerning the property issue, his concern about the objectivity of the Ombudsman’s inquiry and his argument that the law was “invalid” since in his view the Ombudsman was using the law to protect poor judgement by its staff. He claimed that the Ombudsman had not forwarded all the disputed information to the Information Commissioner and sought to rely in support of this claim on the unlikelihood of there not being more information and his interpretation of a refusal by the Ombudsman to set out details of information in a specific tabular form.

13. The evidence of Ms Davison on behalf of the Ombudsman indicates that the disputed information consists of:-

“handwritten notes and jottings, mainly by me. These notes were prepared in the course of, and for the purpose of, deciding whether or not the Appellant’s complaint should be investigated and comprise information gathered by me for that purpose.”

She went on to explain that no information was removed or destroyed from the file, that there was no communication (save what was disclosed) with Hillingdon Homes. She confirmed that the decision not to investigate the complaint was taken in the light of the complaint and its supporting documents and correspondence and the statutory provisions.

14. The Information Commissioner concluded that these notes:-

“consist of information which the LGO either created or was provided with in the course of its investigation into allegations of administrative failure”.

The Tribunal having seen the material, concurs with that view.

Consideration

15. In coming to its decision the tribunal reminded itself that its role is to determine whether the Decision of the Information Commissioner is in accordance with the law and in considering this it may review any finding of fact upon which the decision is based. It does not concern itself with the reasons why the information is sought, it is “purpose blind” the question is whether, on the facts as established, the law requires the information to be disclosed or not. While the Appellant may consider that the

information would be very useful to him, that use does not go to the question of whether or not the exemption claimed applies to these circumstances.

16. The issues raised by the Appellant were three in number, however during the course of the appeal a fourth was raised and no injustice to any party is caused by considering it. These issues are:-

- Was there an investigation sufficient to attract the protection of the exemption
- The allegation of lack of objectivity and the Appellant's desire to satisfy himself by seeing everything that the assessment was objective
- Whether the disclosure of some information to another took the information in question out of the protection of the exemption
- Whether there was more information held than had been disclosed.

17. Turning first to the applicability of the statutory exemption, S44 of FOIA provides:-

“(1) Information is exempt information if its disclosure otherwise than under this Act by the public authority holding it –

(a) Is prohibited by or under any statute...”

18. The Local Government Ombudsman system was brought into existence by the Local Government Act 1974. This provides:-

“(32)(2) Information obtained by a local Commissioner, or any officer of either Commission, in the course of or for the purposes of an investigation under this part of this Act shall not be disclosed except –

(a) For the purposes of the investigation and of any report to be made under section 30 or 31 above; or

(b) For the purposes of any proceedings for an offence under ...

(c) For the purposes of any proceedings under S29(9) ...”

19. The question which the Tribunal has to decide therefore is whether the facts of the case fall within the statutory bar to disclosure. The Appellant argued that since there was no investigation and no information obtained from other parties the exemption did not apply.

20. The Tribunal was not convinced by this argument. A necessary part of any investigation by a statutory body is determining whether a complaint falls within its powers and if so whether there are reasons, for example that the individual should pursue another route for redress, why the statutory body should not take up the issue. Even though a formal decision not to investigate was taken, there still needed to be, and was, an investigation to establish what steps were appropriate. In the course of this investigation there was the generation of information and analysis derived from the material supplied and the legal framework of the Ombudsman. The Tribunal was satisfied that these actions and processes were “information obtained ...for the purposes of an investigation”. And accordingly the appeal fails on this ground.

21. The ground of appeal of lack of objectivity must also fail. A challenge to the objectivity of the Ombudsman's processes with respect to the carrying out of an investigation does not lie to this Tribunal but would need to proceed by way of judicial review. From the information before the Tribunal it does not appear likely that such a

challenge, if brought within time, would succeed; however that is not a matter with which the Tribunal need concern itself.

22. The argument that the Ombudsman was in breach of the prohibition against disclosure contained in S33(2) of the Local Government Act 1974 also lacks merit. The Ombudsman disclosed the complaint to Hillingdon Borough Council as a proper step in his investigation. He had a statutory right so to do. There was no breach. Even if there were a breach, that would not entitle him to commit another such breach.
23. The appellant has expressed the view in his evidence that there must be more information. This however is an expression of opinion and the inference he sought to draw from the refusal to provide tabulated information is untenable, he was not entitled to such tabulation in any event. The Tribunal accepted the truthfulness of the evidence of Ms Davison, who had direct knowledge of the handling of the complaint by the Ombudsman, that the disputed information was as she said and there was no further information beyond that shown to the Information Commissioner and Tribunal.
24. For these reasons the Tribunal upheld the Information Commissioner's Decision Notice and dismissed the appeal.

C Hughes OBE
Judge

24 May 2011