

LUTAF GREENSHAW
and
THE INFORMATION COMMISSIONER

Before: Brian Kennedy QC,

DECISION

Introduction:

[1] This decision relates to an appeal brought under section 57 of the Freedom of Information Act 2000 (“the FOIA”) and Regulation 18 of the Environmental Information Regulations (“EIR”). The appeal is against the decision of the Information Commissioner (“the Commissioner”) contained in a Decision Notice dated 5 April 2018 (reference FS50705564), which is a matter of public record.

[2] The Tribunal Judge and lay members sat to consider this case on 24 September 2018.

Factual Background to this Appeal:

[3] Full details of the background to this appeal, Mr Greenshaw’s request for information and the Commissioner’s decision are set out in the Decision Notice and not repeated here, other than to state that, in brief, the appeal concerns the question of whether the Local Government Ombudsman (“LGO”) was correct to withhold information under s44(1)(a).

CHRONOLOGY:

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| 23 May 2017 | Appellant raises issues with LGO regarding their decision in respect of a complaint made |
| 24 Aug 2017 | Appellant’s request to LGO for all information relating to a particular case, with redactions for personal information |
| 27 Aug 2017 | Appellant contacts LGO again demanding the requested information without delay, complaining that it should have been provided by June |

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| 14 Sept 2017 | LGO informs Appellant that most of the requested material constituted the Appellant's personal data and disclosed it under Data Protection Act 1998, and withheld some 'third party correspondence' |
| 20 Sept 2017 | Appellant expresses dissatisfaction with response |
| 2 Oct 2017 | Internal review clarifies that some information not previously considered was not able to be disclosed under s44(1)(a) as the Local Government Act 1974 prohibited disclosure |
| 12 Oct 2017 | Complaint to the Commissioner |
| 17 Nov 2017 | Commissioner clarifies scope of request with Appellant |
| 9 Feb 2018 | Commissioner again clarifies scope of request with Appellant |
| 13 Feb 2018 | Commissioner requests from LGO sight of withheld information and explanation of reliance on s44(1)(a) |
| 5 April 2018 | DN upholding the refusal |

RELEVANT LEGISLATION:

Freedom of Information Act 2000

Section 44 Prohibitions on disclosure

(1) Information is exempt information if its disclosure (otherwise than under this Act) by the public authority holding it—

- (a) is prohibited by or under any enactment,
- (b) is incompatible with any obligation, or
- (c) would constitute or be punishable as a contempt of court.

(2) The duty to confirm or deny does not arise if the confirmation or denial that would have to be given to comply with section 1(1)(a) would (apart from this Act) fall within any of paragraphs (a) to (c) of subsection (1).

Local Government Act 1974

Section 32 Law of Defamation, and disclosure of information

(2) Information obtained by a Local Commissioner, or any officer of the Commission, in the course of or for the purposes of an investigation under this Part of this Act shall not be disclosed except—

- (a) for the purposes of the investigation and of any report to be made under section 30 or section 31 above; or
- (aa) for the purposes of a complaint which is being investigated by the Parliamentary Commissioner or the Health Service Commissioner for England (or both); or]

(b) for the purposes of any proceedings for an offence under the Official Secrets Acts 1911 to 1939 alleged to have been committed in respect of information obtained, by virtue of this Part of this Act, by a Local Commissioner or by an officer of the Commission or for an offence of perjury alleged to have been committed in the course of an investigation under this Part of this Act or for the purposes of an inquiry with a view to the taking of such proceedings, or

(c) for the purpose of any proceedings under section 29(9) above, and a Local Commissioner and the officers of the Commission shall not be called upon to give evidence in any proceedings (other than proceedings within paragraph (b) or (c) above) of matters coming to his or their knowledge in the course of an investigation under this Part of this Act.

...

(7) Information obtained from the Information Commissioner by virtue of section 76 of the Freedom of Information Act 2000 shall be treated for the purposes of subsection (2) above as obtained for the purposes of an investigation under this Part of this Act and, in relation to such information, the reference in paragraph (a) of that subsection to the investigation shall have effect as a reference to any investigation.

COMMISSIONER'S DECISION NOTICE:

[4] The LGO confirmed to the Commissioner that its understanding of s32 (2) of the Local Government Act 1974 prohibited the Ombudsman from disclosing any information obtained in the course or, or for the purposes of, the investigation of a complaint, unless the Ombudsman considers it necessary for the investigation (or in limited circumstances relating to legal proceedings). LGO stated that the withheld information took the form of an email exchange between a councillor and a council officer. The exchange in question does not refer to the Appellant by name, and was received from the Council in the course of its investigation into the Council's conduct.

[5] Disclosure of the information is therefore barred by statute as an absolute exemption, and the LGO was not obliged to provide the Appellant with the information he requested to that extent.

GROUND OF APPEAL:

[6] The Appellant requested a review of the conclusion that s44 (1)(a) was engaged, complaining that the LGO had failed fully to investigate his complaints and that the email chain in question originated from a complaint that he had made.

COMMISSIONER'S RESPONSE:

[7] The Commissioner reiterated that she had considered all of the exemptions in s32 (2) LGA 1974, and found that none of them applied. Insofar as the Appellant was claiming that the email chain was his personal data, the Commissioner applied for this ground to be struck out under Rule 8 (2)(a) as it refers to a subject access request under DPA, not FOIA, and it was a matter that has already been considered by the Commissioner.

APPELLANT'S REPLY:

[8] The Appellant gave some background information about the complaint that he made to the LGO about the Council, and claimed that Council members warned each other that the Appellant had a right to see any correspondence with his name on it. He feared that his messages to Council members were being unlawfully intercepted. His case was that the actions of the Council were so egregious as to justify nothing but complete disclosure in order to expose the wrongdoing. He further denied that any of his requests constituted Subject Access Requests, and requested that the Tribunal consider his entire request under FOIA.

[9] In reference to the 'legal proceedings' exception that can permit disclosure, the Appellant argued that the only way in which he could assess whether or not to bring legal proceedings was to consider the information. He accused members of the Council of misleading the LGO, and in preventing a fair and full investigation of his complaint, breached his rights under Article 8 and Article 1 Protocol 1 of the ECHR. Conversely, the rights of those identified in the information would not be impinged as the Appellant states that they are already in the public domain.

TRIBUNAL CONCLUSION:

[10] The Tribunal had the benefit of two cases provided to us by the Commissioner, namely *Commission for Local Administration in England v ICO (EA/2007/0087)* and *Purser v ICO and LGO (EA/2010/0188)*. Both of these cases upheld the prohibition on disclosure under s32 (2) LGA 1974, and that information coming to the LGO in furtherance to a complaint being received was such exempt information. In *Purser* the Tribunal went on to note that any criticisms of the Ombudsman's investigations ought to be pursued by way of judicial review and not through appealed information requests before the Tribunal.

[11] The statutory provision of s33 (2) is an absolute bar to disclosure. The Appellant has not disputed this fact. The Tribunal has had the benefit of reviewing the closed material, and can confirm that none of the exceptions at s32 (2)(a)-(c) apply. For the reasons set out above, the Tribunal is not persuaded that the Commissioner erred in fact or in Law and accordingly we dismiss this appeal and make no further order.

Brian Kennedy QC

22 October 2018.

Promulgated Date:

03 January 2019.