



Tribunals Service
Information Tribunal

Information Tribunal Appeal Number: EA/2007/0087
Information Commissioner's Ref: FS50112347

Heard at Procession House, London, EC4
On 18 February 2008

Decision Promulgated
11th March 2008

BEFORE

CHAIRMAN

CHRIS RYAN

and

LAY MEMBERS

MARION SAUNDERS
TONY STOLLER

BETWEEN:

COMMISSION FOR LOCAL ADMINISTRATION IN ENGLAND

Appellant

-and-

THE INFORMATION COMMISSIONER

Respondent

Representation:

For the Appellant: Mr T Pitt-Payne
For the Respondent: Mr J Boddy

Decision

The Tribunal upholds the Decision Notice dated 26 July 2007 and dismisses the appeal.

Reasons for Decision

The request for information

1. On 1 February 2006 an individual wrote to The Commission for Local Administration in England (“CLA”) in order to complain about its decision to discontinue an investigation into a complaint of maladministration. The letter included a request for copies of all papers used in reaching that decision. The request was interpreted as a request for the contents of the CLA’s complaint file. It was refused on the basis that section 32(2) of the Local Government Act 1974 (“LGA”) prohibited disclosure of any information obtained in the course of, or for the purpose of, the investigation of a complaint and that the information requested was therefore exempt from the obligation of disclosure imposed by section 1 of the Freedom of Information Act 2000 (“FOIA”), by virtue of section 44 of the FOIA.

The Statutory Provisions

2. Section 44 of the Freedom of Information Act 2000 (“FOIA”), so far as relevant, provides as follows:

“(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 enactment...”

3. At the relevant time, section 32(2) of the Local Government Act 1974 (“the LGA”) provided as follows:

“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 section 31 above; or

(b) for the purposes of any proceedings for an offence under the Official Secrets Acts 1911 to 1989 alleged to have been committed in respect of information obtained, by virtue of this Part of this Act, by a Local Commissioner or by an officer of either Commission or for an offence of perjury alleged to have been committed in the course of an investigation under this Part of this Act or for the purposes of an inquiry with a view to the taking of such proceedings, or

(c) for the purpose of any proceedings under section 29(9) above,

and a Local Commissioner and the officers of either Commission shall not be called upon to give evidence in any proceedings (other than proceedings within paragraph (b) or (c) above) of matters coming to his or their knowledge in the course of an investigation under this Part of this Act”.

Complaint to the Information Commissioner and Appeal to the Information Tribunal

4. The original refusal to disclose was maintained, following a review by the CLA, and a complaint was lodged with the Information Commissioner on 9 March 2006. In a Decision Notice dated 26 July 2007 the Information Commissioner concluded that the statutory prohibition under LGA section 32(2) applied to the majority of the information withheld by the CLA but that certain documents, which were listed separately, did not fall within it and should therefore have been disclosed. In reaching that conclusion the Information Commissioner identified three categories of relevant information.
 - (i) Information passed to a Local Commissioner by a third party in the course of his investigation. This was covered by LGA section 32(2). None of the exceptions set out in (a) to (c) of that subsection applied and accordingly information falling within this category was not required to be disclosed.
 - (ii) Information in documents generated by the Local Commissioner in the course of investigating the complaint which should still be treated as information falling with LGA section 32(2), because it had originally

been obtained in the course of, or for the purposes of the investigation.

(iii) Information which did not make reference to the nature of the complaint or information obtained as a result of the investigation. The Information Commissioner concluded that this class of information had not been obtained in the course of, or for the purposes of, the investigation. It was therefore not covered by the statutory prohibition under LGA section 32(2) and was not exempt information under FOIA section 44.

5. The Decision Notice referred to the information in (ii) above in the following terms:

“17. The Commissioner has also found that a certain amount of information contained within the complaint file is information that was generated by the public authority and its officers in the course of investigating the complaint against Herefordshire County Council. This information is typically comprised of telephone transcripts, correspondence from the public authority to Herefordshire County Council, notes made by the public authority's investigator, internal memo's and emails. It is the Commissioner's view that where such information draws upon, or makes reference to, the complaint against Herefordshire County Council or the public authority's investigation into this complaint, then this constitutes information obtained in the course of, or for the purposes of, an investigation. Whilst these documents may have been generated by the public authority itself and have therefore not been physically obtained, it is clear that the information contained within the documents will have been obtained in the course of, or for the purposes of the investigation into the complainant against Herefordshire County Council.

6. The Decision Notice then went on to deal with the category (iii) information as follows:

“18. A certain amount of the information generated by the public authority does not make reference to the nature of the complaint against Herefordshire County Council or information obtained as a result of the public authority's investigation into the complaint. It is the Commissioner's opinion that this information has not been obtained for the course of, or for the purposes of, the investigation and is therefore not covered by the statutory prohibition.”

