



IN THE FIRST-TIER TRIBUNAL
GENERAL REGULATORY CHAMBER
INFORMATION RIGHTS

Case No. EA/2011/0164 & 0165

ON APPEAL FROM:

The Information Commissioner's
Decision Notice No: FS50324048 & FS50376989
Dated: 29 June 2011

Appellants: Olivia Thompson
Stanley Dyke

Respondent: Information Commissioner

Date of paper hearing:
10 January 2011

Before
Melanie Carter
(Judge)

and

Richard Fox
Roger Creedon

DECISION OF THE FIRST-TIER TRIBUNAL

The Tribunal decided to strike out the appeals.

REASONS FOR DECISION

Introduction

1. These appeals arise from requests for information under the Freedom of Information Act 2000 “(FOIA)” by Olivia Thompson and her father Stanley Dyke (“the Appellants”). Mr Dyke had made complaints to an NHS Trust about the care and treatment of his wife and Ms Thompson’s mother. Both Mr Dyke and Ms Thompson subsequently made complaints to the Healthcare Commission. They were both aggrieved at how the Healthcare Commission had handled their complaints. They subsequently complained, as was their right, to the Parliamentary Health Service Ombudsman (PHSO). The PHSO considered the complaints and decided not to take them forward, a decision which it upheld on review. The Appellants made a number of information requests to understand the reasons for this decision and the way in which it came about.
2. On 17 December 2009 Ms Thompson wrote to the PHSO requesting what the IC categorised as different eight “sets” of information. In responding to the request, the PHSO disclosed some information under FOIA and explained it did not hold certain other information but provided details of where that information was likely to be held. It explained that some information is her personal data and exempt under section 40(1) FOIA, that some information was redacted as it was third party personal data under section 40(2), that the remaining information was exempt from disclosure under section 44(1), and disclosed additional information privately (not through FOIA) to the Appellant under the exception to the statutory bar at section 15(1)(a) of the Health Service Commissioners Act 1993 (see below).
3. Mr Dyke made several requests to the PHSO about information relating to the consideration of his complaint in order to better understand the PHSO’s reasons for the decisions and who made those decisions. The PHSO’s response whilst offering some relevant information was very unclear.
4. Both Mr Dyke and Ms Thompson complained to the IC with regard to the PHSO’s decisions on their letters of request. Mr Dyke agreed that the IC was to focus his investigation on his request for information as to the name and job title of the persons involved in considering the substantive complaint to the PHSO, and whether the

Ombudsman herself had any involvement in the decision not to fully investigate the complaints.

5. The Decision Notices dated 29 June 2011 upheld the decisions of the PHSO other than with regard to procedural breaches of FOIA. The public authority was not required to disclose any information or to take any other steps.
6. Ms Thompson and Mr Dyke appealed the Decision Notices to this Tribunal. The Commissioner considered that there was no realistic prospect of the appeal succeeding and accordingly invited the Tribunal to strike it out under rule 8(3)(c) of the Tribunal Procedure (First-Tier) (General Regulatory Chamber) 2009 Rules.

Grounds of appeal and applicable legal test

7. The Tribunal's powers insofar as relevant to this appeal are to be found in section 58 of FOIA. Thus the Tribunal may uphold an appeal:

“(1) If.....under section 57 the Tribunal considers-

(a) that the notice against which the appeal is brought is not in accordance with the law,”.

8. Thus, the Tribunal is concerned with grounds upon which it might be said that the Decision Notices were not in accordance with law. The Tribunal does not take the IC's decisions again, rather its task is to consider the Decision Notices and to consider whether it can be impugned on legal grounds.
9. As the Tribunal is considering whether or not to strike these appeals out under rule 8(3)(c) of the Rules, it has to ask itself whether either or both of the appeals have a realistic prospect of success.
10. The Tribunal proceeded on the basis that the relevant grounds of appeal, that is, ones which fall within this Tribunal's jurisdiction were that:
 - a. further information was held;
 - b. the section 44 FOIA exemption did not apply as the information in question was not subject to the statutory bar against disclosure under section 15 of the Health Service Commissioners Act 1993, that is, it had not been obtained “in the course

of or for the purposes of an investigation”; alternatively that the discretion not to disclose under that Act had not been properly exercised.

11. The Tribunal readily acknowledges that these two grounds did not begin to cover the points put to the Tribunal, forming the basis of the Appellants’ general discontent with the decision of the PHSO and the way in which it was handled.
12. In particular, the Appellants had raised points with regard to the IC not having imposed any ‘sanction’ on the PHSO. This appeared to relate to the IC’s section 42 Data Protection Act 1998 assessment (that is as to the PHSO’s compliance with data protection requirements regarding a subject access request that had been made by Ms Thompson) which was conducted outside of FOIA and therefore not within the jurisdiction of the Tribunal. Alternatively it appeared, the Appellants might have been arguing that the IC should have imposed a sanction for the procedural breaches of FOIA (sections 10(1) and 17(1)) set out in the Decision Notices). First, there were no ‘sanctions’ in FOIA as such (in contrast to the Data Protection Act regime which does, as the Appellants had noted, provide for monetary penalties). That the IC had not specified any steps to be taken by the public authority was a reflection of the fact that the breaches had been procedural (failure to meet deadlines and to provide a valid refusal notice).
13. Whilst understanding the Appellants position it is simply beyond the Tribunal’s powers to intervene in most of the matters raised . It had been explained to them that this Tribunal did not have the jurisdiction to essentially review the PHSO’s decision on the substantive complaints as to the Healthcare Commission and how they were handled. It would have been necessary to judicial review the PHSO’s decision at the time

