Neutral Citation Number:

**IN THE FIRST-TIER TRIBUNAL** **Appeal No: EA/2017/0050**
**GENERAL REGULATORY CHAMBER**
**(INFORMATION RIGHTS)**

**ON APPEAL FROM:**

**The Information Commissioner's Decision Notice No: FS50621662**
**Dated: 23 February 2017**

**Appellant:** **Dr Paul Davies**

**Respondent:** **The Information Commissioner**

**2nd Respondent:** **The Cabinet Office**

**Heard at:** **Alfred Place London**

**Date of Hearing:** **12 July 2017**

**Before**

**Chris Hughes**

**Judge**

and

**Roger Creedon** and **Dave Sivers**

**Tribunal Members**

**Date of Decision:** **19 July 2017**

**Attendances:**

For the Appellant: Dr Davies (junior)

For the Respondent: Peter Lockley

For the 2nd Respondent: Richard Turney

**Subject matter:**

Freedom of Information Act 2000

## DECISION OF THE FIRST-TIER TRIBUNAL

The Tribunal upholds the decision notice dated 23 February 2017 and dismisses the appeal.

## REASONS FOR DECISION

Introduction

1. Following an occasion in 2012 when his son was charged a penalty fare for travelling in a first class rail carriage on a second class ticket; Dr Davies has been concerned about the actions and independence of the Independent Penalty Fares Appeals Service (IPFAS). He has had extensive correspondence with the Department for Transport. At an early stage of the correspondence junior officials in that Department made rude comments about him in e-mails which were subsequently disclosed in response to a Data Protection Act subject access request. The Department apologised for those statements. He feels that the Department has been mendacious in describing IPFAS as independent since it is part of one of the train operating companies (TOC). In his view this means that IPFAS cannot take independent decisions and that the Permanent Secretary of the Department for Transport has authorised the making of statements which he knows to be false.

2. Dr Davies has pursued this issue and exhausted all remedies within the Department for Transport, including having his complaint considered by the Department's Independent Complaints Assessor. He complained to the Head of the Home Civil Service about how his complaint had been handled and there was further correspondence. He remained dissatisfied.

3. In February 2015 the Department for Transport issued a document: *"Consultation: Changes to the rail Penalty Fares appeals process."* The consultation period ran until 27 April 2015. In a section headed *"Establishing the independence of appeals bodies"*, the document stated:-

*"1.26 Concerns have been raised about the fact that IPFAS is a subsidiary of a TOC. This situation has emerged as a result of a changing franchise landscape since privatisation in 1996. Ownership of IPFAS was first transferred from British Rail to Connex South Eastern and now rests with the current route franchisee, Southeastern (part of the Go-Ahead group).*

*1.27 Whilst we do not consider this has had a negative impact on passengers in practice – we are confident that IPFAS has acted objectively and properly in discharging its functions – we believe that if we can make changes to establish its independence without doubt and secure the highest possible standards of transparency we should do so."*

4. On 14 April 2015 Dr Davies wrote to the Cabinet Secretary (Sir Jeremy Heywood):-

*"I note that you have not acknowledged, let alone responded to my emails that make serious allegations against Mr Philip Rutnam [Permanent Secretary DfT] and the DfT, not least that he issued a major consultation document against the civil service guidelines for the conduct of a consultation process during an election period... You are also endorsing the false statements in the consultation document…. I ask that every appeal turned down since 1994 now be reviewed by an independent body. I did offer to work with you to find a less expensive solution, but you have driven me, by your inaction, to this request.*

*Under either the Freedom of Information Act or the Data Protection Act, whichever is relevant in each case, that all consideration, responses, discussions with other departments and notes of meeting relating to my case, and not limited to those, dating back to my original email to Sir Bob Kershaw [more correctly Kerslake], be revealed to me.*

5. On 15 May 2015 he made a similar but more detailed request under FOIA:-

*"All internal correspondence, including, but not limited to, emails, letters, notes of meetings, minutes, actions, notes of telephone calls, relating to and or generated by my emails to Sir Bob Kershaw, Sir Jeremy Heywood, Mr John Manzoni and Mr Mark Doran.*

