



Case Reference: EA/2023/0284
Neutral Citation Number: [2024] UKFTT 00756 (GRC)

First-tier Tribunal
General Regulatory Chamber
Information Rights

Heard: Determined on the papers
On: 16 January 2024
Decision given on: 9 August 2024

Before

TRIBUNAL JUDGE JACQUELINE FINDLAY
TRIBUNAL MEMBER EMMA YATES
TRIBUNAL MEMBER DAVE SIVERS

Between

FRANCIS MANUEL KWOFIE

Appellant

and

THE INFORMATION COMMISSIONER

First Respondent

HEALTH AND SAFETY EXECUTIVE NORTHERN IRELAND

Second Respondent

Decision

1. The appeal is Dismissed.

REASONS

Background and Request

1. This appeal is brought under s.57 of the Freedom of Information Act 2000 (FOIA) against the Decision Notice (DN) of the Information Commissioner (the Commissioner) dated 4 May 2023 with reference IC-227159-X5B3 which is a matter of public record.
2. The parties opted for a paper determination of the appeal. The Tribunal was satisfied that it could properly determine the issues without a hearing within Rule 32(1)(b) of The Tribunal Procedure (First-tier Tribunal)(General Regulatory Chamber) Rules 2009, as amended (the Rules).
3. In reaching its decision the Tribunal took into account all the evidence before it in an agreed open bundle and three closed bundles and made findings on the balance of probabilities. Two of the closed bundles were identical (references 021131223 and 018101123) and comprised five pages of emails. One closed bundle comprised five fully redacted pages (reference 019a110124). The Second Respondent in response to an enquiry from the tribunal clerk confirmed that the fully redacted closed bundle comprised the same material as the other two closed bundles.
4. It is necessary to withhold the information in the closed bundles because they contain the withheld information and to do otherwise would defeat the purpose of the proceedings.
5. The full details of the background to this appeal, Mr Kwofie's request for information (the Request) and the Commissioner's decision are set out in the DN.

6. Mr Kwofie wrote to the Health and Safety Executive Northern Ireland (HSENI), the Second Respondent, on 13 February 2023 and requested information in the following terms:

"I am writing to ask for a copy of the decision made by inspector [name redacted]."

7. Prior to this, Mr Kwofie had lodged a complaint to the Second Respondent about his employer regarding five overalls which were given to be washed and not returned. He stated that he had been using one overall for a month and his overall protected him from radiation when he was welding which he did for eight hours every shift. He asserted that he was punished by the withholding of the overalls because he reported the bad attitude of his co-workers and the supervisors. Mr Kwofie received an email dated 25 July 2022 (D106) stating: "I can confirm that we have investigated your complaint and can confirm that the case is closed as "not upheld.""

8. On 22 February 2023 the Second Respondent responded to the Request and confirmed it held information relevant to the Request. The Second Respondent said a report was not generated in the course of the investigation of Mr Kwofie's complaint but it held correspondence from Mr Kwofie's employer which satisfied its enquiries. The Second Respondent withheld the information under s. 30(1)(b) and s. 44(1) of the Freedom of Information Act 2000 (FOIA). The letter dated 22 February 2023 (C93 – C97) from an officer of the Second Respondent to Mr Kwofie stated:

"I can confirm that following a search of our paper and electronic records that HSENI holds information relevant to your request. I can confirm that HSENI made preliminary enquiries into your complaint which were satisfied. The complaint was closed without further action. A report was not generated however, HSENI does hold correspondence from your employer which satisfied our enquiries."

9. Mr Kwofie requested an internal review dated 5 March 2023. The outcome of the review of 27 March 2023 upheld the decision.
10. On 28 March 2023 Mr Kwofie contacted the Commissioner and asked that the Commissioner investigate. He stated he was dissatisfied with the handling of his Request for the following reasons:
 - a. He disagrees with the outcome of the public interest test because there's nothing that is going to harm anyone in the public nor cause any injuries nor put the life of the public and the inspector in harm's way.
 - b. He does not believe the cost of providing the information would exceed the cost limit because his Request is just to let the public know the injustice meted out to him by the company which is a crime and he doesn't think HSENI would harbour crime.
 - c. He has not been provided with enough support to refine his Request.
 - d. He disagrees that the exemption applies because he just wants to know how the inspector assigned to the case made his decisions, he knew what he was getting into when he accepted the assignment to do the investigation.
 - e. He disagrees with the outcome of the public interest test, because it's strange for an inspector to do an investigation on a complaint without writing a report but just correspond with the company and close the case, public officials and/or investigators don't do that.
11. The Commissioner decided that the Second Respondent was entitled to rely on s. 30(1)(b) (investigations and proceedings) and did not go on to consider the application of section 44(1)(a) (prohibitions on disclosure) of FOIA to refuse the request. The Commissioner did not require the Second Respondent to take any steps as a result of the decision.

12. The Commissioner's DN records at paragraph 14 that the Commissioner viewed the withheld information concerning a complaint about unsafe work activities and provisions of overalls for welding activities and accepted that this was an investigation the Second Respondent had a statutory power to conduct under the Health and Safety at Work (Northern Ireland) Order 1978 (the 1978 Order).
13. Mr Kwofie submitted that his complaint was 'not upheld' which indicates a decision was made and he seeks to know how the inspector made his decision. He asks for a copy of the decision made by the inspector.

