First-tier Tribunal
(General Regulatory Chamber)
Information Rights **Appeal Reference: EA/2017/0150**

Heard at Field House on 24th January 2018

Before

JUDGE
MISS FIONA HENDERSON

TRIBUNAL MEMBERS
MS ALISON LOWTON
AND
MR ANDREW WHETNALL

Between
KUSHARA NAVARATNE **APPELLANT**
and

THE INFORMATION COMMISSIONER **RESPONDENT**

and

FINANCIAL OMBUDSMAN SERVICE
SECOND RESPONDENT

Representation:
FOS – Mr Leo Davidson (Counsel)
Mr Navaratne – did not attend (see Tribunal's ruling of 24.1.18)
ICO – did not attend

DECISION AND REASONS

Introduction

1. This is an appeal against the Information Commissioner's decision notice FS50658556 dated 22nd June 2017 upholding the Financial Ombudsman Service's (FOS) decision that the Appellant's request was vexatious relying upon s 14(1)FOIA.

Background

2. FOS was set up by Parliament to resolve disputes between consumers and financial businesses. The Appellant has brought multiple cases to its service and raised a number of concerns about how these cases have been handled. Prior to the request that is the subject of this appeal, he has made 13 previous FOIA requests and 2 Subject Access Requests (SARs). He has made negative comments about the FOS on his own requests and those submitted by others on a web forum "Whatdotheyknow" (WDTK).

Information Request

3. The Appellant wrote to FOS on 11th October 2016 asking for:

1) For each year since 2010, please provide:

a) average time taken to process a Subject Access Request

b) longest time taken to process a Subject Access Request

c)Shortest time taken to process a Subject Access Request

4. FOS refused the request on 10th November 2016 relying upon s14 FOIA. They chose not to carry out an internal review.

Complaint to the Commissioner

5. The Appellant complained to the Commissioner on 6th December 2016. He argued that :

i. The refusal breached the statutory time limit as it was outside of 20 working days.

ii His request had a serious purpose for him and the public.

iii the refusal was based on requestor background and not the request as required under s14 FOIA.

iv The burden in providing the information would be small as the FSO should be keeping it anyway and it could be determined from a spreadsheet.

6. FOS set out their reasons for relying upon s14[1] arguing that they:

"weighed up the purpose and value of the request against the impact and disruption it would have on our organisation. We took into account [the Appellant's] other communications with our service and we believe his request is a result of his general dissatisfaction with our service".

[1] In a letter dated 15.05.2017 p 134

The Commissioner upheld the FOS refusal and their reliance on s14(1) FOIA.

Appeal

7. The case was listed for an oral hearing on 24th January 2018 at 10 am, the Appellant did not attend but FOS did. The Appellant's application for an adjournment was refused in the ruling of the same date and the Tribunal went on to determine the appeal based upon the oral submissions and the written material.

8. The Appellant's Grounds are that:
   i. Information Commissioner failed to find that there was a breach of s10 FOIA as the response was outside the 20 working day limit.
   ii. He disputes the ICO's factual synopsis and conclusions.
   iii. The ICO has found the requestor vexatious and not the request as provided for by s14 FOIA.
   iv. The request was not vexatious as it was not "manifestly unjustified, inappropriate or improper use of a formal procedure".
   v. A request born out of frustration is not cause for finding a request vexatious (*Oakley v ICO EA/2014/0093*).
   vi. He disputes that the request is vexatious or lacks purpose.
   vii. FOS are breaching ICO guidelines in not keeping track of that data so should not be able to rely upon the effort to provide it in holding the request vexatious.
   viii. FOS failed to provide advice and assistance to enable him to refocus his request under s16 FOIA.

Breach of s10 FOIA

9. The Information Commissioner accepts that the response was sent 2 days outside of the statutory timescale. Her view is that this is a relatively minor breach not worthy of comment and that in any event the focus of the complaint was the substance of the refusal and not the time taken[2].

