



**First-tier Tribunal
(General Regulatory Chamber)
Information Rights**

Appeal Reference: EA/2017/0294

**Heard at the East London Tribunal Hearing Centre
On 30 April 2018**

Before

**KAREN BOOTH
JUDGE**

**MR DAVE SIVERS AND MS ROSALIND TATAM
TRIBUNAL MEMBER(S)**

Between

JOSEPH BALDWIN

Appellant

and

THE INFORMATION COMMISSIONER

Respondent

DECISION AND REASONS

DECISION

1. The appeal is allowed because the Respondent's decision dated 14/12/2017 is not in accordance with the law.

We substitute the following decision notice in its place:

Points 2 and 3 of the Appellant's request to the Independent Police Complaints Commission ("IPCC") dated 20/3/2017 were not requests for recorded information held by the IPCC; they were requests for advice. Section 1(1) of the Freedom of Information Act 2000 did not, therefore, apply to those requests. The IPCC is not required to take any steps.

REASONS

Background to appeal

2. The Appellant was living with and caring for his parents for many years. His mother died in 2009. He continued to care for his father amidst a background of disputes with his siblings about his caring strategies and financial issues. In May 2010 the Appellant was arrested by police in connection with allegations of wilful neglect of his father. Those charges were subsequently dropped. In the meantime, the Appellant's father was moved into Oakhurst Court Nursing Home in Surrey, where he died on 27/10/2010.
3. The Appellant has made complaints against, and raised questions with, various authorities in relation to these events. One of his many grievances relates to the removal of his father from his home (allegedly against his father's wishes) without the involvement of an independent mental capacity advocate, which the Appellant believes was illegal.

The request for information

4. On 20 March 2017 the Appellant wrote to the Independent Police Complaints Commission ("IPCC") and requested information in the following terms:

"I would like to make a subject access and also freedom of information request for information.

1. I have enclosed some information that I have researched from the police reform act 2002, and the police and criminal evidence act 1984.

2. Can you tell me if someone under the mental capacity act 2005, and the person they look after lacks mental capacity and there is no one suitable to look after the person and there are conflicts within the family, should an independent mental Capacity Advocate be appointed, which I believe complies with section 44 of the mental capacity act.

3. When the person who has been arrested for wilful neglect of the person they care for under the mental capacity act and then later the person that has been

removed from their home has been left to die, am I correct in thinking that the matters should be referred to the IPCC? And then the IPCC refer the matter over to the CPS?

4. The reason for my arrest under the mental capacity act 2005 was so the Police could search my property for medications which had been presented to the Police, when they had made a visit on 3 weeks earlier.

5. And given my father was neglected by a care agency, his own Doctor and a Care Home, which I took the blame for, the Police then refuse to investigate this matter, then can you tell me how the Police can arrest me for what I have not done, and at the same time refused to investigate the people who created the neglect of my father and leave me to suffer.

Please could you answer all of the above questions?"

5. On 18/4/2017, the IPCC responded to the request. They informed the Appellant that points 1, 4, 5 and 6 had not been treated as requests for information as they were in the nature of descriptions and comments on matters in which the Appellant had been involved. As regards points 2 and 3, they informed him that they were refusing those requests in reliance on section 21 of the Freedom of Information Act 2000 (information accessible to applicant by other means), on the basis that they were questions about the scope and interpretation of the relevant legal rules. They did, however, inform him that information about the system for dealing with police complaints/misconduct was available on their website.
6. The IPCC subsequently reviewed their decision, but did not change it. In connection with point 3 they provided a link to their statutory guidance and referred him to the relevant sections.

The complaint to the Information Commissioner

7. On 26/5/2017, the Appellant complained to the Respondent about the IPCC's response to his requests for information.
8. The IPCC wrote to the Respondent on 3/12/2017 confirming that they were applying section 21 to points 2 and 3. As regards point 2, they said that they considered this question to be a request for legal advice on the interpretation of legislation. They provided links to various publicly accessible websites which might include relevant information. As regards point 3, they again referred to relevant sections of their publicly available statutory guidance. After further discussions with the Respondent, the IPCC provided a hard copy of some extracts about the Mental Capacity Act from the college of policing website and drew their attention to a link on that website to a related code of practice. They also provided hard copies of the relevant sections of their guidance, which the Respondent sent on to the Appellant with the link to the relevant part of the college of policing website.

9. In her decision notice dated 14/12/2017, the Respondent decided that the Commission had correctly applied section 21 of FOIA to points 2 and 3 of the Appellant's FOIA request and was not required to take any steps.

