



**First-Tier Tribunal
General Regulatory Chamber
(Information Rights)**

Appeal reference: EA/2021/0121

Before

**Upper Tribunal Judge O'Connor
Tribunal Member Paul Taylor
Tribunal Member Emma Yates**

Between

Asif Khan

Appellant

and

**(1) Information Commissioner
(2) Financial Conduct Authority**

Respondents

DECISION AND REASONS

Decision: The appellant's appeal is dismissed

Reasons

Introduction

1. The appeal to which this decision relates is brought by the appellant against a Decision Notice issued by the Information Commissioner ('ICO') on 7 April 2021 - reference IC-53270-C3L0, in which the ICO concurred with the conclusion of the Financial Conduct Authority ('FCA') that it did not, for the purposes of the Freedom of Information Act 2000 ('FOIA'), hold the information requested by the appellant.
2. This appeal was determined on the papers with the consent of the parties. When considering the appeal, we kept under constant review the issue of whether undertaking our consideration on the basis of the papers alone was fair and just.

The request for information and FCA response

3. The appellant wrote to the FCA on 4 June 2020 at 07.37 and requested information in the following terms:

"I refer to the company named as Perry Prowse Insurance Consultant Ltd (3241671) as per Link

https://register.fca.org.uk/ShPo_FirmDetailsPage?id=001b000000MfQRaAAN

The insurance broker Perry Prowse Ltd is required to have had appropriate insurance in place (professional indemnity insurance) when dealing with clients as per rules and legislation.

FCA being the regulator for the insurance industry would be required to have a record of the listed firms insurance provider.

Perry Prowse Ltd refused to disclose this information to me.

Please can you provide the contact details of Perry Prowses indemnity insurance..."

4. The FCO responded on 2 July 2020 ('the initial response') stating that it could neither conform or deny whether the information was held, citing section 44(2) of FOIA with reference to section 348 of the "Financial Services and Markets Act (FSMA)".
5. On the same date as the initial response, the appellant wrote to the FCA seeking "to appeal" its decision. This led to the FCA conducting an internal review, the outcome of which was communicated to the appellant by way of a letter dated 24 August 2020. In that letter, the FCA states as follows:

"The outcome of my review is that I consider, as far as we are able to ascertain, that the information requested is not held by the FCA.

I am sorry that we cannot help. The FCA's General Insurance & Conduct Specialists department have reviewed the records held for Perry Prowse Insurance Consultants) Ltd - reference number 311916. They have advised that we hold no record of the name of any professional indemnity insurer for this firm."

The ICO's Decision Notice

6. The appellant made a complaint to the ICO about the way in which the abovementioned request for information was handled. As alluded to above, the ICO responded by way of a Decision Notice dated 7 April 2021 in which it

was concluded that the information requested by the appellant was not held by the FCA.

Events after the ICO's Decision

7. At paragraph 17 of his witness statement of 31 August 2021, Andrew Cobbett - the Chief Information Security Officer and Data Protection Officer at the FCA, details the disclosure of historic information to the appellant subsequent to the ICO's Decision Notice:

"17. In April 2021, a colleague located the name of the Firm's professional indemnity insurer from 2003-2004 on a legacy system. This information did not fall within the scope of Dr Khan's request, but in the spirit of full disclosure, the FCA notified the Information Commissioner's Office on 15 April 2021 [E120-121] and Dr Khan on 6 May 2021 [E139]. The FCA was not initially able to disclose the name of insurer due to the restrictions of section 348 FSMA. However, consent was obtained from the relevant parties and the information was provided to Dr Khan on 21 June 2021: [E142-143]. My colleague was informed that the insurer had not provided professional indemnity insurance to the Firm after October 2004."

