EA/2011/0183

MIGUEL CUBELLS

Appellant

and

THE INFORMATION COMMISSIONER

First Respondent

and

WRIGHTINGTON, WIGAN & LEIGH NHS FOUNDATION TRUST

Second Respondent

Submission by Maurice Frankel, Campaign for Freedom of Information

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Note: the authorities and materials cited in this submission will be provided in a separate bundle. References to pages in that bundle are in curly brackets and take the form {MF 1}

Introduction

1. This submission is made with the permission of the Tribunal, granted on April 20 2012.

2. The Appeal relates to four requests made by the Appellant to the Second Respondent in May 2010. Of those four requests, one was refused under the exemption in section 21 of the Freedom of Information ("FOI") Act for information which is already reasonably accessible the applicant. This submission does not dealt with that request.

3. The remaining three requests were refused on the grounds that they sought information which the Second Respondent had supplied to the Parliamentary and Health Service Ombudsman ("PHSO") for the purpose of an investigation under the Health Service Commissioners Act 1993 ("the 1993 Act").

4. Section 15(1) of the 1993 Act prohibits the disclosure of information obtained by the PHSO for the purpose of an investigation under section 3 of the 1993 Act. The IC held that this prohibition does not apply solely to disclosure by the PHSO but also to

disclosure of the same information by any public authority which has supplied the information to the PHSO.

5. Information whose disclosure is prohibited by any enactment is exempt from disclosure under section 44(1)(a) of the FOI Act. The IC held that the Appellant's remaining three requests were therefore exempt under section 44(1)(a).

6. This submission maintains that the IC's finding on this issue is based on an error of law and that the correct position is that section 15(1) of the 1993 Act prohibits disclosure by the PHSO and her staff but by no-one else. The IC was therefore wrong to find that section 44(1)(a) applied to the Appellant's three remaining requests.

The purposes of the s.15 restriction

7. The purpose of statutory prohibitions on disclosure of the kind found in section 15(1) of the 1993 Act was described 40 years ago in the Franks Report on Section 2 of the Official Secrets Act 1911 {MF 7-8}:

> 192. The Government today becomes involved in many aspects of the life of the nation and the lives of its citizens. Its involvement in the management of the economy brings it into close contact with business and industry. The Welfare State has brought it into much closer contact than in the past with the lives of individual citizens. The Government possesses some information, at least, about every citizen and every firm in the land; in some cases it possesses a very considerable amount of such information. The Government would be quite unable to perform its functions in the modern State if it could not obtain this kind of information. Much of this information is of a private and confidential kind. Much of it comes to the Government on an express or an implicit basis of confidence. Even where it is not supplied to the Government on a clearly confidential basis, it is generally accepted that the Government should not use or disclose the information except for the purposes for which it was given or obtained…
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> 196. A considerable number of the statutes which require the giving of information, or which confer powers of entry or inspection, contain provisions expressly prohibiting unauthorised disclosures of the information obtained in these ways. The principle behind these provisions is that when the State requires the citizen to provide or reveal information which may be of a personal and confidential nature, or which should be kept confidential for commercial reasons, then the State should give to the citizen a guarantee that this information will be properly protected.[1] (emphasis added)

[1] Departmental Committee on Section 2 of the Official Secrets Act 1911, Chairman, Lord Franks, Volume 1, Report of the Committee, Cm 5104, September 1972.

8. The implication of these passages is that, generally, the interests protected by statutory restrictions such as section 15 of the 1993 Act are the interests of *individuals or bodies which supply information to public authorities for the purpose of their functions*. Such statutory restrictions are not intended to prevent the submitter of the information, or other persons who also happen to hold that information, from disclosing it if they are otherwise free to do so.

9. The PHSO has almost unlimited power to compel the provision of information needed for the purpose of an investigation, save for information about cabinet proceedings. Section 15 exists to reassure those supplying that information that the PHSO will use the information solely for its statutory purposes and for no other reason.

10. The PHSO's formidable powers to compel authorities or persons to provide information for the purpose of an investigation are found in section 12 of the 1993 Act. This states:

