



Tribunals Service
Information Tribunal

IN THE MATTER OF AN APPEAL TO THE INFORMATION TRIBUNAL

Information Tribunal Appeal Number: EA/2008/0040
Information Commissioner's Ref: FS50155312

Decided at an oral hearing sitting at Decision Promulgated
Peterborough Magistrates Court
On 20th October 2009 **14th December 2009**

BEFORE

CHAIRMAN
Fiona Henderson

and

LAY MEMBERS
Roger Creedon
Tony Stoller

BETWEEN:

CHARLES EDWARD STUART

Appellant

and

THE INFORMATION COMMISSIONER

Respondent

and

DEPARTMENT FOR WORK AND PENSIONS

Additional Party

Subject matter FOIA:

- Whether information held s.1
- Meaning of Public authorities s.3
- Refusal of request s.17
- Recommendations as to good practice s.48

Cases:

Bromley v Information Commissioner and the Environmental Agency

EA/2006/0072 Fowler v Information Commissioner and Brighton and Hove

City Council EA/2006/0071

Representation:

For the Appellant: Mr Stuart in person

For the Respondent: Ms Michelle Voznick

For the Additional Party: Mr Gerry Facena

Decision

The Tribunal refuses the appeal in relation to ground 4 in that it is satisfied that the disputed Information was not held at the date of the information request. The Tribunal finds that:

- the Commissioner did not accept a bare assertion that the information was not held but
- the Commissioner ought to have investigated whether the DWP had considered the possibility that the disputed information was held on their behalf by a third party before coming to this conclusion.

The Tribunal allows the appeal in relation to ground 10 and substitutes the following decision notice in place of the decision notice dated 19th March 2008.

Information Tribunal

Appeal Number: EA/2008/0040

SUBSTITUTED DECISION NOTICE

Dated 13th December 2009

Public authority: The Department of Work and Pensions

**Address of Public authority: The Adelphi, 1-11 John Adam Street,
London, WC2N 6HT**

Name of Complainant: Mr Charles Stuart

The Substituted Decision

For the reasons set out in the Tribunal's determination, the substituted decision is that

- At paragraph 7 there should be inserted:

"a review carried out as a customer complaint without consideration of the Freedom of Information Act"

to replace reference to *"its internal review"*.

- Added to the Decision Notice at paragraph:

41(i)(e) *"The refusal notice did not inform the complainant of The Pension Service's internal review procedure which was a breach of section 17(7)(a) FOIA"*

Action Required

No action is required

Signed:

Dated this 13th day of December 2009

Fiona Henderson

Deputy Chairman, Information Tribunal

Reasons for Decision

Introduction

1. Mr Stuart was the Executor of his deceased Uncle's Estate. Before his death his Uncle's affairs had been dealt with by 2 different Receivers because he was unable to manage his own affairs. Following the death of his Uncle (Mr Bennett) in April 2006 Mr Stuart contacted the Pension Service (a branch of the Department of work and Pensions (DWP)) by telephone on 16th October 2006 to inform them of the death and to seek to ascertain what payments had been made. He followed this in writing the same day.
2. Upon contacting the DWP it became apparent that:
 - The current Receiver had not notified the Pension Service of the death,
 - In consequence, Pension payments had continued to be made in relation to Mr Stuart's Uncle after his death.
3. Mr Stuart had numerous concerns relating to the way that his Uncle's affairs were administered during his life including that:
 - not all payments had been credited to his Uncle's Account,
 - improper deductions had been made during periods of hospital care,
 - he had been required to pay for elements of his care that ought to have been free,
 - the Receivers had not liaised with the next of kin in circumstances where they ought to have.
4. Pursuant to his duties as Executor and in order to further the investigation into alleged irregularities which he believed ought to take

place Mr Stuart made a request to the DWP in his letter of 16 October 2006, for the following information in relation to his late uncle:

“Will you please also supply me with the payment history and the Banks, Account Numbers and Sort Codes for the recipient Accounts of those payments covering the whole period from 22/12/00 or earlier if his Pensions had been transferred to a receivers account before that.

...

can you please tell me what the rules for payments of pension during hospitalisation were from 10 April 2002 till 02 May 2002 i.e. How much pension would my uncle have had deducted?”