The Notice of Appeal

8. By way of a Notice of Appeal to the First-tier Tribunal ('FtT'), dated 5 May 2021, the appellant challenges the ICO's Decision Notice on the following grounds:
 - (i) The matter concerns a request for the Professional Indemnity Insurance details of Perry Prowse (Insurance Consultants) Limited, for the years 2014 to 2019. The FCA held information within the scope of the request, which they had previously failed to disclose i.e., historic details of Perry Prowse's indemnity insurer. The FCA have stated that they hold this information but are not obliged to disclose it.
 - (ii) The FCA failed to address the appellant's requests for information under different legislation i.e., the Third Parties (Rights Against Insurers) Act 2010 (s.11 and Schedule 1), the Third Parties (Rights against Insurers) Act 1930 and the Provision of Services Regulations 2009
 - (iii) The FCA have been negligent in their role as a regulator, by not retaining professional indemnity insurance details.

The legislative background

9. Section 1(1) of FOIA reads:

- “(1) Any person making a request for information to a public authority is entitled –
- (a) to be informed in writing by the public authority whether it holds information of the description specified in the request, and
 - (b) if that is the case, to have that information communicated to him.”

10. By section 50 of FOIA:

“Application for decision by Commissioner

- (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. Section 57 of FOIA materially states:

“Appeal against notices served under Part IV

- (1) Where a decision notice has been served, the complainant or the public authority may appeal to the Tribunal against the notice.”

12. The powers of the Tribunal in determining this appeal are set out in section 58 of FOIA, as follows:

“If on an appeal under section 57 the Tribunal considers -

- (a) that the notice against which the appeal is brought is not in accordance with the law, or
- (b) to the extent that the notice involved an exercise of discretion by the Commissioner, that he ought to have exercised his discretion differently,

the Tribunal shall allow the appeal or substitute such other notice as could have been served by the Commissioner, and in any other case the Tribunal shall dismiss the appeal.

On such an appeal, the Tribunal may review any finding of fact on which the notice in question was based.”

Discussion

13. We have before us an “Open Hearing Bundle” running to 344 pages, which we have considered in full. We have also been provided with a 15 page “Closed

Hearing Bundle”, which is subject to a Direction from the Tribunal’s Registrar, pursuant to rule 14(6) of the Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules 2009, that its contents are not to be disclosed to anyone except the Information Commissioner. The documents therein are described in paragraphs 9 and 16 of Andrew Cobbett’s statement, dated 13 August 2021. We have considered these documents and concur with the Registrar’s conclusion that they should not be disclosed to anyone except the Information Commissioner. Having considered the documents, we are content that the entirety of our reasons for dismissing this appeal can be set out in an open judgment. There is, therefore, no closed annex to this judgment.

The FtT’s jurisdiction

14. The FtT is a creature of statute and its jurisdiction in the instant appeal is founded in FOIA. FOIA provides for a general right of access to information held by public authorities. That right is subject to exceptions and exemptions. It makes provision for its enforcement by the ICO and for a right of appeal from a decision of the ICO to the FtT.
15. It is apparent from a consideration of section 50 of FOIA that it is rooted in a complaint about a request for information to a public authority not having been dealt with in accordance with Part I of FOIA. The role of the ICO in the instant scenario is to consider whether the public authority has dealt with the request for information in accordance with part I of FOIA. It is no part of the ICO’s function to determine whether the public authority considered the request in accordance with the Third Parties (Rights Against Insurers) Act, the Third Parties (Rights against Insurers) Act 1930 or the Provision of Services Regulations 2009.
16. The import of section 58 of FOIA is that the right of appeal to the FtT involves a full merits consideration of whether, on the facts and the law, the public authority dealt with the request for information in accordance with Part I of FOIA (see e.g., Information Commissioner v Malnick and ACOBA [2018] UKUT 72 (AAC); [2018] AACR 29 at paragraphs [45]-[46] and [90]).
17. Consequently, it is also no part of the FtT’s function to determine whether the FCA considered, or ought to have considered, the request in accordance with the Third Parties (Rights Against Insurers) Act 2010, the Third Parties (Rights against Insurers) Act 1930 or the Provision of Services Regulations 2009. Nor, for the same reason, is it part of the FtT’s function or jurisdiction to consider whether the FCA has been negligent in its role as a regulator. The jurisdiction of the FtT is limited to a consideration of whether the FCA dealt with the request for information in accordance with Part 1 of FOIA. In the instant appeal, that requires a consideration of whether the FCA held information within the scope of the appellant’s request, not whether it should have held such information

