



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

Appeal Reference: EA/2018/0197

**Heard at Wigan County Court
On 5 March 2019**

Representation:

Appellant: in person

First Respondent: The Information Commissioner did not appear

Second Respondent (Parliamentary and Health Service Ombudsman): Did not appear

Before

JUDGE BUCKLEY

DAVE SIVERS

PAUL TAYLOR

Between

MARTIN L ADEDEJI

Appellant

and

THE INFORMATION COMMISSIONER

First Respondent

and

PARLIAMENTARY AND HEALTH SERVICE OMBUDSMAN

Second Respondent

DECISION

1. For the reasons set out below the Tribunal dismisses the majority of the appeal. The appeal is partially allowed in that the Commissioner should have determined that the Public Authority was in breach of s 1(1) of the Freedom of Information Act 2000 (FOIA) for (i) failing to confirm or deny that it held the information and (ii) by failing to provide the case assessment checklist or rely on an applicable exemption.

SUBSTITUTE DECISION NOTICE

Public Authority: Parliamentary and Health Service Ombudsman
Complainant: Martin Adedeji

The Substitute Decision

1. For the reasons set out below the Public Authority was entitled to refuse the Complainant's request for information made on 1 December 2016 on the ground that the requested information was not held. The Public Authority breached s 1(1) FOIA (i) by failing to inform the Complainant that it did not hold the information and (ii) by failing to provide the case assessment checklist or rely on an applicable exemption.

Action Required

2. No action is required.

REASONS

Introduction

1. This is an appeal against the Commissioner's decision notice FS50693084 of 13 August 2018 which held that the Parliamentary and Health Service Ombudsman (PHSO) held no further information within the scope of the request. The Commissioner did not require the public authority to take any steps.

Factual background to the appeal

2. On 3 August 2009 Mr Adedeji attended a consultation with his GP at Dicconson Group Practice. On 29 January 2010 he made a complaint about the GP's conduct in that consultation to Ashton Leigh and Wigan Primary Care Trust ('ALWPCT'). Mr Adedeji has made a number of further complaints arising out of this consultation, including complaints to ALWPCT in January 2010 and March 2010.
3. Most relevantly to this appeal he complained to the Commissioner in 2011 about what Mr Adedeji asserts amounted to the a breach of the Data Protection Act 1998 (DPA) by ALWPCT, namely the mishandling of his personal data by

ALWPCT by (i) altering his January 2010 statements of complaint and (ii) misappropriating and misusing extracts from his March 2010 complaint.

4. He complained to PHSO on 14 July 2015 about the ICO's handling of that complaint. His complaint to PHSO was threefold: firstly he complained that the ICO had unfairly stated that it was likely that there was no breach of the DPA, secondly that they had failed to deal with his most serious complaint (labelled (ii) in the previous paragraph) and thirdly that there had been a lengthy delay.
5. Mr Adedeji asserts that PHSO handled his complaint badly. In particular, that PHSO wrongly concluded that there was no evidence of failings in the Commissioner's decision that ALWPCT had not breached the DPA and that PHSO, as the Commissioner had done, failed to mention complaint (ii) above. The request which is the subject of this appeal is part of Mr Adedeji's attempt to remedy the perceived failings in PHSO's handling of his 2015 complaint.

Request, Decision Notice and appeal

Request

6. On 1 December 2016 Mr Adedeji made an information request via the 'what do they know' website to PHSO in the following terms:

Please note that by my below reference to the '2015 complaint' I am referring to a 2015 complaint you handled to which you gave the references; EN-223689 and EN-231978/0027.

I am requesting a copy of all information you hold of:-

1. The training the staff received, who dealt with the 2015 complaint, to ensure they had the specific skills necessary to enable them to assess the alleged breaches of the Data Protection Act (DPA) in the 2015 complaint.
2. Which organisations and advisors (internally and externally) that, in 2015, you would seek advice from to assist you, in your assessments, as to whether or not;
 - a. A public authority had breached the DPA.
 - b. The Information Commissioner's Office (ICO) had properly dealt with a member of the public's complaint that a public authority had breached the DPA in their handling of a service users' personal data.
3. Who you actually sought and received advice from to assist you in your assessment, of the 2015 complaint, as to whether or not:-
 - a. Ashton, Leigh and Wigan Primary Care Trust (ALWPCT) had breached the DPA.
 - b. The ICO's Office had properly dealt with a complaint that ALWPCT had breached the DPA in their handling of a service users' personal data.
4. What you should, and also must make, a record of in respect of the complainant's specific complaint allegations in the 2015 complaint you handled.

