IN THE FIRST-TIER TRIBUNAL **Case No. EA/2017/0184**
GENERAL REGULATORY CHAMBER
INFORMATION RIGHTS

ON APPEAL FROM:
The Information Commissioner's Decision Notice
No FS50679303 dated 9 August 2017

Appellant:	**David Howells**
First Respondent:	**Information Commissioner**
Second Respondent:	**The Financial Ombudsman Service**
Date of hearings:	**5 March 2018** **30 May 2018**
Date of decision:	**15 September 2018**

Before

Anisa Dhanji
Judge

and

Dave Sivers and Andrew Whetnall
Panel Members

Representation
For the Appellant: John Samson, Counsel
For the First Respondent: No representative
For the Second Respondent: Leo Davidson, Counsel

Subject matter

Freedom of Information Act 2000, section 12 (cost limits), 14(1) (vexatious request), and section 16 (advice and assistance).

IN THE FIRST-TIER TRIBUNAL **EA/2017/0184**
GENERAL REGULATORY CHAMBER
INFORMATION RIGHTS

SUBSTITUTED DECISION NOTICE

Dated:	15 September 2018
Public Authority:	Financial Ombudsman Service
Address of Public Authority:	Exchange Tower, South Quay Plaza, 183 Marsh Wall, London E14 9SR
Name of complainant:	Mr David Howells

The following Decision Notice is substituted in place of the Information Commissioner's Decision Notice dated 9 August 2017.

The Financial Ombudsman Service ("FOS"), failed to comply with its obligations under section 16 of the Freedom of Information Act 2000.

However, in view of the steps that the FOS has since taken, no further directions are made in relation to its obligations under section 16.

Section 14(1) of the Freedom of Information Act is not engaged.

Signed

Anisa Dhanji
Judge

REASONS FOR DECISION

Introduction

1. This is an appeal by David Howells (the "Appellant"), against a Decision Notice ("DN"), issued by the Information Commissioner (the "Commissioner"), on 9 August 2017. It concerns a request for information made by the Appellant to the Financial Ombudsman Service ("FOS"), on 1 February 2017.

2. The Appellant's request relates to allegations that had been made by the Appellant that the Royal Bank of Scotland Group ("RBS"), engaged in systematic document falsification to cover up wrong-doings. The allegations have received substantial press coverage.

3. In April 2011, the Appellant lodged a complaint with FOS about National Westminster Bank ("NatWest"), which is part of RBS. The complaint resulted in a decision in the Appellant's favour in November 2013, with NatWest being required to pay compensation to the Appellant.

4. Subsequently, the Appellant made a series of requests to FOS under the Freedom of Information Act 2000 ("FOIA"), in relation to its handling of his complaint.

5. The information later provided by the FOS adjudicator included correspondence from NatWest, some of which bore a confidentiality stamp stating as follows:

> "*This information contains CONFIDENTIAL INFORMATION relating to [RBSG's] commercial business activities which if disclosed by FOS to the complainant or to any third party would be likely to adversely affect our legitimate business interests*".

6. On 14 July 2016, the Appellant made a request under FOIA for information regarding the use of that stamp. FOS responded on 25 July 2016, stating that the information was not stored in searchable form, and it would therefore require a manual search. FOS also stated that the information was exempt from disclosure under section 12 of FOIA, because a manual search would exceed the specified cost limits. Pursuant to its obligations to provide advice and assistance under section 16 of FOIA, FOS said that it had considered whether it would be possible for the Appellant to refine the request, but having regard to the quantity of documents falling within the scope of the request, this was not possible.

7. On the same day, the Appellant submitted a revised request. On 5 August 2016, FOS informed the Appellant that it did not hold information falling within the scope of the revised request.

8. On 1 February 2017, the Appellant made another FOIA request (the "Request"), and it is that which is the subject of the present appeal.

