



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

EA/2011/0170

ON APPEAL FROM:

**Information Commissioner's Decision Notice: FS50359522
Dated: 21 June 2011**

Appellant: DAVID WARDENIER

Respondent: THE INFORMATION COMMISSIONER

Second Respondent: WEST YORKSHIRE POLICE

Third Respondent: MINISTRY OF JUSTICE

On the papers

Date of hearing: 18 January 2012

Date of Decision: 9th February 2012

Before

**Annabel Pilling (Judge)
Rosalind Tatam
and
David Wilkinson**

Representation:

For the Appellant:	David Wardenier
For the Respondent:	Robin Hopkins
For the Second Respondent:	West Yorkshire Police
For the Third Respondent:	Treasury Solicitor

Subject matter:

FOIA Whether information held s.1

DECISION OF THE FIRST-TIER TRIBUNAL

For the reasons given below we find that the Decision Notice of 21 June 2011 was not in accordance with the law and we issue a substitute Decision Notice. The West Yorkshire Police wrongly identified the information requested and did not comply with the requirements under section 1(1) of the Freedom of Information Act 2000 to inform the requestor whether it holds the information requested and, if so, to communicate it to him.

SUBSTITUTED DECISION NOTICE

Dated 9th February 2012

Public authority:

West Yorkshire Police

Address of Public authority:

Police Headquarters
Laburnum Road
Wakefield
WF1 3QP

The Substituted Decision

For the reasons set out in the Tribunal's determination, the substituted decision is that the West Yorkshire Police did not deal with the request in accordance with the requirements of the Freedom of Information Act 2000.

Action Required

The West Yorkshire Police must now consider the request of 9 June 2010 in accordance with the requirements of section 1(1) of the Freedom of Information Act 2000 and either disclose to the Requestor the Memorandum of Understanding between the Police and HMP service entitled Managing Crime in Prisons referred to in its letter to the Appellant dated 23 December 2009 or issue a refusal notice in accordance with section 17 of the Freedom of Information Act 2000.

The West Yorkshire Police must do so within 20 working days from the date of this Substituted Decision Notice.

Dated this 9th February 2012

Signed:

Annabel Pilling

Judge

Reasons for Decision

Introduction

1. This is an Appeal against a Decision Notice issued by the Information Commissioner (the 'Commissioner') dated 21 June 2011. The Decision Notice relates to a request for information made to the West Yorkshire Police ('WYP') under the Freedom of Information Act 2000 (the 'FOIA').
2. On 9 June 2010, the Appellant wrote to the WYP:

"Further to previous correspondence, please forward to me a copy of the document you have cited "Managing Crime in prisons."

3. The WYP, after consultation with the Ministry of Justice ('MoJ'), disclosed to the Appellant version 3.1 of a draft document from the Police Advisers Section to Her Majesty's Prison Service, the Operation Guidance Document with the title "Managing Crime in Prisons". Some information was redacted from the document.
4. The Appellant complained to the Commissioner who concluded that the WYP correctly withheld the redacted information by virtue of section 31 of FOIA on the basis that disclosure would be likely to prejudice certain specified law enforcement matters and that, in all the circumstances of the case, the public interest in maintaining the exemption outweighed the public interest in disclosure.

The Appeal to the Tribunal

5. The Appellant appealed to the Tribunal on 29 July 2011. The Tribunal joined the WYP and MoJ as Respondents.
6. The Appeal has been determined without a hearing on the basis of written submissions and an agreed bundle of documents
7. In addition, the Tribunal was provided with a closed bundle of documents. This bundle included an unredacted version of the draft Police Advisers Section Operation Guidance Document. We have considered all the material placed before us.

The Powers of the Tribunal

8. The Tribunal's powers in relation to appeals under section 57 of the FOIA are set out in section 58 of the FOIA, as follows:

(1) If on an appeal under section 57 the Tribunal considers-

- (a) *that the notice against which the appeal is brought is not in accordance with the law, or*
- (b) *to the extent that the notice involved an exercise of discretion by the Commissioner, that he ought to have exercised his discretion differently,*

the Tribunal shall allow the appeal or substitute such other notice as could have been served by the Commissioner; and in any other case the Tribunal shall dismiss the appeal.

On such an appeal, the Tribunal may review any finding of fact on which the notice in question was based.

9. The starting point for the Tribunal is the Decision Notice of the Commissioner but the Tribunal also receives and hears evidence, which is not limited to the material that was before the Commissioner. The Tribunal, having considered the evidence (and it is not bound by strict rules of evidence), may make different findings of fact from the Commissioner and consider the Decision Notice is not in accordance with the law because of those different facts. Nevertheless, if the facts are not in dispute, the Tribunal must consider whether FOIA has been applied correctly. If the facts are decided differently by the Tribunal, or the Tribunal comes to a different conclusion based on the same facts, that will involve a finding that the Decision Notice was not in accordance with the law.

