



First-tier Tribunal  
(General Regulatory Chamber)  
Information Rights

Appeal Reference: EA/2017/0008

Heard at Fleetbank House, Salisbury Square, London  
On 14 June 2017

Before  
CHRIS RYAN  
JUDGE  
MIKE JONES  
ALISON LOWTON  
TRIBUNAL MEMBERS

Between

SAKET TRIVEDI

Appellant

and

THE INFORMATION COMMISSIONER

First Respondent

and

FINANCIAL OMBUDSMAN SERVICE LIMITED

Second Respondent

DECISION AND REASONS

**Attendances:**

The Appellant represented himself.  
The First Respondent did not attend the hearing.  
For the Additional Party: Rupert Paines of Counsel.

**Subject matter:** Freedom of Information Act 2000:  
Cost of compliance and appropriate limit s.12

GENERAL REGULATORY CHAMBER

DECISION OF THE FIRST-TIER TRIBUNAL

The appeal is dismissed.

REASONS FOR DECISION

1. This is an appeal from a Decision Notice issued by the Information Commissioner on 20 December 2016, in which she rejected a complaint by Mr Saket Trivedi ("the Appellant") about the handling of a request for information he had submitted to the Financial Ombudsman Service Limited ("FOS").

The request for information and its rejection by the FOS

2. On 19 July 2016, the Appellant submitted a request for information to the FOS in the following terms:

*"Please provide me with the following information for as far back as the FOS hold these records:*

- *The total number of complaints raised with the FOS against private health insurance providers, per year, split by provider;*
- *The split of these complaints by upheld, rejected and dismissed, by year and provider;*
- *For those that were dismissed, please specify under which DISP rule they were dismissed under by year and provider.*

*Please also provide the following breakdown from my previous FOI request 1561:*

- *For the period where records go back to, the total and breakdown (by DISP) for all cases dismissed without its merits being reviewed across sectors and types of complaint;*
- *The top 20 sectors plus private health insurance would suffice.*

*I'd also be grateful if you could send me the terms and conditions of the FOS scheme rules from 2010 to present (ie, all published versions since then to present day). I attach the equivalent document from the Legal Services Ombudsman for your perusal."*

We will refer to this communication as "the Request".

3. The references in the Request to "DISP" or "DISP rules" was to the rules concerning complaint handling made by the Financial Conduct Authority and published in that organisation's handbook.

4. The Request took effect under section 1 of the Freedom of Information Act 2000 ("FOIA"), which provides that a public authority is obliged, on request, to state "*whether it holds information of the description specified in the request*" and, if so, to communicate it to the person making the request.
5. FOIA section 12 provides that the obligation under section 1 does not arise where, on a reasonable estimate, the cost of complying with a request would exceed "*the appropriate limit*" as set out in separate regulations<sup>1</sup>. As those regulations apply to the FOS in this case the information request could be refused if the cost of:
  - i. determining whether the FOS held the requested information; and then
  - ii. locating and retrieving any relevant document and extracting from it the relevant information

would have exceeded £450. In estimating whether that was the case a notional charge of £25 could be applied to each hour of work involved in the exercise. In other words if, on a reasonable estimate, the task would take more than 18 man hours the request could be refused.

6. The FOS accepted that it held most of the requested information and that it could make it available to the Appellant within the costs limit. However, it said that it could not comply with the final part of the Request because it had not created any document equivalent to the publication created by the Legal Services Ombudsman. It claimed that it did not therefore hold the information at the date of the Request. As to the first two parts of the Request, the FOS stated that the nature of its case management systems meant that a manual inspection of hard copy records would be required in order to identify the DISP rule relied on in each instance of complaint dismissal. The cost of complying with those aspects of the information request would therefore exceed the £450 cost limit.

#### The complaint to the Information Commissioner and her Decision Notice

7. The Appellant complained to the Information Commissioner about the way in which these aspects of the Request had been handled, but his complaint was rejected. In the Decision Notice from which this appeal emanates the Information Commissioner concluded that the FOS followed the rules published in the FCS Handbook and did not hold a separate document explaining dispute resolution rules that were particular to the FOS. The Information Commissioner also set out, in paragraphs 25 to 30 of the Decision Notice, her findings on the FOS's case handling system, which led her to conclude that it was reasonable to estimate that the information sought identifying the DISP rule applied in each instance of complaint dismissal could only be accessed by inspecting hard copy files and that such an exercise would exceed the cost limit. In the process she accepted that since 2009 there had been 292 instances of a complaint against a private medical insurance organisation (i.e. those covered by the first part of

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<sup>1</sup> The Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2004.

the Request) having been dismissed without consideration of the merits. As to the second part of the Request, she accepted that the total number of dismissals in all categories of complaint had totalled over 10,000 in the previous two years and inferred that the number would be much higher if the whole period covered by this part of the Request were to be taken into account.