The Request Giving Rise to the Present Appeal

9. The Request was made on the following terms:

> "*1. You stated that you and your colleague…have been "unable to locate any agreements, processes or communications with RBS or NatWest relating to them using a confidentiality stamp." But can you please state for the record, as a matter of fact, that no agreement, processes or communications exists or has existed between the bank and the FOS relating to their use of a confidentiality stamp or statement, and relating to what evidence the bank submits to the FOS which the bank would like the FOS to consider confidential and not to be released to complainants or third parties. If such agreements, processes or communications exists or has existed, can you please provide me with a copy of them.*
>
> *2. Has the confidentiality stamp that was used on the CES notes document the bank submitted to the FOS been use [sic] on other evidence in cases other than my own?* ***Yes*** *or* ***no****.*
>
> *3. Was the confidentiality stamp which the bank used on the evidence it submitted to the FOS in my case used as standard by the bank (i.e. on a large proportion or a significant number of the documents and evidence the bank submitted to the FOS) between 2011 and 2014?* ***Yes*** *or* ***no****.*
>
> *4. Was the same statement regarding confidentiality used as standard by the bank on emails the bank sent to the FOS (when it submitted evidence electronically) between 2011 and 2014?* ***Yes*** *or* ***no****.*"

10. The letter also included a further subject access request under the Data Protection Act 1998, which does not fall to be considered in this appeal.

11. FOS responded on 16 February 2017, stating that:

> "*[a]s we've previously explained to you – we don't record whether or when RBS or NatWest has put a confidentiality stamp on documents/evidence that it has submitted to us – in a searchable form on our system. We also don't record statements made by the bank about confidentiality in emails – in a searchable form. The only way to provide you with this information would be to individually search through every complaint we've had against RBS or Nat West since 2011 and then look through every document from the business.*"

12. FOS went on to explain that it had received 102,642 complaints against NatWest and RBS between 1 January 2011 and 31 December 2016, and that the cost of complying with the Request would considerably exceed the cost limit of £450 (18 hours at £25 per hour).

13. FOS also stated that it had:

> "…*considered whether we can provide you with any guidance as to how to refine your request – but given what you've asked for, we believe it's unlikely the request can be refined sufficiently enough to bring it within 18 hours*".

14. The Appellant requested an internal review. He also asked FOS to carry out a broad sampling exercise in order to establish whether the confidentiality stamp was used in other cases.

15. FOS responded on 15 March 2017. It stated, in relation to the first part of the Request, that it did not hold any relevant information concerning agreements, processes or communications with NatWest/RBS relating to their use of a confidentiality stamp.

16. As to the remainder of the Request, FOS reiterated its reliance on section 12 of FOIA. It stated that a broad sampling exercise would not be reasonable, given the volume of documents at issue, and also that such a sample may not be an accurate reflection of all the cases involving RBS or Nat West.

17. In addition, taking into account the extent of the previous correspondence with the Appellant, FOS also invoked section 14(1) of FOIA (vexatious requests).

The Complaint to the Commissioner

18. The Appellant complained to the Commissioner under section 50 of FOIA. The Commissioner investigated the complaint.

19. The Commissioner said, in her Decision Notice, that she was satisfied that compliance with the Request would require a manual review of documents from 102,642 cases, and that "*the time required to do this would vastly exceed the appropriate limit*". On that basis, the Commissioner accepted that section 12 applied.

20. As to the Appellant's suggestion that FOS should carry out a broad sampling exercise as a practical solution to the request, the Commissioner's view was that under FOIA, a public authority is not required to carry out such an exercise.

21. In light of her conclusions in relation to section 12, the Commissioner did not go on to consider whether FOS could also rely on section 14.

22. The Commissioner considered whether FOS had complied with its duty to provide advice and assistance under section 16 of FOIA. In her view,

however, since FOS did not record the information requested in a searchable form, it was unable to provide advice as to how to refine the Request sufficiently to bring it within the 18 hour time limit.

The Appeal to the Tribunal

23. The Appellant has appealed against the Decision Notice. The Appellant requested an oral hearing.

24. Prior to the hearing on 5 March 2018, we received a substantial bundle of documents. We have considered all the documents before us, including those received from the parties subsequent to the hearing, even if not specifically referred to in this decision.