10. The provisions for applying for a decision by the Commissioner are set out in s50 FOIA which provides:

[2] 74 bundle

(1) Any person (in this section referred to as "the complainant") may apply to the Commissioner for a decision whether, in any specified respect, a request for information made by the complainant to a public authority has been dealt with in accordance with the requirements of Part I.

11. The time limits for complying with a request under s10 or providing a refusal notice under s17 are set out in Part I of FOIA and are mandatory unless an application for extension has been made in accordance with FOIA.

12. It is not disputed that FOS exceeded the time allowed for providing a refusal notice under FOIA and had not sought an extension. The Tribunal is satisfied that the complaint that there was a breach of the time limit was clearly specified in accordance with s50(1) FOIA from the terms of the complaint[3]. Whilst it is true that the Appellant was also challenging the reasons for the refusal and that in the absence of the disclosure sought that was the more significant element of the complaint, we observe that a complainant is not limited to a single challenge to a public authority's handling of their complaint the prerequisite being that they must specify their complaint.

13. S50(2) places an obligation on the ICO[4] to make a decision or specify its grounds for not making a decision, the Information Commissioner had done neither, as such the ICO's choice to ignore that element of the complaint was a technical breach of s50 FOIA. To this limited extent the appeal is allowed.

Ground ii

14. The Appellant disputes the ICO's factual synopsis. This is not a valid ground of appeal under s58 FOIA as it is a challenge to the way the Commissioner has summarised the

[3] P122

[4] 50(2) … the Commissioner shall make a decision unless it appears to him [statutory grounds for declining to make a decision]

50(3) … he shall either—

(a)notify the complainant that he has not made any decision under this section as a result of the application and of his grounds for not doing so, or

(b)serve notice of his decision (in this Act referred to as a "decision notice") on the complainant and the public authority.

evidence which is not a basis for finding that the Decision was wrong in law. The Commissioner accepts that the summary in paragraph 26 of the decision notice is ambiguous but maintains that it is not material as the point made to support the conclusion that the present request is vexatious relies upon the fact of numerous FOIA requests and complaints to FOS which the Appellant accepts. This is a complete rehearing and the Tribunal is not bound by the facts found by the Commissioner or restricted to the evidence that was before him. To the extent that the Appellant disputes the conclusions, the Tribunal makes its own findings pursuant to this appeal in relation to the other grounds raised by the Appellant.

Grounds iii-vii

15. These grounds are the specific way in which the Appellant challenges the Commissioner's conclusion that the request was vexatious. Section 14 FOIA provides:

(1). Section 1(1) does not oblige a public authority to comply with repeated requests or a request for information if the request is vexatious. …

Parliament has expressly declined to define the term "vexatious". The issue was considered in detail in *Dransfield v Information Commissioner and Devon County Council [2015] EWCA Civ 454* which quoted at length and with approval from the Upper Tribunal decision in the same case. The Upper Tribunal in *Dransfield* took as its starting point that a request was not vexatious simply because it was annoying and irritating. It had also to be without justification:

"*the key question is whether the request is likely to cause distress, disruption or irritation, without any proper or justified cause" provides a useful starting point, so long as the emphasis is on the issue of justification (or not).*"[5] They analysed the definition of "vexatious" by reference to four broad issues:

a) The present or future burden on the public authority,
b) The motive of the requestor,
c) The value and serious purpose of the request,
d) Whether the request caused harassment or distress to staff.

16. The Tribunal considers these factors to be a helpful framework to structure its consideration of whether the request was vexatious but has had regard to the fact that it is not intended to be an exhaustive definition or a checklist for determination of this

[5] Para 26 UT decision

issue. Additionally, it is not necessary to meet all the criteria identified in *Dransfield* to be vexatious.

17. The factors above are considered in the context that the Court of Appeal held that "*vexatiousness primarily involves making a request which has no reasonable foundation, that is, no reasonable foundation for thinking that the information sought would be of value to the requester, or to the public or any section of the public".*[6]

The present or future burden on the public authority

18. In considering the burden (on the public authority and its staff) the evidence was that information relating to the handling of SARs since 2011 is logged electronically, FOS does not currently record statistics for the response times but the spreadsheets allow FOS to record whether the request was responded to in time. Statistics are provided to the board periodically in this regard. For the information requested to be provided, they would need to create a new formula on each of its logs to calculate the time taken to process each SAR and then collate the answers. For SARs prior to 2010 this would be a manual process.

