IN THE FIRST-TIER TRIBUNAL
GENERAL REGULATORY CHAMBER
[INFORMATION RIGHTS]

Case No. EA/2011/0183

ON APPEAL FROM:

Information Commissioner's
Decision Notice No: FS50356737
Dated: 2 August 2011

Appellant:	**Miguel Cubells**
First Respondent:	**The Information Commissioner**
Second Respondent:	**Wrightington, Wigan & Leigh NHS Foundation Trust**
Heard at:	**Manchester Crown Court Building**
Date of hearing:	**30 April 2012**
Date of decision:	**30 May 2012**

Before

Chris Ryan
(Judge)

Suzanne Cosgrave
Malcolm Clarke

Attendances:

For the Appellant:	Mr Cubells in person (assisted by Maurice Frankel)
For the First Respondent:	Tom Cross (counsel)
For the Second Respondent:	Simon Charlton (Weightmans LLP)

Subject matter: Information accessible by other means s.21
Prohibitions on disclosure s.44

Cases: *Ofcom v Morrissey and the Information Commissioner* [2011] UKUT 116 (AAC),
R (on the application of Kay) v Health Service Commissioner [2008] EWHC 2063 (Admin).

IN THE FIRST-TIER TRIBUNAL **EA/2011/0183**
GENERAL REGULATORY CHAMBER
INFORMATION RIGHTS

DECISION OF THE FIRST-TIER TRIBUNAL

The appeal is allowed in part and the Decision Notice dated 2 August 2011is substituted by the following notice:

Public Authority: **Wrightington, Wigan and Leigh NHS Foundation Trust**

Complainant: **Mr Miguel Cubells**

For the reasons set out in the decision of the First-tier Tribunal of today's date the public authority failed to deal with the request for information in accordance with the Freedom of Information Act 2000 and is directed to disclose to the Appellant within 35 days of the date of this Decision Notice the following:

(a) Copies of all documentation forwarded to the Ombudsman in regard to the Complainant's family's complaint regarding the death of the Complainant's mother while in the care of the public authority.

(b) Copies of all communications forwarded to the Ombudsman relating to the death of the Complainant's mother.

(c) Copies of emails, letters, written notes, reports, minuted telephone conversations, electronic attachments utilised by the Public Authority in response to the Ombudsman's investigation into the death of the Complainant's mother.

REASONS FOR DECISION

1. We have decided that information provided by the Second Respondent to the Parliamentary and Health Service Ombudsman in the course of an investigation conducted by her did not fall within the prohibition against disclosure imposed by section 15 of the Health Service Commissioners Act 1993 and was not therefore exempt information for the purposes of section 44 of the Freedom of Information Act 2000.

The request for information and complaint to the Information Commissioner.

2. On 23 and 24 May 2010 the Appellant, Mr Cubells, submitted two requests for information to the Second Respondent ("the Trust"). The requests were lengthy and included a degree of overlap. But, as the matter came before us, there were just four that remained in issue. In summary they sought the following:

    1. Copies of all medical records forwarded to the Parliamentary and Health Service Ombudsman ("the Ombudsman") in regard to Mr Cubell's family's complaint regarding the death of his mother while in the Trust's care.

    2. Copies of all documentation forwarded to the Ombudsman in regard to that complaint.

    3. Copies of all communications forwarded to the Ombudsman relating to the death of Mr Cubell's mother.

    4. Copies of emails, letters, written notes, reports, minuted telephone conversations, electronic attachments utilised by the Trust in response to the Ombudsman's investigation into the death of Mr Cubell's mother.

3. The requests were made under section 1 of the Freedom of Information Act 2000 ("FOIA"), which imposes on the public authorities to which it applies an obligation to disclose requested information unless certain conditions apply or the information falls within one of a number of exemptions set out in FOIA.

4. The first request was refused on the basis that the information was covered by FOIA section 21 (information accessible by other means). Requests 2, 3 and 4 were refused in reliance on the exemption set out in FOIA section 44 (disclosure prohibited under another statute). The Trust maintained that position following an internal review of its initial decision and, following a complaint by Mr Cubells, the Information Commissioner decided that the Trust's stance had been justified.

The Appeal to this Tribunal

5. The Information Commissioner's decision was set out in a Decision Notice dated 2 August 2011. Mr Cubells appealed to this Tribunal. Initially he challenged just the conclusion reached in respect of FOIA section 21, but he was subsequently given leave to amend his Grounds of Appeal to add a challenge to the Information Commissioner's conclusion under section 44.