5. How and where you should, and also must, make a record of the complainant's specific complaint allegations that were sent to you in the 2015 complaint.

Response

7. In its response dated 3 January 2017 PHSO relied on s 44(1)(a) of the Freedom of Information Act (FOIA) (Exempt information where disclosure prohibited by an enactment) and informed Mr Adedeji that he could contact them privately (rather than via a public forum) if he wished to request information in relation to his own complaint so that they could assist him under the Data Protection Act 1998 (DPA), the Health Service Commissioners Act 1993 and the Parliamentary Commissioners Act 1967. PHSO explained that it did not have specific guidance on how to handle complaints about a data breach or about the Information Commissioner's Office (ICO). It provided links to the publicly available PHSO casework policies and guidance that explain its casework procedures. It also provided a link to a response provided on 9 August 2016 to an FOI request about PHSO staff's obligations under the DPA.
8. Mr Adedeji emailed PHSO from his own email address to request the information but received no substantive response. He requested an internal review on 7 March 2017. By email dated 28 April 2017 PHSO upheld its decision on internal review. It continued to rely on s 44(1)(a) and stated that the link to the DPA training information satisfied that part of the request.
9. Mr Adedeji referred the matter to the Information Commissioner on 26 July 2017. During the Information Commissioner's investigation PHSO made no further reference to the s 44(1)(a) exemption and did not maintain its application to any elements of the request. On 13 March 2018 the Commissioner asked PHSO a series of questions on what information in the scope of the request was held.
10. PHSO responded on 9 April 2018 as follows:

Question one

11. PHSO does not hold specific information on the training the staff who dealt with the complaint in 2015 received on how they handle complaints about the Information Commissioner's Office. It attached guidance documents which were in place at the time of the 2015 request. A link had been provided to previously disclosed details of online DPA training staff received in 2015.

Question two

12. In relation to 2(a) PHSO does not assess whether a public authority had breached the DPA. In relation to 2(b) the complaint did not proceed to a statutory investigation. The caseworker's decision is approved by a manager as

recorded in the case assessment checklist. Advice would not be sought from other organisations or advisors.

Question three

13. 3(a) is outside the remit of PHSO. In relation to 3(b) PHSO said that no advice was sought, other than approval by a manager as recorded in the case assessment checklist.

Questions four and five

14. The complaint did not proceed to a statutory investigation, but an initial investigation was carried out. For an initial investigation the case assessment checklist details what information should be recorded.

Decision Notice

15. In a decision notice dated 13 August 2017 the Commissioner considered each element of the request in turn and PHSO's response as set out in its letter dated 9 April 2018. It decided that on the balance of probabilities PHSO does not hold any further information within the scope of the request.

Grounds of Appeal

16. The Notice of Appeal states that the outcome sought is the overturning of the Commissioner's Decision Notice and a finding that PHSO:

1. Failed within 20 working days to provide a proper/valid refusal notice
2. Failed within 20 working days to provide a copy of the information it held within the scope of the request which Mr Adedeji was entitled to receive under the FOIA
3. Failed within 20 working days to confirm or deny whether they held the information requested.

17. The Grounds of Appeal are in summary that:

1. The Commissioner fails to deal with the fact that PHSO led Mr Adedeji on 'a wild goose chase' by asking him, in effect, to resubmit his claim under the DPA but ignoring the further emails that he sent and by initially relying on s 44 and then abandoning its reliance on this exemption. Mr Adedeji argues that a proper refusal notice has not been provided.
2. Some of the links provided did not work, and some linked to large and complex documents through which Mr Adedeji was expected to trawl to find the relevant information.

3. PHSO did, in effect, assess breaches of the DPA by concluding that 'we have not seen any evidence that they (the Commissioner) have failed to meet their obligations under the DPA'.
4. The Commissioner's decision is undermined by a conflict of interest and the fact that she has found that ALWPCT have not mishandled his personal data.
5. The annotation by JT Oakley on Mr Adedeji's request on the 'WhatDoTheyKnow' website supports Mr Adedeji's belief that PHSO holds information in relation to advisors within the scope of questions 3 and 4.
6. The Decision Notice inaccurately represents Mr Adedeji's complaint correspondence.

