

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 25 February 2021

Public Authority: Financial Ombudsman Service
Address: Harbour Exchange Square
Isle of Dogs
London
E14 9SR

Decision (including any steps ordered)

1. The complainant requested copies of notifications provided to the Financial Conduct Authority. The Financial Ombudsman Service ("FOS") refused the request as it estimated that the cost of complying would exceed the appropriate limit.
2. The Commissioner's decision is that the FOS has reasonably estimated that the cost of complying with the request would exceed the appropriate limit and it was therefore entitled to rely on section 12(1) of the FOIA to refuse the request.
3. The Commissioner does not require further steps.

Background

4. In 2015, Parliament approved the Alternative Dispute Resolution for Consumer Disputes (Competent Authorities and Information) Regulations. ("the ADR Regulations"). The ADR Regulations are aimed at resolving consumer complaints without requiring the parties involved to bring the matters before the courts. Parties can instead bring the matter before an "ADR entity" which can consider the dispute and issue a decision that the parties agree to be bound by.
5. The ADR Regulations designate a number of "competent authorities" which have the power to accredit one or more ADR entities to operate within their particular industry. Prospective ADR entities are required to apply to the competent authority for accreditation.

6. Regulation 9 of the ADR Regulations requires a prospective ADR entity to provide the competent authority with information supporting its case for accreditation. Once accreditation has been approved, Regulation 11 requires that:

"In the event of a change to the information which an ADR entity has supplied under regulation 9(1), the ADR entity must, without undue delay, provide written notification of the change to the competent authority."

7. In the financial services industry, the Financial Conduct Authority (FCA) is the competent authority and has accredited the FOS as an ADR entity for resolving disputes involving financial service companies.

Request and response

8. On 10 July 2020, the complainant wrote to the FOS and requested information in the following terms:

"My information request relates to an ADR entity obligations under s.11(1):

"Beginning from the FOS initial ADR entity approval in July 2015 until this day provide all your s.11(1) written notification to any changes of your supplied s.9(1) information to the competent authority."

9. The FOS responded on 4 August 2020. It refused the request because it felt that the cost of complying would exceed the appropriate limit.
10. Following an internal review the FOS wrote to the complainant on 2 September 2020. It upheld its position that section 12 of the FOIA would apply.

Scope of the case

11. The complainant contacted the Commissioner 29 September 2020 to complain about the way his request for information had been handled.
12. The Commissioner considers that the scope of her investigation is to determine whether the FOS has reasonably estimated that the cost of compliance would exceed the appropriate limit.

Reasons for decision

Section 12 – Cost of Compliance Exceeds Appropriate Limit

13. Section 1(1) of the FOIA states that:

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.

14. Section 12 of the FOIA states that:

(1) Section 1(1) does not oblige a public authority to comply with a request for information if the authority estimates that the cost of complying with the request would exceed the appropriate limit.

(2) Subsection (1) does not exempt the public authority from its obligation to comply with paragraph (a) of section 1(1) unless the estimated cost of complying with that paragraph alone would exceed the appropriate limit.

15. The “Appropriate Limit” is defined in the Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2004 (“the Fees Regulations”) and is set at £450 for a public authority such as the Council. The Fees Regulations also state that staff time should be notionally charged at a flat rate of £25 per hour, giving an effective time limit of 18 hours.

16. When estimating the cost of complying with a request, a public authority is entitled to take account of time or cost spent in:

(a) determining whether it holds the information,

(b) locating the information, or a document which may contain the information,

(c) retrieving the information, or a document which may contain the information, and

(d) extracting the information from a document containing it.

17. A public authority does not have to make a precise calculation of the costs of complying with a request; instead only an estimate is required. However, it must be a reasonable estimate. In accordance with the First-Tier Tribunal in the case of *Randall v Information Commissioner & Medicines and Healthcare Products Regulatory Agency* EA/2007/0004,

the Commissioner considers that any estimate must be “sensible, realistic and supported by cogent evidence”.¹ The task for the Commissioner in a section 12 matter is to determine whether the public authority made a reasonable estimate of the cost of complying with the request.