19. The Appellant argues that the FOS should have refused the request as information not held rather than under s14 FOIA. Although we are not bound by the Commissioner's guidance[7] we accept the reasoning as set out within e.g. paragraph 19:
"*In most cases when information is held in electronic files and can be retrieved and manipulated using query tools or language within the software, that information is held for the purposes of FOIA and the EIR. The use of query tools or languages does not involve the creation of new information. Their use should be viewed simply as the means of retrieving information that already exists electronically."*
Consequently we reject the Appellant's contention and accept that the information is held within the existing records.

20. In terms of numbers, there were over 250 resolved cases per year for 2015-17. There were 12 spreadsheets to 2011-14 that would have to be interrogated and these were

[6] Paragraph 68 C of A decision
[7] https://ico.org.uk/media/for-organisations/documents/1169/determining_whether_information_is_held_foi_eir.pdf

overlapping. Some requests were dealt with on the same day therefore it would require an assessment of the hours and minutes taken to establish the shortest which would require manual checking of the file. A similar provision would be necessary to determine the longest. We are satisfied that there would be a significant burden in terms of complying with the request and we take into consideration that the FOIA team at FOS is small and that in complying with this request they would be diverted from other work.

21. The Tribunal considered whether data for 2010 was included in the request as "Since" could be interpreted as meaning "including" 2010 or "after 2010". The Tribunal must apply the objective meaning of the word. FOS interpreted it as meaning "including" and the Appellant has not challenged this construction in his appeal. The Tribunal agrees that this is the objective reading of the request and therefore takes into consideration that the provision of the information for 2010 can only be done manually and would increase the amount of work and hence disruption involved in answering the request[8].

22. The Appellant argues that FOS are breaching ICO guidelines in not keeping track of that data so should not be able to rely upon the effort to provide it in holding the request vexatious. The Tribunal has set out below[9] its findings relating to the information that was already recorded and its availability to the Commissioner and does not accept that the raw data from which compliance rates could be determined would have been of material assistance in enabling the Commissioner to scrutinise and hold FOS to account, as such the additional burden in extracting the specific information requested by the Appellant in our judgment is disproportionate.

23. The assessment of the impact and administrative consequence of a request also requires consideration of the context of a request, the number, breadth, pattern and behaviour of previous requests[10] in assessing distress, disruption and irritation. On the facts of *Dransfield* there was a considerable burden on the authority from past correspondence with the prospect of substantial further correspondence. In addition to assessing the specific burden of answering this request, FOS rely upon context and the cumulative

[8] It is NOT argued by FOS that the burden of answering the request would bring it within the cost exemptions.
[9] Paragraphs 40-41
[10] Para 28 UT

burden of successive requests of (they maintain) little objective value and the appellant's other interactions with FOS.

24. FOS's case is that they do not criticize requestors for appropriate use of the system however they argued that their resources constitute "public funds" as they are raised by a coercive levy and therefore they have a duty to use the funds reasonably and proportionately. The FOS has limited resources. Its purpose is to resolve disputes between consumers and financial businesses which it aims to do fairly, reasonably, quickly and informally. It has to think about the deployment of its limited resources. From the context of the avenues of complaint and enquiry pursued by the Appellant, the FOS argue that it was no longer being used for the purpose that it was meant and that hence s14 was engaged.

25. They provided a document detailing the Appellant's interactions with them in relation to Correspondence with the Appellant relating to FOIA and SARs[11]. The Appellant has also set out his account of the extent and the reasons for his interactions with FOS[12]. FOS invited the Tribunal to take into account activity post FOS' refusal of this request on the basis that it was in keeping with previous behaviour with no sign of the interactions abating or being resolved by the response to requests. The tribunal observes that whilst subsequent actions may be indicative of motive, on the facts of this case it is hard to extrapolate because of the impact of the refusal which might be considered to have aggravated the Appellant hence impacting upon his subsequent conduct. At the hearing FOS accepted that items 23-30 of p 100-102 do not go to the vexatiousness of the request and the Tribunal has not taken them or any FOIA requests after the relevant date into consideration in this appeal.