> **12. Evidence**
>
> (1) For the purposes of an investigation pursuant to a complaint under section 3(1) a Commissioner may require any officer or member of the health service body concerned or any other person who in his opinion is able to supply information or produce documents relevant to the investigation to supply any such information or produce any such document.
>
> (1A) For the purposes of an investigation pursuant to a complaint under section 3(1A) or (1C) a Commissioner may require any person who in his opinion is able to supply information or produce documents relevant to the investigation to supply any such information or produce any such document.
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> (2) For the purposes of an investigation a Commissioner shall have the same powers as the Court in respect of—
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> (a) the attendance and examination of witnesses (including the administration of oaths and affirmations and the examination of witnesses abroad), and
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> (b) the production of documents.
>
> (3) No obligation to maintain secrecy or other restriction on the disclosure of information obtained by or supplied to persons in Her Majesty's service, whether imposed by any enactment or by any rule of law, shall apply to the disclosure of information for the purposes of an investigation.
>
> (4) The Crown shall not be entitled in relation to an investigation to any such privilege in respect of the production of documents or the giving of evidence as is allowed by law in legal proceedings.
>
> (5) No person shall be required or authorised by this Act—
>
> (a) to supply any information or answer any question relating to proceedings of the Cabinet or of any Committee of the Cabinet, or
>
> (b) to produce so much of any document as relates to such proceedings;
>
> and for the purposes of this subsection a certificate issued by the Secretary of the Cabinet with the approval of the Prime Minister and certifying that any information, question, document or part of a document relates to such proceedings shall be conclusive.

(6) Subject to subsections (3) and (4), no person shall be compelled for the purposes of an investigation to give any evidence or produce any document which he could not be compelled to give or produce in civil proceedings before the Court.

11. Section 15(1) states:

15. Confidentiality of information

(1) Information obtained by a Commissioner 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,

(b) for the purposes of any proceedings for—

(i) an offence under the Official Secrets Acts 1911 to 1989 alleged to have been committed in respect of information obtained by virtue of this Act by a Commissioner or any of his officers, or

(ii) an offence of perjury alleged to have been committed in the course of the investigation,

(c) for the purposes of an inquiry with a view to the taking of such proceedings as are mentioned in paragraph (b),

(d) for the purposes of any proceedings under section 13 (offences of obstruction and contempt) or

(e) where the information is to the effect that any person is likely to constitute a threat to the health or safety of patients as permitted by subsection (1B).

(1A) Subsection (1B) applies where, in the course of an investigation, a Commissioner or any of his officers obtains information which—

(a) does not fall to be disclosed for the purposes of the investigation or any report to be made in respect of it, and

(b) is to the effect that a person is likely to constitute a threat to the health or safety of patients.

(1B) In a case within subsection (1)(e) the Commissioner may disclose the information to any persons to whom he thinks it should be disclosed in the interests of the health and safety of patients; and a person to whom disclosure may be made may, for instance, be a body which regulates the profession to which the person mentioned in subsection (1A)(b) belongs or his employer or any person with whom he has made arrangements to provide services.

(1C) If a Commissioner discloses information as permitted by subsection (1B) he shall—

(a) where he knows the identity of the person mentioned in subsection (1)(e), inform that person that he has disclosed the information and of the identity of any person to whom he has disclosed it, and

(b) inform the person from whom the information was obtained that he has disclosed it.

(2) Neither a Commissioner nor his officers nor his advisers shall be called on to give evidence in any proceedings, other than proceedings mentioned in subsection (1), of matters coming to his or their knowledge in the course of an investigation under this Act.

12. The restriction in section 15 serves to reassure those supplying potentially sensitive information to the PHSO, including patient health records, confidential and perhaps even classified information, that no improper disclosure of that information will occur.

13. This view of the provision's purpose is reflected in the decision of the First Tier Tribunal in case *EA/2011/0164 & 0165, Olivia Thompson and Stanley Dyke v Information Commissioner*, issued on 20 January 2012 {MF 11}. This considered, in part, whether information relating to preliminary work carried out by the PHSO in order to decide whether to proceed to a full investigation, could be disclosed by it without contravening section 15(1). The Tribunal stated at paragraph 18 {MF 16}:

> The Tribunal was of the view that the PHSO did carry out an investigation for the purposes of section 15(1), in that it undertook preliminary work in order to consider whether to carry out a full investigation of the complaint. It was of the further view that it would be anomalous to interpret the statutory prohibition against disclosure as only applying if the PHSO were to proceed to full investigation. Parliament could not sensibly have intended section 15 to have this effect as otherwise the intention behind the bar, to encourage and protect the confidence of those coming forward with complaints to the PHSO, would be defeated. (emphasis added)

The IC's expanded interpretation

14. The expanded interpretation of section 15(1) adopted by the IC would mean that once a person has supplied information to the PHSO for the purposes of an investigation that person, and anyone else who also holds the same information, is prohibited from making any further disclosure of that information, other than those permitted by paragraphs (a) to (e) of section 15(1).

15. The IC's argument appears to derive from the use of the passive voice in section 15(1):

> (1) Information obtained by a Commissioner or his officers in the course of or for the purposes of an investigation shall not be disclosed except –

16. It is submitted that the meaning of this passage is that information obtained by a Commissioner or his staff, may not be disclosed by them except in the specified circumstances. The passive voice merely reflects the Parliamentary draftsman's assumption that no other reasonable interpretation could arise.