18. For these reasons alone, we must reject grounds 2 and 3 of the appellant's Notice of Appeal on the basis that the FtT has no jurisdiction to consider such matters.

Scope of the request

19. We now turn to consider whether the FCA have dealt with the appellant's request for information in accordance with Part 1 of FOIA.
20. There is a dispute between the parties as to the temporal scope of the request for information made by the appellant. The ICO treated the request as being for *the "current indemnity insurer details for Perry Prowse Ltd on the FCA's files."* – see paragraph 16 of the ICO's Response to the Notice of Appeal. The FCA also indicate that it had understood that the appellant *"was requesting details of the indemnity insurer at the time of his request."*
21. As observed above, in his grounds of appeal to the FtT the appellant asserts that this appeal concerns his request for the indemnity insurance details of Perry Prowse (Insurance Consultants) Limited, for the years 2014 to 2019. In his Reply, the appellant further explains (paragraphs 11 and 12) that the dates 2014 to 2019 relate to the period of his interaction and insurance cover with Perry Prowse Limited.
22. For reasons we set out below, any decision we make in relation to the aforementioned dispute as to the scope of the request, is academic. Nevertheless, out of deference to the parties we will make a finding on this issue in any event.
23. The scope of a request must, in general, be determined on an objective reading of the request itself, considering any relevant background facts. We have set out the terms of the request at paragraph 5 above and in doing so we observe that there are no temporal limitations expressed therein. Nevertheless, we agree with the FCA and the ICO that on an objective reading the appellant is requesting the contact details of the Perry Prowse Limited professional indemnity insurer, at the time the request was made. In support of this conclusion, we observe that the request refers to requiring the details of *"the listed firms insurance provider"* i.e., in the singular.
24. In his submissions, the appellant refers to his email correspondence with the FCA of 27 May, 2 June, and 4 June 2020 (at 06.37) in support of his contention that the scope of the request was not limited to the details held of the insurer at the time the request was made. Having considered those emails, we conclude that they do not assist the appellant's position. The emails of the 27 May 2020 and 04 June 2020 (at 06.37) are in identical terms to the request for

information of 4 June 2020 (at 07.37) and, whilst in our view they should have been treated as FOIA requests by the FCA, neither adds anything to our analysis of the scope of the information request. The email of 2 June requests a response by the FCA to the email of 27 May, and once again adds nothing to our analysis of the scope of the 4 June information request.

25. We further observe that in his request for an internal review of the FCA's initial decision, the appellant refers to his request for information as being for "*the name of the insurers and contact details to file a claim in negligence against them*". We note, once again, that therein the information being requested is referred to in the singular. It is also apparent that the purpose of the request for information, as disclosed therein, supports the contention that it was contact details of the current indemnity insurer that were being sought by the appellant.
26. In any event, as we have stated above, our conclusion as to the temporal scope of the information sought by the appellant is not material to the outcome of this appeal.

Does the FCA hold the requested information?

