



Tribunals Service

Information Tribunal

Appeal under section 57 of Freedom of Information Act 2000

Information Tribunal Appeal Number: EA/2008/0056

Information Commissioner's Ref: FS50145475

**Heard at Field House, London, EC4A
On 12 December 2008**

**Decision Promulgated
14 January 2009**

BEFORE

DEPUTY CHAIR

CLAIRE TAYLOR

and

LAY MEMBERS

MICHAEL HAKE AND ANDREW WHETNALL

Between

MELVYN C BLUCK

Appellant

and

INFORMATION COMMISSIONER

Respondent

and

DEPARTMENT FOR WORK AND PENSIONS

Additional Party

Representation:

For the Appellant: Melvyn Bluck
For the Respondent: Rachel Kamm
For the Additional Party: Gerry Facenna

Subject areas covered:

Whether information held s.1

Cases referred to:

Linda Bromley v Information Commissioner & the Environment Agency (EA/2006/0072)

Decision

The Tribunal upholds the decision notice dated 23 June 2008 and dismisses the appeal.

Reasons for Decision

Introduction

1. Mr Melvyn Bluck is seeking from the Pension Service a copy of actuarial advice that was commissioned by the Parliamentary and Health Service Ombudsman¹ ('the Ombudsman').
2. His request stems from Mr Bluck having been unsatisfied with the level of compensation he received under a statutory scheme. The official at the Pension Service dealing with his compensation claim did not have discretion to vary the amount of compensation, and when writing to Mr Bluck had alluded to this independent advice as indicating that the assumptions made in reaching the calculation were within a reasonable, albeit optimistic, range.
3. The Pension Service has informed Mr Bluck that it does not hold the information requested but that the Ombudsman does. Accordingly, Mr Bluck made a separate request for the information from the Ombudsman. The Ombudsman did not agree to disclose it. Therefore, on 10 November 2008, Mr Bluck made a separate complaint to the Information Commissioner ('Commissioner') in relation to that request. That second request is outside the scope of this appeal.
4. In this appeal, the Tribunal's task is to determine whether the Pensions Service held the information Mr Bluck seeks. Mr. Bluck's motivation for seeking the information, and the reasonableness or otherwise of the calculations he was concerned about are not matters for the Tribunal to consider. The public authority named as a party in this case is Department for Work and Pensions ('DWP'). This is because the Pension Service is an executive agency of DWP.

Background

5. By letter of 15 June 2005, Mr Bluck was informed that he had made a successful claim for compensation under a Government scheme intended to compensate those who had been misinformed about changes affecting the amount of State Earnings Related Pension ('SERPs') a surviving spouse would inherit.

¹ Also known as the Parliamentary Commissioner for Administration, a public authority under the Freedom of Information Act 2000.

6. After being awarded a lump sum as compensation, Mr Bluck wrote to Mr Edmondson on 23 June 2005 to query the calculation of the award.
7. The Pension Service responded in an undated letter, probably sent late in June or July 2005. Amongst other things, the letter informed Mr Bluck that the Ombudsman had previously sought professional advice from an independent actuary on the assumptions underlying the calculation of the awards for compensation. The words used were:

“The Ombudsman sought professional advice from an independent Actuary. That Actuary suggested that the financial assumptions underlying the actuarial basis for the Pension Service’s calculations (referred as the GAD factor) while more optimistic than he would have used in the current economic and investment conditions probably fell within a range most actuaries might consider reasonable. He concluded that The Pension Service’s approach to calculating redress was reasonable.”

8. Mr Bluck continued to correspond with the Pension Service for a number of months. On 27 July 2005, Kate Willis of the Pension Service wrote to Mr Bluck explaining that the formula used to calculate compensation in these SERPs cases was provided by the Government Actuary’s Department. On 6 December 2005, Mr Edmondson wrote explaining that: *“Redress was calculated using the formula agreed by the National Audit Office and Parliament.”*

The Request for Information

9. On 22 November 2006, Mr Bluck wrote in reference to the undated letter:

“At the end of this letter reference is made to professional advice from an independent actuary on the financial assumptions underlying the actuarial basis for the Pension Services calculations, which he considered to be more optimistic than he would have used in the current economic and investment conditions.