6. For reasons which will become apparent we will deal with the section 21 issue quite shortly and will then consider the application of section 44 to the remaining information requests.

Request 1 - FOIA section 21

7. The Trust's initial position under section 21 was that it had sent to the Ombudsman the same set of medical records that it had previously provided to Mr Cubells under a request under the Access to Health Records Act 1990. Mr Cubells found it difficult to understand why the Ombudsman declined to undertake an investigation. He suspected that the Trust had not in fact sent the Ombudsman all the material that he, Mr Cubells, had inspected. He continued to press his case, relying on an inconsistency which he perceived in the documentary record of the Ombudsman's consideration of the case.

8. On the first hearing of Mr Cubells' appeal, on 19 December 2011, the Information Commissioner informed the Tribunal that the Trust had just discovered that certain contemporaneous records of the medical care in question had in fact been omitted from the dossier passed to the Ombudsman. In the light of that information the hearing was adjourned to enable the Trust to be joined as a party and for evidence to be filed explaining the circumstances in which the Trust had given incorrect information to both Mr Cubells and the Information Commissioner and clarifying the extent of the disclosure made to the Ombudsman.

9. Up to the commencement of the adjourned hearing on 30 April 2012 both the Trust and the Information Commissioner continued to rely on section 21 because, they said, Mr Cubells had clearly received all information that had been provided to the Ombudsman plus the additional information that had been inadvertently omitted from the dossier. Mr.Cubell's point, on the other hand, was that he wanted to know precisely what was (and therefore what was not) sent to the Ombudsman and that providing him with more information than was sent to the Ombudsman, without identifying which of that information was not sent to the Ombudsman, did not answer his request. However, in the course of the hearing the parties agreed that this part of the appeal should be adjourned to enable Mr Cubells to compare his copy of the medical records with the Ombudsman's dossier (which by this time had been returned to the Trust) so that he would have a

complete picture of exactly what the Ombudsman had received. We have been informed subsequently that the inspection took place and that, as a consequence, Mr Cubells does not wish to pursue that part of his appeal. We do not therefore need to make a decision on the point. Nor do we make any comment on the manner in which the Trust handled this part of the original information request because, as matters transpired, its witness was not given the opportunity to answer questions at the hearing and we did not hear any submission on the point from its advocate.

Request 2, 3 and 4 - FOIA section 44

10. In his decision notice the Information Commissioner decided that a prohibition on disclosure imposed by section 15 of the Health Service Commissioners Act 1993 ("HSCA") applied to the Trust, on the facts of this case, and that the information referred to in requests 2 – 4 therefore fell within the exemption set out in FOIA section 44. Under FOIA section 2(3)(h) that exemption is categorised as an absolute exemption. Once the Information Commissioner had decided that it was engaged, therefore, it was not necessary for him to consider any other factors and he therefore concluded that the Trust had been right to refuse the request.

11. The relevant part of FOIA section 44 reads:

> *"(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 …"*

12. The relevant parts of the HSCA are as follows:

> *"3(1) On a complaint duly made to the [*Ombudsman*] by or on behalf of a person that he has sustained injustice or hardship in consequence of –*
>
> > *(a) a failure in a service provided by a health service body,*
> >
> > *(b) a failure of such a body to provide a service which it was a function of the body to provide, or*
> >
> > *(c) a maladministration connected with any other action taken by or on behalf of such a body,*
>
> *The [*Ombudsman*] may, subject to the provisions of this Act, investigate the alleged failure or other action."*
>
> *"11 (2) An investigation shall be conducted in private."*
>
> *"15(1) Information obtained by the [*Ombudsman*] or his officers in the course of or for the purposes of an investigation shall not be disclosed except-*
>
> > *(a) for the purposes of the investigation and any report to be made in respect of it…"*

13. The Information Commissioner decided that the information withheld by the Trust fell within the prohibition. He reached that conclusion by deciding that:
    a. the word “obtained” in HCSA section 15 covered both information which the Ombudsman proactively obtained as part of an investigation as well as information supplied to her;
    b. the fact that the Ombudsman ultimately decided not to take Mr Cubell’s complaint forward into a full investigation did not take the information outside the scope of the words “…for the purposes of an investigation…”; and
    c. the withheld information was, as a fact, released by the Trust to the Ombudsman in the context of Mr Cubells’ complaint and was used when deciding whether to investigate it: accordingly it was “obtained… for the purpose of an investigation”.