27. As identified above, the FCA's position is that it did not hold any information within the scope of the appellant's request - such scope being that alluded to in the preceding paragraphs of our decision. The FCA has further indicated that, in any event, it does not hold any information about the indemnity insurers of Perry Prowse Limited other than for the period 1 November 2003 to 31 October 2004, and that such information as it does hold was disclosed to the appellant on 6 May 2021 on a discretionary basis, outwith its obligations under FOIA.
28. There will rarely be certainty that information that has been requested under the FOIA regime does not remain undiscovered somewhere within a public authority's records. However, absolute certainty it is not what is required by law. We must decide, having taken into account all relevant factors, whether the public authority is likely to have held relevant information beyond that which has been disclosed. One, amongst many relevant factors that we must consider, is the rigour and extent of the public authority's search for the information in the context of an understanding of how it manages its records.
29. The Freedom of Information Code of Practice (4 July 2018) identifies at [1.12] that a public authority is required to search for information:

"...in a reasonable and intelligent way based on an understanding of how the public authority manages its records. Public authorities

should concentrate their efforts on areas most likely to hold the requested information. If a reasonable search in the areas most likely to hold the requested information does not reveal the information sought, the public authority may consider that on the balance of probabilities the information is not held.”

30. In its decision, the ICO summarises the content of its communications with the FCA regarding the FCA’s record management systems and, in particular, its record management in relation to Perry Prowse Ltd, as follows:

- “11. The FCA has responded to the Commissioner’s enquiries explaining that firms with permission to carry on insurance distribution activity in relation to non-investment insurance contracts, such as Perry Prowse (Insurance Consultants) Ltd, are required to complete a Retail Mediation Activities Return (RMAR).
12. The RMAR must be completed with the information specified in the Supervision section of the FCA Handbook¹ which deals with reporting requirements
13. The FCA has further explained that as part of the RMAR self-certification process, Perry Prowse was required to confirm that they are in Indemnity insurance (PII) – as per pages 15-19 of the aforementioned FCA Handbook.
14. The FCA provided the Commissioner with a copy of Perry Prowse’s most recent submitted RMAR, which the Commissioner has viewed and can confirm that no insurer names are detailed on it.
15. The FCA has advised the Commissioner that its General Insurance Supervision was responsible for the supervision of Perry Prowse. As this is the relevant business area, this would be where any relevant information would be held. In this case on the RMAR, which it held electronically.
16. It confirmed that no other records held about Perry Prowse contains the requested information. Searches were carried out in its electronic database and MS Outlook folders for Perry Prowse using the search term PII.
17. The FCA has told the Commissioner that FCA staff are not permitted to hold FCA information on their own computers. And it has no reason to believe any information has ever been deleted or destroyed.
18. The Commissioner asked whether it is required to hold the requested information and the FCA responded that as previously advised, firms such as Perry Prowse are required to take out and maintain PII. They are also required to submit a PII self-certification form as part of the RMAR confirming that they are in compliance with the FCA’s requirements.
19. It has stated that the drop-down menu on the electronic RMAR provides a list of named insurers which comprise the majority of the PI insurance market. However, none had been selected on the form.
20. The FCA concluded by stating beyond the information submitted in

the RMAR, there is no requirement for firms to provide any further information about their PII arrangements, unless requested to do so.”

31. The FCA confirms the accuracy of this summary at paragraph 28 of its Response to the Notice of Appeal.

32. In his witness statement of 31 August 2021, Andrew Cobbett sets out in more detail the system operated by the FCA for the collection of relevant information from firms such as Perry Prowse Limited, including information relating to Professional Indemnity Insurance cover. The statement also summarises the information, or lack of information, that can be obtained from the RMARs submitted by Perry Prowse Limited:

“6. The records of the FCA have been compiled either under a statutory duty, or in the normal course of business, or other profession, by a number of persons who have, or may reasonably be expected to have, personal knowledge of the matters dealt with in the information that they each compiled. The persons who compiled the information cannot, with reasonable diligence, be identified or found or cannot reasonably be expected (having regard to the time that has elapsed since they compiled the information, and to all the circumstances) to have any recollection of the matters dealt with in that information.

7. To the best of my knowledge, there are also no reasonable grounds for believing that this statement dealing with the records of the FCA is inaccurate because of improper use of the computer or any respect in which it was not operating properly or was out of operation so as to affect the accuracy of the computer search that my colleagues, made of the records of the FCA.