25. The Commissioner did not attend the hearing. We have considered her position as set out in the Decision Notice, and in the Response to the Notice of Appeal.

Grounds of Appeal and the Commissioner's Response

26. The Appellant's grounds of appeal are extensive. A number of issues raised by the Appellant are not within this Tribunal's jurisdiction. In brief, we take the relevant grounds of appeal to be that:

- The Decision Notice contains a number of statements that are inaccurate and/or fails to refer to the Appellant's own views on particular issues, including as to FOS's reliance on sections 12 and 14;
- FOS did not satisfy the criteria for reliance on section 12;
- FOS did not comply with its duty to provide advice and assistance under section 16; and
- The Commissioner failed to take account of the public interest in disclosure of the information requested.

The Tribunal's Jurisdiction

27. The scope of the Tribunal's jurisdiction in dealing with an appeal from a Decision Notice is set out in section 58(1) of FOIA. If the Tribunal considers that the Decision Notice is not in accordance with the law, or to the extent that it involved an exercise of discretion by the Commissioner, he ought to have exercised the discretion differently, the Tribunal must allow the appeal or substitute such other Notice as could have been served by the Commissioner. Otherwise, the Tribunal must dismiss the appeal.

28. Section 58(2) confirms that on an appeal, the Tribunal may review any finding of fact on which the Decision Notice is based. In other words, the Tribunal may make different findings of fact from those made by the Commissioner,

and indeed, as in this case, the Tribunal will often receive evidence that was not before the Commissioner.

The Statutory Framework

29. Under section 1 of FOIA, any person who makes a request for information to a public authority is entitled to be informed if the public authority holds that information, and if it does, to be provided with that information.

30. The duty on a public authority to provide the information requested does not arise if the information sought is exempt under Part II of FOIA or if certain other provisions apply. In the present case, FOS has invoked sections 12 and 14. The Appellant relies on section 16.

Section 12

31. Section 12 of FOIA provides that a public authority is not required to comply with a request for information if it estimates that the cost of complying with the request would exceed the "appropriate limit".

32. The "appropriate limit" is set out in the Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2004 (the "Regulations"). In the case of a public authority listed in Part I of Schedule 1 of FOIA, the appropriate limit is £600. In the case of any other public authority, the appropriate limit is £450. FOS is not listed in Part I of Schedule 1 of FOIA. It is therefore subject to the lower limit of £450.

33. Regulation 4 provides that a public authority may, for the purposes of estimating whether the cost of complying with a request for information would exceed the appropriate limit, take account only those costs that it "reasonably expects" to incur, in determining whether it holds the information, in locating the information, retrieving the information and extracting the information from a document containing it. The costs are to be estimated at a rate of £25 per hour.

Section 14

34. Section 14 of FOIA sets out two grounds on which a public authority may refuse a request. The first is where the request is vexatious. The second is where the request is identical or substantially similar to a previous request that the public authority has already complied with. FOS has relied on the first.

35. Where section 14 applies, the public authority does not have to provide the information requested, nor indeed is it required to inform the requester if it holds the information.

Section 16

36. Section 16(1) of FOIA requires a public authority to give advice and assistance to any person making an information request, so far as it would

be reasonable to expect them to do so. Under section 16(2), this is clarified to mean that provided a public authority conforms to the recommendations as to good practice contained in the Code of Practice ("the Code") issued pursuant to section 45 FOIA, it will have complied with section 16(1).

37. The Code provides, in relation to the duty to advise and assist, that where the cost of compliance would exceed the appropriate limit, public authorities should:

> *"…consider providing an indication of what, if any, information could be provided within the appropriate ceiling. The authority should also consider advising the applicant that by reforming or re-focussing their request, information may be able to be supplied for a lower, or no, fee."*

38. The Commissioner has highlighted that the obligation under the Code of Practice is to "*consider*" providing an indication of what information could be provided within the appropriate limit. The Commissioner says there will be cases in which the scope of a given request is so broad that it would not be possible for a public authority to provide meaningful advice as to how a request might be refined.

