

## **Freedom of Information Act 2000 (FOIA)**

### **Decision notice**

**Date:** 23 January 2019

**Public Authority:** Financial Ombudsman Service (FOS)  
**Address:** South Quay Plaza  
183 Marsh Wall  
London  
E14 9SR

#### **Decision (including any steps ordered)**

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1. The complainant has requested information relating to the issue of the finality of the FOS final decision. The FOS refused to comply with the request under section 12 FOIA.
2. The Commissioner's decision is that the FOS was correct to apply section 12 FOIA and that it was not therefore obliged to comply with the request. The Commissioner also considers that the FOS provided the complainant with appropriate advice and assistance in accordance with its obligations under section 16 FOIA.
3. The Commissioner requires no steps to be taken.

#### **Request and response**

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4. On 21 August 2018 the complainant requested information of the following description:

"In the Financial Ombudsmen Service (FOS) frequently asked questions (FAQ's) it states the following:

Q. Can I APPEAL against an ombudsman's decision?

A. A decision by one of our ombudsmen is the FINAL stage of our dispute -resolution procedure.'

All seemingly very clear, but then in a ruling by the High Court of Justice

before Mr Justice Teare, 03/10/17 the judge states the following:

'8. [named individual] submitted that FOS has no statutory power to reconsider a complaint and that the parties have no power to confer on FOS a power which statute does not give it...'

'10 It is true that the relevant legislation (Schedule 17 to the Financial Services and Markets Act 2000, paragraph 14) does not contain an express power for an Ombudsman to reconsider a complaint. But I consider that Mr Strachan QC, on behalf of FOS, was right in his submission that the power to reconsider a complaint is part and parcel of FOS's duty to consider a complaint that has been properly brought before it.'

Please provide all relevant documents which address the issue of the finality of the FOS final decision bearing in mind that case law as quoted above clearly contradicts the FOS advice in its recent FAQ's.

I suspect that you will either refuse to provide this information under some arrived at FOIA exemption or you will say you don't have any documents that address this serious contradiction. The public will make up their minds on this depending on what your response is in terms of its transparency."

5. On 28 September 2018 the FOS responded. It refused to comply with the request under section 12 FOIA as it said that it would exceed the cost limit to do so.
6. The complainant requested an internal review on 28 September 2018. The FOS sent the outcome of its internal review on 31 October 2018. It upheld its original position but confirmed that even if the request were refined it is likely exemptions would apply to the information such as section 42 (legal professional privilege) and 40(2) (third party personal data).

## **Scope of the case**

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7. The complainant contacted the Commissioner on 30 October 2018 to complain about the way the request for information had been handled.
8. The Commissioner has considered whether the FOS was correct to apply section 12 FOIA to the request in this case.

## Background

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9. The FOS was set up by Parliament under the Financial Services and Markets Act 2000 (FSMA) to resolve disputes that consumers and businesses aren't able to resolve themselves. It looks at each case on its individual merits.
10. It has a two-stage process for investigating complaints. When a consumer brings a complaint to the FOS it investigates and tells the parties what it thinks the outcome should be. It reaches conclusions on each complaint based on its view of what is fair and reasonable in the circumstances of that individual complaint. If either party to the complaint disagrees with the outcome they can ask for the complaint to be passed to an ombudsman who will make the final decision. The ombudsman will then take a look at all the information afresh and issue a decision setting out their findings, as the final stage in the process.
11. A final decision by an ombudsman brings FOS involvement on a case to an end. Once it has made a final determination it has no express power to revisit it. At this stage it has discharged its statutory duty and are therefore *functus officio*. Although it only becomes legally binding if the consumer accepts the ombudsman's decision. However, in the event of a legal challenge to a final decision, if the judge decides in the claimant's favour he may quash the decision and remit it back to the FOS for re-determination by a different ombudsman.
12. Alternatively, in rare circumstances – such as where a legal challenge is contemplated – the ombudsman service might obtain the consent of both the parties to reconsider the complaint. The complaint may then be decided afresh by a different ombudsman.