8. The records of the FCA show that the firm Perry Prowse (Insurance Consultants) Limited – Firm Reference Number 311916 - has been authorised by the FCA since 14 January 2005 and has been in liquidation since 22 June 2016 (it has stopped taking on new business but has to continue to meet our standards in dealing with its customers).

9. Twice a year, Perry Prowse (Insurance Consultants) Limited was required by the FCA to submit a Retail Mediation Activities Return (“RMAR”) form via the Gabriel on-line system. Section E of this form requires confirmation that they hold professional indemnity insurance. If the firm has renewed its PII cover since the last RMAR submission, it is required to provide details of its PII cover. The last RMAR submitted by Perry Prowse (Insurance Consultants) Limited was for the reporting period 31/10/2018 to 30/04/2019 which gave basic details of a policy that ran from 01/11/2018 – 31/10/2019. The underwriters are shown as “Multiple/Other” but there is no name of the insurer or contact details of the insurer: [C5CB C7CB]. The

relevant RMARs from 2014-2019 were also completed with "Multiple/Other" as the name of the insurer with no further contact details provided: [C8CB]. The FCA is unable to share the RMARs with Dr Khan as they contain confidential information within the meaning of section 348 FSMA.

10. If the FCA held the name or contact details of the Firm's professional indemnity insurer, it would be included in the RMARs.
"
33. The references in square brackets in paragraph 9 of Andrew Cobbett's statement are to the Closed Hearing Bundle, which we have had an opportunity to consider. Having done so, we accept that the information contained on the RMAR forms submitted by Perry Prowse Limited is as identified in the statement and, in particular, that the RMARs did not disclose information within the scope of the appellant's request, even if the request is read as covering the period between 2014 and 2019.
34. Andrew Cobbett also provides details of further searches undertaken by the FCA in response to the appellant's request for information:
 - "11. Nevertheless, in order to ensure that relevant information was not held elsewhere, my colleagues conducted additional searches of the FCA's records. Although the RMARs were the most likely location for any relevant information, there are four other potential repositories in which relevant information could have been held:
 - a. Livelink. This is the FCA's records management system which has been used since 2013.
 - b. The T drive. This is the FCA's legacy records management system which was used prior to 2013. Any relevant information relating to the firm between 2004 and 2013 would be saved in the T drive.
 - c. INTACT. This is a system used by the FCA to store communications and information about the firms which it regulates. Any communication from the Firm, whether by email, telephone or post, is recorded on INTACT against the Firm's reference number.
 - d. The FCA's Enforcement & Market Oversight Division's case records.
12. I have not personally undertaken searches but am satisfied that the following searches of the records were undertaken:
 - a. A member of FCA staff at the grade of Senior Associate in the Sector Team in the FCA's Insurance & Conduct Specialists Department searched the RMARs submitted by the firm between 2014-2019 via Gabriel.
 - b. A member of FCA staff at the grade of Senior Associate in the

Sector Team in the FCA's Insurance & Conduct Specialists Department searched the firm folder for Perry Prowse (Insurance Consultants) Limited in Livelink using the search terms 'professional indemnity' and 'PII'.