39. The Commissioner's own guidance states that at a minimum, a public authority should indicate if it is able to provide any information at all, coming within the scope of the request, within the applicable cost limit. It goes on to explain that if the requestor understands the way in which the estimate has been calculated, it should help them to decide what to do next.

40. In All Party Parliamentary Group on Extraordinary Rendition v Information Commissioner and Ministry of Defence [2011] UKUT 153 (AAC), the Upper Tribunal stated (at para 47), in relation to section 16, that in cases where the request for information is not *"abusive or frivolous",* dialogue is contemplated between the public authority and the requester to "*refine the request to what is realistically available within cost*".

The Appeal Hearing

41. At the start of the hearing on 5 March, we confirmed with the parties that we had all the papers on which they intended to rely. We also ascertained that there was someone present from FOS who knew how its files are organised and would be able to give meaningful assistance on those issues.

42. We then sought to clarify the issues with the parties. During the course of those preliminary discussions, the Appellant said that he was no longer pursuing points 1 and 4 of the Request. Therefore, the only live issues in this appeal were now in relation to points 2 and 3, namely:

> *2. Has the confidentiality stamp that was used on the CES notes document the bank submitted to the FOS been use [sic] on other evidence in cases other than my own?* ***Yes*** *or* ***no****.*

3. Was the confidentiality stamp which the bank used on the evidence it submitted to the FOS in my case used as standard by the bank (i.e. on a large proportion or a significant number of the documents and evidence the bank submitted to the FOS) between 2011 and 2014? ***Yes*** *or* ***no****.*

43. Having read the papers and having heard opening submissions from both parties, we invited them to consider whether, given an opportunity, they could resolve the remaining issues in this appeal. We made it clear that they were not obliged to take the opportunity. Both indicated their willingness to do so. We gave them the time requested. At the end of that time, we were informed that they were making good progress in discussing how the Request could be narrowed so that the Appellant could obtain a meaningful response within the prescribed cost limits.

44. In due course, they informed us that they had reached agreement as to the searches that would be carried out and the amount of time that would be spent on the basis of a reformulated and narrower Request, and further, that it was expected that on completion of that exercise, the Appellant would withdraw his appeal.

45. Directions were made for the agreement between the parties to be recorded and provided to the Tribunal, and also for the Tribunal to be notified by 30 April as to whether the Appellant was indeed withdrawing his appeal as anticipated, or whether the appeal was to continue, in which case the hearing would reconvene on 30 May.

46. In the event, we were informed by the parties on or around 30 April, that despite the searches undertaken by FOS on the basis agreed between the parties, the Appellant wished to pursue the appeal because he considered that he had not been correctly informed about FOS's retention policy, and that in effect, relevant information had been destroyed. The Appellant's position was that had FOS dealt with the Request properly when it was made, that information would still have been available.

47. The hearing reconvened on 30 May. The Appellant expressed his appreciation for the efforts that had been made by FOS on and since 5 March, and also made it clear that he was not alleging any impropriety by FOS. However, because he could not obtain the information that he considered he would have been able to obtain as at the date of the Request, he was seeking a finding from the Tribunal to the effect that FOS had not complied with its obligations under FOIA.

48. On behalf of FOS, Mr Davidson initially sought to argue (although not with great force), that the agreement reached between the parties disposed of the appeal. We pointed out to him, however, that the agreement reached was not akin to a consent order, and that it was always anticipated that if the Appellant chose not to withdraw the appeal, the hearing would proceed. Mr Davidson also submitted that the Tribunal should strike out the appeal under Rule 8(3)(c) of the Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules 2009 (as amended), on the basis that there was no reasonable prospect of the Appellant's case, or part of it succeeding. We

declined. As will be clear from our findings, this is not a case in which there was no reasonable prospect of the Appellant's case, or part of it, succeeding.

49. The hearing proceeded on the basis of submissions. There was no oral evidence on the basis that we had read the witness statements and there was nothing further to add.

