



Case Reference: EA-2023-0142
NCN: [2023] UKFTT 00623 (GRC)

First-tier Tribunal
General Regulatory Chamber
Information Rights

Heard: On the papers

Heard on: 13 July 2023
Decision given on: 18 July 2023

Before

TRIBUNAL JUDGE SOPHIE BUCKLEY
TRIBUNAL MEMBER PAUL TAYLOR
TRIBUNAL MEMBER JO MURPHY

Between

DAVID WILLINGHAM

and

THE INFORMATION COMMISSIONER

Appellant

Respondent

Decision: The appeal is allowed.

Substitute decision notice:

Organisation: The Parliamentary and Health Service Ombudsman

Complainant: Mr. David Willingham

1. The Parliamentary and Health Service Ombudsman (PHSO) held information which fell within the scope of the request namely the PHSO Governance Framework.
2. No steps are ordered.

REASONS

Introduction

1. All parties agreed and the tribunal concurs that this appeal was suitable for determination on the papers.
2. This is an appeal against the Commissioner's decision notice IC-201134-H5H9 of 13 February 2023 which held, on the balance of probabilities, that the PHSO held no information within the scope of the request.

Academic appeals

3. This appeal relates to information that the appellant already had in his possession when he made his complaint to the Information Commissioner. It is therefore an entirely academic appeal. It is a waste of the tribunal's time and resources and an exercise in futility to hear appeals in relation to material which is already in the possession of the appellant. Spending time and resources determining such appeals runs counter to the overriding objective, under which dealing with a case fairly and justly includes dealing with the case in ways which are proportionate to the importance of the case and the anticipated costs.
4. There is no realistic prospect of any tangible advantage to the appellant in succeeding in his appeal, such as to outweigh the disadvantages for the parties in terms of expense, and the wider public in terms of the use of scarce tribunal resources and expense to the public purse. In the tribunal's view this appeal is an abuse of process and a waste of public money.
5. Ordinarily the tribunal would have sought the appellant's views on a proposal to strike out an entirely academic appeal. However, as the tribunal panel had already convened to hear the case, the most proportionate course of action was to determine the appeal on its merits.

Requests, Decision Notice and appeal

The Request

6. This appeal concerns the following request made on 5 September 2022:

“If you still maintain that Mr. Behrens does not have a copy of the relevant disciplinary procedure and is unable to access this, please instead provide a full and accurate description of (1) the conduct standards and (2) the disciplinary arrangements and processes, that apply to Mr. Behrens in his position as PHSO. In this case, please also replace references to the disciplinary procedure in my FoI request with references to this description of the relevant conduct standards and disciplinary arrangements and processes and respond accordingly.”

The response

7. On 13 September 2022, the PHSO responded, stating:

“In response to your email please see the following link which will redirect you to Parliamentary Commissioner Act 1967 (legislation.gov.uk) this is the legislation

that governs the Ombudsman's work and role. If you wish to raise concerns about Rob Behrens's conduct whilst in office, you would need to raise these concerns with PACAC [Public Administration and Constitutional Affairs Committee] for which we have already provided you with a web link to the relevant informant" [sic].

8. In its internal review on 30 September 2022 the PHSO stated: "I can confirm we don't hold the information you have requested".

The Decision Notice

9. In a decision notice dated 13 February 2023 the Commissioner decided that the PHSO held no information within the scope of the request on the balance of probabilities.

Notice of Appeal

10. The Grounds of Appeal are that the PHSO should have provided the appellant with the PHSO Governance Framework, which was provided to the appellant by the Parliamentary Public Administration and Constitutional Affairs Committee on 26 September 2022:

"I contest the Information Commissioner's decision on the grounds that paragraph 3.2.3 of the PHSO Governance Framework states that members of the PHSO Board are expected to abide by the Cabinet Office Code of Conduct for Board Members of Public Bodies and by the Nolan Principles of Standards in Public Life. The Framework also describes these standards of conduct in more detail. As stated on the PHSO website, the Ombudsman, Mr. Rob Behrens, is a member and Chair of the Board therefore, I contest, must be subject to these standards of conduct. The PHSO deliberately withheld this information from me. The information clearly falls within the scope of my FoI request, is held by PHSO and is applicable to the Ombudsman. The Information Commissioner wrongly decided that the PHSO does not hold this information. The Information Commissioner had access to evidence that the PHSO holds the information in the documentation I submitted as part of my complaint. Specifically, the Parliamentary Public Administration and Constitutional Affairs Committee provided various links in their email to me of 26th September 2022, one of which was to the PHSO Governance Framework referred to above."

The Commissioner's response

11. The Commissioner submits that the PHSO Governance Framework ('the Governance Framework') does not fall within the scope of the request, because it should be seen as a document relating to the members of the board of the PHSO, rather than as a document pertaining specifically to the Ombudsman, Mr Rob Behrens.
12. Further the Commissioner submits that this document is publicly available and the appellant was in possession of it when he made his complaint to the Commissioner. It is not clear what the proceedings would achieve in practical terms.