14. The Information Commissioner went on to consider the relevance of a number of available exceptions to the section 15 prohibition, which the Ombudsman might have exercised her discretion to apply. However, he concluded that he was bound by the Upper Tribunal decision in *Ofcom v Morrissey and the Information Commissioner* [2011] UKUT 116 (AAC), which was to the effect that neither the Information Commissioner nor this Tribunal should take into account the correctness of a decision by another regulator not to apply an exception. Accordingly the Information Commissioner decided that, because the Ombudsman had not exercised her discretion to allow disclosure of the withheld information, the statutory bar to disclosure continued to apply and the information was therefore exempt under FOIA section 44.

15. Mr Cubells was assisted in formulating his Grounds of Appeal addressing the section 44 issue by Mr Maurice Frankel of the Campaign for Freedom of Information. Mr Cubell applied for permission for Mr Frankel to submit written and oral submissions and we decided, notwithstanding objection by the other parties, that we should grant the application.

16. The arguments addressed by Mr Frankel on Mr Cubells behalf may be summarised as follows:
    a. The prohibition in section 15 creates, and was designed to create, a balance to the wide powers which the Ombudsman has to compel the disclosure of information for the purposes of an investigation, in that it provides reassurance to those supplying information that no improper disclosure of that information will occur.
    b. Although section 15(1) uses the passive voice (“shall not be disclosed”) the correct construction is that its meaning is that there should be no disclosure by the Ombudsman or her officers. It would be wrong to interpret it as meaning that the prohibition applies to any third party holding information which it happens also to have supplied to the Ombudsman.

c. If Parliament had intended such a broad application of the prohibition it may be expected to have made this explicit in the Act itself, which it has not done.
d. It may be speculated that the reason why the Parliamentary draftsman was content to leave the passive language in place was that the FOIA had not been enacted at the time and he would have seen no reason to consider the prohibition extending to an NHS body holding information which either related to a third party (and was likely, therefore, to be already bound by an obligation of confidence) or concerned its own procedures and organisation (which it should be free to disclose).
e. Section 15 includes an exception (in subsection (1)(a)) to enable the Ombudsman to perform her statutory function but it contains none that would enable an authority susceptible to an investigation by the Ombudsman to disclose, for the purposes of its own statutory functions, any information that had been made available to the Ombudsman for the purposes of an investigation.
f. Other exceptions to the section 15 prohibition cover disclosure for the purposes of, for example, proceedings for perjury committed in the course of the Ombudsman's investigation and proceedings under HSCA section 13 for obstruction of an investigation or contempt: yet no equivalent exception has been provided for information which an authority continues to hold, even if the continued imposition of the prohibition interfered with its other statutory duties.
g. The interpretation favoured by the Information Commissioner would, in various sets of circumstances, create a very unsatisfactory result, which Parliament could not have intended:
    i. If information, once disclosed to the Ombudsman, is then subject to a prohibition on any disclosure by the party who disclosed it, an NHS authority would be prevented from even sharing it with a patient's GP or another health authority into whose area the patient moved.
    ii. It might even be said that if a patient's GP disclosed information to an NHS authority and the authority subsequently disclosed it to the Ombudsman then the GP would find that the information in his or her possession had, from that point, become subject to a restriction.
    iii. Similarly, information previously supplied by the authority to, for example, a social services department or the police could not then be further disclosed by those bodies (even if this was necessary for the patient's well-being) once it had been passed on by the authority to the Ombudsman.
    iv. The prohibition would continue indefinitely, even after the Ombudsman had completed her investigation, and would, for example, prevent an NHS authority from using the information in question in its response to an Ombudsman report, either defending its actions or explaining the steps

it proposed to take in light of criticism contained in the report.

v. A person complaining to the Ombudsman would find that he or she was thereafter unable to make any use of information passed to the Ombudsman in support of the complaint, a result that would be inconsistent with the right to “receive and impart information” under Article 10(1) of the European Convention on Human Rights.

h. The Information Commissioner’s interpretation would also create an inconsistency with HSCA section 15(1)(e), which enables the Ombudsman (but not any other person) to disclose in some circumstances information that is to the effect that a person may constitute a threat to patient health or safety.

i. If we considered that there was ambiguity on the point we may obtain guidance (under the principle set out in *Pepper v Hart* [1993] 1 All E R 42) from a statement made during the passage through Parliament of a predecessor to HSCA by the Minister responsible for it. This made it clear that the intention was to impose a prohibition only on the Ombudsman and her officers and not on any other party who had disclosed information for the purposes of the enquiry.

j. The Tribunal should interpret the statutory provisions in issue with a view to giving effect, so far as possible, to the requirement of Article 8 of the European Convention on Human Rights (respect for private and family life). An outcome that resulted in a blanket prohibition on the disclosure of information about the medical treatment of a family member would breach Article 8. That outcome should be avoided by the Tribunal complying with the requirement to interpret legislation, so far as possible, in a way that is compatible with convention rights.