Would you please arrange to send me a copy of this professional advice since I am concerned that it is impossible to achieve an interest rate of 23% as required by the amount of compensation I have received.” (Emphasis added.)

10. In response, on 30 November 2006, Mr Edmondson wrote explaining the passage quoted in paragraph 7 above. He stated that the Ombudsman had requested advice from an

independent actuary. It was commissioned (presumably in order to investigate a complaint related to a Pension Service case dealing with SERPs compensation) in relation to another person. Mr Edmondson wrote that he was unable to forward the advice and should not have mentioned it.

11. Mr Bluck wrote to the Commissioner on 16 December 2006 about his request for information. The Commissioner subsequently informed the Pension Service that its reply to Mr Bluck had not constituted an adequate refusal notice under the Freedom of Information Act 2000 ('FOIA'). Therefore, the Pension Service provided a further response to Mr Bluck on 2 April 2007. In this letter, it was explained that the Pension Service did not hold the information and that Mr Bluck should contact the Ombudsman to request a copy of the report from them, as the Ombudsman was the owner of the report.
12. In accordance with the process for appealing, Mr Bluck then requested that the Pension Service conduct an internal review of the decision it had taken. On 16 May 2007, Mr Bluck was told that the conclusion of the review was that the Pension Service was not the author of the requested advice and that it did not hold a copy of it. It was explained to Mr Bluck that during the course of the review it was established that Mr Edmondson had been made aware of the Ombudsman's advice "*during verbal discussions with a Departmental policy team*".

The Complaint to the Information Commissioner

13. Mr Bluck complained to the Commissioner by letter of 29 August 2007, maintaining that the Pension Service held the requested information. The Commissioner conducted an investigation, issuing its Decision Notice dated 23 June 2008.
14. The Commissioner concluded that:
 - (a) On the balance of probabilities, the information requested was not held by the Pension Service;
 - (b) The Pension Service had dealt with the request in accordance with section 1(1)(a) of FOIA "*by informing the complainant that the requested information is not held*";
 - (c) Where a public authority conforms to the provisions of part II of the section 45 Code of Practice in relation to the provision of advice and assistance, it will be held to

have complied with section 16 FOIA. The Pension Service had informed Mr Bluck, in line with its duties under the section 45 Code of Practice, that he should redirect his request for advice to the Ombudsman.

- (d) The Pension Service breached the requirements of section 10(1) by failing to inform Mr Bluck that the requested information was not held within twenty working days of receipt of the request.
- (e) No further steps were required to be taken.

15. Amongst other things, the following had been take into account in reaching this decision:

- (a) Mr Edmondson had stated he had been made aware of the requested advice during a verbal conversation with a member of the departmental policy team. He had said that he never possessed a hard copy of the document, and nor did the policy team or anyone else involved in the complainant's case;
- (b) Due to the passage of time, it would be difficult to establish the name of the case (or individual) that the requested advice related to, and the undated letter gave no details about this;
- (c) Searches undertaken by the Pension Service were conducted to try to establish whether it held the information at any point.

The Appeal to the Tribunal

16. Mr Bluck appealed to the Tribunal by Notice dated 4 July 2008. The Tribunal issued directions joining DWP as a party. At the final hearing, on 12 December 2008, the Tribunal heard from Mr Bluck, Mr Edmondson and Mr Forrest. The Tribunal also had the benefit of and has considered written statements from the witnesses; oral and written submissions from the parties (including, in Mr Bluck's case, various letters); and the bundle of documents submitted by the parties.

The Appellant's Grounds of Appeal and Evidence

17. Mr Bluck's reasons for disputing the Commissioner's decision are as follows:

'The explanations given by the Dept for Work and Pensions defies belief and a level of incredibility concerning the existence of the evidence that I am seeking yet is believed totally by the Information Commissioner'.

18. In support of this he included, amongst other things,

(a) The undated letter;

(b) His letter dated 3 June 2008 to the Commissioner, commenting on a paragraph in the undated letter:

"If you carefully examine the un-dated letter from Andrew Edmondson.... you will see that he quotes directly from the Ombudsman's report and there can be no doubt about this. Therefore the Department for Work and Pensions does hold a copy of the Ombudsman's report and they are being uneconomical with the truth in stating that they do not.. the other scenario is that Andrew Edmondson... has a phenomenal memory and can recall in full detail the exact wording of the Ombudsman's report. However, I do not believe this to be the case and I am convinced that he was quoting directly from the Ombudsman's report that is in his possession..."