5. This is the information request with which this appeal is concerned. Mr Stuart has made other information requests relating to other public authorities which have been referred to the Commissioner separately. Mr Stuart sought to link these information requests and referrals to the Commissioner within this appeal, but the grounds of appeal relating to these were summarily dismissed on 2nd April 2009 for the reasons given in the ruling dated 19th March 2009. Additionally the Tribunal notes here that under section 58 FOIA the Tribunal has no jurisdiction to comment upon the sufficiency or otherwise of any investigation into the payments to the Receivers by the DWP.
6. It took the DWP some 3 ½ months to provide a substantive response to this information request, on 6th February 2007, and even then this was incomplete. They provided details of the corporate payees on the account, the dates they had responsibility to receive payments and the payment history from August 2004 until October 2006 these being *‘the latest details we still hold’*. The DWP refused to disclose the bank details of the Receiver asserting that it would breach the Data Protection Act (DPA).

7. The DWP conducted an “internal review” the results of which were communicated to Mr Stuart in a letter dated 1st March 2007 from Alexis Cleveland who was at that time the Chief Executive of the Pension Service. (It was accepted by the DWP in their letter of 4th July 2008 that that this review “*was not undertaken under the provisions of FOIA because it was not appreciated by the DWP that it was a request for a review under FOIA.*”). From the DWP’s reply dated 25th July 2008 it is clear that this review was conducted by the customer services team as a customer complaint. It is conceded by the Commissioner that in his preparation of the Decision Notice at paragraph 7, he had assumed that the review was pursuant to FOIA and that this was factually wrong.
8. The letter of 1st March stated inter alia that:
 - The bank details of the receiver could not be released because the Data Protection Act applied.
 - No further details were held regarding the payment history as documents were destroyed after 14 months which was in keeping with the DWP’s document retention policy.
 - No overpayments had been repaid by the named firm but the DWP was considering recovering the overpayment.
9. On 26th March 2007 the Appellant complained to the Commissioner. The Commissioner attempted to deal with the case informally at first, providing guidance to the DWP and referring Mr Stuart back to the DWP to await their reconsideration of the matter in the light of that guidance. Mr Stuart was not satisfied with the DWP response and the Commissioner commenced a substantive investigation in October 2007. During the investigation the DWP abandoned their reliance upon the DPA (and as it became during the Commissioner’s investigation section 40 FOIA) and by letters dated 8th and 28th January 2008 released information that had previously been withheld under that section.

10. The Commissioner served a Decision Notice FS50155312 on 19 March 2008 in which he held that:

- the Pensions Service had breached sections 10 and 17 of FOIA and
- the outstanding requested information (the payment history predating August 2004) was not held.

11. In the Decision Notice under “other matters” the Commissioner referred to the Appellant’s belief that the DWP had breached section 77 FOIA by destroying payment history records over 14 months old. The Commissioner explained that he *“does not consider there is any evidence that the public authority has destroyed the information to prevent disclosure, or as a result of the request to view it”*.

The Appeal

12. Mr Stuart appealed to the Tribunal on 16th April 2008. His nine grounds of appeal were clarified at the telephone directions hearing of 27th June 2008 and by way of an email dated 4th July 2008 and appear in the amended directions dated 7th July 2008. Mr Stuart was given leave to add an additional ground of appeal (ground 10) in the ruling and directions dated 27th November 2008. Grounds 1,2,3,5,6,7,8 and 9 were summarily dismissed on 2nd April 2009 for the reasons set out in the ruling dated 19th March 2009. In that ruling the Tribunal made the following findings relating to “discretion” in the context of section 58 FOIA:

*“discretion is referring to the Commissioner’s role as a “decision maker” whilst exercising his functions under the Act. Discretion in the context of section 58 has to be operative in law (in the sense of being an exercise of a statutory duty or discretion, binding a party or being determinative of a core issue). It is the **Notice** that requires an exercise of discretion (i.e. not the course of the investigation) and is applicable to circumstances where*

the statute is permissive but not mandatory, for example the Commissioner “may” choose to issue an information notice under section 51 FOIA or an enforcement notice under section 52 FOIA .”

13. The Tribunal did not agree that the Commissioner had discretion in deciding whether to accept the Pension Service’s assertions that information was not held. The Tribunal was satisfied that this is a mixed question of fact and law. The Tribunal took into consideration the fact that the Appellant was a litigant in person and found that references to “discretion” in ground 4 was misconceived and that the substance of the Appellant’s ground of appeal was reflected if the ground was read as an allegation that the Commissioner “erred”.

The Questions for the Tribunal

14. Ground 4

The Information Commissioner [erred] when finding that the requested Payment History information was not held,

- a) in that he has accepted the Pension Service’s assertions that the information was not held because it had a retention policy under which the records had been deleted,*
- b) in that no apparent enquiry was made of an independent party such as the PS/DWP’s Bank as to whether they held the requested information in the form of accounts that were held on behalf of the PS/DWP, in that they could be obtained simply on request by the PS/DWP.*

15. The Tribunal is satisfied that this is a mixed question of fact and law. There is a factual dispute here as to whether the information is held, but there is a legal question as to the sufficiency or otherwise of the investigation.