7. On 22 August 2007 the CLA appealed to this Tribunal on the basis that the Decision Notice was not in accordance with the law for the purposes of FOIA section 58. The Appeal was heard on 18 February 2008, during which evidence was given by Mr Jeremy White, one of the three Commissioners for Local Administration appointed

under LGA section 23(4). We were provided with copies of the documents in dispute on a confidential basis.

Issues arising on the Appeal

8. The Appeal concerned only the third category of information identified in paragraph 4 above. It was common ground between the parties that disclosure in response to the request would not have been for any of the purposes specified in paragraphs (a) – (c) of section 32(2). The only question to be determined therefore was whether the information in dispute had been “obtained by a Local Commissioner, or any officer of either Commission, in the course of, or for the purposes of an investigation” under the relevant part of the LGA.
9. The CLA’s primary argument was that it created an artificial distinction because all of its investigations were shaped by information from outside and the statutory prohibition should therefore apply to all documents that were generated for the purposes of a specific complaint. It was conceded that if documents of a generic nature, such as information on the handling of complaints in general, found their way on to the complaint file then these should be treated as falling outside the statutory prohibition, but apart from material of that kind, the whole of the CLA’s file on a particular complaint should be exempt from disclosure. The Information Commissioner challenged that interpretation. He argued that the plain meaning of the words “...obtained...in the course of or for the purpose of an investigation...” was that the statutory prohibition applied only to information from a source external to the CLA. His counsel, Mr Boddy, conceded that the way in which the distinction between the second and third categories of information had been explained in the Decision Notice was not as clear as it might have been and that this may have led to some uncertainty on the point. It certainly did not create uncertainty for the purpose of the Decision Notice itself, as the information in question was identified in a separate list. But it did seem to create difficulty for Mr White in trying to apply the general principle to future cases, because of what he perceived to be an inconsistency between paragraphs 17 and 18 of the Decision Notice quoted above. The language used in paragraph 17 to identify the type of information covered by the second category was perhaps a little imprecise, possibly because the Information Commissioner departed from the language of the statutory provision in an attempt to

explain and illustrate its meaning. However, it is category (iii), not category (ii), that is in dispute and it is therefore the words quoted in paragraph 6 above that are relevant for the purpose of this appeal. We do not think that they need cause particular difficulty. The LGA defines what may be withheld. It is information that has been "...obtained...in the course of or for the purposes of an investigation...". The Decision Notice approaches the issue from the opposite direction. It sets out to describe the information that may not be withheld and says, in effect, that if it refers to neither the subject matter of the complaint nor information obtained while investigating that complaint, it should not be regarded as having been obtained in the course of the investigation or as having been obtained for the purposes of the investigation.

10. There is, therefore, no material difference in our view between the meaning of the Statute and the way in which it is expressed in the Decision Notice. However, in considering each item of the disputed information, we have applied the language of the statute, rather than that of the Decision Notice. Copies of the documents containing the disputed information were provided to us in a closed bundle and we have decided that they should all be disclosed. We explain our reasons in respect of each document in a separate confidential schedule. This is to remain confidential until either any appeal from this decision has been concluded, or the time for making such an appeal has expired, with no appeal having been launched. However, we make the following general comments, which do not refer to the detailed content of any of the documents, in order to explain our decision in broad terms. Some of the documents consist of internal memoranda, prepared by CLA staff, dealing with the mechanics of the investigation but making no reference to the matters complained of or any facts or matters that came to light during the investigation. It might be said that even information such as the name of the authority being complained about or the very fact that the complaint existed constituted information which the CLA would not have been in possession of had the complaint not been made and that it was therefore information obtained in the course of the investigation or information obtained for the purposes of the investigation. We believe that this would introduce an element of artificiality and that applying the plain meaning of the statute leads to the conclusion that none of the internal memoranda contained in the closed bundle fall within the statutory prohibition. Similarly in relation to communications between

the CLA and the authority about whom the complaint was made, it might be said that the position played by the individual to whom a letter or e mail was sent, his or her email address or the postal address of the authority was information that the CLA "obtained" in the course of, or for the purposes of, the investigation. But, ignoring artificiality as before, we conclude that documents in the closed bundle of this type, which were created in the course of making arrangements for the handling of an aspect of the investigation, but which make no reference to what was involved in the investigation, are not covered by the statutory prohibition and are not therefore exempt from disclosure. The final category of document in the closed bundle comprised file notes which again dealt only with matters such as arrangements for meetings or reports on how far the investigation had proceeded. We conclude that this category should also be disclosed because the documents contain no information about the matters investigated.