#### The appeal to this Tribunal

8. On 17 January 2017, the Appellant appealed the Decision Notice to this Tribunal. Appeals to this Tribunal are governed by FOIA section 58. Under that section we are required to consider whether a Decision Notice issued by the Information Commissioner is in accordance with the law. We may, in the process, review any finding of fact on which the notice in question was based. Frequently, as in this case, we find ourselves making our decision on the basis of evidence that is more extensive than that submitted to the Information Commissioner.
9. The additional evidence took the form of a witness statement signed by Kavita Savani the Senior Legal Counsel to the FOS. She confirmed that the FOS operated its dispute resolution operation under powers created by the Financial Services and Markets Act 2000 and in accordance with procedural rules which are set out in the Financial Conduct Authority's Handbook. She stated that she had never come across a separate document summarising or explaining the rules, despite having worked within the FOS legal team for 7 years, and believed that the FOS had not followed the example of the Legal Ombudsman in creating one. She had, nevertheless, carried out further enquiries to see if any such document had ever come into existence, but had found nothing.
10. As regards the cost of satisfying the request for a breakdown, by reference to DISP rules, Ms Savani believed that it would be possible to provide the information in the first part of the information request within the cost limit. That is to say, limiting the scope of the Request to the 292 dismissed cases arising from complaints against private health insurance providers only.
11. However, the Request, read as a whole, also covered (in its second part) the much wider category of "all cases" or at least the "top 20 sectors plus private health insurance." Ms Savani calculated that in the period 2014-16 alone there had been 10,308 complaints in all categories, which had been dismissed or found to be outside the FOS jurisdiction. She calculated, on the basis of a sample exercise she had carried out, that it took 2 minutes and 48 seconds to find and record the reason for a dismissal from each hard copy file, with the result that it would take 426 hours to extract the information from just the 2014-16 files, without taking into consideration the other years covered by this part of the Request.
12. Ms Savani explained that the necessity to inspect each file arose from the case handling system which the FOS operated. It incorporates a facility for searching across various categories of information about cases. One category combined information on whether a complaint had been dismissed or found to fall outside the FOS' jurisdiction. But the system had not been set up to record the rule relied on in those cases where a complaint had been dismissed.

13. In preparing her evidence Ms Savani had checked with adjudicators and investigators employed by the FOS to see if there was any other way of obtaining the information under consideration, but it had been confirmed to her that this was not possible.
14. By the date of the hearing of the Appeal the FOS and the Appellant had agreed, in light of the evidence summarised in paragraph 10 above, that the information concerning health insurance providers should be disclosed, irrespective of whether the Appellant was entitled to receive the equivalent information in respect of all categories of case. The information was provided on 6 June 2017 and the Appellant confirmed that no further issue arose in relation to it. He nevertheless asked Ms Savani a number of questions arising from her witness statement relating to the FOS case management system generally. In the process she explained that an investigator or adjudicator would not necessarily identify a particular DISP rule when writing to a complainant to notify him or her that a complaint was being dismissed. The decision would nevertheless have been made on the basis of one or more of the DISP rules. Subsequently, a member of the FOS staff would have incorporated a limited amount of information about the case into a searchable index of all cases. One of the features recorded at that stage would be the reason for dismissal. This would be selected from a list in a drop down menu, but the options made available in that way would not include any reference to a DISP rule number. Nor would it track the precise language of any rule, although it was likely to reflect it in general terms.
15. Ms Savani also stated, in answer to a question put to her by the Tribunal panel, that the time taken to comply with the first part of the Request had been consistent with the outcome of the sampling exercise referred to in paragraph 11 above.

#### The parties' arguments and our conclusions

16. The Appellant did not dispute that FOS investigations are regulated by the rules set out in the FCA Handbook. However, he argued that if no further document exists that is broadly equivalent to the explanatory notes issued by the Legal Service Ombudsman, there were grounds for concern that the FOS staff might not operate in a fair, reasonable consistent and balanced way. He considered that they did not. However, that assessment was based on his own experience of dealing with them in circumstances which have no direct bearing on the limited issues falling within the jurisdiction of this Tribunal and the scope of this Appeal. We are limited to considering whether, on a balance of probabilities, the document the Appellant seeks was or was not held by the FOS on the date of the Request. We are not required, or permitted, to extend our enquiries into whether or not the FOS should have created such a document.
17. We have concluded that the FOS was right to say that it did not hold this part of the requested information at the relevant time because it had simply never created such a document, There was nothing on which FOIA section 1 could therefore engage.
18. The Appellant indicated that he recognised that the effect of Ms Savani's evidence on the content and format of the FOS's case management system was that an inspection of hard copy files could only be avoided by reconfiguring the searchable records. He nevertheless maintained his challenge under FOIA section 12 and commented that the costs involved in a contested hearing may have exceeded the cost of carrying out the relevant search. It is inherent in a case of this nature that significant legal costs are likely to be incurred if a public authority's cost estimate is challenged. And the

purpose of the section would be undermined by any suggestion that the calculation required by the Regulations should be set against the costs of a legal challenge to its application.

19. The Appellant argued in his Grounds of Appeal that the public interest in knowing how the FOS applied the rules regarding complaint dismissal should be taken into account. There is no justification for adopting such an approach. Section 12 and the Regulations together provide a self-contained mechanism for protecting public authorities from the imposition of what Parliament evidently considered would be excessive cost burdens. The FOIA is clear in stipulating the circumstances where a public interest test may apply and section 12 is not one of them.
20. We are satisfied, on the basis of the evidence about the cost estimate given by Ms Savani, which was not seriously challenged at the hearing, that complying with the second part of the Request would certainly have exceeded the £450 cost limit and that the Information Commissioner was therefore right when she decided that the FOS had been entitled to refuse disclosure on that basis.
21. For the reasons given the Appeal is dismissed.
22. Our decision is unanimous.

Judge Chris Ryan

Judge of the First-tier Tribunal

Date: 26 June 2017

Date Promulgated: 27 June 2017