17. The IC maintains that section 15(1) applies to any information supplied to the PHSO for the purpose of an investigation, regardless of who holds it. It interprets section 15(1) as if it includes the underlined words below:

> (1) Information obtained by a Commissioner or his officers in the course of or for the purposes of an investigation shall not be disclosed either by the Commissioner or his officers or by any person who has supplied that information to the Commissioner or his officers or by any other person who also holds that information except –

18. The First Respondent's skeleton argument confirms that this is its view. Paragraph 28(iii) states:

> 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 PHSO and others who may hold the information protected

19. If such a broad application of the prohibition on disclosure were intended Parliament would be expected to make that explicit in the Act itself, not least because of its far reaching implications for all those who may be subject to it. There is no indication of such an intention in the Act, other than the use of the passive voice in section 15(1).

20. Moreover, it is difficult to imagine why Parliament should have thought it necessary to draft section 15(1) in such wide terms given that, at the time of the 1993 Act, the FOI Act did not exist.

21. Parliament may have been concerned that citizens might need to be reassured that PHSO would properly protect their personal data; conceivably, even public authorities might need to be reassured that the PHSO would properly protect their sensitive data. But what purpose would be served by prohibiting an NHS body which had provided information to the PHSO from disclosing that information itself? Most of this information would involve confidential personal information about individual patients which the NHS body could not lawfully disclose in any case. There would be no reason to prohibit an NHS body from disclosing any other information, for example, about the adequacy of its internal procedures if it wished to.

Disclosure for the purpose of statutory functions

22. Paragraphs (a) to (e) of section 15(1) set out the circumstances in which the PHSO may disclose information without breaching the prohibition. It is notable that the PHSO is permitted to disclose the information for the purpose of its key functions, that is, for the purposes of an investigation into a complaint and the report into it.

23. Significantly, no comparable provision is made for disclosures which are necessary for the statutory purposes of the bodies supplying information to the PHSO. If the prohibition applies to statutory bodies such as NHS Trusts, as the IC maintains, the

failure to permit those bodies to disclose information for the purpose of their statutory functions is inexplicable.

24. It is difficult to believe that if Parliament intended the prohibition to extend to the NHS bodies supplying information to the PHSO it would have made no provision for them to continue to disclose information for their own statutory purposes. The fact that such provision is made for the PHSO alone strongly suggests that the prohibition does not have the wide scope for which the IC argues.

25. The statutory bars of the kind to which section 44(1)(a) of the FOI Act refers invariably permit disclosures to be made for the purposes of an authority's statutory functions. For example:

- The Information Commissioner himself commits an offence if he discloses information relating to an identifiable individual or business which has not consented to the disclosure. The offence is not committed if the disclosure is for the purposes of, and necessary for, the discharge of any functions under the Information Acts. *[Data Protection Act 1998, sections 59(1) and 59(2)(c)] {MF 18}*

- A Home Office official is guilty of an offence if he discloses information obtained in connection with his functions under the Animals (Scientific Procedures) Act 1986 unless the disclosure is for the purpose of discharging his functions under that Act. *[Animals (Scientific Procedures) Act 1986, section 24(1)] {MF 20}*

- It is an offence for any person to disclose confidential information obtained by the Financial Services Authority in the exercise of any power under the Financial Services and Markets Act 2000 unless the disclosure is for the purpose of facilitating the carrying out of a public function and is permitted by regulations *[Financial Services and Markets Act 2000, sections 348(1), 349(1) and 352] {MF 21, 22 & 27}*

- It is an offence for a person to disclose information obtained in the exercise of any power conferred by the Communications Act 2003 unless the disclosure is for the purpose of facilitating the carrying out by OFCOM of any of their functions. *[Communications Act 2003, sections 393(1),(2) and (10)] {MF 29 & 30}*

26. The persons who supply information to the PHSO for the purposes of an investigation will always include statutory authorities since these are the bodies subject to investigation (see section 2 of the 1993 Act). It is inconceivable that Parliament would

introduce a blanket ban on the release of information by these bodies without permitting the disclosures necessary for their own functions.

27. It is clear from section 15 itself that there is no implied "business as usual" exception which would permit an authority to set aside the statutory restriction where it interfered with its normal duties. On the contrary, not even a disclosure necessary for the purposes of proceedings for perjury, contempt or an Official Secrets prosecution could take place were it not for the express provision made for those circumstances.

28. If section 15(1) has the meaning attributed to it by the IC, it is hard to see how any NHS body could continue to treat a patient once a complaint about that patient's treatment had been made to the PHSO.