17. It will be seen, therefore, that Mr Frankel did not challenge any of the conclusions reached by the Information Commissioner and summarised in paragraph 13 above. His only challenge was that the Information Commissioner had been wrong to treat the prohibition as applying to both the Ombudsman and those providing information to her. The Information Commissioner put his counter argument in quite stark language, asserting in his skeleton argument that:

> *“Section 15 creates an unqualified prohibition on disclosure on the part of any person holding the protected information. In doing so it draws no distinction between the* [Ombudsman] *and others who may hold the information protected…”*

18. Before us Mr Cross, counsel for the Information Commissioner, argued (with the support of the Trust) that we were bound by precedent to reject Mr Frankel’s argument. The authority he relied on was *R (on the application of Kay) v Health Service Commissioner* [2008] EWHC 2063 (Admin).

19. *Kay* was a case in which a father had complained to the Ombudsman about the treatment given to his daughter and sought access to all potentially relevant information that might assist him in pursuing his complaint. He also sought the same information from the Trust responsible for his daughter's care. The report of the case records that the Trust refused, but it contains no further information on that element of the matter (unsurprisingly, as the application to the Administrative Court related to the position of the Ombudsman, not the Trust). The position adopted by the Ombudsman was that she would be prepared to disclose documents on which she was minded to rely in determining the complaint or which might influence her decision. These included clinical notes and records but also other documents such as reports from an External Professional Adviser, a doctor's report, correspondence and internal communications within the Trust about the complaint or the care of the claimant's daughter, the conclusions of a clinical adviser and the Trust's response to the Ombudsman's enquiries. The Ombudsman had stated that she would not disclose other documents, on which she did not propose to rely, or which would not influence her decision, because she regarded them as not relevant to the complaint that had been referred to her.

20. The judge in *Kay*, Mrs Justice Dobbs, decided that the Ombudsman was entitled to limit the information to be disclosed in this way and that the withholding of the remaining information did not undermine the fairness of the Ombudsman's investigation because (quoting with approval the words of Collins J in *R (on the application of Turpin) v Commissioner for Local Administration* [2001] EWHC Admin 503):

> *"The law as to the requirements of fairness in conducting an investigation is, as it seems to me, clear. The general rule is that a person or body which has to make a decision based on an issue raised by one person against another should normally disclose the material on which it is going to rely or which comes into its possession which may influence its decision to each of the parties so that each party can know what material is available, what matters are likely to be held against them and whether it is necessary for that party to itself put forward material or to make representations to deal with such matters."*

21. Mrs Justice Dobbs then went on to approve the Ombudsman's proposal to require the applicant to undertake not to use the information that was to be disclosed for any purpose other than that investigation. In that context the judge said:

> *"I take section [15] to mean what it says, namely that information disclosed to the ombudsman in the course of or for the purpose of the litigation shall not be disclosed except for the purposes of the investigation and any report to be made in respect of it. In my judgment that applies to those receiving the information from the [Ombudsman] itself.*

> *"This is a jurisdiction where the majority of the information obtained is likely to be confidential and section 15 is clearly in place to protect the confidentiality of the material. It would be an absurd position if the ombudsman was restricted as to the situations in which she could disclose the material, only for the material to be used by others for reasons outside the ambit of the ombudsman's investigation and report. It cannot in my judgment have been the intention of Parliament that a person could then use the information as he chose, relying on some justification for the use, the damage having been done in the use of the material before any decision as to justification has been taken"*

22. Mr Cross relied on this passage and argued that it set out a principle, which was broad enough to cover the facts of this appeal, to the effect that the prohibition in section 15 covers, not just the Ombudsman, but others who are in possession of the same information. He argued that the prohibition must therefore be regarded as extending to both those to whom information was passed by the Ombudsman as well as those from whom the Ombudsman obtained it.

23. In our view the circumstances in which Mrs Justice Dobbs made the judgment on which Mr Cross relies are significantly different from those of the present appeal for two reasons. First, the information to be disclosed in that case had been filtered down from all the information assembled during the investigation to just the information which was relevant to the preliminary conclusion which the Ombudsman had reached, and which therefore needed to be made available to those affected before a final determination was made. That gave the information an additional significance that justified the continuing imposition of an obligation of confidence during the final stage of the decision-making process. Once the decision had been finalised the information would be likely to be disclosed as part of the Ombudsman's report.