Conclusions

S. 30 FOIA investigations and proceedings

14. S. 30(1) of FOIA states:

"Information held by a public authority is exempt information if it has at any time been held by the authority for the purpose of –

(b) any investigation which is conducted by the authority and in the circumstances may lead to a decision by the authority to institute criminal proceedings which the authority has power to conduct."
15. The phrase "at any time" means that information is exempt under s.30(1) if it relates to any ongoing, closed or abandoned investigation. It extends to information that has been obtained prior to an investigation commencing, if it is subsequently used for this purpose.

16. S. 30 is a classed based exemption. This means that it is not necessary to demonstrate that disclosure would lead to any kind of prejudice in order to engage the exemption, only that the request falls within the class of information which the exemption is designed to protect.
17. S. 30(1) can only be relied upon by a public authority that has a duty to investigate whether someone should be charged with an offence.
18. The Tribunal found that the withheld information is correspondence from Mr Kwofie's employer which the Second Respondent stated satisfied its enquiries and related to the Request.
19. The Tribunal viewed the withheld information and was satisfied that it was held by the Second Respondent for the purposes of an investigation.
20. The Second Respondent has a statutory power to investigate under the 1978 Order with the prospect that it may be used to set up criminal proceedings if necessary. The Tribunal found that the information was obtained using the Second Respondent's statutory powers under Article 16 (Investigations and Enquires) and Article 22 (Powers of Inspectors) of the 1978 Order solely for the purpose of determining whether there had been any breach by the Mr Kwofie's employer company of Article 4 of the 1978 Order (General Duties of employers to their employees) and therefore liability for a criminal offence under Article 31 (1) (a) of the 1978 Order or other civil sanction(s) which could be imposed by the Second Respondent.
21. The Second Respondent investigated Mr Kwofie's complaint and decided that the complaint was not upheld and no further action was required. The Tribunal found that no report was completed and the correspondence held

was exempt from disclosure under s.30(1)(b) FOIA (investigations and proceedings conducted by public authorities).

22. The Tribunal found that s. 30(1)(b) of FOIA is engaged.

Public interest test

23. S. 30 is subject to the public interest test. When applying the public interest test it is necessary to consider whether in all the circumstances of the case the public interest in maintaining the exemption outweighs the public interest in disclosing the information (s.2(2)(b) FOIA).
24. In reaching its decision the Tribunal has borne in mind that in *Montague v Information Commissioner and the Department for International Trade* [2022] UKUT 104 (AAC), a three-judge panel of the Upper Tribunal decided that the public interest balance must be assessed on the basis of how matters stood at the time of an authority's decision on the Request.
25. In relation to the public interest test the Tribunal found that there is a general public interest in information being accessible to promote transparency, and to build public confidence in the Second Respondent's investigative process. Disclosure would allow people to determine whether the Second Respondent had acted appropriately and discharged its statutory functions.
26. Mr Kwofie submitted that he did not agree with the application of the public interest test because there was nothing going to harm anyone in the public or cause any injuries or put the life of the public or the inspector in the way of harm. The Tribunal did not find this a persuasive argument. The Tribunal is required to consider whether disclosure could in anyway compromise a public

authority's ability to carry out its investigative work effectively. Although there is an argument in favour of disclosure, namely for the above reasons, the public interest balance lies in maintaining the exemption. The Tribunal found that there is public interest in protecting the integrity of ongoing investigations with a view to not compromising the ability of the Second Respondent to investigate and enforce compliance with the 1978 Order.

27. The Tribunal found that disclosure may compromise the ability of the Second Respondent to investigate and enforce compliance with the 1978 Order as it would deter duty-holders from being open and expressing frank opinions and stop complainants coming forward.
28. The Tribunal found that no inspector's report was made in the course of the Second Respondent's investigation of Mr Kwofie's complaint and information was obtained from his employer. The information was obtained using the Second Respondents' statutory powers as set out above in paragraph 20.
29. The Tribunal found that the public interest in disclosure of the withheld information is outweighed by the public interest in maintaining the exemption.
30. The Tribunal stands in the shoes of the Commissioner and takes a fresh decision on the evidence. The Tribunal does not undertake a review of the way in which the Commissioner investigates complaints or the way in which the Commissioner's decision was made.
31. In relation to the points raised by Mr Kwofie the Tribunal found that the Second Respondent did not withhold the information on the basis that it was not cost effective or could be considered sensitive or harmful and this point is not relevant to this case. Accordingly, the cost of providing the information is not relevant in this appeal.

32. To the extent that Mr Kwofie is dissatisfied with his workplace, this is a matter outside the jurisdiction of the Tribunal. In addition, it is not within the jurisdiction of the Tribunal to comment or adjudicate on how the Second Respondent carried out its investigations.
33. In relation to the point of appeal that Mr Kwofie had not been provided with enough support to refine his Request, the Tribunal is concerned with Mr Kwofie's Request as made and is not required to consider any request that he might have made or could have made.
34. Having decided that the Second Respondent was entitled to rely on s. 30(1)(b) (investigations and proceedings) it was not necessary to consider the application of section 44(1)(a) (prohibitions on disclosure) of FOIA to refuse the Request.
35. The Tribunal found that none of the grounds of appeal presented by Mr Kwofie identify any error of law in the DN nor do they identify any incorrect exercise of the Commissioner's discretion.
36. Accordingly, the appeal is dismissed.

Signed: Judge J Findlay

Date: 16 January 2024