*All external correspondence including but not limited to emails, letters notes of meetings, minutes, actions, notes of telephone calls, relating to and or generated by*

*my emails to Sir Bob Kerslake, Sir Jeremy Heywood, Mr John Manzoni and Mr Mark Doran.*

*Any other relevant discussions and correspondence with Mr Philip Rutnam or any of the officials at the Department for Transport, and with the Minister.*

*Anything else related to penalty fares on the railway and penalty fares appeals on the railway that is related to my campaign."*

6. The Cabinet Office responded separately with respect to his personal data which fell to be handled under the DPA and the material to be considered under FOIA. With respect to FOIA material it provided certain material on 31 July 2015 but refused the remainder under s36(2)(b) and (c). These provide:-

   *"(2) Information to which this section applies is exempt information if, in the reasonable opinion of a qualified person, disclosure of the information under this Act— ….*

   *(b) would, or would be likely to, inhibit—*

   *(i) the free and frank provision of advice, or*

   *(ii) the free and frank exchange of views for the purposes of deliberation,*

   *(c) would otherwise prejudice, or would be likely to prejudice, the effective conduct of public affairs"*

7. Mr Matthew Hancock, the Minister for the Cabinet Office, as the qualified person approved the use of this provision on 2 July 2015. On internal review (communication 9 November 2015) the Cabinet Office maintained its position and informed Mr Davies that *"none of the small amount of information that we withheld shows that officials have acted improperly or not told the truth".*

8. Dr Davies complained to the Information Commissioner (the ICO) who investigated. In doing so the ICO considered whether the prejudice feared fell within the specific provisions relied upon, the nature of the information and timing of the request and the extent of the Minister's knowledge of the issue and whether the decision reached was in these circumstances reasonable. The Minister had concluded that disclosure would impact on the ability of the Cabinet Secretary and others (DN paragraph 15):-

*"…to receive candid advice and briefings from officials when responding to correspondence. Without this candid advice they would not be sufficiently well informed on the issues raised by correspondents. Responses to such correspondence would therefore be based on insufficient information."*

9. The ICO concluded that this was a reasonable conclusion (DN paragraphs 13-17). Having decided that the exemption was engaged the ICO then considered where the balance of public interest lay (DN paragraphs 19-23). She gave some weight to the value of transparency in assisting in the accountability of public bodies and the understanding of how such bodies handle complaints as against the significance of the provision of candid advice in ensuring that complaints were handled effectively. The ICO noted that the correspondence related to a single complaint which was not a matter of wider public interest. Having considered the withheld information the ICO concluded that greater weight should be given to the importance of ensuring candid advice and upheld the Cabinet Office position.

10. In the grounds of appeal Dr Davies argued that the ICO had erred in law and that civil servants had lied about the status of IPFAS. He argued that the ICO had taken into account irrelevant matters (the view of the cabinet office that disclosure would inhibit free and frank advice), he wished to see whether:-

    *"the evidence of intemperate or abusive language used by members of the Civil Service in relation to the Applicant was replicated at all levels…. Further, one presumes that this is a rare incident. The chilling effect, if such exists- can only rest upon civil servants who require uncivil language to communicate. This class is surely zero, and it is therefore an illogical position for the MCO to have taken.*

    *In the alternative if the use of such language is widespread, then the MCO* [Minister for the Cabinet Office] *must have taken into account considerations he ought not to have taken into account, namely that such behaviour ought to be hidden The public interest in finding out this fact – if it be true – should beyond peradventure have required disclosure…"*

11. In resisting the appeal the ICO relied on the DN. It was not unreasonable of the Minister to conclude that disclosure would lead to some chilling effect on the future provision of advice and the exchange of views for the purpose of deliberation and there was little countervailing public interest. There were no grounds for thinking that

senior civil servants in the Cabinet Office would replicate the language of junior civil servants in DfT two years before. The CO had disclosed much information in relation to the request, there had been no blanket refusal and the ICO's decision had been focussed on the effect of disclosure in the context of a complaint. The specific public interest considered had been the one the exemption was intended to protect. While there was a public interest in the debate as to whether IPFAS was genuinely independent disclosure of any further information would not assist – the public already knew the status of IPFAS and how DfT officials described it. There was no additional public interest in disclosing the information, it was far-fetched to describe civil servants of lying.