(c) A letter from Kate Willis referred to above.

19. At the hearing, Mr Bluck described the stress to him and his wife as a result of the struggle he has had. He explained that there had been 34 letters going to and from Mr Edmondson and that he had been able to form a good opinion of the person with whom he was corresponding. On that basis he did not believe the paragraph from the undated letter (quoted in paragraph 7 above) was Mr Edmondson's terminology so that he must have copied it. At the hearing and by letter dated 1 December 2008, he made reference to the inaccuracy of the statement about retained files and on this basis questioned the truthfulness of Mr Forrest's first witness statement. There was also an implication that Mr Edmondson might have been asked earlier about the policy on retention of clerical files in his division.

The Additional Party's Evidence

20. Mark Forrest: Mark Forrest, the National Pension Centre Operations Manager, served two written witness statements and gave oral evidence at the hearing.
21. In the first statement, dated 13 November 2008, his testimony included the following:
- (a) The primary reason he maintained that the information requested was not held was that it was independent professional advice commissioned by the Ombudsman for the purposes of their investigation into one case, and he would not have expected it to be provided to DWP in any event.
 - (b) Mr Edmondson had confirmed this in March 2007, when he had been consulted prior to DWP issuing a refusal notice. Mr Edmondson was again consulted as part of the internal review and said that he had learned of the advice during a conversation with a colleague about another customer.
 - (c) When the Commissioner started to investigate the case, National Pension Centre revisited the case. Mr Bluck's clerical file was reviewed. A search was made of the DWP intranet and online and to see if the advice had been referred to elsewhere. The Special Payments Business Manager had also confirmed that his team did not hold a copy of the report.
 - (d) Mr Forrest explained that aside from the places already searched, there were no other electronic files where such advice would be kept. He thought that if, for some reason, a copy of the advice had been provided to the Department, it would most likely have been placed on a clerical file relating to a particular individual. As he did not have a name for the individual in relation to which the Ombudsman had obtained advice referred to in this appeal, he thought it would be impossible to locate the document without searching every clerical file. He stated that clerical files created for individual special claimant decisions were destroyed within 14 months.
22. In the second witness statement dated 1 December 2008, Mr Forrest testified:
- (a) Subsequent to a conversation with Mr Edmondson (*see paragraph 25 below*) he had discovered that clerical files with Ombudsman involvement were not destroyed within 14 months and that this part of his first witness statement was incorrect. Consequently, 29 closed inherited SERPs customer files were located and he had arranged for them to be examined. In one file there was a letter from the Ombudsman to an MP dated 30 July 2004, that had later been forwarded to Mr

Edmondson by the MP. This contained a paragraph which was repeated in the witness statement, and which has therefore been seen by Mr Bluck. The Tribunal does not intend to quote this paragraph in the Decision, in case it is prohibited by section 11 of the Parliamentary Commissioner Act 1967. (See *below*). However, it has been accepted that the wording is similar to that set out in paragraph 7 above, and Mr Bluck has not contested this.

(It should be noted that DWP did not disclose to Mr Bluck the rest of the contents of this letter prior to the hearing, and stated that it was to be treated as confidential. (See *paragraph 45 below*). We also note that this information was submitted within two weeks of the hearing, and had not been before the Commissioner when he had to reach his decision.)

- (b) Mr Forrest stated that he thought it was clear that the relevant wording used in Mr Edmondson's undated letter had come from recalling the analogous case referred to in this letter from the Ombudsman, or "*was lifted from another letter or document*" in Mr Edmondson's possession that itself quoted part of the Ombudsman's letter. In other words, he suggested that Mr Edmondson did not copy the wording straight from a copy of the document requested by Mr Bluck and it was also not Mr Edmondson's record of a verbal conversation.

