



IN THE FIRST-TIER TRIBUNAL
GENERAL REGULATORY CHAMBER
INFORMATION RIGHTS

Case No. EA/2011/0283

ON APPEAL FROM:

**The Information Commissioner's
Decision Notice No: FS50389485
Dated: 15 November 2011**

Appellant: COLIN PARKER

Respondent: INFORMATION COMMISSIONER

**Second Respondent: PARLIAMENTARY & HEALTH SERVICE
OMBUDSMAN**

**On the papers at Field House
22 March 2012**

Date of decision: 16 April 2012

Before

**ROBIN CALLENDER SMITH
Judge**

and

**ROGER CREEDON and RICHARD FOX
Tribunal Members**

Representations:

For the Appellant: Mr Colin Parker

For the Respondent: Mr Richard Bailey, Solicitor for the Information
Commissioner

For the Second Respondent: Mr Damien Welfare, Counsel instructed by PHSO

Subject matter:

FOIA 2000: Whether information held s.1

Cases:

Bromley v Information Commissioner (EA/2006/0072), Parker v Information Commissioner and National Patient Safety Agency (NPSA) (EA/2011/0233) and Parker v Information Commissioner & NSPA (EA/2011/0066).

SUBSTITUTED DECISION NOTICE

Dated 16 April 2012
Public authority: Parliamentary and Health Service
Ombudsman

Name of Complainant: Mr Colin Parker

The Substituted Decision

For the reasons set out in the Tribunal's determination, the Tribunal dismisses the appeal.

At Paragraphs 18 and 19 of the original Decision Notice dated 15 November 2011 the Information Commissioner found a 64-day delay by the PHSO in providing further information to the Appellant. The Tribunal has found that this further information was mistakenly provided and was outside the scope of the original information request. It follows that there was no failure to comply with s.10 (1) FOIA and that the Appellant was provided with the information relevant to his request within 20 working days.

Action Required None

16 April 2012

Robin Callender Smith

Judge

DECISION OF THE FIRST-TIER TRIBUNAL

The Tribunal upholds the decision notice dated 15 November 2011 and dismisses the appeal.

REASONS FOR DECISION

Introduction

1. The Appellant requested information from the Parliamentary and Health Service Ombudsman (PHSO) about what legal arguments and principles were used by the staff when reviewing cases and what materials the PHSO used to train those staff to make decisions on cases.
2. The context of that request was that the Appellant was pursuing a possible complaint against the PHSO concerning the National Patient Safety Agency and the Yorkshire and the Humber Strategic Health Authority.
3. His specific request originated from a letter dated 16 February 2011 when he asked for

The legal arguments and principles used by the Review Team in deciding whether a customer service team decision is flawed or unreasonable.

The current training documents referring to legal arguments and legal principles used in preparing review team members to appraise or judge earlier decisions made by staff in the PHSO service.

4. On 21 February 2011 the PHSO told him that complaints in relation to its own work were handled in line with the "Ombudsman's Principles of Good Complaint Handling" and provided the Appellant with a copy of the document. He was also sent extracts from the PHSO's internal "Casework Policy and Guidance".

5. The Appellant complained to the IC on 28 April 2011 and the IC concluded that, on the balance of probabilities, the PHSO did not hold any information beyond that which it had provided to the Appellant.
6. The Decision Notice recorded the fact [at Paragraphs 11 – 14] that the Appellant argued that the information given to him by the PHSO was not what he had requested. The Appellant had asserted that there had been a telephone conversation with a member of the PHSO's staff which led him to believe that the organisation held more information.
7. The IC concluded – after further enquiries to the head of the PHSO's Review Team – that no further information (other than that which had been provided to the Appellant) was held in relation to the request. The IC inspected the information provided to the Appellant by the PHSO and concluded that there was no further evidence within that information to suggest that the organisation held further information within the scope of the Appellant's request.

The appeal to the Tribunal

8. The Appellant argued – in Paragraph 10 of his grounds of appeal – that it was not sufficient for the IC to reach a conclusion about whether the requested information was held on the balance of probabilities. He felt that the IC did not test adequately the PHSO's explanation about why the information was not held. He argued that

in law, the Commissioner is required to consider the questions, e.g. is sufficient evidence available to demonstrate an adequate scope, quality and rigour of the searches and whether there is evidence as to a motive to withhold the information actually in the authority's possession.
9. The Appellant also complained – in Paragraph 7 of his grounds of appeal – that the document provided by the PHSO entitled

"Ombudsman's Principles of Good Administration" did not fall within the scope of his request.

10. In relation to the issue of a telephone conversation with the head of the Review Team at the PHSO – which led him to suspect that the organisation held more information within the scope of his request – the Appellant stated that the head of the review team informed him: "You can't have that".

11. The Appellant also felt that the length of time taken by the PHSO to deal with his request suggested that there was

a strong PHSO disinclination to even consider the FOIA in this case. It may well be that the PHSO do not wish to divulge the requested information to prevent it being made available to the public.... The delay may be understood as an indicator of a motive to withhold the requested information, the provision of which may have been perceived by the PHSO as having inconvenient consequences for them.