16. Ground 10

In light of the Additional Party's concession (paragraph 10 of their reply dated 25th July 2008) that the "internal review" referred to in the letter of 1st March 2007 was not conducted under FOIA :

- a) The Commissioner erred in fact in the Decision Notice in that he treated this review as having been conducted under FOIA,*
- b) The Commissioner erred in failing to record an additional breach of FOIA in that the review was not conducted under FOIA.*

Evidence

17. For the substantive hearing on 20th October 2009 the Tribunal was provided with a bundle of documents which represented the distilled correspondence between the parties in relation to these 2 grounds only and included a copy of the DWP document retention policy. There was some confusion as to whether the Commissioner had seen the document retention policy that was applicable at the time as parts of the policy were provided in an "updated" form which post dated the material time. However, from the documents before it, the Tribunal was satisfied that the Commissioner was provided with the section of the document retention policy applicable to the disputed material which was current at the date of the consideration of the request.

18. The Tribunal adjourned the oral hearing to a paper hearing to enable additional evidence to be provided by DWP in relation to their banking relationship and usage of the BACs system. The Tribunal was provided with a witness statement dated 27th October 2009 of Wayne Stephens (DWP Head of Banking Finance Policy and Practice).

19. The Tribunal considered and took into consideration all the evidence before it and has referred to specific elements in its analysis of the arguments and issues set out below.

Legal submissions and analysis

Ground 4a

20. The Commissioner refutes the suggestion that he accepted a bare assertion that the information was not held. He maintains that he sought evidence in support of the assertion and questioned whether it was available by other means before concluding that the information was not held. He relies upon the Tribunal Decision of *Bromley v Information Commissioner and the Environmental Agency EA/2006/0072* in support of the contention that:

- The standard of proof is “*the balance of probabilities.. [because] ... there can seldom be absolute certainty that information relevant to a request does not remain undiscovered somewhere within a public authority’s records.*”

21. He further relies upon *Fowler v Information Commissioner and Brighton and Hove City Council EA/2006/0071* where the Tribunal said that evidence that the information is not held may include:

“evidence of a search for the information which had provided unsuccessful or some other explanation for why the information is not held”.

22. Mr Stuart sought to argue that “a balance of probabilities” was not attainable because the Tribunal had already ruled at the pre-hearing stage that the Commissioner’s conduct of other complaints relating to his other information requests was not material to this appeal. The Tribunal rejects this contention and in doing so reminds itself that it will make a fresh decision on the evidence and is not bound by the Commissioner’s approach or the evidence that was before the Commissioner. Mr Stuart did not point the Tribunal to any legal authority and the Tribunal is not aware of any to suggest that this was the wrong standard of proof. This Tribunal is therefore satisfied that it

is appropriate to adopt the principles as set out in the aforementioned case law.

23. From the DWP letter of 21st November 2007 it is clear that:

- a. The Pension Service document and data retention periods are mainly determined by benefits legislation covering review and appeal time limits. The retention period is 14 months.
- b. Data was weeded after 2 years every 3 months on a rolling basis. No back-up or archive copy was kept or retrievable.
- c. Clerical papers will be held until action is complete. At the time of the information request the payments were still being made so the action was not complete and the file had not been destroyed. In light of Mr Stuart's queries the file was being retained. No information about the payments made is held in the clerical papers
- d. The Computer records of the payments existed back to August 2004

24. From the document retention policy it is apparent that:

"5060 For RP (retirement pension) purposes, claims are PA (put away) once all action is completed. The PA is the date when all action is completed.

5061 destroy PA'd cases:

- *14 months after PA if they are system maintained or*
- *14 months after the customer's death if they are clerically maintained."*

25. The Commissioner pointed to the fact that in concluding that the information had been destroyed at the relevant time and was consequently not held, he had:

- seen the document retention policy and the destruction of the disputed material was consistent with the application of that policy,
- the clerical file in this case had been retrieved and disclosed to Mr Stuart and did not include the disputed information,
- an archive and system back up check had been completed which confirmed that once documents were destroyed in compliance with the document retention policy they could no longer be retrieved.

26. However, Mr Stuart's case questioned whether the DWP could be believed in their explanations as to whether the information was still held or whether and why it had been destroyed. In reviewing the Commissioner's finding of fact afresh (under section 58 FOIA) the Tribunal has considered Mr Stuart's points in turn. He maintains that the DWP have lied or been disingenuous in its responses in the past and that consequently the Tribunal should not accept their bona fides when considering the document retention policy and their evidence and arguments. He further that the DWP are helping to cover up wrongdoing by other authorities.

