Tribunals Service
Information Tribunal

Information Tribunal Appeal Number: EA/2007/0076

Information Commissioner's Ref: FS50147950

Determined on the papers at Procession House, London, 21st January 2008

Decision Promulgated 6th February 2008

BEFORE

CHAIRMAN

CHRIS RYAN

and

LAY MEMBERS

DAVE SIVERS
JOHN RANDALL

B E T W E E N:-

MR DAVID BILLINGS

Appellant

-and-

THE INFORMATION COMMISSIONER

Respondent

Decision

The Tribunal upholds the decision notice dated 2 July 2007 and dismisses the appeal.

Reasons for Decision

Introduction

1. This is an unusual Appeal because it relates to a Decision Notice which was substantially in favour of the Appellant. The Decision Notice was dated 2 July 2007. It recorded the Information Commissioner's decision that the Parliamentary and Health Service Ombudsman ("PHSO") failed to comply with section 1(1) of the Freedom of Information Act 2000 ("FOIA") when it refused to disclose to the Appellant information about the dates of any communication between a named officer of the PHSO staff and the Office of the Deputy Prime Minister between January 2002 and December 2005. The PHSO's refusal had been based on its belief that the Appellant's request had been vexatious for the purposes of FOIA section 14. The Information Commissioner decided that it had been inappropriate to rely on section 14. He also decided that the PHSO's handling of the request had been in breach of FOIA section 17(5) because of the delay in telling the Appellant that it relied on section 14.

2. In the course of the Information Commissioner's investigation of the Appellant's complaint about the way in which the PHSO had handled his request the Appellant submitted a refined version of that request. The Information Commissioner passed this on to the PHSO, which then disclosed to the Appellant the information specified in the refined request. Not only was the Decision Notice substantially in the Appellant's favour, therefore, but the underlying disagreement had been resolved by the time that it was issued.

3. Notwithstanding these facts the Appellant appealed to this Tribunal under FOIA section 57. His Notice of Appeal was lodged on 29 July 2007. The Grounds of Appeal simply stated:

> *"The Information Commissioner's decision notice is disputed on the ground that it does not fairly and accurately reflect the facts of the case"*

In a letter to the Tribunal dated 25 July 2007, before the Appeal had been officially launched, the Appellant set out what he described as "a number of concerns regarding the content of the Decision Notice". The Information Commissioner treated the content of the letter as part of the Grounds of Appeal when he filed a Reply to the Appeal and we propose to do the same. The letter sets out five criticisms and we will treat each in turn. As will be apparent, four of the five are not genuine grounds of appeal at all, although we have found it convenient to use that expression to refer to the contents of the letter and the Notice of Appeal, read together.

4. We have decided this Appeal, on the papers, which consisted of the Grounds of Appeal, the Information Commissioner's Reply and an agreed bundle of documents. The parties were invited to lodge additional written submissions but chose not to.

First Ground of Appeal

5. As mentioned above the Information Commissioner decided that the PHSO had been wrong to characterise the original request as vexatious and to have refused disclosure on that basis. The PHSO had asserted that it was entitled to adopt this approach because it considered that the request did not have a serious purpose or value. The Information Commissioner concluded that it did have a purpose. The purpose was that the complainant had a genuine, reasonable interest in establishing whether the PHSO's practices with regard to the relationship between its staff and the bodies whose activities it investigated, complied with its own operating policies. The Appellant therefore succeeded on this point.

6. At the end of the Decision Notice the Information Commissioner added a section headed "Other Matters". It opened with the words:

> *"Although they do not form part of this Decision Notice the Commissioner wishes to highlight the following matters of concern:"*

7. He then commented on an element of confusion that had arisen over certain references to the PHSO's conflicts of interest policy and stated that he believed that his investigation might have been concluded more swiftly had the Appellant been clearer on the point. The Grounds of Appeal respond to that comment by

expressing the view that *"…the over emphasis and focus on issues relating to the interpretation of the PHSO Conflict of Interest policy within the Decision Notice is secondary and misrepresents the purpose of the request."*

8. As the "Other Matters" section did not form part of the reasoning by which the Information Commissioner reached his decision, there is no basis upon which the criticism may be said to demonstrate that the Decision Notice did not comply with the law. This is not therefore a ground of appeal that we can contemplate.

