



**IN THE FIRST-TIER TRIBUNAL
GENERAL REGULATORY CHAMBER
(INFORMATION RIGHTS)**

Case No. EA/2011/0196

**ON APPEAL FROM:
Information Commissioner
Decision Notice ref FS50368227
Dated 8 August 2011**

Appellant: Robert Winsor

Respondents: (1) Information Commissioner
(2) Parliamentary and Health Service Ombudsman

Date of hearing: 19 January 2012

Date of decision: 1 February 2012

Before

HH Judge Shanks

Marion Saunders

Malcolm Clarke

Representation:

Appellant: In person

Ombudsman: Tony Child

The Information Commissioner did not appear at the hearing, the Tribunal having directed that he need not do so and could rely solely on written submissions.

Subject area covered:

Prohibitions on disclosure s.44

Cases referred to:

R (Turpin and another) v Commissioner for Local Administration [2001] EWHC 503 (Admin)

Decision

The appeal is dismissed.

Reasons for Decision

Factual background

1. Mr Winsor, the appellant, was employed by Big Game TV in its call handling department between May 2005 and May 2006. It is his belief that there is widespread malpractice by TV companies running phone-in quiz shows and that OFCOM has failed to regulate these activities properly such that a massive fraud is being perpetrated on the public. He has sought to bring these allegations to public notice with great tenacity and determination; we are obviously not in any position to say whether there is any substance in them.
2. In March 2007 Mr Winsor made a complaint to the second respondent (the Ombudsman) about OFCOM through his MP, Mark Field. The Ombudsman declined to investigate the complaint on the basis that there was no prima facie evidence of maladministration by OFCOM.
3. On 7 December 2009 he made a request of the Ombudsman under the Freedom of Information Act 2000 for the identity of any MPs who had made representations to her on behalf of constituents affected by premium rate telephone services problems. The Ombudsman's response was that she was prohibited from disclosing that information by section 11(2) of the Parliamentary Commissioner Act

1967 and that it was therefore absolutely exempt under the 2000 Act by virtue of section 44. Mr Winsor applied under section 50 to the Information Commissioner who upheld the Ombudsman's position. He has now appealed to this Tribunal against the Commissioner's decision. The sole issue in the appeal is whether the Commissioner was wrong to find that the Ombudsman was prohibited from disclosing the requested information by section 11(2).

4. As part of the factual background it was accepted at the hearing by Mr Child for the Ombudsman that there were five MPs coming within the terms of Mr Winsor's request (including Mr Field) and that none of the complaints passed on by any of those MPs had led to a formal investigation. Mr Winsor does not accept that the number of MPs in question could be five since he says he already knows of six; again that is not a matter which we are able to determine in this appeal.

The statutory framework

5. The position of Ombudsman was established by the 1967 Act. The relevant provisions of the Act are as follows:
 - (1) By section 5(1), she is empowered to investigate any action taken by a government department or certain other authorities (including OFCOM) in the exercise of administrative functions in any case where a member of the public has made a written complaint to an MP that he has suffered injustice as a consequence of such action and the complaint is referred to her by the MP.
 - (2) It is a matter for the Ombudsman's discretion whether she starts and carries on with an investigation and she determines whether any complaint is duly made.¹
 - (3) Every investigation is conducted in private and apart from an express requirement to allow the authority to comment on any allegation she can decide on the procedure.²

¹ Section 5(5)

² Section 7(1) and (2)

- (4) “For the purposes of an investigation under section 5(1) ...” she has power to require any Minister or member of any authority or any other person to provide information or documents which she considers relevant.³
- (5) By section 9 the Ombudsman has the power to refer to the High Court any case where she considers that a person has obstructed her in the performance of her functions or been guilty of something that would have amounted to a contempt of court in connection with an investigation.
- (6) In any case where she conducts an investigation or decides not to she must send the MP concerned a report of the results of the investigation or a statement of reasons for not conducting an investigation.⁴
- (7) Section 11(2), which is relied on by the Ombudsman, provides as follows:

Information obtained by the [Ombudsman] or [her] officers in the course of or for the purposes of an investigation under this Act shall not be disclosed except:

(a) for the purposes of the investigation and of any report to be made thereon under this Act;

...

(c) for the purposes of any proceedings under section 9 of this Act....

Mr Winsor’s submissions

6. Mr Winsor’s first submission was that his request related to a massive fraud, that OFCOM had misled the Ombudsman about it and was therefore guilty of contempt of court and, furthermore, that the Ombudsman herself is also guilty of some contempt of court; all this, he says, means that the Ombudsman must disclose the information requested. As indicated we are not in a position to make findings in relation to any of these allegations but in any event none of them can affect the clear prohibition in section 11(2). It is clear that the exception to the prohibition at

³ Section 8(1)
⁴ Section 10(1)

section 11(2)(c) only arises if the Ombudsman decides to initiate proceedings under section 9 and, in such circumstances (which do not apply here) information would only be discloseable for the specific purposes of such proceedings and not pursuant to a Freedom of Information Act request.

7. Mr Winsor's second submission is that the information in question was not "obtained" by the Ombudsman because she would simply have received it without request or effort on her part. We are quite satisfied that the word "obtain" can be used to mean "receive" as well as "gain as a result of effort" (as indicated by the extract from the Shorter Oxford Dictionary produced for us) and that the wider meaning is intended in section 11(2).
8. The third submission is that the information was not obtained "...in the course of or for the purposes of an investigation under [the] Act" and that it therefore does not come within the terms of the prohibition. The Ombudsman accepts that the information could not have come to her "in the course of an investigation" and is clearly right to do so since until a complaint is received through an MP there can be no question of an investigation. She says, however, that the information was obtained "for the purposes of" an investigation. This seems to us the only really moot point in the case.
9. We accept Mr Child's point based on the case of *R (Turpin and another) v Commissioner for Local Administration* [2001] EWHC 503 (Admin) at para 64 that it is not necessary that a formal investigation is ever started for information to have been obtained "for the purposes of an investigation" if the information is relevant to the question whether an investigation should be carried out ("an investigation whether there should be an investigation", as the judge put it in that case). However, that does not answer the issue whether the identity of the MP passing on a particular complaint under section 5(1) of the Act (which is the information Mr Winsor seeks) is information obtained by the Ombudsman "for the purposes of an investigation" under the Act.
10. This is a matter of statutory interpretation and it seems to us there are arguments pointing in both directions. On the one hand, the relevant "investigation" is an investigation into the administrative actions of the authority complained of and we

cannot see that the identity of the MP passing on the complaint can possibly have any relevance to the substance of that investigation and that in that sense it has not been obtained for the purposes of an investigation. Rather it is merely a trigger which starts off the whole process; the same would not apply of course to details of the complainant or his complaint.

11. On the other hand, it is a pre-condition of any investigation that an identified MP has passed on a complaint to the Ombudsman and she must report back to that MP with the results of the investigation or a statement of her reasons for not carrying out a formal investigation: it could be said that the identity of the MP is therefore a piece of information obtained for the purposes of an investigation. Mr Child also made the valid point that in interpreting section 11(2) we should take account of the fact that the whole procedure under the Act is meant to be private and that an interpretation in favour of Mr Winsor would tend to undermine that and perhaps discourage members of the public from raising complaints.

We have considered this issue carefully and all panel members are agreed that this is a finely balanced decision. On balance two of us (Judge Shanks and Marion Saunders) favour the interpretation of the Ombudsman and the Commissioner. Malcolm Clarke favours that of the appellant. The appeal is therefore dismissed by majority decision.

HH Judge Shanks

1 February 2012