



ON APPEAL FROM:

The Information Commissioner's Decision Notice No: FS50500980

Dated: 29th. July, 2014

Appeal No. EA/2014/0193

Appellant: SHARON HODGKINSON (“SH”)

**First Respondent: THE INFORMATION COMMISSIONER
 (“the ICO”)**

**Second Respondent: FINANCIAL OMBUDSMAN SERVICE LIMITED
 (“FOS”)**

Before

David Farrer Q.C.

Judge

and

Paul Taylor

and

Jean Nelson

Tribunal Members

Date of Decision: 28th. February, 2015

The appeal was determined on written submissions.

Subject matter: FOIA S. 14(1)
Whether the Appellant's request was vexatious.

Authorities: Dransfield v ICO and Devon County Council
[2012]UKUT 244

DECISION OF THE FIRST-TIER TRIBUNAL

The Tribunal concludes that the request was vexatious.
It therefore dismisses the appeal.

Dated this 28th day of February, 2015

David Farrer Q.C.

Judge

[Signed on original]

REASONS FOR DECISION

The role of FOS

1. FOS was created by the Financial Services and Markets Act, 2000 (“FSMA”). Its function is to administer and operate a scheme to resolve quickly and informally, through an independent adjudicator, complaints by eligible persons against financial businesses. It is an alternative to litigation within the court system.
2. FSMA provides for the making of rules for the operation and jurisdiction of FOS jointly with the Financial Conduct Authority (“the FCA”). The rules are set out in a section of the FCA handbook, “Dispute Resolution: Complaints” and are referred to as “DISP”. DISP reflects the statutory duty of FOS to determine a complaint by reference to what is fair and reasonable and identifies the matters which the Ombudsman will take into account in making such a determination. DISP also contains provisions permitting the Ombudsman to dismiss a complaint without consideration of the merits. One ground for such dismissal is that he considers the complaint to be frivolous or vexatious.
3. Where an eligible complaint is received it is referred to an adjudicator for initial investigation. He invites representations from the parties and offers a provisional assessment of the complaint and likely outcome. He may consider whether a dismissal of the complaint without consideration of the merits is appropriate. If his assessment is not accepted by either party, the adjudicator may make further investigations and express a further view. Absent agreement, the complaint may be passed then to the Ombudsman together with the adjudicator’s conclusions for independent determination by the Ombudsman. FOS may also investigate complaints as to the level of service that it has provided and such complaints may ultimately be determined by an independent assessor.

The background to this appeal

4. SH referred thirty - five complaints to FOS by March, 2009. Thirty were rejected or dismissed summarily. In eighteen cases the grounds for summary dismissal included a finding that the complaint was frivolous or vexatious. The complaints involved, in most cases, minimal if any financial loss. These matters do not appear to be in dispute. SH had therefore considerable empirical evidence of the FOS assessment of what was frivolous or vexatious by the time that she made the request featured in this appeal.
5. On 23rd. March, 2009, the Deputy Chief Ombudsman wrote to SH stating that a complaint against Lloyd's TSB Bank was frivolous or vexatious and that her past use of FOS suggested that the same would apply to any future complaint that she raised. Like the adjudicator, whose decision he was reviewing, he suspected that she was making complaints in order to obtain compensation unfairly by exploiting their nuisance value. He foresaw that any such complaints would for this reason be dismissed without consideration of the merits, pursuant to the DISP power referred to in paragraph 2. This was, of course, a decision taken in the exercise of FOS's powers when handling complaints against financial businesses; it did not relate to a FOIA request.
6. In late 2012 SH made a further complaint, this time against Bank of Scotland, which the adjudicator dismissed on 18th. December, 2012 without investigation of the merits. She referred to the Ombudsman's earlier letter. That summary dismissal was upheld by the Ombudsman on 28th. February, 2013. The Independent Assessor dismissed SH's complaint of poor service by FOS by letter of 31st. January, 2013.

The Request

7. On 18th. January, 2013, presumably in response to the adjudicator's letter one month earlier, SH made the following request for information -

“I wish to be provided with “Knowledge and Information Toolkit” which the FOS refers to in order to decide if a complaint is frivolous or vexatious under DISP Rule 3.3.4(2) as in the above “closed” case being clearly consulted by adjudicator in order that I may better understand the FOS rationale”

8. The FOS treated this as a request under s.1 of FOIA and replied on 29th. January, 2013,

stating that FOS held no such information. On internal review this response was expanded a little. SH was told that there was such a toolkit with notes for adjudicators on a variety of topics but that they did not include the assessment of frivolous or vexatious requests. SH complained to the ICO.

The Complaint to the ICO

- 9 The ICO attempted to clarify the scope of the request, whether it was for the entire toolkit or such note as might guide adjudicators on the question of frivolous or vexatious requests. SH indicated on 16th. April, 2013 that she required “the entire toolkit” which would show whether such guidance was included.
10. On being informed of this clarification, the Ombudsman provided SH with a link to his Technical Resource published on his website, setting out his approach to handling complaints. She rejected this, stating that she required the full detailed guidance within the toolkit. The ICO therefore submitted to the FOS, on behalf of SH, on 19th. April, 2013 a fresh request in these terms -

“the full detailed guidance which is your Knowledge and Information Toolkit, used as internal complaints handling guidance by the FOS”.

This is the request with which this appeal is concerned since it represents a revision of the original, defined by SH.