The appeal

10. The Appellant exercised his right of appeal under section 57 of FOIA against the Respondent's decision notice. The Appellant opted to attend an oral hearing, whereas the Respondent requested a paper decision.
11. In his grounds of appeal, the Appellant did not specifically dispute or address the Respondent's conclusion that the IPCC had correctly applied the exemption in section 21 of FOIA. He expressed frustration about the lack of any answers to the questions he had posed. He provided a chronology of the events leading up to his request for information and provided copies of various related documents. He asserted that the IPCC's failure to answer his questions amounted to a cover up of suspicious circumstances surrounding his father's death, which was preventing him from instigating an investigation through the Crown Prosecution Service. He interpreted the IPCC's response as meaning that they could not answer his request in case the information they hold is misleading.
12. The Appellant indicated that the outcome he was seeking was an apology, the answer to his questions and a consequent change to the Respondent's published decision.
13. On 26/1/2018 the Respondent asked the Tribunal to consider striking out the appeal on the basis that there was no reasonable prospect of his case succeeding. In the alternative, the Respondent asked the Tribunal to dismiss the appeal. There was a slight change of tack in relation to point 2 of the request, in that the Respondent was now asserting that that question was not, in essence, a request for information to which FOIA applies, but a request for advice on the interpretation of legislation. To the extent that it was a request for information about the Mental Capacity Act 2005, they maintained the view that that information was exempt from disclosure under FOIA because it is reasonably accessible to the Appellant by other means, including via the sources referred to in the IPCC's letter to the Respondent of 3/12/2017. As regards point 3 of the request, the IPCC said that those matters are addressed in sections 7 and 8 of the IPCC's statutory guidance, which is accessible via the IPCC website.
14. The Appellant responded to the strike out application on 3/2/2018, primarily by alleging that the Kent police, the IPCC and the Respondent were working together to prevent him from accessing the information that he seeks.
15. The strike out application was refused by the Tribunal on 23/2/2018 for the reasons given in paragraphs 5 and 6 of the Case Management Directions dated 23/2/2018. The Appellant was directed to provide to the Respondent, no later than 8/3/2018 a copy of each document he relied on in relation to the appeal and to ensure that each such document went to the following

questions: why did he say that point 2 was a request for information and not a request for the IPCC to give a legal opinion?; and why did he say that the IPCC holds further information not reasonably accessible to him which answers his questions at points 2 and 3?

These questions were not addressed by the Appellant in advance of or at the hearing.

The law

16. Our task is set out in section 58 of FOIA:

Determination of appeals

(1) If on an appeal under section 57 the Tribunal considers—

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

(b) to the extent that the notice involved an exercise of discretion by the Commissioner, that he ought to have exercised his discretion differently,

the Tribunal shall allow the appeal or substitute such other notice as could have been served by the Commissioner; and in any other case the Tribunal shall dismiss the appeal.

(2) On such an appeal, the Tribunal may review any finding of fact on which the notice in question was based.

17. In this appeal, the legal issue we had to decide (as we explained to the Appellant at the hearing) was limited to whether the Respondent's decision notice was in accordance with the law. Two of the outcomes sought by the Appellant (being an apology and answers to his questions) were outside our remit. We had to decide whether the Respondent correctly concluded that the IPCC was entitled to refuse the requests for information in points 2 and 3 of the Appellant's letter dated 20/3/2017 in reliance on the exemption in section 21 of FOIA, which provides as follows:

21 Information accessible to applicant by other means

(1) Information which is reasonably accessible to the applicant otherwise than under section 1 is exempt information.

(2) For the purposes of subsection (1)—

(a) information may be reasonably accessible to the applicant even though it is accessible only on payment, and

(b) information is to be taken to be reasonably accessible to the applicant if it is information which the public authority or any other person is obliged by or under any enactment to communicate (otherwise than by making the information available for inspection) to members of the public on request, whether free of charge or on payment.

(3) For the purposes of subsection (1), information which is held by a public authority and does not fall within subsection (2)(b) is not to be regarded as reasonably accessible to the applicant merely because the information is available from the public authority itself on request, unless the information is made available in accordance with the authority's publication scheme and any payment required is specified in, or determined in accordance with, the scheme.

The evidence

18. The evidence before us consisted of the paper evidence in the open hearing bundle (pages 1 – 210); an additional page of evidence that we accepted at the hearing (letter dated 6/4/18 from Ministry of Justice to the Appellant responding to a FOIA request about the powers of the First-tier Tribunal and the Upper Tribunal on a FOIA appeal); and the Appellant's oral evidence.

Our decision and the reasons for it

19. Section 1(1) of FOIA provides as follows:

General right of access to information held by public authorities

(1) 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.

"Information" is defined in section 84 of FOIA as meaning "information recorded in any form".

20. There is no obligation on a public authority to answer questions generally or to create information which is not held in recorded form at the time of the request.

21. At the hearing, the Appellant gave us a long and detailed account of the events leading up to his request for information. He took us through numerous documents in the bundle of evidence to explain the chain of events. The points he made that had some relevance to the issues we had to decide were:

- that he disagreed with the IPCC's assertion that they would need to research relevant case law in order to provide the advice he sought, adding "that's what they are there for"; and
- for him to have to pay for legal advice would not be reasonable when he had been advised to raise these matters with the IPCC.

22. After considering all of the evidence before us it was clear to us that neither points 2 or 3 of the Appellant's request to the IPCC were requests for recorded information.

In the case of point 2, the Appellant described a set of circumstance that related to the events referred to above and then asked whether an independent mental capacity advocate should have been appointed under section 4 of the relevant Act. In the case of point 3, the Appellant described a related set of circumstances and then asked whether, in such circumstance, the matter should be referred to the IPCC and then in turn to the CPS.

We could see no distinction between the two. These were clearly requests for advice on the relevant law/procedures, as opposed to request for recorded information held by the IPCC.

23. The Appellant has misunderstood the purpose of FOIA. FOIA cannot be used as a device to obtain advice or opinions on legal or other matters. The IPCC were wrong, in our judgement, to have interpreted questions 2 and 3 as requests for information. Their subsequent change of tack added to the confusion. Their motives were good, however, and they provided some helpful pointers to the Appellant in relation to the questions he had raised.

Conclusion

24. The Respondent incorrectly concluded that section 21 applied to the request. Our substituted decision notice is set out in paragraph 1.

Signed: Karen Booth

**Judge of the First-tier Tribunal
Date: 7 June 2018**