## Reasons for decision

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### Section 12 – cost exceeds appropriate limit

13. Section 12 of the FOIA allows a public authority to refuse to deal with a request where it estimates that it would exceed the appropriate cost limit to:
  - either comply with the request in its entirety, or

- confirm or deny whether the requested information is held.
14. The estimate must be reasonable in the circumstances of the case. The appropriate limit is currently £600 for central government departments and £450 for all other public authorities. Public authorities can charge a maximum of £25 per hour to undertake work to comply with a request - 24 hours work for central government departments; 18 hours work for all other public authorities. If an authority estimates that complying with a request may cost more than the cost limit, it can consider the time taken to:
    - (a) determine whether it holds the information
    - (b) locate the information, or a document which may contain the information
    - (c) retrieve the information, or a document which may contain the information, and
    - (d) extract the information from a document containing it.
  15. The appropriate limit for FOS is £450 or the equivalent of 18 hours work.
  16. In this case FOS has said that it believes it does hold some information about this matter, as while determining the time taken to locate the information held by the legal team it did come across a few references to the information asked for.
  17. It explained that its service was set up to resolve disputes between consumers and financial businesses and it deals with a range of disputes – from complaints about current accounts to complaints about advice given on an investment. Last year FOS received 1,456,396 enquiries, took on 339,967 new complaints and resolved 400,658 complaints. It employs around 2,000 case handlers and 300 ombudsmen to look into and investigate these cases.
  18. The complainant asked for “all relevant documents”. Any documents held about a final decision or the finality of final decisions could be held across a variety of departments including its various casework teams, on individual cases, its stakeholder team and its legal team. Given the variety of folders, cases and locations it would need to search it considers it reasonable that the time to locate all the information it holds would vastly exceed the 18 hour cost limit.
  19. FOS also said that it considered a refined request made by the complainant (not subject to this Notice) to search just records held by its legal team. In order to find all documents it would need to search a range of folders on the shared legal drive, which consists of 18 folders,

over 6,000 sub folders and over 66,000 files, as well as a number of folders in the shared legal mailbox.

20. It spoke with colleagues in the legal team to identify the most relevant folders where the information would likely to be stored. One of the sub folders identified in the shared legal mailbox contained over 4,500 emails. It tried to narrow the results by searching by key terms such as 'finality', 'reconsider' and 'final decision' but this still brought back a huge number of emails. It looked through a few of the emails and a lot of them didn't bring back any relevant information. The size of the emails also varied considerable from a single email, to email chains with multiple attachments. This meant the time taken to review each email could vary from one or two minutes to over ten minutes per email.
21. If it were only to review the emails in a single subfolder of the shared legal mailbox it would need to review 250 emails an hour and more than 4 emails in a minute. Give the size of the emails this wouldn't be possible in the time set out under the FOIA.
22. It also searched a number of sub folders in the shared legal drive to see if they brought back any fewer results. One of the relevant folders it identified contained 1,100 items for 2018 alone and went back a number of years.
23. Given the above figures, it is reasonable to estimate that the time taken to review all the documents/folders held by the legal team alone or even the most likely folders held by the legal team to see whether they discuss its final decisions and their finality would vastly exceed the 'appropriate limit' set out in the Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2004.
24. Based upon the submissions provided by FOS, the Commissioner considers that due to the wide scope of the request and the fact that FOS looked at whether it could locate, retrieve and extract information just held by the legal team which in itself would exceed the cost limit; it would exceed the cost limit under section 12 FOIA to comply with the request in this case.

## **Section 16 – Advice and Assistance**

25. Under section 16 FOIA the FOS is obliged to provide the complainant with advice and assistance to help the complainant refine the request to fall within the cost limit or explain why this would not be possible.
26. FOS advised the complainant he may be able to refine his request by providing it with key words he would like it to search its legal team's

records for and narrow the timeframe for it to search. It also explained that if it did hold information and it was refined, the complainant should be aware that there could potentially be other exemptions engaged such as personal data of others if it related to an individual case at the service or legal professional privilege if it was advice from its legal team, in order to manage the complainant's expectations.

27. The Commissioner therefore considers that the FOS has complied with its obligations under section 16 FOIA in this case.

## Right of appeal

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28. Either party has the right to appeal against this decision notice to the First-tier Tribunal (Information Rights). Information about the appeals process may be obtained from:

First-tier Tribunal (Information Rights)  
GRC & GRP Tribunals,  
PO Box 9300,  
LEICESTER,  
LE1 8DJ

Tel: 0300 1234504

Fax: 0870 739 5836

Email: [GRC@hmcts.gsi.gov.uk](mailto:GRC@hmcts.gsi.gov.uk)

Website: [www.justice.gov.uk/tribunals/general-regulatory-chamber](http://www.justice.gov.uk/tribunals/general-regulatory-chamber)

29. If you wish to appeal against a decision notice, you can obtain information on how to appeal along with the relevant forms from the Information Tribunal website.
30. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

**Signed.....**

**Gemma Garvey**  
**Senior Case Officer**

**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
**Cheshire**  
**SK9 5AF**