

FOIA s.38 – Qualified exemption: health and safety

FOIA s.31(1)(a) – Qualified exemption: law enforcement

FOIA s.16 – Duty to advise and assist

FOIA s.1 – Duty to confirm or deny

Mr M. P. King v IC & Department for Work and Pensions

EA/2008/0085

20th March 2008

Cases:

Bowbrick v IC & Nottingham City Council [2006] UKIT EA_2005_0006

Berend v IC and London Borough of Richmond on Thames [2007] UKIT EA_2006_0049

Adlam v IC & HM Treasury [2007] UKIT EA_2007_0059

Facts

The appellant was concerned that a policy was adopted by Jobcentre Plus whereby people wishing to make a benefit application were expected to do so by telephone to a call centre rather than by handing in a written application. The appellant felt that personal information given over the telephone was open to misuse and therefore wrote to the Department for Work and Pensions (DWP) requesting the risk assessment carried out on the telephone system. The request was refused on the basis that it fell under the s.38 FOIA ‘safety and security’ exemption. DWP accordingly considered that the public interest in maintaining the exemption outweighed the public interest in disclosure as providing details of any risk assessment could compromise the security of the system by identifying potential weakness and any controls put in place to address them if any existed. The appellant pointed out that s.38 related to ‘health and safety’ not ‘safety and security’ and therefore asked DWP to reconsider their decision. DWP responded by stating that the health and safety exemption stood.

Prior to the IC taking any active steps, DWP wrote to the appellant to inform him that Jobcentre Plus had reconsidered its decision, extracts of the risk assessment were attached but some information still being withheld under s.38 ‘safety and security’. During correspondence with the IC’s office, DWP considered that the withheld material was not within the scope of the appellant’s request, but in the alternative, they were relying upon s.31(1)(a), s.36, and s.24. As such, DWP wrote to the appellant enclosing much of the risk assessment and the policies and procedures relating to the protection of personal information and indicating that the information given originally was not strictly correct as the reference to a telephony risk assessment was unfortunate because that document did not relate to the thrust of the his concerns. They stated that they were providing part of the risk assessment as a matter of good customer service, but that the rest was being withheld as it was

peripheral to the original request. They stated that if any further request for the information was made, they would rely on the exemptions under ss.31(1)(a), 36 and 24 FOIA.

The appellant claimed that his interests were wider than that of the telephony system but that he had nothing more to go on than those references in making the request. As such, he claimed that DWP had breached their s.16 duty to advise and assist. He also felt that the original request had not been dealt with as the disclosure related to third parties, verification of identity and bogus callers rather than the threat of the appropriation for illegal purposes of personal information provided over the public telephone to your contact centre for making benefit claims.

The IC held that the information withheld from the appellant was outside of his request as it consisted of strategic policy information related to the set up of the telephony, security or job structure within Job Centre Plus and was not therefore “risk assessments”. Therefore DWP did not breach s.1 FOIA and were not required to disclose the information.

Findings

Was the telephone risk assessment as contained within the larger (ACCORD) document covered by the appellant’s request for information?

The Tribunal rejected the submission that no documents exist which relate to the request. They also rejected the notion that the IC’s decision notice was wrong on a question of fact due to the fact that he was aware that the ACCORD document did not address the appellant’s concerns and held that the IC was bound to consider the information request and if the requestor wishes to have different information from that already requested, his remedy is to make a fresh request in different terms.

The Tribunal held that irrespective of the Appellant’s original concerns, the information request that the Appellant made was specific, particular and there was no doubt that he wished to see the risk assessment referred to in the DWP’s letter.

Therefore, the Tribunal was satisfied that the telephone risk assessment as contained within the ACCORD document was the subject of the Appellant’s request for information, and that no other documents fell to be disclosed under the request.

Did the DWP at the time of the request hold further undisclosed information, which fell within the scope of the request?

Since the appellant’s request referred specifically to the risk assessment of the telephony contained within the ACCORD document, the Tribunal was satisfied that there were no other documents that fell to be disclosed within the terms of the appellant’s original request. However, the Tribunal found that whilst most of the withheld information from the ACCORD document was outside the scope of the request, there were parts of the withheld information which did fall within the terms of the request.

If relevant parts had not been disclosed, could DWP rely upon the exemptions in ss. 24, 31(1)(a), 36 or 44 FOIA to withhold the information?

The Tribunal noted that *Bowbrick* considered that both the IC and the Tribunal have the power to consider exemptions raised in front of them for the first time.

In considering the exemption raised under s.31(1)(a) the Tribunal noted that it was raised immediately after the ICO indicated that s.38 was in his view not an appropriate exemption. The reasoning advanced by DWP for relying upon this exemption was very similar to that relied upon in relation to s.38. Therefore, the Tribunal held that it would seem unjust to prevent a public authority from relying upon an early identified harm because they mistakenly applied the same or similar facts and reasoning to the wrong exemption. They also considered the interests of justice and the wider impact of a failure to consider a late arising exemption upon persons not party to the case (such as the general taxpayer as well as users of the DWP telephony system). They further noted that whilst it is expected that public authorities give proper consideration to exemptions when considering an information request there is a danger that too rigid an approach by the IC or the Tribunal would result in public authorities raising all conceivable exemptions in response to a request, in a “belt and braces” approach in order to preserve their position for later. This would add unnecessarily to confusion upon the part of the information requestor and would add to the burden upon the ICO in relation to time and money spent dealing with complaints to it.

