



FIRST-TIER TRIBUNAL

GENERAL REGULATORY CHAMBER

Appellant: Newcastle Upon Tyne Hospital NHS Foundation Trust

Tribunal Ref EA/2011/0236

Respondent: The Information Commissioner

DECISION NOTICE

1. This appeal is struck out because I consider that there is no reasonable prospect of it succeeding.
2. I retain strong doubts as to whether the Tribunal should entertain this appeal on what may be an abstract issue for there is no longer any real dispute between the parties. I have decided, however, after considering Rule 2, to strike out the case on other grounds.
3. In February 2011 Mr Ord was in dispute with Newcastle Upon Tyne Hospital NHS Foundation Trust (“the Trust”). He had been dismissed from his employment with them and had taken his case to an Employment Tribunal. He asked the Trust for some statistics about the number of people who had been dismissed over a three year period.
4. On 15 March the Trust confirmed that they held the information but they refused to give it to Mr Ord relying on an exception in Section 21(1) Freedom of Information Act 2000. This exempts from the basic right to information under Section 1 of the Act any information which is:-

“reasonably accessible to the applicant otherwise than under Section 1”.

The other provisions of Section 21 are not relevant here. The Trust advised Mr Ord that he should make an application within the employment tribunal litigation. Standard disclosure orders are made in Employment Tribunals although it seems the information Mr Ord was requesting had not been included within the original disclosure. (See para 3 of the Trust Solicitor’s advice dated 14 October 2011.)

Decision Continued

Appellant: Newcastle Upon Tyne Hospital NHS Foundation Trust

Tribunal Reference Number: EA/2011/0236

Date of decision: 6 January 2011

5. Under the relevant procedural rules, Mr Ord could apply to a Judge to order the Trust to “provide additional information”. His application would have to include an explanation of how the order would assist the Tribunal in dealing with the proceedings efficiently and fairly.
6. On 19 March the Trust upheld their decision on review so towards the end of that month Mr Ord took his case to the Information Commissioner.
7. The Commissioner wrote to the Trust on 11 April. On 14 April the Trust disclosed the information to Mr Ord. They say they did so “voluntarily in the course of tribunal proceedings”. Eventually, on 22 September 2011 the Commissioner issued a decision notice. He decided that the Trust had incorrectly applied Section 21(1) but decided that no further action was necessary.
8. Nevertheless, this prompted an appeal from the Trust, who explained in their notice of appeal that:-

“The point at issue is one of prioritising the correct forum by which information is provided. The Trust point is that once proceedings are issued, the correct forum lies within the proceedings that have been issued, in this case the Employment Tribunal.”

In a response to a strikeout warning the Trust elaborated on this stating that if proceedings are pending:-

“the primary route for disclosure of information must be the ongoing litigation”.

They added that if Mr Ord had made an unsuccessful request to an Employment Tribunal Judge then, and it seems only then, would it be correct to say that the information was not reasonably accessible to him. A request under Section 1 Freedom of Information Act would then “fall to be considered”.

9. As I have indicated the effect of the Trust’s submissions is that if a citizen is involved in litigation with a public authority his rights under the Freedom of Information Act are some how frozen or put on hold until (s)he has “taken the primary route” of making an application to the court or tribunal which has jurisdiction over the litigation. Identical requests made on the same day by two citizens would result in two different decisions if

Decision Continued

Appellant: Newcastle Upon Tyne Hospital NHS Foundation Trust

Tribunal Reference Number: EA/2011/0236

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one of them was engaged in litigation with the authority and one was not. I cannot accept that this consequence flows from Section 21(1).

10. Moreover, it is central to the working of the 2000 Act that once the citizen has obtained information under it, then he or she has freedom to use it. The Trust concedes that if Mr Ord had obtained the relevant information in the course of litigation then the same freedoms of use would not apply. This seems to me to be fatal to the Trust's case. In my judgement, the reference to "information" in Section 21(1) necessarily means information carrying with it the same freedom of use as information obtained under Section 1 of the Act.
11. The Trust's stand is that, as a matter of principle, Mr Ord should take "the primary route first". However, if I apply Section 21(1) to the individual circumstances of Mr Ord, it is by no means obvious to me that the statistics he sought would meet the test of assisting the Employment Tribunal to deal with their proceedings efficiently and fairly. The Trust states that it is "a matter of speculation" how he could have satisfied an Employment Tribunal Judge that such was the case.
12. In those circumstances, it seems to me, the Commissioner's conclusion that the information was not "reasonably accessible" to Mr Ord by way of an application to the Employment Tribunal was inevitable and is unassailable.
13. For these reasons I have struck out this appeal.

Signed:	NJ Warren	Date:	6 January 2011
	Chamber President		