50. FOS asked the Tribunal to make a finding in relation to section 14.

Findings

51. Because of what had transpired at and after the hearing on 5 March, and the stage that had been reached between the parties by the time of the hearing on 30 May, the issues in dispute are narrower than they would otherwise have been.

52. The issues that we need to determine are in relation to sections 12, 14 and 16 of FOIA. We have already summarised these provisions above. A finding in favour of FOS under sections 12 or 14 would dispose of the appeal. However, at the parties' request, we will reach findings on both.

Section 14

53. We will begin section 14. Was the Request vexatious? If it was, then no obligations arise under section 16. As already noted, the Commissioner made no findings in relation to section 14.

54. FOIA does not define "vexatious". However, there have been a number of decisions of the Upper Tribunal ("UT") which have offered guidance as to what the term means in the context of information requests. The principles are perhaps most comprehensively set out in Information Commissioner v Devon County Council and Dransfield; Craven v Information Commissioner and Department of Energy and Climate Change, and Ainslie v Information Commissioner and Dorset County Council.

55. These cases all concerned section 14(1) of FOIA and/or the corresponding provision under the Environmental Information Regulations 2004. They were heard by Judge Wikeley, who treated Dransfield as the 'lead case' and set out guidance on the meaning of "vexatious" which we have summarised below:

- In the context of section 14, "vexatious" carries its ordinary and natural meaning, within the particular statutory context of FOIA. The dictionary definition of "vexatious" as *"causing, tending or disposing to cause … annoyance, irritation, dissatisfaction or disappointment can only take us so far"*. As a starting point, a request which is annoying or irritating to the recipient may well be vexatious, but it depends on the circumstances.

- "Vexatious" connotes *"manifestly unjustified, inappropriate or improper use of a formal procedure"*. Such misuse may be evidenced in different ways.

- The Commissioner's guidance that *"the key question is whether the request is likely to cause distress, disruption or irritation without any proper or justified cause provides a useful starting point so long as the emphasis is on the issue of justification (or not)"*.

- The purpose of section 14 is to protect public authorities and their employees in their everyday business. Thus, consideration of the effect of a request on them is entirely justified. A single abusive and offensive request may well cause distress, and so be vexatious. A torrent of individually benign requests may well cause disruption. However, it may be more difficult to construe a request which merely causes irritation, without more, as vexatious.

- An important aspect of the balancing exercise may involve consideration of whether there is an adequate or proper justification for the request.

- A common theme underpinning section 14(1) as it applies on the basis of a past course of dealings between a public authority and a particular requester, is a lack of proportionality.

56. He stressed that this guidance is not intended to be prescriptive, and went on to say that the question of whether a request is truly vexatious may be determined by considering four broad issues or themes:

- The burden on the public authority and its staff;

- The motive of the requester;

- The value or serious purpose of the request; and

- Any harassment or distress caused to the staff.

In paragraphs 29 to 45, he set out further guidance about each of these four themes.

57. The UT decisions in Craven and Dransfield were upheld by the Court of Appeal ("CA"). In Dransfield v ICO & Devon County Council; Craven v ICO & Department for Energy and Climate Change [2015] EWCA Civ 454, the CA added that the starting point is that vexatiousness primarily involves making a request which has no reasonable foundation, that is, no reasonable foundation for thinking that the information sought would be of value to the requester, or to the public, or to any section of the public. It went on to say (at para 68), that:

> *"Parliament has chosen a strong word which therefore means that the hurdle of satisfying it is a high one, and that is consistent with the constitutional nature of the right. The decision maker should consider all the relevant circumstances in order to reach a balanced conclusion as to whether a request is vexatious".*

58. The CA also considered that where a motive can be established, that may be evidence of vexatiousness, although if a request is aimed at disclosure of

important information which ought to be publicly available, then even a "vengeful" request may not meet the test.