The reply of Mr. Willingham

13. Mr. Willingham strongly disputes the Commissioner's view that the Code of Conduct in the Governance Framework does not constitute information held by the PHSO which was relevant to his information request. As the Commissioner says, the Governance Framework relates to the members of the board of the PHSO. The Ombudsman is a member of the board so, by definition, the Code of Conduct contained in the Framework must apply to him and the PHSO was wrong to withhold this information from him or direct him to where it could be found.
14. Mr. Willingham responds to the Commissioner's statement that the Governance Framework document is publicly available on the PHSO website, establishing its accessibility to Mr. Willingham and the general public and that Mr Willingham was in possession of the document when he made his complaint to the Commissioner. He submits that this does not detract from the fact that the PHSO failed to provide the document to Mr Willingham or direct him to it and denied holding any information regarding the conduct standards which apply to the Ombudsman.
15. Mr Willingham asks the Tribunal to find that this is a fundamental breach of the PHSO's obligations under Freedom of Information legislation and to take appropriate action accordingly as requested in his application to the Tribunal.
16. The action that he requested in the notice appeal is as follows:
 - 16.1. That the Information Commissioner revises his decision and declares that the Ombudsman wrongly withheld information from him regarding standards of conduct which apply to the Ombudsman;
 - 16.2. That the Ombudsman be required to explain to the Information Commissioner and Mr. Willingham why the information was wrongly and repeatedly withheld from him;
 - 16.3. That the Information Commissioner imposes appropriate censure and penalty to the Ombudsman for his actions in wrongly withholding the information and thus breaching his legal obligations under FoI legislation;
 - 16.4. That the Ombudsman be required to write to Mr. Willingham formally providing the withheld information and any other information withheld in response to my FoI request.

Legal framework

17. Section 1(1) FOIA provides:

“Any person making a request for information to a public authority is entitled –
(a) to be informed in writing by the public authority whether it holds information of the description specified in the request, and
(b) if that is the case to have that information communicated to him.”

18. The question of whether information was held at the time of the request is determined on the balance of probabilities.

The role of the tribunal

19. The tribunal's remit is governed by s.58 FOIA. This requires the tribunal to consider whether the decision made by the Commissioner is in accordance with the law or, where the Commissioner's decision involved exercising discretion, whether he should have exercised it differently. The tribunal may receive evidence that was not before the Commissioner and may make different findings of fact from the Commissioner.

Issues

20. The issues for the tribunal to determine are:

- 20.1. On the balance of probabilities did the PHSO hold information within the scope of the request?
- 20.2. What steps, if any, should the PHSO be ordered to take?

Evidence

21. It is unfortunate that no case management orders were made in this case.

22. The Commissioner has not provided a bundle, on the basis that he wished to rely only on the Decision Notice and response. However, the party that is tasked with providing a bundle is tasked with preparing a bundle that contains the documents relied on by both parties. The appellant wished to rely on documents and those should have been placed in a bundle.

23. Further, the Commissioner should provide any *relevant* documents to the tribunal, whether or not he wishes to rely on them. This should include at least the original request and responses and the reference to the Commissioner. It is not appropriate for the tribunal to simply rely on extracts from those documents set out in the Commissioner's response.

24. In the absence of a bundle the tribunal is faced with an unindexed collection of documents, including word documents containing cut and pasted correspondence, presumably but not definitively provided by the appellant. This is unsatisfactory.

25. In the absence of a bundle the tribunal records that it read and took account of the following documents:

- 25.1. The Decision Notice
- 25.2. The Grounds of appeal
- 25.3. The ICO response
- 25.4. The appellant's reply
- 25.5. The PHSO Governance Framework
- 25.6. Cut and pasted text from the appellant's complaint to the ICO – undated.
- 25.7. Cut and pasted text from previous FOI request from the appellant to the PHSO dated 26 July 2022
- 25.8. Cut and pasted text of the appellant's FOI request in this appeal dated 5 September 2022
- 25.9. Extract from PHSO website entitled 'Members of the Board'

Discussion and conclusions

Did the PHSO hold information within the scope of the request?

26. We find that the PHSO Governance Framework fell within the scope of the request because it contains conduct standards for the members of the PHSO board, including the Ombudsman.
27. Mr. Behrens, in his capacity as PHSO, was a member of the Board. This is clear from the extract from the PHSO website and from the terms of the Governance Framework. The Governance Framework makes clear that ‘the Ombudsman’ is the Chair of the Board. Not all Chairs are also members of the relevant board, but the extract from the website lists Mr. Behrens as a member of the board.
28. On this basis we conclude that the Ombudsman was subject to the conduct standards set out in the Governance Framework when sitting on the Board. On this basis, in our view, the PHSO Governance Framework contains information on the conduct standards which apply to Mr. Behrens in his position as PHSO.
29. It is not in dispute that the Governance Framework was held by the PHSO.
30. For those reasons the appeal is successful and a decision notice is substituted as above.

What steps should be ordered?

31. Given that Mr. Willingham already has this information, and indeed held it before he referred the matter to the Commissioner, we determine that it is not appropriate to order the PHSO to take any steps. It would be entirely disproportionate and a waste of time and scarce public resources to direct the PHSO to provide a fresh response in relation to information which the appellant already has.
32. We have no power to impose a penalty.

Signed Sophie Buckley

Date: 17 July 2023

Judge of the First-tier Tribunal