Our Analysis

10. The Appellant appeals against the Commissioner's Decision Notice; he is unrepresented and has been hampered in the preparation of this appeal by his personal circumstances. Although broad grounds of appeal had been identified from the Appellant's original Notice of Appeal document, and submissions have been received addressing those grounds, the lack of logic in the arguments presented by the Respondents in this appeal has caused us to commence with a

consideration of the original request for information to ascertain for ourselves what has led to this position.

11. The original request for information was made by the Appellant to the WYP by letter dated 9 June 2010. The letter was headed *“Re: Investigations by you (regarding IPCC¹ instructions)”* and was made in the context of a complaint being pursued by the Appellant in respect of the response of the WYP in dealing with allegations of assault on him whilst in a prison:

“Further to previous correspondence, please forward to me a copy of the document you have cited “Managing Crime in prisons.”

12. Within the agreed bundle of documents is the letter from WYP to the Appellant referring to that document. This letter is dated 29 December 2009 and contains the explanation for why the WYP did not instigate an investigation in relation to the Appellant’s allegations. The WYP explained that such matters are for the initial consideration of HMP Management in the first instance and that the police will only become involved at the request of HMP Management: *“This is in accordance with a Memorandum of Understanding between the Police and HMP service² titled Managing Crime in Prisons.”*

13. It is clear from this letter that WYP cited this document as being the basis upon which it had not investigated the allegations made by the Appellant. This Memorandum of Understanding between the Police and HMP Service is the agreed policy to follow in respect of allegations of crime committed in prisons. The Appellant sought a copy of that document in order to pursue a claim against the WYP and/or prison service.

14. In our opinion the WYP did not consider the Appellant’s request properly and has misidentified the information requested. The information identified by the WYP was merely an operational guidance note drafted for a consultation exercise in 2008 –

¹ The Independent Police Complaints Commission.

² Her Majesty’s Prison Service

2009 and neither ACPO³ nor HMP Service were signed up to this document. It is clear from the Appellant's original request and subsequent submissions, including references to the "MoU", that he wanted the document relied upon by the WYP as justification for the stance it had taken in respect of his complaint about the way in which his allegations of assault had been dealt, namely the Memorandum of Understanding between the Police and HMP service titled Managing Crime in Prisons.

15. Throughout dealing with this matter the WYP, the MoJ, and the Commissioner have failed to consider the initial request but have perpetuated the original error. The MoJ is clearly perplexed how the draft operational guidance document came to be identified by the Appellant. The answer to this is that it never did; the Appellant requested the Memorandum of Understanding between the Police and HMP service titled Managing Crime in Prisons and it was the WYP which located a document with a similar title, providing a redacted version to the Appellant ultimately resulting in this appeal.
16. As the MoJ observes in its written submissions, the Appellant's grounds of appeal are predicated on the assumption that the information requested represents the policy in operation within the prison estate regarding referral of matters to the police. That assumption is correct insofar as it relates to the information *requested* as opposed to the information eventually provided by the WYP. The information disclosed by the WYP has no relevance or bearing on the Appellant's complaint about the stance taken in respect of his allegations of assault, unlike the information requested in his letter of 9 June 2010.
17. In the Decision Notice the Commissioner refers to the requested information as being "*Managing Crime in Prisons*", a draft operational guidance document written by the Police Advisors Section to HMP Service". This was the *disclosed* information but was not the information clearly identified by the Appellant in his request. It follows that the Decision Notice is wrong in law and we therefore substitute the Decision Notice above.

³ The Association of Chief Police Officers

18. The WYP must now consider the request for information as identified by the Appellant in his request of 9 June 2010 and disclose the Memorandum of Understanding between the Police and HMP service titled Managing Crime in Prisons to him or issue a refusal notice in accordance with section 17 of FOIA.

19. Our decision is unanimous.

Observation

20. The expected focus of this appeal was the information which had been redacted from the operational guidance note provided to the Appellant on the basis that disclosure would be likely to prejudice certain specified law enforcement matters under section 31 of FOIA, and that in all the circumstances of the case, the public interest in maintaining the exemption outweighed the public interest in disclosure. Although we do not have to consider this in light of our finding above, we note that the majority of that information is already in the public domain, particularly as it is mostly contained in Annex C to PSO 2000 Prison Discipline Manual Adjudications. This PSO was not provided directly to the Tribunal despite being referred to by the Ministry of Justice. It seems to us that any serious analysis of the operational guidance note should have begun with a comparison of its content with the PSO 2000 which is available in all prison libraries. We note that no such comparison was conducted by any of the respondents and we further note that it would be difficult to sustain the argument that disclosure of information already in the public domain that was contained within a draft consultation document with no legal standing would be likely to prejudice those factors listed from section 31 of FOIA.

Signed:

Annabel Pilling

Judge

Date: 9th February 2012