12. The Cabinet Office supported the ICO in resisting the appeal. It was reasonable of the Minister to opine that disclosure of written exchanges relating to the response to an individual complaint would be likely to inhibit the provision of advice and exchange of views. Furthermore there was little countervailing interest in disclosure There was no inappropriate language and no public interest in seeking out such language. The ICO had correctly stated that the public knew the status of IPFAS and its management arrangements. There was a difference of view between Dr Davies and the Cabinet Office as to how such should be described; this was not a matter of truthfulness. The information had been current at the time of the request.

13. In oral argument Mr Davies argued that the tribunal needed to come to a view on the independence or otherwise of IPFAS to properly consider the case. He adopted the stance of his father that the fact that IPFAS was organisationally within one of the TOCs meant that it was impossible that it could make an independent decision. Accordingly to assert as DfT civil servants had done, that IPFAS could make independent decisions was to lie. He agreed that the questions for the tribunal were whether the s36 opinion was reasonable if so where the balance of public interest lay. There was a substantial public interest in knowing whether the senior civil servants involved had been abusive. The disclosure of the information would inform and alert the public to the significant issue of the independence of IPFAS which was being hidden by the civil service.

14. In responding to the appeal Counsel for the ICO and Cabinet Office submitted that the opinion was reasonable. Senior officials must be allowed to exchange views frankly in writing in the context of decisions concerning a response to an individual

complaint. There was no justification for suspecting that senior civil servants would have been abusive and the DfT had put the information about the status of IPFAS very fully in the public domain in the public consultation document published shortly before the request for information was made.

Consideration and Conclusion

15. The tribunal was satisfied that the proper resolution of this appeal did not require it to make a ruling on the status of IPFAS. Such a ruling was not within the powers of the ICO and therefore not included in the DN. It is clearly possible to take different views of the practical independence of IPFAS in making its decisions; to disagree with Mr Davies does not imply dishonesty and it is rarely helpful in the face of a legitimate difference of opinion to impute such moral failings in one's interlocutor.

16. The Minister for the Cabinet Office, in coming to his opinion was advised of and shown the information falling within the request, which parts were to be disclosed (a briefing on the penalty fares regime prepared by DfT) and which were not (internal civil service emails). The submission identified the decision the Minister was required to consider and the arguments with respect to the impact of disclosure, the requirement for candid advice in responding to correspondence, and the concern that disclosure would lead officials to expect future disclosure in such cases and tailor their written communications accordingly inhibiting the free and frank provision of advice and curbing the free exchange of ideas. The tribunal is satisfied that the submission provided a proper basis upon which the Minister could reasonably come to the conclusion that the exemption was engaged and showed the potential for disclosure to inhibit the proper provision of written advice and exchange of ideas.

17. With respect to where the balance of public interest lay Mr Davies argued that it was important to reveal whether there were abusive comments within the emails. This is a purely private interest of Dr Davies arising out of his earlier experience of junior DfT officials. As the Respondents correctly identified it was inherently improbable that senior officials in the Cabinet Office would behave in such a way and they had not. There was no public interest in disclosing the emails on this basis. He also argued that disclosure of the emails would inform the public debate about the lack of independence (as he saw it) of IPFAS. This argument is entirely lacking in substance. The DfT had, very shortly before the request, published a consultation document

exposing the issue to public scrutiny releasing these emails would add not assist one iota in informing the public. Some weight must be given to the public interest in upholding the exemption, especially as a qualified person has given an opinion that the exemption is engaged. There is effectively no weight on the other side of what is essentially a private interest in continuing to pursue a personal complaint.

18. The tribunal is satisfied that the ICO's decision is correct in law and dismisses the appeal.

19. Our decision is unanimous

Judge Hughes
[Signed on original]

Date: 19 July 2017