23. At the hearing, Mr Forrest stated that he manages 800 people, and the Department receives a vast number of letters. He explained that the general departmental policy was to destroy closed files after 14 months. This was why he had assumed this was the case with the clerical files with Ombudsman involvement. The 29 files that recently had been found had been latterly stored in a separate place from where Mr Edmondson's old team had worked. Originally, clerical files with Ombudsman involvement were not separated from other clerical files, such that there would have been up to 1200 cases within the filing system before the older ones would start to be destroyed. The implication being made was that as regards the thoroughness of the search at the time when the request was made, it would not have been a simple task to look through every clerical file in search of the requested information. It had become easier as time had passed since the number of retained files had whittled down to twenty-nine. He stated that he would accept that there might be concerns about the thoroughness of the original search given that it was clear the Department had missed something, namely the letter from the Ombudsman forwarded by the MP. Nevertheless, he believed the original discussions with Mr Edmondson and the team as to where the requested information might be held constituted a reasonable search.

24. Andrew Edmondson: During the directions hearing on 19 September 2008, the Deputy Chair had said that Mr Bluck would need to be able to cross-examine Mr Edmondson at the hearing. Despite this, she had to issue further directions on 21 November 2008 before DWP agreed to call him. The reason for her having directed as such was that she considered that there might be force to the contention that Mr Edmondson had copied the relevant wording (*set out in paragraph 7 above*) from another document, instead of it being Mr Edmondson's summary of a verbal conversation.
25. When he was preparing prior to the hearing, Andrew Edmondson read Mr Forrest's first witness statement and notified him of the inaccuracy outlined in paragraph 22 (a) above. Andrew Edmondson subsequently served a witness statement and gave oral evidence at the hearing.
26. In his written evidence, he explained:
- (a) Mr Edmondson left his post at the Special Payments Department in March 2007.
 - (b) He has always been certain that he has never seen the advice requested by Mr Bluck.
 - (c) Mr Bluck had requested a copy of that advice about 18 months after the undated letter was sent. Due to this passage of time, Mr Edmondson had been unable to remember exactly how he knew about the advice referred to. Mr Bluck's case was one of hundreds of cases he was dealing with in his work on compensation cases. In a week, he would work on up to sixty or seventy cases.
 - (d) Originally, he had thought the most likely explanation for using the particular wording in the undated letter was that he had discussed the Ombudsman's conclusion and advice with the Department's policy team. He did not remember receiving the Ombudsman's letter or quoting directly from it in the undated letter. However, he now thought it seemed clear that the wording came from this or from another letter that quoted the Ombudsman's letter.
 - (e) When he received Mr Bluck's request for the advice, he had asked the assistance of the policy branch in tracking it down. (He had had regular contact with the policy team because the SERPs cases were politically sensitive). He understood that the policy branch had contacted the Ombudsman who would not release the advice.

27. At the hearing, Mr Edmondson explained that when he had worked at the Special Payments Department, he had not been involved in work with the Ombudsman. This was the work of the policy team who were situated in London. As he would not commonly see reports from the Ombudsman, he would have been likely to remember if he had seen the requested advice. He explained that he had not needed to include the paragraph in the undated letter that had resulted in the request, but did so because he thought it gave his argument more weight.
28. He did not think there was anyone from his team of six people in Special Payments still working in the same posts.

Legal Submissions and Analysis

29. Submissions made by Mr Facenna for DWP included:
- (a) Mr Edmondson was adamant that he had never seen the requested advice and to the best of his knowledge nor had the rest of the team he had worked with;
 - (b) The Ombudsman's office had told the Department that the advice could not be sent to the Pension Service;
 - (c) At the time of the request there were 1200 personal files held by the team and as there was no reason to think the advice would have found its way into those files, it would have been an enormous task to search those files;
 - (d) There had been various investigations by the Department to see whether the advice was "held" by them. The search undertaken had been reasonable and proportionate given the primary proposition that the Department had never received the requested information;
 - (e) Mr Edmondson went out of his way to be as helpful as he could with Mr Bluck.
30. Submissions made by Rachel Kamm for the Commissioner included the following:
- (a) The test as to whether DWP "held" the information was on the balance of probabilities, and this is the only workable test when trying to investigate what is in the possession of a large department.