59. The UT has revisited the issue of vexatious requests in a number of further cases, including CP v Information Commissioner [2016] KUT 427 (AAC) which considered whether the FTT had correctly given weight to the nature of the requests made and had conducted an appropriately rounded assessment in the light of the high hurdle required to satisfy section 14(1), and whether the evidential basis for the FTT's decision was sufficiently clear. The UT stressed that the high hurdle for satisfaction of the section 14(1) test requires an appropriately detailed evidential foundation of the course of dealings between the requestor and the public authority. While a compendious and exhaustive chronology exhibiting numerous items of correspondence is not required, there must be some evidence, particularly from the Commissioner, about the past course of dealings between the requestor and the public authority, which explains and contextualises them. The UT went on to say that a proper scrutiny of the number of previous FOIA requests requires more than a superficial count, and that section 14 should not be invoked without objective and careful justification.

60. We turn now to the facts of the present case, which for convenience, we will consider by reference to Judge Wikeley's 4 themes set out at paragraph 55 above.

61. As to burden, clearly, the Request was much greater in scope than could have been dealt with under the cost limits. However, to that extent the public authority could rely on section 12, as FOS has done. In some cases, a request may pose an extremely costly burden for the public authority, but those burdens may not be ones which it is permitted to rely on for the purposes of section 12 because it goes beyond the location of the information and extends to the review of information for whether exemptions and redactions are required. We accept that section 14 can extend to such cases. and indeed this is made clear in CP, and again in Oxford Phoenix Innovation Ltd v Information Commissioner & Medicines and Healthcare Products Regulatory Agency [2018] UKUT 192 (AAC), but there is almost no evidence before us as to that being the position with the Request.

62. The Request must, however, be seen holistically, in its totality, and in the context of the Appellant's previous and likely future requests. This is inkeeping with Judge Wikeley's guidance in Dransfield (at paragraph 29):

> *"First the present or future burden on the public authority may be inextricably linked with the previous course of dealings. Thus the context and history of the particular request, in terms of the previous course of dealings between the individual requester and the public authority in question, must be considered in assessing whether it is properly to be characterised as vexatious. In particular, the number, breadth, pattern and duration of previous requests may be a telling factor."*

63. While there is some evidence before us as to the Appellant's other requests made to FOS (both under FOIA and DPA), it has not been presented along

the lines envisaged by CP (see paragraph 58 above), and indeed there is no real evidence that the number, breadth, pattern or duration of the previous requests have been particularly burdensome. As to future burden, the evidence does not suggest that the Appellant is on a fishing expedition. The Request had a specific purpose, and while the Appellant may make further requests, it is by no means evident that he will continue to do so.

64. As regards motive, value and purpose**,** for convenience, we have considered these two themes together because on the facts of the present case, as indeed in Dransfield, the issues are closely intertwined.

65. The motive of the requester may well be a relevant and indeed a significant factor in assessing whether a request is vexatious. Judge Wikeley noted in Dransfield*,* at paragraph 34, that *"the proper application of section 14 cannot side-step the question of the underlying rationale or justification for the request"*.

66. The Appellant's assertions that the Request serves a public interest runs to many pages in his grounds of appeal, further submissions and witness statements, in which he seeks to explain the context and background to the Request. In his view:

- The effect of the confidentiality stamp has been to make secret or confidential the detail of the banks' submissions to the FOS on a complaint, even where those submissions concern details specific to the complaint and complainant, and are not a matter of genuine commercial confidentiality.

- In his particular case, the bank's submissions altered its own customer service records so as to misrepresent facts and put the bank's case in the best light.

- In preventing scrutiny of the bank's submissions by the complainant, the confidentiality stamp allows misrepresentation or false statements to go unchallenged and allows complaints to be settled on the basis of a false representation of facts by the bank.

- It is also wrong to represent the Request as a persistent pursuit of a personal grievance; the Request raises a matter of significant public interest.

- the Financial Conduct Authority ("FCA") informed him that it would be a criminal offence under section 348 of the Financial Services and Markets Act 2000, for him to reveal the fact that during the FCA's investigations, RBS had admitted using the confidentiality stamp as standard practice between 2011 to 2014. He says therefore, that the only viable way for him to establish its use was through a FOIA request to FOS.