11. It was argued on behalf of the CLA that, if an exercise similar to that which we have undertaken had to be made every time a request for information was made, a very substantial burden of work would be placed on the CLA's staff. We have sympathy with that argument but do not feel that it could justify departing from what we believe to be the clear meaning of section 32(2). And the burden is one that all public authorities have been required to bear as a result of the enactment of the FOIA. We do not accept, as counsel for the CLA submitted, that there is no countervailing benefit. Although the application of our interpretation of the provision will result in the disclosure, in this case, of fairly anodyne information, there may be other cases in which disclosure will reveal that the procedures followed by those conducting an investigation fell short of the required standard. In those circumstances the distinction, which we believe section 32(2) creates, between the subject matter of an investigation (to be kept secret) and the processes followed in conducting the investigation (a valid subject matter for public scrutiny) will have served a useful purpose. We acknowledge, of course, that in some cases the two elements will be combined in a single document and that occasionally it may prove to be impossible to redact the confidential information without so emasculating the document that it ceases to be intelligible. It may be that in those circumstances the whole document would have to be treated as confidential, and therefore covered by the statutory prohibition, but we would not wish to say anything on that issue which might be seen

as an attempt to impose an inflexible rule on those assessing such materials in the future.

12. We should add that if the disclosure of information falling outside the statutory prohibition (as we have interpreted it) were to be contrary to the public interest in the circumstances, a mechanism appears to have been provided under LGA section 32(3) to maintain confidentiality.
13. An alternative argument was put forward by Mr Pitt-Payne, on behalf of the CLA, in the event that we did not accept his primary argument. The alternative was that all the documents in question fell within the meaning of the word “obtained” in section 32(2), even if they had been generated within the CLA and did not consist of or include information provided by a third party. The argument may be summarised in this way:
 - (1) The section does not say, as it could, that the prohibition applies to information obtained by the CLA but to information obtained by “*a Local Commissioner, or an officer of either Commission*”.
 - (2) Mr White’s unchallenged evidence was that the complaint had been looked into by an investigator employed by the CLA who, at a certain point in the process, shared the contents of his case file with Mr White in order to discuss the investigation. The case file at that stage contained several of the documents set out in the closed bundle. Subsequently Mr White and the investigator passed between themselves the remaining documents that now appear in the closed bundle.
 - (3) The investigator is an officer of the CLA and Mr White is a Local Commissioner. It follows that each of the documents in question was either obtained by a Local Commissioner (Mr White) from an officer of the CLA (the investigator) or were obtained by the officer from the Local Commissioner.
14. The argument must be seen in the context of the provisions of LGA 1974 which established the role of a Local Commissioner. These are located in Part III of the statute. Section 23 established a body of commissioners, the CLA, which was to include those appointed to the office of Local Commissioner. By virtue of paragraph

5(3) of Schedule 4 the CLA is a body corporate. It is required by section 23 to divide the country into areas, to appoint one or more Local Commissioners to be responsible for each area and to allocate categories of complaint to one or more of the Local Commissioners. It also has other responsibilities for the overview of the Local Commissioners' activities, including receiving reports from each of them as to the discharge of their functions (section 23(11)) and preparing a general report each year. However, the role of conducting investigations is granted, not to the CLA, but to each Local Commissioner (see section 26) and the powers and obligations associated with that role are also expressed (in sections 27 – 29) by reference to the Local Commissioners and not the CLA.

15. We believe that the separation in this way between what may be characterised as management functions (to be performed by the CLA) and the investigatory powers (vested in individual Local Commissioners) may have resulted from Parliament's desire that instances of maladministration should be seen to be investigated by an individual rather than by what might be regarded by complainants as an impersonal organisation. Whether or not that was Parliament's motivation the allocation of responsibilities explains why section 32(2) did not refer to information obtained by the CLA. And, having created a situation in which information obtained during an investigation will come into the possession of the individual Local Commissioner conducting it, the draftsman evidently felt it necessary to make clear that the statutory prohibition on disclosure also applied to materials obtained by those working in a subordinate role on an investigation. Such persons will not be employed by the Local Commissioner, even though they will be operating in a support role on the Local Commissioner's investigations, but will be employees of the CLA.
16. We conclude, therefore, that it is only information obtained from a third party, and not information passed between a Local Commissioner and an individual working with him, that falls within the prohibition against disclosure set out in section 32(2) and therefore the exemption provided by FOIA section 44.
17. It was also argued before us that there were several occasions when one employee of the CLA passed to another all the information that was in the complaint file at the time and that the receiving employee therefore "obtained" the information at that stage for the purposes of section 32(2). It seems to us that the implication inherent

in this argument is that the CLA's obligations under FOIA could be evaded simply by passing a complaint file from desk to desk within its own office. We believe that such an outcome would fly in the face of commonsense and the plain meaning of the language of section 32(2). We accordingly reject this argument also.

Conclusion

18. In the light of what we have said we dismiss the Appeal and direct that the Decision Notice (including the order for partial disclosure) should stand.

Signed

Chris Ryan

Deputy Chairman

Date 11th March 2008