- (b) The Commissioner was right to reach the decision it did on the basis of the limited information before it. This was because it had decided it was *more likely* that the paragraph Mr Edmondson had included in his undated letter was a summary of a verbal discussion, than it was that he had had a copy of the requested advice in his possession and was lying to Mr Bluck. There had been no reason to doubt Mr Edmondson.
- (c) In an ideal world, Mr Edmondson would have been asked what clerical files still existed, but a reasonable search had been carried out and it was always possible that even after a reasonable search more information would still be there to be found.

The Task of the Tribunal

31. The Tribunal's remit is governed by section 58 FOIA. This requires the Tribunal to consider whether the decision made by the Commissioner is in accordance with the law or whether he should have exercised any discretion he had differently. The Tribunal may receive evidence that was not before the Commissioner, and may make different findings of fact from the Commissioner.

The Questions for the Tribunal

32. The Questions for the Tribunal in this appeal are as follows:
- (a) Does the Pension Service hold the information?
- (b) Is the evidence that was initially submitted in confidence by DWP part of the requested information?
- (c) Should the Ombudsman's letter be disclosed to Mr Bluck, even if it does not constitute the requested information?

A. DOES THE PENSION SERVICE HOLD THE INFORMATION?

The relevant law

33. A person who has made a request to a 'public authority' for information is, (subject to the provisions of FOIA), entitled to be informed in writing by the public authority whether it holds the information described in the request, and if so to have that information communicated to him. (*See section 1(1) of FOIA*).

34. In deciding whether information is “held” by a public authority for the purposes of section 1 of FOIA, previous decisions have found it useful to apply a test, which the Tribunal was referred to. The test was established in *Linda Bromley v Information Commissioner & the Environment Agency* (EA/2006/0072). In that case, the Tribunal observed in paragraph 13:

“There can seldom be absolute certainty that information relevant to a request does not remain undiscovered somewhere within a public authority’s records. This is particularly the case with a large national organisation like the Environment Agency, whose records are inevitably spread across a number of departments in different locations. The Environment Agency properly conceded that it could not be certain that it holds no more information. However, it argued (and was supported in the argument by the Information Commissioner) that the test to be applied was not certainty but the balance of probabilities. This is the normal standard of proof and clearly applies to Appeals before this Tribunal in which the Information Commissioner’s findings of fact are reviewed. We think that its application requires us to consider a number of factors including the quality of the public authority’s initial analysis of the request, the scope of the search that it decided to make on the basis of that analysis and the rigour and efficiency with which the search was then conducted. Other matters may affect our assessment at each stage, including, for example, the discovery of materials elsewhere whose existence or content point to the existence of further information within the public authority which had not been brought to light. Our task is to decide, on the basis of our review of all of these factors, whether the public authority is likely to be holding relevant information beyond that which has already been disclosed.”
(Emphasis added)

35. This Tribunal agrees that since it is difficult to establish with certainty whether a large organisation ‘holds’ requested information, the Tribunal needs to decide this ‘*on the balance of probabilities*’. Depending on the circumstances, factors in reaching the decision might logically include what searches have been carried out and the rationale for the extent and method of search.

Findings of the Tribunal

36. The Tribunal accepts the contention that the Pension Service did not commission the advice that was referred to in the undated letter, and that it was commissioned by the Ombudsman.
37. The Tribunal agrees with Mr Bluck's submission that the style of wording used in the paragraph quoted above (in paragraph 7) was different from that used in the rest of the undated letter. Furthermore, in terms of meaning, the paragraph does not seem to make full sense in the context of the rest of the letter. Therefore the Tribunal accepts that it is likely that the relevant wording was copied from some other text and was not Mr Edmondson's summary of a his conversation with another official. However, this does not mean that the wording had to have come from Mr Edmondson having the requested advice in his possession.
38. The Tribunal accepts Mr Edmondson's evidence that due to the passage of time he could not remember where the wording came from. It was reasonably clear, however, that he had obtained the wording from somewhere and, but for his later recollection of the separately filed material, the likely written source would not have come to light. We consider that any questions as to Mr Edmondson or Mr Forrest's honesty are unfounded and there is not the evidence to question their credibility. The Tribunal has not been given any reasons why the officials may not have told the truth and tried to conceal that the full professional advice sought was in their possession. We accept Mr Edmondson's assertion that he never saw the requested professional advice and that the policy team tried to see whether the Ombudsman would release it to them after Mr Bluck had made his request. We accept that Mr Edmondson was always trying his best to help the Appellant.
39. The Tribunal accepts that it is more likely than not that the text was copied from the Ombudsman's letter referred to above or from another similar letter. Given the different style of writing we consider it much less likely that Mr Edmondson drafted the words as his own summary of the requested advice following a conversation. This conclusion would be consistent with the content of his letter to Mr Bluck of 30 November 2006. When seeking to bring matters to a close at that time, he acknowledged there that part of the content of an earlier letter had been drawn from material relating to someone else.
40. The Tribunal accepts the submissions made by Mr Facenna and Ms Kamm, as summarised above. In particular, we accept that the Pension Service conducted a