26. From the Appellant's submissions and the FOS schedule we are satisfied that:
    - the Appellant made 6 FOIA requests from March to June 2014.
    - Whilst there was then a gap in his FOIA requests, the request that is subject of this appeal was the 8th FOIA request in 8 months in 2016.
    - He has raised 8 official complaints since December 2013.

[11] P97-102 bundle
[12] Including: P18 et seq, p24, p62-65, Email of 29.1.18

- In the 3 years from December 2013 he has raised over 10 service related complaints.
- He has made 19 generally critical annotations on WDTK since April 2016[13] relating to FOS responses to FOI up to the date of the response to this FOIA request.
- From the Appellant's submissions it is clear that additionally he has sought to contact staff by telephone and to contact senior staff not associated with the case to obtain information when he has felt that his emails have not been answered in time.[14]

27. FOS argue that the Appellant's dealings are motivated by a general dissatisfaction with FOS whom he has sought to inconvenience and that the unifying principle of the requests is the fact that FOS will be required to expend time and resources in dealing with the request. We accept this argument based on the Appellant's dealings with FOS up to the date of the refusal.

28. The Appellant states that he is a "*whistleblower and known dissident*" and that *"public institutions … leave themselves open to (and also welcome) critique and criticism from the public"* and it is in this context that the Tribunal understands he maintains that he has been active in holding the FOS to account and commenting on WDTK. However, FOS argue that the FOIA requests have a scattergun approach with no common theme, triggered by apparent free association with other interactions he has had with FOS on that basis they maintain that there will be a future burden as this is part of a course of conduct. On his own evidence, at times the FOIA requests are motivated by curiosity and we are satisfied that historically there has been a significant burden associated with dealing with these interactions which is disproportionate to the value of the information requested.

29. The Appellant's case is that a previous request was fuelled by frustration with his emails not being answered for extensive time periods. We do not accept this, whilst this might have been the trigger in our judgment the information requested was tangential to the

[13] An additional 4 were made in April-May 2014.
[14] P15

resolution sought. From the correspondence attached, the Tribunal notes that the request for annual leave dates was precipitated by the Appellant not having had a response by 10.07am on a Tuesday to an email (seeking confirmation of a fax number that was already given in the email correspondence) that was sent at 8.25pm on a Friday in the knowledge (at the time that the request was made) that the employee was on annual leave at the time. Rather than request the annual leave dates for employees with the same initials; the Tribunal observes that a more proportionate response would have been to ask that individual to send an "out of office reply" if they were away in the future to enable him to manage his expectations.

30. The Tribunal also notes that some of the annotations on the WDTK website related to failures to receive a response to FOIA requests prior to the expiration of the statutory time to respond. The Tribunal takes into consideration that the genesis of this request relates to the time taken to complete disclosure under SAR in a case where at least some of the delay related to IT problems rather than failure to action the request.

31. Many of the Appellant's arguments can be summarised as a contention that he could have been more vexatious[15]. We did not find these arguments helpful in determining the issue before us because the Tribunal does not have to consider whether the request was the most vexatious request, but rather whether this request itself meets the threshold.

32. We are satisfied therefore from past dealings that it is likely that there would be a future burden associated with complying with this request in that it represents a continuing course of conduct that would not be resolved through provision of the information requested.

The motive of the requestor and the value and serious purpose of the request

33. The Appellant argues that the Commissioner (and FOS) have treated him as vexatious and not the request. Pursuant to ***Dransfield*** the Tribunal has had regard to the motive (of the requester), the value and serious purpose and the underlying rationale or

[15] As set out in FOS reply paragraph20 p 94 bundle.

justification for the request. In this case there is such an overlap between these factors that we have dealt with them together. The Commissioner agrees that the mere fact of frustration with a public authority is unlikely to make a request vexatious without more. The Appellant relies upon the *Oakley* Case (which is not binding on this Tribunal). This case predates Dransfield and in any event adopted a holistic approach which was consistent with the Commissioner's approach to the case.