24. The second element of distinction is that, the information having fallen within the section 15 prohibition as a result of it having been obtained by the Ombudsman in the course of an investigation, it remained incumbent on her to maintain its confidentiality, if only for her own self-protection. If she were to release it to a third party without imposing, by undertaking, the same confidentiality imposed on her by statute she would be in danger of breaching the prohibition.

25. We believe that the effect of the differences we have highlighted is that *Kay* may be distinguished for the purposes of this appeal and that the, admittedly general, statements contained in the passage quoted above should not be regarded as establishing a binding precedent extending to the different facts of this case. The judge was clearly right, if we may say so, to stress the importance of the prohibition extending beyond the Ombudsman to those receiving information from her. But

the judgment says nothing, in our view, that establishes a principle that is broad enough to encompass the facts of this case.

26. In those circumstances we are entitled to return to the arguments put forward by Mr Frankel and consider, with an open mind, whether they establish that the section 15 prohibition does not apply to information in the hands of the Trust. In doing so we also consider the following counter-arguments put forward by Mr Cross.

27. No doubt influenced by Mr Frankel's explanation of some of the unattractive consequences if the Information Commissioner's interpretation was favoured, Mr Cross retreated a little from the broad statement quoted in paragraph 17 above. He conceded that the prohibition might not extend to information that did not properly form part of the subject matter under investigation. However, he maintained that, for the purposes of this appeal, there clearly was sufficient connection between the investigation and the information covered by requests 2 – 4 for prohibition to apply to all of it.

28. Mr Cross challenged Mr Frankel's interpretation of section 15. He said that both the natural meaning of the language of the section and the application of a purposive construction led to the conclusion that the prohibition extended to all those holding information that had been obtained by the Ombudsman in the course of her investigation. He argued that there was no reason why the prohibition should not bind a provider of information and that it would create an absurd situation if the Ombudsman could not disclose information but an NHS authority being investigated could. It would, he said, create a situation where section 44 of FOIA would provide a route to avoid the prohibition in section 15 of HSCA, which would strike at the very basis on which the Ombudsman conducts investigations.

29. We are satisfied that section 15, read as a whole and particularly in the light of the exceptions to the prohibition, (which are clearly focused on the Ombudsman and no one else), should be interpreted as imposing a prohibition only on the Ombudsman and her staff. It may follow, from what we have said above, that the prohibition should continue to apply, or should be imposed, if the Ombudsman needs to disclose any of the information she has obtained to a third party. There is no inconsistency there. The information, once obtained during an investigation, should obviously not be released from the prohibition on disclosure just because it becomes necessary for the Ombudsman to disclose it to a third party. There is no logical reason, however, for the prohibition to be imposed on those holding information that has been shared with the Ombudsman. The profoundly unattractive consequences which Mr Frankel outlined demonstrate the absurdity of such an outcome.

30. In reaching that conclusion we do not feel the need to seek outside assistance, whether from Hansard or the European Convention on

Human Rights, because in our view the language of the section is clear when construed in context and in the light of the clear purpose of the provision.

31. We do not think that our conclusion undermines the conduct of the Ombudsman's investigation. It is required by HSCA section 11(2) to be conducted in private, which will result, directly or indirectly, in the imposition of an obligation on those contributing information or submissions to it to maintain the confidentiality of the process and not, for example, to disclose the lines of enquiry that the Ombudsman may be pursuing or the issues she is putting to those whose actions are being investigated. It does not follow that the basic information, detached from any indication of such lines of enquiries or issues, must remain secret, just because it has previously been made available to the Ombudsman as part of her investigation. And, once a report has been issued (or the Ombudsman has decided not to pursue an investigation – as she had done in this case, before the information request had been refused), the privacy of the investigation also falls away.

Conclusion

32. In light of our conclusions above we have decided that the prohibition in section 15 of the HSCA does not extend to the Trust and that it was not therefore entitled to treat the information covered by requests 2 – 4 as exempt for the purposes of FOIA section 44. On that basis the information should have been disclosed and the Decision Notice was not in accordance with the law for the purposes of FOIA section 58. Accordingly we allow the appeal and substitute the Decision Notice set out at the commencement of this decision.

33. Our decision is unanimous.

[Signed on the original]

Chris Ryan
Judge

30 May 2012