29. Having supplied information to the PHSO for the purpose of an investigation, an authority could make no further disclosure of it for any purpose. It could not communicate the same information to the patient's GP or to another health professional. It could not forward the patient's medical records to another Trust if the patient moved out of its area unless it first deleted all references to the information supplied to the PHSO. These restrictions would make the patient's continued care impossible.

30. It is not only the body which supplied information to the PHSO which would be prevented from disclosing it. Any person who also held a copy of information which some other body had supplied to the PHSO would be subject to the same restriction, in the IC's view (paragraph 28(iii) of the IC's skeleton argument).

31. If a GP had supplied information to a Trust which the Trust had forwarded to the PHSO, the GP would then be prohibited from making any further disclosure of that information, even for the purpose of referring the patient for investigation or treatment.

32. Information which an NHS body had supplied to a social services department, an education authority or the police could not then be further disclosed by those bodies, even with the patient's consent. It could not be shared with anyone else in order to provide services to the patient, prevent danger to others or investigate criminal offences.

33. Moreover, section 15 does not cease to apply once the PHSO investigation is complete. If the IC's view of section 15 is correct, these damaging effects would continue indefinitely. Anyone complaining to the PHSO, would trigger a permanent freeze on the circulation of the information obtained by the PHSO irrespective of who held it. No public or private sector body holding copies of the information supplied by

some other party to the PHSO could then disclose it for any purpose, a chaotic situation.

Threats to patient safety

34. Specific evidence that the IC's expanded interpretation of section 15(1) could not have been not intended is provided by section 15(1)(e). This permits a disclosure to be made:

> (e) where the information is to the effect that any person is likely to constitute a threat to the health or safety of patients as permitted by subsection (1B).

35. This is elaborated upon in sections (1A) and (1B):

> (1A) Subsection (1B) applies where, in the course of an investigation, a Commissioner or any of his officers obtains information which—
>
> (a) does not fall to be disclosed for the purposes of the investigation or any report to be made in respect of it, and
> (b) is to the effect that a person is likely to constitute a threat to the health or safety of patients.
>
> (1B) In a case within subsection (1)(e) the Commissioner may disclose the information to any persons to whom he thinks it should be disclosed in the interests of the health and safety of patients; and a person to whom disclosure may be made may, for instance, be a body which regulates the profession to which the person mentioned in subsection (1A)(b) belongs or his employer or any person with whom he has made arrangements to provide services.' (my underlining)

36. Thus, if information suggests that a doctor or nurse presents a risk to the safety of patients the PHSO is permitted to disclose it to a body such as the General Medical Council or the Nursing and Midwifery Council, notwithstanding the prohibition. A disclosure to the police would no doubt also be permitted in appropriate cases.

37. Yet it is only the PHSO who is able to make such a disclosure – no similar disclosure by an NHS body, or anyone else, is permitted by section 15(1B).

38. It is inconceivable that Parliament would -

(a) introduce a prohibition on the disclosure of information by both the PHSO and those who have supplied information to the PHSO, such as the NHS bodies being investigated

(b) lift that prohibition to permit patients to be protected from danger only where the disclosure is made by the PHSO

(c) retain the prohibition for NHS bodies, so as to bar them from taking similar action to protect patients.

39. This further indicates that the prohibition is not intended to apply to NHS bodies such as the Second Respondent.

Public authority accountability

40. Another casualty of the IC's interpretation would be the interests of accountability. A public authority would be prohibited from using its own information to respond to a published report by the PHSO. The authority may wish to defend itself against criticism of it made in the report, explain how the problem occurred or describe measures it had since taken to prevent their recurrence. It may be able to do so without using confidential or personal information supplied to it by any third party.

41. Under the IC's approach, the NHS body could not explain itself by reference to any information it had previously supplied to the PHSO even where it wished to and was otherwise free to.

42. To prevent a public authority making use of its own information to explain its actions would undermine public accountability for no valid reason at a time when it is most needed – when an authority is called on to publicly account for its behaviour in light of an adverse Ombudsman finding. This is unlikely to have been Parliament's intention.

The rights of complainants

43. If section 15(1) of the 1993 Act applies to anyone who has supplied information to the PHSO for the purpose of an investigation it must also apply to those complaining to the PHSO. Complainants such as the Appellant would be permanently barred from making any further disclosure of their information once they had supplied it to the PHSO.

44. By complaining to the PHSO complainants would forfeit the right to make any further disclosure of their own information. They could not communicate it to the press, a Member of Parliament, the Secretary of State, another complaints handling body or to fellow sufferers.