reasonable and thorough search to ascertain whether it held the requested advice. Factors taken into account include that a) the search seemed proportionate given that it ascertained where that the original advice was located; b) Mr Bluck was duly informed that he could request the information from the Ombudsman and how to contact them; c) the author of the undated letter knew he had never seen the advice – and when planning how to go about searching for requested material, asking the author of the undated letter what he remembered would seem to be the most obvious starting point; and d) given reasons (a) to (c) within this paragraph, searching through the large number of extant clerical files - possibly 1200 - in case the advice could be found, would have been a disproportionately onerous and an inefficient approach to conducting the search.

41. Accordingly, the Tribunal does not consider that sufficient evidence has been given to suggest that the Pension Service has ever held the requested advice.
42. The Tribunal accepts that the Additional Party conformed with its obligations under section 16 of FOIA by informing the Appellant that he should redirect his request for advice to the Ombudsman.

B. IS THE EVIDENCE THAT WAS INITIALLY SUBMITTED IN CONFIDENCE PART OF THE REQUESTED INFORMATION?

43. After a closed session during the hearing, the Tribunal considered whether the Ombudsman's letter (*referred to in paragraph 22 above*) could itself constitute part of the requested information. Having reviewed the Ombudsman's letter, and Mr Bluck's letter of 22 November 2006, the Tribunal concluded that Mr Bluck had clearly requested a copy of professional advice, and that the Ombudsman's letter was not part of that advice and is not part of the requested information.

C. SHOULD THE OMBUDSMAN'S LETTER BE DISCLOSED TO MR BLUCK, EVEN IF IT DID NOT CONSTITUTE THE REQUESTED INFORMATION?

44. During the closed session, the Tribunal heard submissions as to whether the whole of the Ombudsman's letter (*referred to in paragraphs 22 and 43 above*) should be disclosed to the Appellant.

45. DWP initially disclosed the material to the Tribunal and Commissioner on a closed and confidential basis. By letter from DWP to the Tribunal dated 3 December 2008, DWP stated:

“The Ombudsman’s office’s position is that it is content for the letters to be disclosed to the Tribunal and Commissioner because they are required for the Tribunal, however applying section 11 of the Parliamentary Commissioner Act 1967 which provides that the information obtained by the Ombudsman or her Officers during the course of or for the purposes of an investigation cannot be disclosed except in very limited circumstances and applying section 44 of the Freedom of Information Act 2000 under which any information caught by section 11 of the Parliamentary Commissioner Act 1967 is exempt from release, it concludes that the letters should not be disclosed in any other circumstances other than for the purposes of this Tribunal.

The Ombudsman’s Office has informed us that it does not agree at this time to the letters being disclosed to Mr Bluck but states that if the Tribunal finds that the letters should be disclosed to him, further reference is made to the Ombudsman’s Office for its views.”

46. However, at the hearing, Mr Facenna stated that, whilst two paragraphs of the letter might fall within section 11 of the Parliamentary Commissioner Act 1967, and certain material had been blanked out prior to its submission (as being “*personal data*” under the Data Protection Act 1998), it was DWP’s position that the remaining wording did not fall within this statutory prohibition and could be disclosed. DWP maintained that this letter (which had been forwarded to Mr Edmondson by the MP but is stated on the letter to have been copied to the Pension Service) was a copy owned by DWP and not held on behalf of the Ombudsman. Accordingly, whilst the Ombudsman had been asked for their views about disclosure as a matter of courtesy, DWP was able to assert that it did not object to the disclosure. Mr Facenna stated that the statutory prohibition on disclosure applies to everyone.