The Tribunal was satisfied that the s.31(1)(a) exemption was engaged as disclosure of this material would prejudice the prevention or detection of crime. In considering the public interest, the Tribunal had regard to the following arguments against disclosure:

- the public will have confidence that their information is secure,
- that they will not be the victim of malicious attacks, identify fraud or any other unlawful activities.
- The DWP services that they rely upon will not be impeded or disrupted.

The Tribunal also had regard to the following arguments in favour of disclosure:

- either to promote confidence in the security of the system or
- to enable the public to call for the DWP to shore up their defences and make them more robust.

However, the Tribunal was satisfied that the factors in favour of withholding the information under s.31(1)(a) substantially outweighed those factors which favour disclosure and that such material as was within the scope of the request from the ACCORD document which has been withheld, should not be disclosed. In light of these findings the Tribunal did not consider the other exemptions advanced.

Should the IC have found that DWP had breached its obligations under s.16?

The Appellant asserted that the IC had misled him by referring to the ACCORD document when that document did not address his concerns and failed to identify documents which would address his concerns.

The Tribunal rejected the argument that the Appellant should have specifically raised s.16 in his complaint in order for it to form part of his appeal as he was not in a position to argue that he should have been given assistance to formulate his complaint.

However, on consideration of s.16, the Tribunal agreed that the Appellant was clear and specific in his letter, there was no ambiguity or lack of clarity about his request and that consequently there was no obligation upon DWP to provide advice or assistance. Accordingly, they concurred with the assessment of the way a request should be treated in light of *Berend*. They also held that the advice and assistance that was provided after the decision notice was provided outside FOIA.

Did the IC have a duty to provide advice and assistance?

The Tribunal held that it would have been preferable if in light of the undertaking given to him the Appellant had been notified as to how the case was progressing prior to the issuing of the Decision Notice. However, failure to take such a step does not amount to an error of law and does not in any event operate to flaw the decision reached by the IC. Therefore, there was no duty upon the IC to provide advice and assistance to the Appellant.

Was the Commissioner wrong in law to find that DWP had not breached its obligations under s.1 because the public authority was granted the opportunity to correct its earlier defaults under FOIA prior to the drafting of the Decision Notice?

Although the Tribunal came to a different conclusion from the IC on the facts and found that the DWP did hold information within the scope of the Appellant's request, which has not been disclosed, the Tribunal was satisfied that this was properly withheld in reliance upon s.31(1)(a). As such the change in reason for the withholding of the information did not affect the factual basis for considering the s.1 breach.

The wording of s.50 supported the Appellant's contention that the IC should be considering the facts as they existed at the date that the IC received the complaint. The Tribunal also agreed that in cases of delay there are separate breaches which can be recorded under ss.10 and 17, but was satisfied that a failure to provide disclosable information by the date of a complaint to the IC should be properly categorized as a breach of s.1 as well as a breach of s.10 or 17.

The Tribunal was satisfied therefore that the wording of the statute supports the Appellant's analysis that the IC should make a decision upon the facts as they were when he received the complaint not when he came to write the decision. This should not be taken to mean that the IC is precluded from considering fresh matters arising during the currency of his investigation, such as the discovery of fresh information or the raising of fresh exemptions. If (as occurred here) disclosure happened during the investigation that can be reflected in the fact that notwithstanding the breach of s.1(1), the IC does not require any steps to be taken to remedy the breach.

The Tribunal noted that there was substantial inconsistency between the IC's decision notices on this point, with some only recording breaches of s.10 and others recording additional breaches of s.1. The IC's approach was considered in *Adlam*. That Tribunal considered that the obligation set out in s.1(1) was "*an absolute one*"

The Tribunal did not accept the Appellant's contentions that the IC's informal approach to investigate a case is ultra vires. There is no mandatory format for investigation set out in FOIA. The IC is not bound to issue an information notice if he requires further information from the public authority.

The Tribunal disagreed with the Appellant's contention that "*exploring with the public authority whether it is prepared to disclose that information forthwith in the absence of a formal Decision Notice*" does not form any part of FOIA and adds nothing that cannot be achieved by the issue of a decision notice and found that there is no conflict between the statutory provisions of FOIA and the reasoning given by the IC. The Tribunal held that the IC has a duty to ensure that disclosure is made in appropriate cases. "Exploring" is more flexible than the issue of a decision notice. It may be that by discussing redaction or scope (as in this case) or the inapplicability of certain exemptions a public authority will voluntarily disclose information that had been previously withheld. Equally if as a result of being alerted to their inappropriate reliance upon an exemption, the public authority seek to raise a fresh exemption (as happened in this case), the IC is in a position to consider that in his Decision notice, potentially avoiding the cost, inconvenience and delay of an appeal to the Tribunal.

Therefore, they concluded that the IC was wrong in law to find that the DWP had not breached its obligations under s.1 because at the time when the complaint was lodged s.1 FOIA had not been complied with. The Tribunal was satisfied that all information within the scope of the request that is not covered by an exemption had been disclosed, accordingly the Tribunal did not require any steps to be taken by DWP.

Conclusion

The Tribunal allowed the appeal in part and substituted the Decision Notice.

Observations

Tribunal noted that DWP did not appear to address the issue of disclosure comprehensively until the case was with the IC. Whilst the Tribunal did not find that the mistaken reliance upon s.38 was deliberate or done in bad faith, they observed that:

- no consideration appeared to be given to redaction or scope until a very late stage,
- there was no evidence before the Tribunal that the Appellant's explanation of why he felt that s.38 was being mis-defined and wrongly applied was ever actively considered during the review process.
- neither was the issue addressed of the Appellant having been misled (reference to the ACCORD document when that document did not address the thrust of his concerns) until the case was before the IC