34. FOS' case was that this request was an improper use of an approved channel determined by motivation. In accepting this argument the Tribunal repeats its findings as set out in paragraphs 27-30 above. The FOS acknowledge that there is a public interest in knowing how many SARs are received and its compliance rates (and it has disclosed this information in relation to other requests). Whilst this information could be derived from the information requested, that is not what in fact has been asked for. It argues that the Appellant's specific requests stem from his dissatisfaction with its services and the request's intention is to cause disruption.

35. The Appellant maintains that he had a serious purpose in requesting the information and that its provision has serious value. He wrote to his MP raising the issue of not being able to get a response to this FOIA request re SAR times and argues that this is evidence that he did want the information, it would have been useful to him and therefore that there was a reasonable purpose. The Tribunal has considered the objective value of the request as set out below and is not satisfied that the complaint to his MP demonstrates value in the information sought.

36. The Appellant had lodged a SAR on 10th April 2014 and his case is that he did not receive a response until 01/09/2014. When he lodged his second SAR on 15th September 2016 he said that he made his FOIA request to help him to gauge the likely time it would take to answer his request as he needed the SAR information in relation to an ongoing case. It is the FOS case that by the time he received the s14 FOIA rejection he had already had a response to the SAR and so that his pursuit of the request demonstrates that it had no genuine purpose or value.

37. The Tribunal sought clarification of some factual issues and the FOS attempted to answer them at the hearing. A question of fact arose at the oral hearing and the FOS and

Appellant provided written information[16] on this point. The Tribunal is satisfied that the Appellant's SAR requests were processed as follows:

- 11 April 2014 SAR: documents and calls were provided on 21 May 2014 (within the 40 day requirement) however, some call recordings could not be sent successfully by email due to their size, they were provided in June 2014 but not received by the Appellant, they were sent again on 1 September 2014
- September 2016 SAR: a substantive response was due on 25.10.16 but not sent until 9 November 2016 but from correspondence sent by the Appellant it is clear that one call recording was mislabelled, another did not upload successfully and one could not be traced, the information was provided in full on 30 December 2016.
- March 2017 SAR: the information was sent in April 2017 within the 40 day requirement.

38. From the chronology as set out above, the Tribunal is satisfied that the terms of the information request would not have provided the clarification that the Appellant wanted. It is arguable on the factual situation set out above that the 2014 SAR was "processed" by the FOS within the time limit in that the information was identified, and sent to the Appellant. FOS were not aware that the information had not successfully been received. From the correspondence it seems likely that the FOS would have recorded that as completed.

39. The Appellant also argued that the purpose of the request was to gauge whether the majority of requests were processed within the statutory time limit; whether there was much variance between the shortest and longest times and if there were isolated cases where a SAR was completed well beyond the 40 day limit. He argued it would assist the public to know the likely timescales and it would assist the FOS in keeping track of response times and it would assist the Commissioner in holding FOS to account. The Tribunal repeats that there is a difference in a "response" time, and the time for all outstanding queries in relation to a request to be successfully resolved.

[16] Email of 26.1.18 from FOS and Appellant's email and enclosures of 29.1.18

40. The evidence which we accept, was that a report is provided to the Board on a semi regular basis of the statistics of compliance with SARs in percentage form. There are open lines of communication with the ICO but they don't provide them with statistics as a matter of course and the ICO does not regularly ask, however, the ICO is responsive to issues raised. From the material before us it is clear that in relation to the September 2016 SAR the matter was reported by the Appellant to the Information Commissioner who investigated and was provided with an explanation by the FOS which she accepted, she took no further action. The information requested would not have been likely to add to that scrutiny in relation to this specific SAR which turned on its own facts.

41. The Appellant's purpose was already met by the Commissioner being the DPA regulator. On the basis that compliance rates were being compiled for the board we are satisfied that they could have been provided to the Commissioner if she had wanted them and that consequently the specific information requested would not have progressed the Commissioner's scrutiny of FOS materially.