The relevant law

47. The relevant provisions of section 11 of the Parliamentary Commissioner Act 1967 are:

“11. - Provision for secrecy of information..

...

(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—

(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 [F2the Official Secrets Acts 1911 to 1989] 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.”

(Emphasis added).

(Note that the “Commissioner” in this section refers to the Ombudsman).

48. It is therefore necessary to consider, whether the passages in the Ombudsman’s letter were “*information obtained by the Commissioner or his officers in the course of or for the purposes of an investigation under this Act.*”
49. Whilst Mr Facenna stated that the statutory prohibition is said to apply to everyone holding the relevant information, a further reason for caution is section 44 FOIA, which would need to have been considered if the letter had formed part of the requested information. That section provides that there is what is called an “*absolute exemption*” from disclosing information if it is prohibited by another Act.

Findings of the Tribunal

50. The Tribunal has reviewed the contents of the Ombudsman’s letter. For the purpose of this hearing, there is one paragraph that was relevant, because it illustrated where DWP asserts that Mr Edmondson may have derived his wording or inspiration for his wording when drafting the undated letter. That paragraph was quoted in Mr Forrest’s second witness statement. The panel are not satisfied that the remaining paragraphs are relevant or particularly helpful to Mr Bluck and they do not form part of the requested information.
51. DWP initially disclosed this letter to the Tribunal on a confidential basis. As explained above, at the hearing the Additional Party then stated that it had no objections to disclosing certain paragraphs that it considered fell outside section 11. The Tribunal

finds this reasoning attractive – the remaining paragraphs do not appear to be “*information obtained by the Commissioner or his officers in the course of or for the purposes of an investigation under this Act*”. However, the Tribunal has not heard from the Ombudsman.

52. (Whilst, according to DWP, the Ombudsman’s office had requested that we refer to it should we find to disclose, its proper course of action should have been to apply to be joined as a party so as to make representations at the hearing. (See *rule 7(3) The Information Tribunal (Enforcement Appeals) Rules 2005*.) It is inadvisable for the Ombudsman’s office (or anyone else) to expect that an appeal may last beyond its set hearing date at its request. However, it is unclear whether the Ombudsman was aware that DWP was to seemingly change its position at the hearing and agree to disclose certain paragraphs despite it having consulted the Ombudsman’s office and been told of its objections.)
53. Given that on the one hand the letter is not part of the requested information and the parts that DWP had accepted to disclose would not appear relevant or helpful to Mr Bluck, and on the other, there is a chance that disclosure might be prohibited by statute (since that is what we understand the Ombudsman to have asserted), we are not prepared to make a ruling to disclose the sections of the letter in question.
54. We would have preferred to hear the representations from the Ombudsman, as to precisely why the particular paragraphs are within the statutory prohibition. However, we do not consider it in the interests of the public to cause further delay and expense in reaching a decision on this point. This is because the information does not form part of the requested information, it is only relevant to the extent that one paragraph helps the Tribunal determine the likely source of information in Mr. Edmondson's letter, and that is the paragraph that Mr Bluck has already seen.
55. We would hope that given DWP’s representations at the hearing, it will now pursue the matter with the Ombudsman and that she will agree the disclosure of any parts of the letter that do not fall with section 11.
56. The Deputy Chair notes that the issues raised in this Section C would probably have been resolved prior to the hearing had the letter not been furnished at such a late stage. It is likely that the letter would have been found and submitted earlier if DWP had called Mr Edmondson as a witness at the much earlier dates in which the Deputy Chair

indicated that he ought to be called. This would probably have reduced costs and made the process less frustrating for the Appellant.

Conclusion

57. The Tribunal concludes that on the available evidence, the Additional Party does not hold the information within the meaning of FOIA that was requested by Mr Bluck. This is because the Tribunal is satisfied on the evidence that, the Additional Party conducted a reasonable search; and that it is reasonable to conclude that the Additional Party does not hold the information. The Appeal is dismissed.

58. Our decision is unanimous.

Signed:

Claire Taylor

Deputy Chairman

Date: 14 January 2009