45. Parliament could not have intended that a person complaining to the Ombudsman should, as a consequence, be bound to a lifetime obligation of silence in relation to

the injustice, hardship or maladministration which they have, or believe they have, suffered.

46. Any such obligation would also be an oppressive and clearly unjustified interference with the right to "receive *and impart* information" guaranteed by Article 10(1) of the European Convention on Human Rights ("ECHR").[2] No justification for such an interference could be derived from Article 10(2). A restriction of this kind could not be "necessary in a democratic society".

The Ombudsman's letter of 20.5.10

47. The IC's view of section 15(1) appears not to have been shared by the PHSO. On 20 May 2010 the PHSO's Freedom of Information/Data Protection Officer wrote to a different complainant who had requested further information about the handling of his complaint [Open Bundle, pages 354-357]. This letter was written at virtually the same time as the Appellant's first request to the Second Respondent (23 May 2010).The letter states that some of the requested information is being supplied but that parts are being refused because:

> section 15 of the Act says that information obtained by the Ombudsman or her officers in the course of or for the purposes of an investigation cannot be released except in the very limited circumstances it describes. In practice, this generally means that such information can only be disclosed for the purposes of the investigation (e.g. to make enquiries of the body complained about) and for the purpose of any report to be made in respect of it (including any decision letter setting out our reasons not to investigate a complaint).
>
> As releasing the residual information you have requested would not be for the purposes of the investigation, I am, therefore, precluded from releasing it under the provisions of the legislation that governs our work….
>
> In respect of the remainder of the information that we hold, the Assessor has informed me that information we relied on from [sic] this is contained in the decision letter (namely, information from correspondence between this Office and Warrington and Halton Hospitals NHS Foundation Trust (the Trust)). Any other information we may

[2] This states:
(1) Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent states from requiring the licensing of broadcasting, television or cinema enterprises.
(2) The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary."

> have, but which was not material to our decision cannot be disclosed because it is caught by section 15 of the Health Service Commissioners Act 1993.

48. It continues:

> Of course, the Trust is not subject to the same legislation as the Ombudsman, and it is open to you to contact them for information that they hold in relation to your complaint to them, should you wish to do so. (emphasis added)

49. It will be observed that the PHSO's FOI officer is advising this complainant to do precisely what the Appellant has done, that is seek the information from the NHS body which had provided it to the PHSO in the first place. The PHSO's officer was clearly of the view that the prohibition which prevented the Ombudsman's office from releasing information would not prevent the Trust from doing so.

Clarification from Hansard (Pepper v Hart)

50. If the Tribunal considers that there is some ambiguity as to the scope of section 15(1) of the 1993 Act, it would be entitled to take account of a ministerial statement to Parliament if that statement directly clarifies the ambiguous provision (*Pepper v. Hart,* [1993] 1 All ER 42*)*[3] {MF 32}. Such a statement exists.

51. It relates to section 11 of the Parliamentary Commissioner Act 1967 ("the 1967 Act") which is virtually identical to section 15 of the Parliamentary and Health Commissioners Act 1993.

52. As originally enacted section 11 of the 1967 Act {MF 57} stated:

> **11. Provision for secrecy of information**
>
> (1) It is hereby declared that the Commissioner and his officers hold office under Her Majesty within the meaning of the Official Secrets Act 1911.
>
> (2) Information obtained by the Commissioner or his officers in the course of or for the purposes of an investigation under this Act shall not be disclosed except –

[3] In that case Lord Browne-Wilkinson stated: "In my judgment, subject to the questions of the privileges of the House of Commons, reference to Parliamentary material should be permitted as an aid to the construction of legislation which is ambiguous or obscure or the literal meaning of which leads to an absurdity. Even in such cases references in court to Parliamentary material should only be permitted where such material clearly discloses the mischief aimed at or the legislative intention lying behind the ambiguous or obscure words. In the case of statements made in Parliament, as at present advised I cannot foresee that any statement other than the statement of the Minister or other promoter of the Bill is likely to meet these criteria." {MF 43}

> (a) for the purposes of the investigation and of any report to be made thereon under this Act;
>
> (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 the Commissioner or any of his officers by virtue of this Act or for an offence of perjury alleged to have been committed in the course of an investigation under this Act or for the purposes of an inquiry with a view to the taking of such proceedings; or
>
> (c) for the purposes of any proceedings under section 9 of this Act;
>
> and the Commissioner and his officers shall not be called upon to give evidence in any proceedings (other than such proceedings as aforesaid) of matters coming to his or their knowledge in the course of an investigation under this Act.