27. Mr Stuart drew to the Tribunal's attention the fact that the DWP had relied upon the Data Protection Act (DPA) in the erroneous belief that the information related to an individual rather than a corporate entity, when it was so obviously not applicable, as evidence of bad faith.

28. The Tribunal notes and it was acknowledged by the DWP in their letter of 8th January 2008 that: *"you did provide sufficient evidence on several occasions that should have allowed us to provide you with the information you requested"*.

29. Mr Stuart argues that the failure to follow the Commissioner's Code of Practice issued pursuant to section 45 FOIA is further evidence of deliberate bad faith. The Code recommends (paragraph 26 onwards)

that public authorities take appropriate steps to ensure that third parties, are aware of the public authority's duty to comply with FOIA and that therefore information will have to be disclosed upon request unless an exemption applies.

- Despite this, no FOIA exemption was identified at the time of the refusal and “review”,
- Consideration of this provision ought to have alerted the DWP to the fact that the information related to a corporate entity and not an individual and that the DPA (pursuant to section 40 FOIA) was not applicable,
- Even after it was realized that Mr Stuart was entitled to the information (letter of 8th January 2008) his request was not subjected to proper scrutiny under FOIA and he was not provided with the bank account details the DWP having left it up to the “discretion” of the Banks concerned. The DWP eventually provided this information in their letter of 28th January 2008.

30. Mr Stuart argues that since the information request was made in the context of an allegation of fraud extra co-operation ought to have occurred rather than obstruction. Mr Stuart relies upon the fact that it took him 15 months to obtain information that the DWP subsequently conceded he had been entitled to from the outset, was indicative of this point.

31. The Tribunal is satisfied that whilst there is evidence of a lack of rigour in the treatment of FOIA requests, this is not indicative of bad faith, but of a failure to apply appropriate knowledge and policies within the department (see paragraph 66 et seq below).

32. Mr Stuart questions the credibility of the assertion that deleted data cannot be retrieved because:

- it was in the public interest that banks should retain the information for the use of the DWP in circumstances where they had not retained their own data because to fail so to do was to enable dishonest conduct to prevail. He argued that it was inconceivable that the DWP would not have arranged this.
- if payment information were destroyed irretrievably in accordance with the DWP data retention policy, it would be “an open goal” as very serious scams and frauds might go undetected or un-prosecuted as the DWP would no longer have proof of payment.

33. The DWP maintain (and the Tribunal accepts) that evidence of the instigation of a fraud e.g. the original claim form would be retained in the clerical file and not destroyed under the document retention policy and so the absence of payment records need not inhibit any investigation. There are avenues available outside the *Freedom of Information Act* wherein the investigatory authorities can obtain records from 3rd parties such as the receiving bank. (This is a different question from whether records are held on behalf of the DWP for the purposes of FOIA by any third party which is dealt with at paragraph 43 et seq below.)

34. Additionally Mr Stuart cited examples of conduct which he considered indicative of bad faith:

- a) When he made his original telephone contact on 16th October 2006 alleging fraud he was told that he would be telephoned back as he had explained that he had further evidence in relation to the fraud. He was not telephoned back and a decision was made by the Pension Service not to investigate further without them establishing what further evidence he had.
- b) Mr Stuart was told during the telephone calls that his fraud allegation would be investigated. Instead it was “assessed” and deemed not appropriate for further investigation.

- c) Mr Stuart considers it inconsistent with DWP's practice of chasing small overpayments and investigating individuals that they would allow an allegation of fraud involving several thousand pounds in relation to a professional receiver to go uninvestigated were it not by reason of bad faith.

35. The Tribunal does not consider that these matters are indicative of bad faith. The Tribunal has seen the internal file notes which show the route that the referral took and its eventual handling by the compliance department. As already stated above, it is not the Tribunal's function to comment on the rigorousness or otherwise of the process for investigating fraud allegations.

36. Mr Stuart further asserts that from the file notes, the decision not to investigate the fraud allegation further was made on 20th December 2006 and yet :

- in her letter of 8th February 2007 the then Chief Executive Alexis Cleveland said:

*"We have referred the matter of the payments paid after Mr Bennett's death to the appropriate investigating team.. a member of Jobcentre Plus Compliance Team is currently dealing with the matter. As we hold details of the payments made after Mr Bennett's death and of the payee, **enough information is held to undertake an investigation without recourse to contact you directly at present.** (emphasis is added by the Tribunal)*

- Her letter of 1st March 2007 stated:

*"The Department has **not necessarily** launched an investigation into fraud in this case.. the Department's interest lies with the overpayment of Mr Bennett's state pension only."*

37. The Tribunal notes that there was no point of contact available to Mr Stuart to follow up his concern in relation to the fraud allegation beyond

the “hotline” telephone number that he used and that he was met with conflicting and ambiguous answers in his attempts to follow up the matter. However, it is clear from the file notes that the Chief Executive’s department when seeking internal information was itself initially provided with a “holding” response rather than a factual response. It was also argued on behalf of the DWP that it is not necessarily policy to indicate the status of fraud investigations and that whilst the response could have been clearer it does eventually indicate that the DWP’s only concern is recovering overpayment. The Tribunal is satisfied that whilst this correspondence highlights flaws in the DWP’s internal processes, it is not evidence of bad faith.