The questions for the Tribunal

12. The main issue for the Tribunal in this appeal is whether the IC was correct to conclude, on the balance of probabilities, that the requested information was not held.

13. There are two subsidiary issues of fact that have to be determined: whether the Appellant's recollection of the telephone conversation with the PHSO proceeded as he recalls or whether the matter was dealt with in the terms averred within the PHSO's two witness statements provided to the Tribunal in this appeal; and whether there was a mistake by Mr Steve Brown, of the PHSO, in a letter he wrote to the Appellant on 20 May 2011.

Conclusion and remedy

14. It is clear from the witness statement of Susannah Beazley, the PHSO's Head of Review Team which dealt with internal complaints about the organisation's procedure, that she considered the information request to be a request for the information used by the Review Team and dealt with it accordingly.
15. She responded to the Appellant's request on 21 February 2011 by giving him a copy of the Ombudsman's "Principles of Good Complaint Handling" together with extracts of the organisations internal Casework Policy and Guidance. She says she did this because she did not consider that any other documents existed that fell within the request. She makes it clear that the Review Team were not legally qualified and received no legal training. They considered decisions in the light of the documentation provided to the Appellant.
16. She points out that if the Review Team were asked to consider a decision based on legal arguments and principles – for instance a decision not to accept a complaint on the basis that it is out of the PHSO's jurisdiction – the reviewer would obtain legal advice specific to that particular case.
17. She states that she telephoned the Appellant on 23 February 2011. She did not recall the specifics of the telephone conversation but there was a file note that stated that the Appellant asked for a copy of the Health Commissioners' Act 1993 and that that was sent to him the following day.
18. As to whether she told the Appellant, in response to requests for further documentation, "You can't have that" during that conversation she was certain that if she did say that (which she specifically could not remember saying) it would have been in the context of the fact that the PHSO had no further documents to disclose. She states that she could only assume that the Appellant misinterpreted her meaning if he thought there were other documents that she was refusing to provide.

19. She notes that the PHSO had provided to the Appellant a number of Legal Briefing Notes and PowerPoint presentations from the organisation's intranet. She states that, although the Review Team had access to those documents, "they are not used by the Review Team for the purpose of carrying out their reviews". She emphasises that she did not consider those documents were confidential, simply that they were not used by the Review Team for the purposes of carrying out their reviews.

20. The Tribunal also notes what is said by her colleague Jennifer Elkeles – Head of the Freedom of Information and Data Protection Team at the PHSO – at Paragraph 14 of her witness statement in relation to the intranet material. She states:

These materials are available to all staff by virtue of the fact that they can be found on the PHSO's intranet. Although they can be accessed by the Review Team, in the same way that they can be accessed by any other member of PHSO's staff, I understand that they are not routinely used by the Review Team when deciding whether earlier decisions of the PHSO are flawed or unreasonable as Ms Beazley has confirmed in her statement.

21. The Tribunal concludes that Ms Beazley's account is straightforward, cogent and credible. It also concludes that the phrase "not routinely" used by Ms Elkeles in the quotation above does not mean that, on occasions, the material was used but rather that it was not used in the terms offered by Ms Beazley in her witness statement. She had after all emphasised that her Review Team were not legally qualified and received no legal training. If the team had been asked to consider a decision based on legal arguments and principles then specific legal advice would then have been obtained tailored to the requirements of the case in question.

22. It follows that the Tribunal prefers and accepts Ms Beazley's account of her recollection of the telephone conversation with the Appellant over the account asserted by the Appellant.

23. Following an internal review by Mr Steve Brown, Head of the Deputy Chief Executive's Office and Governance, he wrote to the Appellant on

20 May 2011 stating that he considered that all information in relation to the request had been provided. He referred to the letter sent to the Appellant on 21 February 2011 and stated:

[Ms Beazley] explained that complaints about us are reviewed taking into consideration the Ombudsman's Principles of Good Administration – I have enclosed a copy of this as it is unclear to me if you were provided with a copy originally.

24. The Tribunal accepts the PHSO's submission, in relation to that portion of the letter (above), that Mr Brown misread Ms Beazley's letter of 21 February 2011. That caused the "Ombudsman's Principle of Good Administration" to be enclosed with Mr Brown's letter to the Appellant by mistake.

25. The Tribunal concludes *that* document fell outside the terms of the Appellant's request although it was easily available on the PHSO's website.

26. The IC found that there was a breach of s.10 FOIA because of the PHSO's delay in providing that document. As the Tribunal finds that it fell outside the information requested, no breach of s.10 occurred and a Substituted Decision Notice on this point has been issued.

27. The Tribunal is satisfied to the required standard, the balance of probabilities, that there is no evidence that the PHSO was disinclined to meet its duties under FOIA. It has demonstrated its approach to transparency by offering to disclose material to the Appellant beyond the terms of his request. The Tribunal is also satisfied that the PHSO does not hold any more information within the terms of the Appellant's request, that there is no evidence that this could be the case and that the IC's decision on this point was correct, following the quality and rigour of the additional examination of whether there was further information conducted by the IC.

28. The Tribunal's decision is unanimous.

29. There is no order as to costs

Robin Callender Smith

Judge

16 April 2012