The Commissioner's response

18. In summary the Commissioner contends that the arguments set out in the Grounds of Appeal are without foundation and not relevant to the appeal.

PHSO's response

19. In summary PHSO asserts that the Grounds of Appeal disclose no reasonable grounds for challenging the Decision Notice.

Legal framework

20. The question of whether or not a public authority holds the information is a factual matter on the balance of probabilities.
21. The tribunal's remit is governed by s.58 FOIA. This requires the tribunal to consider whether the decision made by the Commissioner is in accordance with the law or, where the Commissioner's decision involved exercising discretion, whether she should have exercised it differently. The Tribunal may receive evidence that was not before the Commissioner and may make different findings of fact from the Commissioner.

Evidence and submissions

22. We have read and were referred to an open bundle of documents. Mr Adedeji made the following submissions, by way of his skeleton argument and/or oral submissions.

Failure to respond to the request in accordance with FOIA

23. The initial response and internal review relied upon s 44(1)(a). This was abandoned during the Commissioner's investigations. PHSO should have

responded to the request by (i) providing the case assessment checklist or a valid refusal notice and (ii) confirming that they did not hold the information. The Commissioner previously stated that it thought PHSO was in breach of s1(1)(a) FOIA.

24. Some of the links provided did not work, others were links to large, complex documents through which Mr Adedeji was expected to trawl in attempt to locate information relevant to his request.
25. The case management checklist which is said to be information within the scope of the request was provided to the claimant in response to a subject access request in 2015. A proper refusal notice should still have been provided in respect of this document.

PHSO and the DPA (relevant to questions 1-3)

26. It is likely that PHSO do make decisions in respect of whether or not the Commissioner did properly assess data protection complaints. This is supported by:
 1. PHSO's final complaint letter dated 28 October 2015 which states ...we have not seen any evidence to suggest that they reached unreasonable conclusions based on the information provided to them...we have not seen any evidence to suggest that they have failed to meet their obligations under the DPA.
 2. PHSO's case summary dated March 2015 entitled 'Information regulator failed to properly assess data protection complaints'
 3. The completed case assessment checklist which states, in respect of the ICO not finding it likely that ALWPCT breached DPA in 2010, that there is 'no evidence of failings'. In order to come to this conclusion there has to have been some decision on whether or not they breached DPA.
 4. An example in the bundle of a case summary sent back to the Commissioner by PHSO.

Question 1

27. Mr Adedeji thinks that PHSO's conclusion that there is no evidence of failings in the Commissioner's decision that ALWPCT had not breached the DPA is wrong. He is trying to find out if the staff were competent to make that decision. That is why he has requested information about their training.
28. The link supplied is about staff training on handling the complainant's personal data. That is not what the question is asking for. Given that PHSO do make decisions about whether the Commissioner's assessment was correct, it is likely that the staff who assessed the claimant's data protection concerns would have

had some training to help them to come to that decision. If they don't have that training their decisions would be unsound.

Questions 2 and 3

29. PHSOs 'professional assessment manual' refers to professional advice at the assessment stage in the customer service flowchart. This supports JT Oakley's annotation which refers to an external investigator. This makes it likely that PHSO do sometimes use advisors and therefore that they are likely to have recorded information within the scope of these questions.

Questions 4 and 5

30. PHSO failed to record Mr Adedeji's most serious complaint issue (referred to as (ii) in the findings of fact above), even though it was clearly detailed in the 14 July 2015 complaint form. It is difficult to accept that it is proper not to record such a serious issue. That is why Mr Adedeji is seeking information about what should be recorded.

31. It is likely that PHSO holds recorded information in addition to the case management checklist such as manuals or procedures which specify what staff should record and where.

32. Finally, Mr Adedeji asserts that the Commissioner has a conflict of interest in this case.

Issues

33. The issues we have to determine are:

1. Did the Commissioner err in failing to find that PHSO had breached s 1(1)(a) FOIA by failing to confirm or deny that it held the information and by failing to provide the case assessment checklist?
2. On the balance of probabilities did PHSO hold any further information within the scope of the request?