38. Additionally Mr Stuart had asked in his letter to the DWP of 12th February 2007 :

“Is there an investigation officer by the name of Sue at a Preston Office and did she take further details of my complaint from me?”.

The letter from the Chief Executive Alexis Cleveland dated 1st March 2007 stated *“the compliance team have no referral from a member of staff called Sue”*. In fact it is apparent from a DWP telephone file note dated 23rd October 2006 that Mr Stuart spoke to a *“Sukhi [], NBFH section, located in Preston”*. Mr Stuart asserts that the Chief Executive has therefore lied or at best deliberately provided mis-information.

39. The Tribunal does not agree. The Chief Executive was explicit that she had contacted the “Compliance team” and not the “fraud team”. Whilst Mr Stuart’s original allegation was in relation to a fraud allegation, it was also in relation to overpayments and their recovery. It was not therefore unreasonable for the Chief Executive to contact the Compliance Team (whom it is apparent from the file notes were dealing with the case). Additionally the name recorded, “Sukhi” rather than “Sue”, is sufficient to satisfy the Tribunal on a balance of probabilities that there is an innocent explanation for any inconsistency between the response and the file note.

40. The Tribunal considered each example cited by Mr Stuart and was satisfied that there was no substance in his assertion that these were indicative of a cover up of a fraud or that information was only provided if convenient to the DWP. In making his submissions, Mr Stuart conceded that there were alternative interpretations to his reading of the documents, but he maintained that cumulatively they were indicative that there was no innocent explanation.

41. In concluding that, cumulatively, the instances cited were not indicative of bad faith, in addition to the reasons cited above, the Tribunal took into account the following:

- The sufficiency of the investigation of the fraud is not a matter for this Tribunal.
- Whilst Mr Stuart sought to argue a conspiracy between government departments involved in the administration of his Uncle's affairs, in light of the fact that the allegations were made against Receivers and not the DWP, it is not suggested that the DWP had themselves perpetuated the fraud.
- Mr Stuart was given the pension payment details dating back to August 2004 and a theoretical calculation of the payments prior to that date for the disputed period. Whilst Mr Stuart alleges that there were irregularities in terms of the payments accounted for by the Receiver in 2001-2, the information he has should enable him to highlight any inconsistencies and undermines his assertion that the information was withheld by the DWP to prevent such inconsistencies being unearthed.

42. For the reasons set out above, the Tribunal does not find that the Commissioner accepted a bare assertion in relation to whether the information had been deleted. The Tribunal is satisfied that the Commissioner took all reasonable steps to investigate this aspect of the case, repeatedly asking for additional evidence, viewing copies of relevant documents and chasing up and clarifying responses from the DWP.

Ground 4b

43. However, the Tribunal does consider that the Commissioner's investigation did not go far enough in that it did not consider explicitly and pursue with the DWP whether the banking information was held on their behalf by a third party namely their bank. From section 3 FOIA it is clear that it is immaterial whether a third party holds the information for their own purposes. It is only if it is held on behalf of the public authority that it falls to be disclosed under FOIA.

44. In section 3 of FOIA

(1) In this Act "public authority" means—

(a) subject to section 4(4), any body which, any other person who, or the holder of any office which—

(i) is listed in Schedule 1, or

(ii) is designated by order under section 5, or

(b) a publicly-owned company as defined by section 6.

(2) For the purposes of this Act, information is held by a public authority if—

(a) it is held by the authority, otherwise than on behalf of another person, or

(b) it is held by another person on behalf of the authority.

Consequently the banks and Vocalink (the Operators of BACS) are not bound by FOIA and their compellability under FOIA arises out of their relationship with the public authority.

45. There was consensus between the Commissioner and the DWP that the responsibility for contacting an appropriate 3rd party would lie with the public authority and not directly with the Commissioner. Mr Stuart disagrees and contends that the Commissioner should have approached the bank directly to see if the information was held. This is

consistent with his approach that anything less would be to accept a bare assertion. The Tribunal is satisfied that since it is the public authority that bears the responsibility of complying with FOIA, they have the responsibility of locating and disclosing the information under the Act. However, in determining whether information is held by a public authority it is the responsibility of the Commissioner to satisfy himself whether and to what extent the DWP have addressed the issue of evidence held on their behalf by a third party.