The complainant’s position

18. The complainant provided the Commissioner with a 469-page document comprising his grounds of complaint and documents that, he felt, supported his case. His arguments essentially boiled down to two points:
19. He argued that the ADR Regulations enacted a specific statutory requirement for the FOS to notify the FCA of changes made to the information it originally submitted when seeking accreditation. He therefore argued that the FOS should be able to identify the relevant correspondence easily.
20. The complainant also argued that the FOS’ search strategy was unreasonable and noted that it had failed to provide a detailed explanation of the cost of complying.

The FOS’ position

21. The FOS set out the environment in which it operated and its relationship with the Financial Conduct Authority. It noted that, whilst it was an independent body set up to resolve consumer disputes, it maintained a close relationship with the FCA. Both organisations were in constant communication to share intelligence and trends within the financial services industry. This flow of information enabled both organisations to carry out their respective roles more effectively.
22. The FOS also noted that, whilst regulation 11 of ADR Regulations required it notify the FCA in writing of any changes to its credentials as an ADR entity, the legislation did not specify the format in which any notification needed to be provided. Because of its ongoing communications, the FOS argued that any “notification” would not be provided via a separate process but would be integrated into the flow of emails between the two organisations.
23. The original reasoned statement that was provided to the FCA in 2015, setting out the FOS’ case for accreditation as an ADR entity under regulation 9(1) was, the FOS explained, 17 pages long and covered a variety of information relating to the FOS’ structure, priorities and

¹ <http://informationrights.decisions.tribunals.gov.uk/DBFiles/Decision/i136/Randall.pdf>

performance. There was thus a wide variety of information which could potentially require changing and thus trigger the need for a regulation 11 notification.

24. The FOS therefore argued that any notifications it had provided to the FCA could only be separated from the other correspondence sent to the same organisation by manually reviewing all FCA correspondence.
25. In order to establish how much correspondence might potentially need reviewing, the FOS explained that:

"When searching the regulatory enquiries mailbox with the phrase @fca.org.uk since July 2015 the results brought up approximately 51,000 emails. By applying filters to only communications sent from the ombudsman service and emails to an email address ending @fca.org.uk, it brings up approximately 17,000 emails."

26. To determine how much information was in scope, the FOS argued that:

"Given the ADR Regulations came into force in July 2015 and given the variety of topics involved in the changes we might need to notify FCA about, we don't consider there was a way to further refine the 17,000 emails. They would need to be manually reviewed in order to consider whether they related to one of the areas which required a notification be provided to FCA pursuant to regulation 11(1). We also considered it would be unlikely that ADR would be specifically mentioned, but instead we would simply inform the FCA of the update through pre-existing channels..."

"...there isn't a specific way of narrowing the request and we weren't able to identify any specific words or phrases that would bring back all of the communications the requestor had asked for."

27. The Commissioner asked whether the relevant correspondence could be isolated by identifying the changes that had occurred and working backwards to work out when the notification had taken place. She noted that the FOS had been re-accredited in 2017 and 2019 and asked if the changes between the three documents could be tracked back to particular items of correspondence. The FOIS responded to say that:

"that approach wouldn't assist here because the information that the ADR Regulations require the Ombudsman Service to provide to FCA every two years (under regulation 11(3)) is not the same as the information we were initially required to provide in 2015."

28. Whilst the FOS did not produce an actual figure for the cost of complying, it noted that it would need a member of staff to review in excess of 900 emails per hour in order to comply with the request within 18 hours. It did not consider that this was realistic.