The FOS Response

- 11 The revised request elicited from the FOS a revised response, relying on the exemption provided by s.36(2)(c) of FOIA, namely that, in the opinion of a qualified person, disclosure would be likely to prejudice the effective conduct of public affairs.
- 12 A request for an internal review elicited reliance by the FOS on further exemptions, which were cited in a letter maintaining the refusal to provide information within the scope of the revised request and which, for reasons indicated below, require neither identification nor comment for the purposes of this decision. SH complained to the ICO.
- 13 The ICO in subsequent correspondence requested copies of each of the KIT notes with annotations citing the relevant exemptions. The FOS stated that such a task, which demanded close consideration of one hundred and thirty - one notes and the application to each of possible exemptions, would impose an unreasonable and disproportionate burden on him. He provided the ICO with a complete index and a sample of the series of notes. The ICO invited him to consider whether s.14 of FOIA might be the appropriate focus of the ICO's investigation.
- 14 Having done so, the FOS indicated reliance on s. 14 and supplied evidence in support of his submission, including estimates of the time required for individual consideration of all the notes and potentially relevant exemptions.

The Decision Notice (“The DN”)

15 The ICO upheld the FOS reliance on s.14. He had regard to the burden imposed by the request and the consequent demands on its resources and to the limited value of the information sought, having particular regard to what the FOS already placed in the public domain.

16 SH appealed.

The appeal

17 Her grounds were simply that her request was not vexatious.

18 The ICO relied largely on the reasoning contained in the DN. He referred to the volume of material in the notes, amounting to about one thousand five hundred pages. The FOS submitted a witness statement from Philip Cohen, legal counsel to the FOS, setting out the history of its dealings with SH and providing detailed evidence, arising from his own scrutiny of the sample notes, of the burden that the request would place on the FOS and the other features identified by the ICO.

19 SH replied in two emails in November and December, 2014. She complained at the inclusion in the evidence submitted for this appeal of letters from FOS to her regarding her complaints against financial businesses because they disclosed her name, contrary to FOS practice when publicising its own decisions. She also observed that publication of the FOS technical resource on - line did not assist those who had no computer or might require large print or Braille material.

Our reasons

- 20 This decision addresses only the issue whether the request was vexatious. Only fragmentary and unilateral submissions have been made as to FOIA exemptions and the DN did not assess them. Nor does the Tribunal. The FOS case is that it cannot reasonably present a properly argued response justifying every relevant exemption in answer to a single request and it has not attempted to do so. There is no reason why SH should seek to refute exemptions for which no clear basis has been established.
- 21 The fact that s.14(1) emerged rather belatedly as the crux of the FOS case is irrelevant. It was raised during the investigation of the relevant complaint to the ICO and resulted from the substantial widening of the scope of SH's request.
- 22 The Tribunal is aware that the judgment of the Court of Appeal on *Dransfield* is awaited. Nevertheless, it has determined not to delay this decision and therefore to apply to its findings in this appeal the approach advocated in *Dransfield*, an authority currently binding on this Tribunal
- 23 SH does not dispute Mr. Cohen's account of the long history of complaints to the FOS
- in its role as adjudicator. Nor did she attempt to contradict the factual assertions in the Deputy Chief Ombudsman's letter of 23rd. March, 2009. These apparently trivial complaints, made, the Deputy Chief Ombudsman suspected, with a view to obtaining unmerited compensation, were not FOIA requests; nevertheless, they are relevant to SH's motivation when making her initial request on 18th. January, 2013 and, still

more importantly, the request with which this appeal is concerned on 19th. April, 2013, which she made through the agency of the ICO. That is the case whether the Deputy Chief Ombudsman's suspicions are well - founded or not.

24 That history strongly suggests, in the Tribunal's view, that her purpose in both cases was to harass the FOS in retaliation for its stern dismissal of her complaints and its refusal to devote further time and resources to them. That interpretation of her conduct is reinforced by her demand for the entire toolkit, which, taken as a whole, could not possibly be of interest to her, when informed that there was no note relating to frivolous and vexatious requests. It is further fortified by her refusal to access the FOS technical resource before deciding that she required every last note.

25 Even without that history this was, in our judgement, a plainly vexatious request. SH had no sensible reason to doubt the FOS statement that there was no note dealing with the handling of such requests. Why should the FOS falsely deny the existence of such a note ? It was most unlikely to be simply mistaken. If the note was sensitive then the FOS would confirm its existence and assert an exemption.

To substitute a request for the whole set of notes was an irrational non - sequitur to the

FOS response, the more so given the availability of the technical resource. The sequence of her reactions undermines any claim that her revised request had real value to her. Given the existence of the technical resource and its pending expansion, it is hard to see what value it would have to the general public. The undoubted public interest in transparency is clearly met, in the Tribunal's opinion, by the on - line resource. If there is no note devoted to the assessment of frivolity or vexatiousness, then there is nothing to be summarised on - line. The objection as to the problems of Braille users and those without on - line access is effectively an

argument against any provision of information by a public authority via a website unless it is simultaneously fully available in hard copy. That flies in the face of sensible contemporary practice.

26 Moreover, any value must be set against the commitment of time and resources required to scrutinise such a wide range of material and make judgements as to whether FOIA exemptions should be invoked. The Tribunal accepts Philip Cohen's evidence on such matters. The wider the demand, the heavier the burden and the more doubtful the value. Useful requests for information, even if complex, are generally focussed.

27 The FOS performs a most important role in resolving disputes between members of the public and financial entities and ordering redress where appropriate. Requests of this kind impede its ability to do so to no useful purpose and the Tribunal must prevent an abuse of FOIA, which has that effect.

28 In summary, this request was probably motivated by resentment rather than a sincere desire for the information requested. It was of very limited value, given the untapped on - line technical resource of the FOS and made demands on FOS time and resources that were wholly disproportionate to any value to SH or the public generally that could result from disclosure.

29 For these reasons we dismiss this appeal.

30 This is a unanimous decision.

David Farrer Q.C.

Tribunal Judge

28th. February, 2015