- c. A member of FCA staff at the grade of Associate in the Information Disclosure Team in the FCA's Cyber & Information Resilience Department searched the T drive folder for Perry Prowse (Insurance Consultants) Limited using the search terms: 'professional indemnity', 'PII' and 'PI'.
 - d. A member of FCA staff at the grade of Associate in the FCA's Supervision Hub searched Intact and reviewed all correspondence and call notes logged on INTACT as being received by the Supervision Hub from Perry Prowse (Insurance Consultants) Ltd for the period 1/1/2014-4/6/2020.
 - e. A member of FCA staff at the grade of Associate in the FCA's Threshold Conditions Team within the FCA's Enforcement & Market Oversight Division searched the enforcement case records, including Livelink folders, archive email inboxes and other miscellaneous records pertaining to Threshold Condition cases for any records relating to Perry Prowse (Insurance Consultants) Limited's professional indemnity insurance for the period 2013 onwards using the search terms 'PII' and permutations of 'professional indemnity insurance'.
13. An Associate is the FCA's core professional grade. The individuals selected search terms as those most likely to identify relevant records for their respective areas.
14. As a result of the above searches I can confirm that:
- i. No records were found to indicate that the firm provided the name or contact details of their professional indemnity insurer (other than for the period November 2003 - 31 October 2004).
 - ii. There is no reason to believe that the requested information might be held elsewhere within the FCA."
35. The appellant submits that as the relevant regulator and in exercise of its supervisory function, the FCA were required to hold information as the identity of the indemnity insurers for insurance brokers such as Perry Prowse Ltd: that it would be incredulous for the FCA to be satisfied with a firm's assertion that it has professional indemnity insurance rather than requiring full details of the insurance provider - particularly when the firm had "*a CVA from 2016*" and had gone into "*liquidation*" but was still permitted to manage its portfolio of clients, (as was the case with Perry Prowse Ltd), and that the FCA's assertions as to the approach it takes to ensuring compliance with insurance obligations is inadequate, remarkable and indicates that the RMAR system is not fit for purpose.

36. Whilst we express our surprise that the system operated by the FCA for the collection of information from firms regarding details of their professional indemnity insurance cover lacks the robustness we would have anticipated, we have already identified above that the FtT's jurisdiction does not extend to a consideration of whether the FCA has been negligent in its duties as a regulator, nor does it extend to the question of whether the RMAR system is fit for purpose. The FtT's jurisdiction extends only to the issue of whether the FCA holds the requested information. In that regard, we accept the evidence of Andrew Cobbett as to the system in place for the collection of such information and that, for reasons which are beyond the scope of this decision, Perry Prowse Limited self-certified that they had the necessary professional indemnity insurance but did not provide details to the FCA of their insurer, a position that was permitted by the structure of the RMAR.
37. We further accept that, in addition to searching for the relevant information on the RMARs submitted by Perry Prowse Limited, the FCA has subsequently undertaken a search for the requested information on its Livelink records management system, the T Drive legacy records management system, the INTACT system – which is a system used by the FCA to store communications about firms that it regulates, and the FCA's Enforcement and Market Oversight Division's case records. We accept that no information relevant to the request made by the appellant was found as a result of these searches, whether this be information within the scope of the request as we have found it to be or information within the scope of the request as it is asserted to be by the appellant.
38. The appellant additionally submits that the FCA's search for the requested information was inadequate because it cannot now confirm whether relevant searches of MS Outlook folders have been undertaken. In our conclusion, the FCA conducted its searches in a reasonable and intelligent way based on its and our understanding of how its record management system operates and we do not accede to the appellant's submission that further searches were required. In particular, we observe that the primary place in which the requested information would be found, if held by the FCA, is in the RMARs. There was no relevant information found therein.
39. Furthermore, MS Outlook is a Microsoft application used to send and receive emails. We accept that the INTACT system, which was searched by the FCA for relevant information, stores email communication in relation to the firms that the FCA regulates and that a search of the INTACT system would reveal any relevant information received via the MS Outlook application. Such a search of the INTACT system was undertaken, and no relevant information was found.

40. Having considered the evidence and submissions before us in the round, including that which is not specifically mentioned in this decision, we conclude that the FCA does not hold the information requested by the appellant and did not hold such information at the date of the internal review; that the FCA dealt with the appellant's request in accordance with the requirements of Part I of FOIA; and, that the Information Commissioner's decision is in accordance with the law. The decision of the panel is, on all aspects of this appeal, unanimous.

Upper Tribunal Judge O'Connor
M O'Connor

31 January 2022