Discussion and conclusions

34. Mr Adedeji asserts that the Commissioner has a conflict of interest in this case. Whether or not the Commissioner handled Mr Adedeji's previous complaint correctly is not in issue in this case, which concerns whether or not PHSO hold certain information. Further the Commissioner is the only body which can deal with the relevant complaint. Finally, the tribunal is an entirely independent body, and, in effect, considers the matter afresh.

Did the Commissioner err in failing to find that PHSO had breached s1(1) FOIA?

35. We accept that:

1. PHSO should have informed Mr Adedeji in writing in its initial response that it did not hold the information under s1 FOIA.
2. PHSO should have confirmed that it held the case assessment checklist and either provided a blank copy or relied on an applicable exemption (for example, s 40(1) on the basis that the checklist contains his personal data so could not be disclosed under FOIA to the world at large).

36. On this basis we conclude that PHSO breached s 1 FOIA. This has been belatedly remedied and PHSO do not need to take any action.

37. Although we accept that Mr Adedeji had some difficulty accessing some of the information provided, and that he had to 'trawl' through some extensive policies in an attempt to provide relevant information, we find that PHSO did enough to comply with their duty to provide advice and assistance under s 16 FOIA, which only requires them to provide advice and assistance so far as it would be reasonable to do so.

On the balance of probabilities did PHSO hold any further information within the scope of the request?

Questions 1,2 and 3

38. We accept the principle behind Mr Adedeji's argument i.e. if PHSO had to make findings, based on the application of legal principles, on whether a body had breached the DPA there would be a business need to hold information on either training of internal staff on the DPA or information on external/internal experts to be consulted.

39. However, it is not within the ombudsman's powers to assess whether or not a public authority has breached the DPA, nor is it within its powers to decide whether or not the Commissioner made an error of law or whether its decision was correct. We can understand why Mr Adedeji has formed the impression that PHSO was substantively reviewing the Commissioner's decision, but that is not something that is within PHSO's powers. The PHSO's role is not to assess whether the ICO correctly interpreted the DPA, but, for example, to assess whether it followed proper administrative procedures in relation to his complaint).

40. Therefore, we do not accept that there is a business need for training staff on assessing breaches of the DPA, nor in seeking advice or assistance from internal organisations or advisors to assist in an assessment of whether a public authority had breached the DPA. For this reason, we accept, on the balance of

probabilities, PHSO's assertion that they do not hold any further information within the scope of questions 1, 2(a) and 3(a).

41. We accept that the evidence relied on by Mr Adedeji supports his assertion that HMSO sometimes consult external advisors. The customer services flowchart refers to 'professional advice' at the assessment stage, and the comment by J T Oakley referred to an 'independent investigator'.
42. This does not however mean that there is a business need for PHSO to hold recorded information on the internal or external advisors that they would consult when assessing if the Commissioner had properly dealt with a member of the public's complaint that a public authority had breached the DPA in their handling of a service users personal data. As stated above, PHSO are not considering an appeal from the decision so there is no business need for professional advice on the application of the DPA. We accept PHSO's assertion that they do not hold any information falling within the scope of question 2(b).
43. In relation to the particular 2015 complaint, there is no evidence to suggest that PHSO did consult any advisors, and, for the reasons set out above, no reason that they should have consulted advisors and therefore no reason for us to reject their assertion.
44. We find on the balance of probabilities that PHSO hold no further information within the scope of questions 2(b) and 3(b).

Questions 4 and 5

45. Mr Adedeji is concerned that PHSO failed to record his most serious complaint issue (referred to as (ii) in the findings of fact above), even though it was clearly detailed in his complaint form. Whether or not this is correct, PHSO say that they have provided all the information they hold which details how where and what information should be recorded.
46. Having reviewed the documentation already provided, we think it is highly unlikely that PHSO are deliberately concealing any further manuals or procedures which set out how information should be recorded. We think it is much more likely that their processes are set out in the information that is already provided. We therefore accept on the balance of probabilities that PHSO holds no further information within the scope of questions 4 and 5. Mr Adedeji may be of the view that PHSO's procedures are inadequate. It is not our role to decide whether or not that is the case. We simply have to decide if we are satisfied, on the balance of probabilities that they hold no further information within in the scope of questions 4 and 5.
47. This is a unanimous decision.

Judge of the First-tier Tribunal

Date: 1 April 2019

Promulgation Date 2nd April 2019