Consideration

14. The first ground of appeal within this Tribunal’s jurisdiction was as to whether there was further information held by the public authority. This ground of appeal arose in both appeals. Whether a public authority holds a document, which is a dispute as to fact, is determined according to the normal civil standard of proof, that is on the balance of probabilities (*Linda Bromley & others v the Environment Agency EA/2006/0072*). The PHSO acknowledged that its response to Mr Dyke had been

very unclear and had apologised for that. He had however, during the course of the IC's investigation, been given the names of the two directors who had handled the complaint, as requested. He had not moreover provided any reasons why or concrete evidence to indicate that further information was held. Accordingly, the Tribunal was of the view that this ground of appeal did not have a realistic prospect of success.

15. With regard to Ms Thompson's request for information, the IC was, in the Tribunal's view, entitled to accept the word of the public authority and not to investigate further in circumstances, as here, where there was no evidence as to an inadequate search, any reluctance to carry out a proper search or any grounds for believing that there is a motive to withhold information actually in its possession. Were this to be otherwise the IC, with its limited resources and its national remit, would be required to carry out a full scale investigation, possibly onsite, in every case in which a public authority is simply not believed. Frustrating though this is for Appellants, the Tribunal accepts in a case such as this, that the IC is entitled to proceed on the word of the public authority. Again, this ground of appeal did not have a realistic prospect of success.
16. The next ground of appeal within the Tribunal's jurisdiction was in relation to Ms Thompson's appeal and whether the PHSO's decision to withhold information under section 44 of FOIA was lawful. This section provides an absolute exemption where information is subject to a statutory prohibition or bar on its disclosure, in this case under section 15 of the Health Service Commissioners Act 1993.
17. Section 15 provides, insofar as relevant, that:

“(1) Information obtained by a Commissioner, or his officers in the course of or for the purposes of an investigation shall not be disclosed except –

(a) for the purposes of the investigation and any report to be made in respect of it,

...

(e) where the information is the effect that any person is likely to constitute a threat to the health and safety of patients as permitted by subsection (1B).

(1B) in a case within subsection (1)(e) the commissioner may disclose the information to any persons to whom he thinks it should be disclosed in the interests of health and safety of patients; and a person to whom disclosure may be made may, for instance, be a body which regulates the profession to which the

person mentioned in subsection (1A)(b) belongs of his employer or any person with whom he as made arrangements to provide services.”

18. The Tribunal was of the view that the PHSO did carry out an investigation for the purposes of section 15(1), in that it undertook preliminary work in order to consider whether to carry out a full investigation of the complaint. It was of the further view that it would be anomalous to interpret the statutory prohibition against disclosure as only applying if the PHSO were to proceed to full investigation. Parliament could not sensibly have intended section 15 to have this effect as otherwise the intention behind the bar, to encourage and protect the confidence of those coming forward with complaints to the PHSO, would be defeated. Not knowing whether or not the PHSO would decide to proceed would mean that one could not be confident of information being handled confidentially and would be bound to discourage complaints coming to light. In this regard the Tribunal took into account the recent persuasive, albeit non-binding, First-Tier Tribunal decision of *Purser v Information Commissioner and the Local Government Ombudsman (EA/2010/0188)* upholding this approach. In particular, the Appellants had not raised any points which would, on the face of it, displace the conclusions at paragraphs 55-70 of the Decision Notice in relation to Ms Thompson’s appeal.
19. Also relevant was the case of *Ofcom v Morrissey and Information Commissioner GIA/605/2010*. In this binding Upper Tier Tribunal case, it was decided that the Tribunal did not have jurisdiction to review the exercise of a discretion whether or not to disclose under a statutory bar. In other words, whilst the Tribunal could and was bound in these appeals to review whether the statutory bar was engaged (vis was the information obtained in the course of or for the purposes of an investigation), it had to stop there and could not go on to consider the legality of the decision whether or not to exercise the discretion under section 15 to order disclosure.

Conclusion

20. In light of the reasons set out above, the Tribunal was of the view that these appeals have no realistic prospect of success. The Tribunal hoped that Mr Dyke and Ms Thompson would be assured that the Tribunal was not dismissing their concerns with regard to the substantive complaints raised with the PHSO: it had formed no view on these as they were beyond its jurisdiction.

21. The Tribunal strikes out these appeals. Our decision is unanimous.

Melanie Carter
Tribunal Judge

Dated: 20 January 2012