53. During the House of Commons committee stage of the Parliamentary Commissioner Bill on November 17 1966 an amendment was moved to insert a new paragraph (d) after paragraph (c) of clause 11(2) of the Bill {MF 68}. This would have established an additional category of protected disclosure:

> (d) for the purposes of and at the request of any Tribunal set up under the Tribunals of Inquiry (Evidence) Act 1921.

54. The amendment was proposed by Mr Anthony Buck MP who argued that the Parliamentary Commissioner should be empowered to give evidence to such a Tribunal if he had information which might be relevant to its work. He cited several examples of prominent Tribunal inquiries, continuing:

> In cases of this type, where a Tribunal is set up under the Act, the Parliamentary Commissioner may have investigated certain matters which are on the fringes of those which are specifically being dealt with by the Tribunal. I find it difficult to see why he should not be a competent witness to reveal these matters to the Tribunal, just as much - and this is already provided in the Bill - as in any proceedings under the Official Secrets Act. I fail to see where the differentiation between these two lies…
>
> At the moment, as I read it, the Commissioner is not competent to give evidence. Even if he wanted to assist the Tribunal, he would not be empowered to do so because he is forbidden by the terms of the Clause to disclose any information, except on certain matters, so that he is not even a competent witness.[4]

[4] Official Report. Parliamentary Commissioner Bill, Standing Committee B, Seventh Sitting, Thursday 17 November 1966, cols 322-323 {MF 68-69}

55. The Financial Secretary to the Treasury, Mr Niall MacDermot MP, responded on behalf of the Government. He explained that the Commissioner's proceedings were expected to be very informal; the Government wanted people who were interviewed by the Commissioner to feel able to speak freely to him; that would be more easily achieved if they knew that their words could not be used in subsequent legal proceedings and that the Commissioner could not be called on to give evidence in such proceedings.[5]

56. Mr MacDermot continued:

> That is the main consideration that led us to take this admittedly exceptional step of proposing that the Commissioner and his officers should not be called upon to give evidence in any proceedings…
>
> I turn to the exceptions. I am asked to explain why they should be there. I think that subsection *(2,a)* is self-explanatory. The reason for the exception in paragraph *(b),* in the case of proceedings for an offence under the Official Secrets Act, is that the Committee will remember that as a *quid pro quo* for giving the Commissioner and his officers such a free range in the material that they may see and for waiving Crown privilege, the Commissioner and his officers are made subject to the Official Secrets Act. If, therefore, there were a question of a prosecution of one of the Commissioner's officers for having improperly disclosed information which came into his possession in the course of his inquiries, it would obviously be necessary for the Commissioner to be able to give evidence that the information in question did come into his possession in the course of those inquiries. That is the reason for that exception.
>
> The same kind of considerations apply to paragraph *(c)* which deals with proceedings by the Commissioner against anyone for obstruction or contempt in preventing him from carrying out his duties properly. Again, it would be necessary for him to be able to give evidence in those proceedings…
>
> Again it will be remembered that under Clause 8(2) the Commissioner has the power to administer oaths. That power is not of much use unless it carries sanctions with it. If anybody were to be prosecuted for perjury, in connection with giving evidence on oath to the Commissioner, he or his officers would have to be able to give evidence of the sworn matter which was alleged to be perjury.[6]

57. These explanations all imply that the only persons to whom the prohibition would apply would be the Parliamentary Commissioner and his staff. According to the minister, it is the *Commissioner* who would be freed from the prohibition in order to give evidence in a case involving Official Secrets, contempt or perjury. No third party is mentioned.

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[5] Cols 323-324 {MF 69}
[6] Cols 324-325 {MF 69-70}

58. Mr MacDermot then addressed the issue raised by the amendment:

> I come to the question of proceedings before a Tribunal set up under the Tribunals of Inquiry (Evidence) Act, 1921…if one is imagining a situation in which the Commissioner has investigated a particular complaint and where, either arising out of that or for some other reason, a more serious matter relating to it has been referred to a Tribunal, it might then be asked, why should not the Commissioner be able to give evidence before the Tribunal? That is the case that we are being asked to consider.
>
> Generally speaking, I should have thought that the answer is that anything that he could have found out in the course of his inquiries would, of course, be open to the Tribunal itself to find out. The members of the Tribunal will be able to investigate the same witnesses, and they will be able to call for and see the same documents which have been obtained from the Department concerned or elsewhere.[7] (emphasis added)

59. This makes it clear that while the Commissioner would be prohibited from giving evidence to a Tribunal by what is now section 11(2) of the 1967 Act no such prohibition would prevent the witnesses who had given evidence to him in the course of his investigations appearing before the Tribunal and repeating the same evidence to it.

