



Appeal number: EA/2017/ 0034

**FIRST-TIER TRIBUNAL
GENERAL REGULATORY CHAMBER
INFORMATION RIGHTS**

KUSHARA NAVARATNE

Appellant

- and -

**THE INFORMATION COMMISSIONER
FINANCIAL OMBUDSMAN SERVICE**

Respondents

TRIBUNAL: JUDGE ALISON MCKENNA

Determined on the papers, the Tribunal sitting in Chambers on 4 December 2017

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DECISION

1. The appeal is dismissed.

REASONS

Background to Appeal

2. The Appellant made a request to the Financial Ombudsman Service (“FOS”) on 25 March 2016 for:

“(a) The number of occasions you asked a financial institution to issue a final response letter because they failed to issue one within eight weeks of the customer contacting them;

(b) The name of the financial institution, the date you contacted them, and the method of contact. e.g. postal letter, phone, fax, email etc”.

3. The Appellant made other requests, with which I am not here concerned as the information he requested was supplied.
4. FOS refused the information requested at paragraph 2 above in reliance upon s. 12 (2) of the Freedom of Information Act 2000 (“FOIA”).
5. The Information Commissioner issued Decision Notice (“DN”) FS50641740 on 2 February 2017, upholding FOS’s decision as to s. 12 (2) and also finding that FOS had complied with s. 16 FOIA. This meant that FOS had no duty to confirm or deny whether it held the requested information or to assist the Appellant further in refining his request.

Appeal to the Tribunal

6. The Appellant’s Notice of Appeal dated 1 March 2017 relies on grounds of appeal as follows: the Information Commissioner failed to include good practice guidance in the DN; there is a risk that other public authorities will fail to give sufficient information about the reasons for a s. 12 refusal; the FOS internal review took longer than 20 days; the FOS ought to have sent the information it did send in a re-usable format on the first occasion rather than having to be asked to re-send it; the Information Commissioner failed to investigate a complaint about alleged misuse by FOS of the Appellant’s personal data. By way of desired outcome, the Appellant asks for the DN to be amended to include these points.
7. The Information Commissioner’s Response dated 7 April 2017 maintained the analysis as set out in the Decision Notice. The Information Commissioner notes that the Appellant has not suggested that the DN is wrong in law, but only that he regards it as “deficient” for failing to mention the additional matters to which he refers in his grounds of appeal. It is submitted that the Tribunal has no jurisdiction to determine the Notice of Appeal in these circumstances.
8. The FOS’s Response dated 6 June 2017 explained that the information requested by the Appellant was not a dataset held on the FOS’s internal systems, so that it would have had to review every individual file to obtain the information. In these circumstances, it had reasonably taken the view that compliance would exceed

the appropriate limit. It asks the Tribunal to uphold the DN in this respect and agrees with the Information Commissioner that the procedural matters raised by the Appellant in his grounds of appeal are not matters within the jurisdiction of this Tribunal.

9. The Appellant's Replies, both dated 14 July 2017, provide a paragraph-by-paragraph commentary on the DN. I understand the criticisms made of the DN to be largely procedural in nature, but the Appellant does clearly submit here that the DN is wrong in law. He disputes the accuracy of the information which was supplied to him by the FOS and contends that FOS was in breach of s. 16 FOIA in not helping him further to refine his request. He submits that the FOS should have given him a breakdown of the estimated costs of compliance at an early stage rather than explaining itself to the Information Commissioner.

Mode of Determination

10. The Appellant initially asked for an oral hearing of his appeal but on 3 November 2017 he asked for a determination on the papers. The Respondents had both suggested a determination on the papers from the outset.

11. Relying on the powers delegated to me by the Chamber President on his appointment to the High Court on 2 October 2017, I directed that this matter was suitable for determination by a Judge sitting alone, pursuant to paragraph 11 (3) (iv) of the Senior President of Tribunals' Practice Statement dated 27 February 2015 (to which the parties were sent a hyperlink).

12. As the parties and the Tribunal agreed that this matter was suitable for determination on the papers in accordance with rule 32 of The Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules 2009, I have determined the appeal without a hearing, after considering an agreed open bundle of evidence comprising some 127 pages.

The Law

13. The relevant law is set out at paragraphs 20 to 22 of the DN. A public authority may refuse to deal with a request under s. 12 (2) FOIA where it estimates that it would exceed the appropriate limit to confirm or deny whether the requested information is held. The estimate must be reasonable and take account of the "appropriate limit" as set by the Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2004. In this case, that is a limit of £450, charged at £25 per hour.

14. The powers of the Tribunal in determining this appeal are set out in s.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.”

15. I am prepared to accept that the Appellant has challenged the DN in a way that gives the Tribunal jurisdiction to determine his appeal. However, I note that the burden of proof in satisfying the Tribunal that the Commissioner’s decision was wrong in law or involved an inappropriate exercise of discretion rests with the Appellant.

Conclusion

16. The evidence shows that FOS conducted a sampling exercise, described at paragraph 27 of the DN, before concluding that it would exceed the appropriate limit of £450 to confirm or deny whether it held the requested information. The FOS estimated that, allowing two minutes per file, it would take 1300 hours to search 2015’s files alone. The Information Commissioner was satisfied for the reasons given at paragraph 28 of the DN that the FOS’s time estimate was reasonable.

17. The Information Commissioner was also satisfied, for the reasons given at paragraph 30 of the DN, that the Appellant’s request could not have been meaningfully refined so as to permit compliance within the appropriate limit. For these reasons, she concluded that the FOS had complied with s. 16 FOIA and required no steps to be taken.

18. There is nothing in the Appellant’s lengthy submissions which has caused me to doubt the correctness of the DN in this case. The Appellant has not persuaded me that the estimate of two minutes per file was unreasonable, or that refining his request would have assisted the FOS to make searches within the limit. I agree with the Respondents that the majority of the Appellant’s submissions raise procedural matters falling outside of the Tribunal’s jurisdiction.

19. Accordingly, I conclude that I am satisfied the FOS was entitled to rely on s. 12 (2) and that it complied with s. 16 FOIA for the reasons set out in the DN. I now dismiss the appeal.

**ALISON MCKENNA
PRINCIPAL JUDGE**

DATE: 4 December 2017

DATE PROMULGATED: 5 December 2017