Second Ground of Appeal

9. The section of the Decision Notice headed "Other Matters" included quotations from the Appellant's correspondence relating to the PHSO conflict of interest policy. The Grounds of Appeal include a complaint that it did not also include a quotation from the conflicts policy itself and added:

> *"Whilst, it is accepted that the Information Commissioner's view is that the request was untenable it is essential that the extracts above are included in the decision notice in the interests of balance and fairness".*

Again, this is not a basis for appealing. The Appellant makes no challenge to the conclusion reached by the Information Commissioner, but simply expresses the view that the reasons for that decision recorded in the Decision Notice should have been expressed differently. For the same reasons that are set out above in respect of the First Ground of Appeal this does not form any basis for an appeal from the decision. The Appeal process is not intended to develop into a joint drafting session, but only to provide relief if the Decision Notice is found not to be in accordance with the law.

Third Ground of Appeal

10. The Appellant has set out a quotation from a letter from the PHSO's solicitor and has stated that it "*…completely vindicates the request for information and outweighs any other arguments regarding whether the request was vexatious. As such, details of this admittance should be included in the ICO's decision notice."*

11. As we have stated above the Information Commissioner decided, in favour of the Appellant, that the PHSO's reliance on section 14 was not justified. This ground of appeal is therefore no more than a comment that the Appellant believes that there is another reason for the Information Commissioner to have reached that conclusion. By no stretch of the imagination can this be said to be a ground of appeal and there is, therefore, once again, no basis for an appeal.

Fourth Ground of Appeal

12. The Appellant quoted a statistic about the speed of response of the PHSO to FOIA requests generally and complained that this did not appear in the Decision Notice. This was another point on which the Information Commissioner found against the PHSO. He did so, properly, on the basis of the information before him. There was no reason why he should have also referred to other information, which had no bearing on the facts of this specific case. It is an abuse of the appeal process to use it in an attempt to rewrite a decision by bringing in additional material which the successful party thought (wrongly in this case) would have bolstered a decision that was already in his favour.

Fifth Ground of Appeal

13. The Information Commissioner considered whether the PHSO had failed to comply with FOIA section 16 in that it had apparently not made any attempt to clarify the Appellant's original request. Section 16(1) reads:

> *"It shall be the duty of a public authority to provide advice and assistance, so far as it would be reasonable to expect the authority to do so, to persons who propose to make, or have made, requests for information to it."*

The Information Commissioner decided that the PHSO had not breached this provision because section 16(2) provides:

> *"Any public authority which, in relation to the provision of advice or assistance in any case, conforms with the code of practice under section 45 is to be taken to comply with the duty imposed by subsection (1) in relation to that case."*

and paragraph 15 of that Code of Practice provides:

> *"An authority is not expected to provide assistance to applicants whose requests are vexatious within the meaning of s.14 of the Act".*

The Information Commissioner has defended his decision on the basis that the PHSO had concluded that the request was vexatious and that, although the Commissioner decided that the PHSO was incorrect in this regard, the PHSO's view could not in all the circumstances be said to have been perverse or wholly unreasonable. As such, he says, the PHSO was acting in accordance with the Code of Practice in not providing assistance.

14. We have some hesitation in adopting the Information Commissioner's reasoning. If it transpires that a public authority was wrong to have concluded that a request was vexatious, then other provisions of the FOIA may come into play. Most obviously, it may be found to have failed in its obligation to communicate the information in question as required by FOIA section 1. It might also be said that the person making it was entitled to the assistance which the public authority should have provided under Section 16, on the basis that he or she should not be denied that right simply because the public authority initially took the view, erroneously, that the request was vexatious. But the obligation to provide advice and assistance is qualified by the words "*so far as it would be reasonable to expect the authority to do so".* It is arguable that the only effect of those words is to place a limit on the <u>extent</u> of the assistance that must be provided. But we think that it also capable of meaning that the obligation is not triggered at all in circumstances where a public authority reaches a rational conclusion that a request is vexatious. It seems to us that this conclusion not only represents an appropriate construction of the language of the section but also reflects the common sense approach adopted in the Code of Practice. Its effect is that if a public authority comes to the reasonable conclusion that a request is vexatious it should not be open to criticism, (if the Information Commissioner or Tribunal subsequently disagrees with its assessment), for having failed to engage in further communications with the person making the request. This does not, of course, mean that public authorities may adopt a cavalier attitude to information requests: seeking to avoid their obligations by perversely or

unreasonably characterising any inconvenient request as vexatious. The protection provided by the qualification to section 16 will not be available to a public authority which has been unreasonable in deciding to treat the request as vexatious.

Conclusion and remedy

15. For the reasons set out above we reject each of the criticisms made by the Appellant. With the exception of the Fifth Ground of Appeal they were in our view completely without merit.

Signed:

Chris Ryan

Deputy Chairman Date: 6th February 2008