60. Parliament was clearly told that the prohibition on disclosure of information contained in what is now section 11(2) of the 1967 Act applied only to the Parliamentary Commissioner and his staff and not to those supplying information to him.

61. Section 11(2) of the 1967 Act uses the same words, expressed in precisely the same passive voice, as section 15(1) of the 1993 Act. Section 11(2) states:

> (2) Information obtained by the Commissioner or his officers in the course of or for the purposes of an investigation under this Act shall not be disclosed except –

62. It is submitted that the minister's statement to Parliament during the passage of the 1967 Act meets the criteria set out by Lord Browne-Wilkinson in *Pepper v Hart*. If the scope of section 15(1) is considered to be ambiguous, that ambiguity is removed by this statement to Parliament during the passage of the identical provision in the 1967 Act.

63. The statement indicates that section 11(2) of the 1967 Act is intended to apply only to the Parliamentary Commissioner for Administration and his staff and not to those supplying information to the PCA. It follows that the identically worded section 15(1) of the 1993 Act is intended to apply only to the PHSO and her staff and not to those

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[7] Cols 325-326 {MF 70}

supplying information to the PHSO, let alone to others who may also happen to hold the same information.

64. The debate from which the above extracts have been taken appears to be the only relevant discussion of the matter occurring during the passage of the 1967 Act. No discussion relevant to this point appears to have arisen during the Parliamentary debates on the 1993 Act or those relating to the passage of the Parliamentary and Health Service Commissioners Act 1987.

Authorities cited by the IC

65. The Information Commissioner's skeleton argument refers at paragraph 28 to a number of authorities relating to section 15 of the 1993 Act. However, none of those authorities refer to the particular issue at stake here, namely, whether that section applies to anyone other than the PHSO and her staff (or other Ombudsmen and their staff).

66. Paragraph 28(iii) of the skeleton includes an extract from a High Court judgement in the case of *Kay*.[8] That case, and the extract quoted, deals with the question of whether the PHSO can disclose information to a complainant subject to restrictions on the use that the complainant can make of it and also does not address the issue involved here.

Article 8 of the ECHR

67. If, contrary to the above submissions, section 15(1) of the 1993 Act and section 44(1)(a) of the FOI Act do apply to the disputed information, it is submitted that the application of those provisions in this case would contravene Article 8 of the ECHR.

68. This provides that:

> (1) Everyone has the right to respect for his private and family life, his home and his correspondence.
>
> (2) There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

[8] R (on the application of Kay) v Health Service Commissioner [2008] EWHC 2063 (Admin)

69. Article 8 imposes positive duties on public authorities to communicate information in certain circumstances. See: Gaskin v UK (1989) 12 EHHR 36, paragraph 38 {MF 101}.

70. These would, it is submitted, require the Second Respondent to provide information to the Appellant about matters relating to his mother's death, any investigation that resulted, and the Second Respondent's role in relation to the PHSO's investigation of the Appellant's complaint.

71. This is the ground covered by the three requests refused under section 44(1)(a) of the FOI Act, referred to in the Information Commissioner's Decision Notice as requests 2, 9 and 10. These are:

> [Request 2] Copies of all documentation forwarded to the Ombudsman in regard to our family complaint regarding the death of [Individual A Redacted].
>
> [Request 9] Copies of All communications forwarded to the Ombudsman relating to the death of [Individual A redacted].
>
> [Request 10] 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 [Individual A redacted].

72. To refuse these requests not on their merits, or on the basis of any harm that might be done by the release of the particular information, but purely on the grounds that a blanket prohibition in section 15(1) prevents their disclosure regardless of the circumstances is, it is submitted, a contravention of the Appellant's Article 8 rights.

73. In this respect the present case shares significant features with of the case of Gaskin, which led the European Court of Human Rights ("ECtHR") to find that a breach of Article 8 had occurred {MF 94}.

74. Graham Gaskin had been brought up in the care of Liverpool City Council. He had sought access to his social services file and, under the arrangements in force at the time, had been provided with the records subject to a number of exceptions. One of these provided for information supplied by third parties to be withheld where the third party refused consent or could not be contacted to be asked for consent.