46. In their arguments before the Tribunal the DWP sought to argue that the information it has provided to the Tribunal in relation to the position of the DWP's bank was not *"inquiries that DWP or the IC should have made during the investigation"*. The Tribunal disagrees. Compliance with section 1 FOIA requires consideration of section 3. Additionally this avenue of enquiry was specifically flagged-up by Mr Stuart during the Commissioner's investigation. He did not receive a direct answer from the DWP and it is clear that this aspect was not considered explicitly by the Commissioner.

47. In his letter dated 1st February 2008 to Mr Beetham at the DWP he said:

*"I expect you to immediately hand over the requested payment history details **or to explain why you have not been able to get those details from your bank**"*

Mr Beetham's response dated 20th February 2008 stated:

"I can confirm that we have made a thorough search throughout the department, including our Bank Liaison section, to attempt to provide you with further historic payments to those already disclosed. However, all previous records have been completely deleted and cannot be retrieved".

In their email to the Commissioner dated 21st February 2008 the DWP said

“Confirmation has been obtained from our Bank Liaison Section that certain information in the payment history has already been destroyed and therefore cannot be supplied”.

48. It is clear from the evidence before the Tribunal that this was not an indication that the information was held by the DWP's bank and that they too had deleted it. As such this does not answer the point raised in Mr Stuart's letter of 1st February 2008.

49. In his letter to the DWP dated 25th February 2008 Mr Stuart states:

“I do not believe you as I am not aware that any commercial Bank does not retain records of transactions it handles for a two year period only and because such asset up would severely restrict the possibility of chasing up past fraud”. (sic)

50. It is not clear whether these letters from Mr Stuart were copied to the Commissioner, however, the Tribunal is satisfied that:

- this was an obvious line of enquiry since (as was being referenced by Mr Stuart above) there is a general expectation that banks keep customer records for longer than 2 years, and that begs the question “on whose behalf are these records being held?”.
- Additionally the reference to the Bank Liaison section should have acted as a trigger to consider whether the information was held on behalf of the DWP by their bank. The information relating to the Bank Liaison section was vague and merited clarification. To determine that the information was not held by the DWP bank, the Tribunal would expect to know as a minimum whether it was ever held by the third party on behalf of the DWP and if so when it was destroyed and in what circumstances.

51. In the absence of this aspect being investigated by the Commissioner, the Tribunal received evidence in order to determine whether such information was so held. In determining this fact afresh, the Tribunal adjourned for further evidence. The Tribunal considers this probative that the Commissioner did not have sufficient evidence before him on this point to determine the finding of fact that the information was not held at the time that he issued his Decision Notice.

52. The evidence of Wayne Stephens (DWP Head of Banking Finance Policy and Practice) was that:

- DWP submits payment files directly to the company dealing with BACS payments, Vocalink,
- Vocalink transmit the payments directly to the receiving banks,
- The DWP does not have to pre-fund payments through a commercial bank. Funds are held in a central Account at the Bank of England and, a lump sum is drawn down automatically by receiving banks representing the value passed by DWP to customers' bank accounts within that bank.
- There is no contractual relationship between DWP and Vocalink in respect of the BACS service. The DWP uses a sponsor bank to enable access to the BACs system. The sponsoring bank is responsible for ensuring that the DWP operates to the BACS standards. Vocalink and the sponsor bank have a contractual relationship regarding data ownership but DWP is not a party to this.

53. Mr Stuart made no written submissions challenging this evidence and from the evidence the Tribunal is satisfied that:

- the Royal Bank of Scotland (the sponsoring bank at the time) never held the disputed information.
- If anyone still holds the information it is Vocalink or the recipient bank.

- There is no contractual relationship between the DWP and either of these parties.
- There are no terms and conditions directly applicable between these 2 parties and the DWP.

54. Even if the information was held by Vocalink (or the recipient bank) at the time that the information request was made, the Tribunal is further satisfied that it was not being held on behalf of the DWP because:

- The DWP had destroyed their own copy of the information,
- The DWP no longer had a business need for the information,
- The DWP had taken no steps to ensure that or ascertain whether Vocalink (or the bank) would retain the information before they destroyed their copy.

55. Therefore for the reasons set out above, upon its own consideration of the evidence, the Tribunal agrees with the Commissioner's finding of fact that the disputed information was not held by the DWP or on its behalf, and there was consequently no breach of section 1 FOIA.

