



**IN THE FIRST-TIER TRIBUNAL
GENERAL REGULATORY CHAMBER
(INFORMATION RIGHTS)**

Appeal No: EA/2015/0285

ON APPEAL FROM:

The Information Commissioner's Decision Notice No: FS50594286

Dated: 16 November 2015

Appellant: George Millington

Respondent: The Information Commissioner

Heard at: Leeds Employment Tribunal

Date of Hearing: 24 March 2016

Before

Chris Hughes

Judge

and

Darryl Stephenson and Paul Taylor

Tribunal Members

Date of Decision: 29 March 2016

Date of Promulgation: 30 March 2016

Attendances:

For the Appellant: in person

For the Respondent: not represented

Subject matter:

Freedom of Information Act 2000

DECISION OF THE FIRST-TIER TRIBUNAL

The Tribunal upholds the decision notice dated 16 November 2015 and dismisses the appeal.

REASONS FOR DECISION

Introduction

1. The Appellant in these proceedings, Mr Millington, formerly kept a herd of ponies. On 31 January 2013 the RSPCA, accompanied by the West Yorkshire Police, visited his premises and removed all 41 animals. A year later he and his wife were convicted following a trial in the Magistrates' Court of offences of causing unnecessary suffering. The judge ordered that the horses should not be returned imposed fines and a ban from keeping horses for ten years.
2. At a preliminary hearing of the criminal case he was informed that one of the ponies which had been removed had become unwell and had been put down. He was subsequently provided, by the RSPCA, with a copy of a necropsy report prepared by the Veterinary Pathology Department of the University of Liverpool at the request of the veterinary surgery which had examined the horse and put it to sleep. The material he was provided with disclosed the existence of a preliminary report.

The request for information

3. On 2 June 2015 Mr Millington wrote to the University making requests under FOIA for:-
*"1. Preliminary report sent 26 April 2013,
2. Application request forms and any associated correspondence from instructing veterinary surgeons practice..."*
4. The University rejected the request relying on s41 FOIA (the exemption for information provided in confidence). On review the University maintained this position:-
".. I am satisfied after reviewing the documentation that there was a mutual duty of confidentiality in existence under the contract between the RSPCA and the Veterinary Pathology Department of the University's School of Veterinary Science. In such circumstances this University's refusal to provide the information you requested

under the exemption referred to in Section 41 of the Freedom of Information Act was justified.

If in fact the RSPCA provided you with any information or documents covered by such duty of confidentiality, they should not have done so without first requesting this University's agreement to waive confidentiality."

The complaint to the Information Commissioner

5. Mr Millington complained to the Respondent Information Commissioner, the "ICO" arguing that the duty of confidentiality was between the veterinary service and Mr Millington and his wife, because at that stage they still owned the horses and the Police and RSPCA had committed the civil wrong of conversion in removing the ponies.
6. In response to the ICO's investigation the University, in an e-mail of 14 October 2015 (bundle page 44), set out in detail its argument with respect to s41, and also relied on s43 FOIA which provides a qualified exemption if disclosure:-
"would or would be likely to prejudice commercial interests of any person including the public authority holding it"
7. The University explained that in its view disclosure would cause a real risk to the University in its:-
"key role in providing confidential and sensitive post-mortem services to veterinary hospitals and the RSPCA, which would have significant reputational and financial consequences and may result in the University not being used for such services in the future."
8. In his decision notice the ICO explored the argument with respect to s.43. He noted that the information was sensitive as it had a connection with legal proceedings and the University's concerns for its reputation for discretion and confidentiality in dealing with sensitive animal cases. Disclosure would have reputational and financial consequences.
9. In exploring the extent of a public interest in the disclosure of the post-mortem on an individual horse he differentiated between Mr Millington's interest and the public interest and found there was only a very limited public interest in a greater understanding of how the Pathology department carried out a post-mortem on a horse.
10. The ICO considered that the s43(2) exemption was engaged with respect to the University's commercial interests. The prejudice was not trivial and disclosure of

information would cause prejudice and lead the University's potential clients to decide not to use its services.

11. In the light of these considerations the ICO found that the information should not be disclosed by reason of the commercial prejudice that it would cause; he did not therefore need to consider the application of the s.41 exemption.

The appeal to the Tribunal

12. In his appeal Mr Millington suggested that the University did not rely on s43(2) so the ICO should not have used it, that prejudice to the University's commercial interests was an excuse, he wanted to know more about the cause of death since he had seen (by a subject access request to the RSPCA) a suggestion that it was due to colic. He stated:-

"this is a personal request, no public interest only concerned interests RSPCA and George Millington."

13. In his response the ICO maintained the arguments analysis set out in the decision notice.
14. In his oral submissions Mr Millington focussed on his perception of misconduct by the RSPCA and an unfair trial. He confirmed that the final post mortem report he had been sent gave the cause of death as heart failure which he felt was inconsistent with what he had seen in a disclosed e-mail. He was suspicious and claimed that the post- mortem report had been changed to hide something. He confirmed that there was no public interest issue. His basic premise was that since he had the final report he should be entitled to have the preliminary report.
15. With regard to the second part of his request, Mr Millington conceded that he could see how disclosure would prejudice the University's commercial interests and stated that he was "*happy to withdraw...*".

The questions for the Tribunal

16. The issue for the tribunal is whether the disclosure would or would be likely to, prejudice the University's commercial interest and if so whether in all the circumstances of the case the public interest in maintaining the exemption outweighs that of disclosure.

Consideration

17. Universities are major commercial organisations and many university departments raise significant income from providing specialist consultancy services using the

expertise of their staff and the equipment used for research and education. These services compete with other providers which are private sector entities not subject to FOIA. The customers paying for these services would expect information they provide and the results they obtain to be confidential to them, whether they contract with a University or with a private company. If the customer were to consider that potentially sensitive information could be released that would be a powerful incentive not to use a University but to use a private company. This would prejudice the income of the University. The issue in this case (disclosure or non-disclosure of a preliminary report prepared by a University) could easily be replicated across the whole of the University of Liverpool. The exemption is clearly made out and the commercial harm would be very real and immediate.

18. In the balance against that clear harm Mr Millington has his own private interest in the cause of death and a sense of grievance which has led him to criticise the RSPCA, the Police, the University and the ICO and his staff. His argument is that if he has the final report, why should he not have the preliminary report, however that does not amount to a reason under FOIA for disclosure. The RSPCA provided him with a copy of the final post mortem report; that was a choice they made and it would seem that it was made without any input from the University. In any event, disclosure to Mr Millington in that instance is not the same as disclosure to the world at large, as is the case under FOIA. It has not chosen to give him a copy of the preliminary report and the commercial interests of the University would be prejudiced if the University handed it over. He has seen the considered and final views of the University pathologist and any information in the preliminary report is precisely that; preliminary. There is no public interest whatsoever in disclosure of the preliminary report and substantial commercial harm to the University.
19. The tribunal is therefore satisfied that the decision of the ICO is correct in law and dismisses the appeal.
20. Our decision is unanimous

Judge Hughes

[Signed on original]

Date: 29 March 2016