42. In reaching this conclusion we take into consideration that the raw data would not reflect how big the request was, how much raw material would have to be searched, whether there were technical difficulties e.g. in the Appellant's case with transfer of data. The raw data would also not show what the impact was in relation to partial compliance, and the reason for non compliance e.g. was clarification sought, were there technical difficulties, was there a dispute re whether the information was complete or successfully received? The Appellant wanted to see statistics which did not exist and which there was little reason in the public interest to compile – as the longest and shortest time taken mean very little in the context of a very varied workload where each request generates a different amount of work and will be of different weight and seriousness.

Whether the request caused harassment or distress to staff

43. The Tribunal has also considered whether the request constitutes harassment or causes distress (of and to staff) through intemperate language, or makes unsubstantiated allegations or contains abuse. We note that in ***Dransfield*** previous requests had been "*belligerent and unreasonable*." FOS maintain that the Appellant has launched

unfounded and scurrilous attacks on FOS[17]. It is not disputed that the terms of the email request itself were polite. There is no evidence before us that suggests that in his direct contact with FOS the Appellant had prior to the relevant date been abusive. Similarly, in relation to his comments on WDTK we are not satisfied on the evidence before us that this was abusive or would constitute harassment insofar as it relates to the comments up to the relevant date. As set out above FOS seek to rely upon the annotations after the event and in particular the blog entitled Financial Ombudsman Service (UK) Bias and Corruption. However, it appears to us that this activity was not material to the perception of harassment at the relevant date and we therefore disregard it. We are not satisfied therefore that this request or the Appellant's contact with FOS at the relevant date caused harassment or distress to staff. We do however, remind ourselves that it is not necessary to fulfil all the factors identified in *Dransfield* for a request to be vexatious.

Advice and assistance (ground viii)

44. The Appellant argues that if the FOS did not have the information requested "to hand" he would have welcomed help and assistance on how to refocus the request and on what information they did have available pursuant to s16 FOIA.

45. S16 FOIA provides:

(1)It shall be the duty of a public authority to provide advice and assistance, so far as it would be reasonable to expect the authority to do so, to persons who propose to make, or have made, requests for information to it.

(2)Any public authority which, in relation to the provision of advice or assistance in any case, conforms with the code of practice under section 45 is to be taken to comply with the duty imposed by subsection (1) in relation to that case.

46. The code of practice[18] makes plain that the main aim of assistance is to provide clarity[19] and that there is no obligation to provide advice and assistance where a request is deemed to be vexatious under s14 FOIA[20]. We have already concluded that the terms of the request included 2010 and there was no need to clarify the request in that sense. Had

[17] P93

[18] Secretary of State for Constitutional Affairs' Code of Practice on the discharge of public authorities' functions under Part 1 of the Freedom of Information Act 2000, Issued under section 45 of the Act

[19] Paragraph 8

[20] Paragraph 15

this been a case that was being refused solely on the grounds of the time and cost taken to extract the information because of the need for manual checking we observe that clarification could have been sought to see if the Appellant was content for a response in days (rather than hours or minutes) however, as set out above that is not the case here. FOS argue that any duty to explain the way information is held and analysed and suggest ways that the request could be reframed only applied where the request had genuine value. In their view it was immaterial on the facts of this case since the point of reliance on s14 FOIA is to prevent further resources being expended. The value of the request would not increase and s16 increases the total burden. We agree with these arguments and are satisfied that in light of our findings as set out above the duty under s16 did not arise on the facts of this case.

Conclusion

47. For the reasons set out above, we allow the appeal in relation to the failure of the Commissioner to find that the FOS was outside the time limit set by s10(1) FOIA and FOS were therefore in breach of s17(1) FOIA but uphold the commissioner's decision in relation to its finding that the request was vexatious and FOS were entitled to rely upon s14(1) FOIA. The Tribunal does not direct that any steps be taken in relation to the breach of s17(1).

Signed Fiona Henderson

Judge of the First-tier Tribunal
Date: 25th April 2018