Ground 10

56. The DWP concede that the "internal review" conducted by the customer services team and communicated to Mr Stuart by letter dated 1st March 2007 from the then Chief Executive of the Pension Service "*was not undertaken under the provisions of FOIA because it was not appreciated by the DWP that it was a request for a review under FOIA.*"). It is conceded by the Commissioner that in his preparation of the Decision Notice at paragraph 7, he had assumed that the review was pursuant to FOIA and that this was factually wrong.

57. When Mr Stuart made his original complaint to the Commissioner dated 26th March 2007, he did not complete the box on the complaint form confirming that he had exhausted the internal complaints

procedure, but he enclosed the correspondence to date. Nevertheless the Commissioner wrote to the DWP on 19th April 2008 asking that they consider whether it was appropriate for his request to be dealt with under the “*normal course of business*” rather than under FOIA. They were also asked to assess whether the requests had been dealt with “*properly under DWP procedures*”.

58. The DWP internal policy includes the following:

Every written request for information is a Freedom of Information request even if the Act itself is not mentioned, ..

If you have any doubt as to what is being requested or you believe that some, or all of the information may be exempt from disclosure you should seek advice from your line manager or other senior officer. If a request leads to consideration of either applying an exemption or charging a fee, you should contact your focal point before taking any further action.”

59. The response to Mr Stuart dated 3rd July 2007 from a DWP FOI Policy Advisor was wholly inadequate. She had not looked at Mr Stuart’s Uncle’s file or presumably the requested information and she made erroneous factual assumptions “*I assume this to be the receiver [who], would not give their consent to provide you with the information you seek...*” Having been asked to consider whether DWP policies were being applied she did not pick up that in accordance with the DWP internal policy this case should have been treated as a FOIA request and that in consequence the refusal notice and review were not compliant.

60. Mr Stuart wrote to the Commissioner on 17th May 2007 objecting to the suggestion that his request could be dealt with in the “normal course of business” because:

- There was no provision whereby FOIA could be avoided in this way,

- Relying upon the Chief Executive's use of the DPA as taking it out of that category,
- *"I note that my first expression of dissatisfaction with the response, according to Section VI of the code of Practice, should have resulted in the department's FOI specialists being contacted and should have resulted in an internal review, whether specifically asked for or not".*

61. Although the Commissioner contacted the DWP and wrote on 12th July 2007 listing the information to which Mr Stuart had not yet had a reply and confirming that he understood that the matter would now be referred to the appropriate DWP Focal Point and treated as FOIA requests, this did not include the information which is the subject of this appeal presumably because a refusal of sorts had already been provided.

62. The Commissioner did not receive explicit confirmation from DWP that they had followed their own procedures. It appears to be from a review of the correspondence that the Commissioner has presumed that the Chief Executive's letter of 1st March was the FOIA review:

- despite there being no reference to an exemption under FOIA at that stage,
- in spite of the fact that other information requests had clearly not been actioned under FOIA.
- and notwithstanding Mr Stuart's explicit reference (17th May 2007) to the fact that there **should** have been a FOI review, taking place after the purported review on 1st March 2007.

63. Section 17(7) FOIA provides:

A notice under subsection (1), (3) or (5) must—

(a) contain particulars of any procedure provided by the public authority for dealing with complaints about the handling of requests for information or state that the authority does not provide such a procedure, and

(b) contain particulars of the right conferred by section 50.

64. Whilst in the body of the Decision Notice at paragraph 29 the Commissioner noted that the DWP had failed to inform the Appellant of his right to an internal review, this was not reflected in the "Decision" part of the Decision Notice. This did not record a specific breach of Section 17(7)(a) FOIA, but recorded a breach of section 17(7) because the Appellant had not been informed of his right to appeal to the Commissioner under section 50 FOIA. The Commissioner indicated at the directions hearing on 27th June 2008 that he would not object to paragraph 41(i)(d) being amended to reflect this.

65. The Tribunal considers it important that procedures in relation to internal reviews are followed. If they are not set out in the refusal notice there is a danger that the opportunity for a thorough reconsideration by the public authority is lost. The Tribunal therefore allows the appeal in relation to this ground and amends the Decision Notice to reflect this finding.

Other matters

66. The Tribunal also makes the following observations. There is no right to a review under FOIA, and the failure to carry out a review under FOIA is not therefore a breach of FOIA in itself. However, the Code of Practice issued pursuant to section 45 FOIA provides at paragraph:

36: "Each public authority should have a procedure in place for dealing with complaints.."

39: "The complaints procedure should prove a fair and thorough review of handling issues and of decisions taken pursuant to the Act.. It

should enable a fresh decision to be taken on a reconsideration of all the factors relevant to the issue...”