75. The ECtHR found that:

> 37….The records contained in the file undoubtedly do relate to Mr Gaskin's "private and family life" in such a way that the question of his access thereto falls within the ambit of Article 8[9]

76. It concluded:

> 49. In the Court's opinion, persons in the situation of the applicant have a vital interest, protected by the Convention, in receiving the information necessary to know and to understand their childhood and early development. On the other hand, it must be borne in mind that confidentiality of public records is of importance for receiving objective and reliable information, and that such confidentiality can also be necessary for the protection of third persons. Under the latter aspect, a system like the British one, which makes access to records dependent on the consent of the contributor, can in principle be considered to be compatible with the obligations under Article 8 (art. 8), taking into account the State's margin of appreciation. The Court considers, however, that under such a system the interests of the individual seeking access to records relating to his private and family life must be secured when a contributor to the records either is not available or improperly refuses consent. Such a system is only in conformity with the principle of proportionality if it provides that an independent authority finally decides whether access has to be granted in cases where a contributor fails to answer or withholds consent. No such procedure was available to the applicant in the present case.
>
> Accordingly, the procedures followed failed to secure respect for Mr Gaskin's private and family life as required by Article 8 (art. 8) of the Convention. There has therefore been a breach of that provision.[10](emphasis added)

77. The contravention of Article 8 arose because the access arrangements involved an inflexible rule by which third party information was withheld where consent for its disclosure was not available. It was the application of that rule, without regard for Mr Gaskin's interests, which led to the contravention.

78. The Appellant's requests in the present case has been refused on the basis of a similarly inflexible rule.

79. The requests relate to the Second Respondent's role in relation to the PHSO investigation following his mother's death. It concerns his family life and invokes the protection of Article 8.

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[9] Gaskin, paragraph 37 {MF 101}
[10] Gaskin, paragraph 49 {MF 104}

80. As the requested information relates to his late mother it is not personal information and cannot be obtained by means of a subject access request. As it does not consist of his late mother's health records it is not accessible under the Access to Health Records Act 1990.

81. His requests under the FOI Act have been refused on the basis of an inflexible rule, the supposed prohibition on disclosure resulting from section 15(1) of the 1993 Act together with the absolute exemption in section 44(1)(a) of the FOI Act.

82. These provisions take no account of the merits of the Appellant's request for information or the sensitivity or lack of sensitivity of the withheld information. The mere fact that information has been supplied to the PHSO for the purpose of an investigation is sufficient to prevent its disclosure, regardless of its content. The prohibition is not limited to the period during which the PHSO is actively engaged in the investigation but is permanent. There is no attempt to balance the Appellant's Article 8 rights against the interests, if any, which the present statutory arrangements are intended to promote.

83. Section 3(1) of the Human Rights Act {MF 112} provides that:

> "So far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights."

84. It is submitted that if the Tribunal considers that a breach of the Appellant's Article 8 rights has occurred as a result of effect of section 15(1) of the 1993 Act and section 44(1)(a) of the FOI Act, it should to interpret those statutory provisions in a manner consistent with those Articles.

85. The way in which this might be done is illustrated by the Report to the Court of Appeal by Judge John Angel on 18 November 2011 in the FTT case *EA/2008/0083*, Dominic Kennedy & The Charity Commission {MF 114}.

86. In that Report Judge Angel found that Mr Kennedy's rights under Article 10 of the ECHR had been contravened by the refusal of the Charity Commission, upheld by the Information Commissioner, to release information in response to his FOI request.[11] The request related to the Charity Commission's investigations of the sources of funds provided to Mr George Galloway's "Mariam Appeal" to provide humanitarian support to the people of Iraq.

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[11] Paragraph 54 {MF 130}

87. The basis for the refusal was the absolute exemption in section 32(2) of the FOI Act for information contained in a document placed in the custody of a person conducting a statutory inquiry for the purpose of the inquiry or created by such a person for the purpose of the inquiry.

88. The Report concluded that:

> such an absolute exemption does not adequately balance the interests of society with those of individuals and groups…
>
> We therefore conclude that there is no justification for s. 32(2) interfering with Mr Kennedy's Article 10 rights in the circumstances of this case.[12]

89. It found that section 32(2) should be construed in a manner compatible with Article 10; that this could be done by limiting the exemption to documents held by inquiries that have not concluded; and that once the inquiry was complete, the exemption should no longer be capable of applying.[13]

90. It is respectfully submitted that the Tribunal should adopt a similar approach in relation to the interference with the Appellant's Article 8 rights in the present Appeal.

Conclusion

91. The Tribunal is invited to uphold the appeal in relation to section 44(1)(a) and, unless some other exemption applies, order the disclosure of the disputed information.

92. Failing that it is invited to find that the Appellant's Article 8 rights have been infringed by application of section 15(1) of the 1993 Act and section 44(1)(a) of the FOI Act; and to construe those provisions in a manner which avoids the infringement and permits the disclosure.

Maurice Frankel
Campaign for Freedom of Information
26 April 2012

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[12] Paragraphs 64-65 {MF 133}
[13] In the event, the Court of Appeal held that as a result of a recent Supreme Court decision, it was not free to conclude that Article 10 had been infringed in the manner suggested in the Report. [2012] EWCA Civ 317