The Commissioner's view

29. The Commissioner considers that the FOS has demonstrated that complying with the request would exceed the appropriate limit.
30. The Commissioner accepts that FOS' argument that it does not have a separate procedure for separating any notification required under regulation 11 of the ADR Regulations and therefore cannot easily be distinguished from any other correspondence sent to the FCA. There is nothing in the legislation that requires notifications to be provided in a particular format (or even mention the ADR Regulations) and thus no reason to doubt the FOS' argument that no separate record is kept.
31. In addition, the Commissioner also recognises that the FOS cannot simply work backwards, as the information that regulation 11(3) requires the FOS to provide on a biennial basis is different to that that regulation 9(1) requires be provided at the outset. She is therefore satisfied that only a manual sift of relevant correspondence would be capable of distinguishing between notifications and more general correspondence.
32. Although the Commissioner does not consider that the FOS would be required to review all the seventeen thousand emails it has provisionally identified, she does consider that even using keywords is unlikely to reduce this total sufficiently as to bring it within the appropriate limit. The lack of a common form for providing notifications and the breadth of information that a notification could potentially cover would require a large number of keywords to be used. Each keyword used would identify a separate batch of emails which would still all need to be reviewed with some emails needing to be reviewed multiple times because they contained multiple keywords.
33. Even if the FOS were able to identify sufficient keywords to guarantee that no relevant information would be excluded from the searches, the Commissioner notes that it would still need to reduce the amount of potentially relevant information by a factor in excess of ten for the request to be answerable within the appropriate limit. She considers it highly unlikely that the FOS would be able to reduce the amount of emails that would need to be reviewed sufficiently that the reviewing could be achieved within 18 hours.
34. Whether notifications should be provided in this format is not a matter that the Commissioner is required to consider. How a public authority manages its information is a matter for the public authority – taking into account its statutory obligations and business needs. When determining whether or not a request could be answered without exceeding the appropriate limit, the Commissioner is only required to consider the way information is, as a matter of fact, held and not how it ought to be held.

35. As the request could not be answered without exceeding the appropriate limit, the FOS was entitled to rely on section 12(1) of the FOIA to refuse it.

Section 16 – Advice and Assistance

36. Section 16 of the FOIA requires a public authority to provide “reasonable advice and assistance” to those making or wishing to make a request.

37. In cases where a public authority considers that a request could not be answered within the cost limit, the Commissioner would normally expect advice and assistance to be provided to help the requestor bring their request within the cost limit.

38. When it initially responded to the request, the FOS informed the complainant that it was unable to provide any suggestion as to a meaningful way that his request could be refined. This was because the FOS considered that the breadth of the request was such that no combination of keywords would be guaranteed to identify all relevant information.

39. At the internal review stage the FOS offered to process a refined request from the complainant if he wished to identify a keyword or combination of keywords that could be used to reduce the potentially relevant information. During the course of the investigation, the FOS noted that it was still willing to process such a request.

40. There is no set requirement as to what advice and assistance should be provided in any given set of circumstances. The only requirement is that it must be “reasonable.”

41. Given the breadth of potentially relevant correspondence, the Commissioner considers that it would be difficult to refine that correspondence in a way that both allows it to be searched without exceeding the cost limit and that would also provide the complainant with some meaningful information. The FOS also explained to the complainant, in its responses, why a request that, whilst seemingly specific on its face, in fact encompassed a vast amount of potential correspondence.

42. The Commissioner is therefore satisfied that the FOS complied with its section 16 duty.

Other matters

43. Whilst the Commissioner considers it was implicit in the response, the FOS did not provide an unambiguous statement that it held relevant information until its internal review.
44. Where a public authority is confident that it would hold relevant information but cannot locate and extract that information without exceeding the appropriate limit, it should still inform the requestor that it holds information, but rely on section 12(1) of the FOIA to refuse the request.
45. If the public authority is genuinely unsure whether or not it holds relevant information and would need to exceed the appropriate limit just to establish whether any information was held, it should rely on section 12(2) of the FOIA to refuse the request without issuing a confirmation or a denial that information is held.

Right of appeal

46. 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@justice.gov.uk
Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

47. 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.
48. 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

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