67. It was conceded at the oral hearing that had the DWP FOIA policy been followed, Mr Stuart's case would have been reviewed pursuant to FOIA. Had that happened it may be that a good deal of the difficulty that has arisen in this case could have been avoided.

68. At the oral hearing the Commissioner observed that had he realized that the review was not conducted pursuant to FOIA, the case might have been passed on to the “good practice team” for investigation and if necessary a section 48 FOIA good practice recommendation. Section 48 FOIA provides:

(1) If it appears to the Commissioner that the practice of a public authority in relation to the exercise of its functions under this Act does not conform with that proposed in the codes of practice under sections 45 and 46, he may give to the authority a recommendation (in this section referred to as a “practice recommendation”) specifying the steps which ought in his opinion to be taken for promoting such conformity.

69. The Tribunal does not have the jurisdiction to decide whether such a referral should be made, however the Tribunal expresses surprise that the matter was not referred in any event, in light of the DWP's conduct of the case. The DWP's case was that they receive millions of pieces of correspondence every year and they deal with most of these “in the normal course of business”, however, it was accepted that pursuant to their internal policy it should have been picked up as a FOIA request.

70. The Tribunal questions whether this internal policy was followed with any reliability and questions the level of understanding of FOIA within the Department at the time. In light of the confusion that had already occurred around the case the Tribunal finds it troubling that the case was not properly reviewed by the DWP pursuant to FOIA after it

became aware that it was referred to the Information Commissioner on 26th March 2007 for investigation for compliance with FOIA.

71. It was only following substantial correspondence with and guidance from the Commissioner and after 9 months that the request was actively re-considered under FOIA in the letter dated 8th January 2008. The letter stated that:

“Following intervention by the Information Commissioner the information you requested was revisited and it has been clarified that as executor of your uncle’s estate you were entitled to receive some of the information you sought that we hold. I apologise that this was not clarified sooner.

The letter sent to you on 6 February 2007 from Alexis Cleveland, the then Chief Executive of the Pension Service was incorrect in that it should have cited section 40 of the Freedom of Information Act... and not the Data Protection Act.

Unfortunately Pension Service staff dealing with your request believed this information was inflexible and unchanging and continued to pursue that line of action, despite evidence to the contrary...

72. Even then it was not picked up that there had been no internal review under FOIA. This letter still did not provide the sort codes and account numbers in respect of the accounts held by the 2 corporate Receivers. Instead the DWP had contacted the Banks and *“asked whether it was the Bank’s policy on request from the Executor of one of their customer’s estate’s to provide the payment details of the customers appointed Receiver.”* The Bank responded that it was down to the discretion of the Branch concerned, and the Branch asked for further details to enable them to make a decision.

73. The Commissioner wrote to the DWP asking them to clarify under which part of FOIA they were withholding these details and by letter dated 28th January 2008 the account details were supplied with another

apology and an acknowledgement that this information should have been made available to Mr Stuart when it was first requested (15 months earlier).

74. The Tribunal remarks that this case has burgeoned beyond that which was proportionate in the circumstances. The Tribunal notes that the correspondence sent by Mr Stuart was voluminous, persistent, unfocused and at times confusing (involving as it did a number of other parties and assuming detailed knowledge of every aspect of all his cases). It was accusatory in tone and at times intemperate. In these respects Mr Stuart did not assist his case and hindered the ability of those with whom he corresponded to address the serious issues he sought to raise. However, the Tribunal accepts that in part this reflected his sense of frustration at believing himself to have a genuine cause and finding himself unreasonably thwarted at every turn. The fact that information was unreasonably withheld for such a long period of time (because his case was not being actioned properly) appears to have fuelled his belief that there was a deliberate cover-up in progress and has added to the length and complexity of this case.

Conclusion and remedy

75. For the reasons set out above, the Tribunal is satisfied that the Commissioner did not accept a bare assertion that the information was not held. However, the Tribunal is satisfied that the Commissioner ought to have determined whether the DWP had investigated the possibility that the disputed information was held on their behalf by a third party before coming to this conclusion. Having considered the matter afresh, the Tribunal is satisfied that the requested information was not held by the public authority or a third party on their behalf at the relevant time.

76. The Tribunal allows the appeal in relation to ground 10 in that the Tribunal is satisfied that the Commissioner erred in fact in the Decision Notice in that he treated the DWP review as having been conducted

under FOIA. The Commissioner further erred in failing to record a specific breach of section 17(7)(a) FOIA in that the Appellant was not told of his right to an internal review .

77. Our decision is unanimous.

Dated this 13th day of December 2009

Signed

Fiona Henderson,
Deputy Chairman