67. The Appellant also relies on the witness statement of Mr Andrew Keats, a former Metropolitan Police Sergeant, and now a Director of SME Alliance Ltd ("SMEA") and Serious Banking Complaints Bureau Ltd ("SBCB"). He says

that SMEA is a not for profit lobby group and is an Associate Member of the All Party Parliamentary Group for Fair Business Banking. SBCB investigates serious complaints where dishonesty is alleged. He links the Appellant's case to allegations that RBS staff in the Global Restructuring Group (GRG) have manipulated customer files so as to flatter RBS's position during customer disputes. Mr Keats also comments on his own and others' experiences of the dealings between GRG and small and medium businesses. He refers to 6 case studies presented to the FCA, who he says declined to investigate on the grounds that individual complaints are outside its jurisdiction. He suggests that malpractice is systemic and potentially widespread, as uncovered in the FCA's 166 Report relating to GRG. He expresses surprise that the FOS and ICO have failed to take into account all the circumstances of the case in arriving at their decision on the Request.

68. FOS' position on section 14 is briefly that:

- The Appellant's previous requests have been burdensome; they have been detailed, often set out a series of questions, and replying has simply led to follow up requests, addressing substantially similar points.

- Dealing with his requests has diverted a small team from dealing with genuine requests; this is unfair to others, detrimental to the public interest and the efficiency of the FOS.

- The Request is of little if any public interest; it relates to the practices of banks and whether they use confidentiality stamps or statements.

- The stamps and statements are not determinative, and FOS will always reach its own view on whether a document is confidential or not.

- The Appellant has no genuine interest in the use of confidentiality stamps and statements which do not deal with him.

- The requests and correspondence between the Appellant, the FOS, the Financial Conduct Authority (the "FCA"), the Independent Assessor and others, suggests that the Appellant's primary motivation is not the information sought in each case, but rather he is seeking to pursue his underlying grievance in whatever forum he can. Section 14 is intended by Parliament to provide a bulwark against such personal crusades.

69. The FCA is not a party to the appeal. However, FCA's letter of 18 January 2017 to the Appellant (at page 27 of the open bundle), states that the FCA investigated but did not agree with the Appellant's view that the only reason for a bank to mark information as confidential is because records had been falsified. It also did not accept that records had been falsified in his case. The FCA letter covers various other strands of his complaint and concludes that it would not be proportionate to investigate the Appellant's concerns further. The Appellant wishes us to record that he does not accept the FCA's interpretation of his complaint or its decision.

70. We turn now to our findings. In this case, as in many others involving section 14, the Tribunal finds itself balancing the conflicting assertions of the parties without being in a position to make findings on the underlying substantive issue, in this case, as to whether confidentiality stamps or statements have in fact been used to cover falsified or misrepresented facts, shielding them from those making a complaint. It is not for us to review the FCA's findings in the letter referred to at paragraph 69 above, nor would it be appropriate to express any view about the Appellant's concerns underlying the Request.

71. Nevertheless, the issues raised about the use of the confidentiality stamp or statements, are clearly of potential public interest. It is important to public confidence that decisions by ombudsmen and regulators are seen to be based on a fair and balanced account of facts. We do not accept that the Appellant is pursuing a narrow private issue, with no wider interest in the information sought. He has given an exhaustive chronology of how he came to be concerned about the wider public interest issues, and why he questions perceived inconsistencies in the responses he has been given. He is supported on the wider public interest aspects by Mr Keats, whose evidence, though not tested by cross examination, we accept comes from a knowledgeable witness.

72. FOS has not sought to challenge factual particulars in the Appellant's evidence, and has relied instead, in the main, on a broad characterisation of his requests and previous history.

73. While we make no findings on the issues in dispute between the Appellant and the FOS, we cannot conclude that the Request is a manifestly unjustified, inappropriate or improper use of a formal procedure, nor that the information sought is of no value to the public or any section of the public.

74. Of course, having a justification does not mean that a request cannot be vexatious. As Judge Wikeley noted, in some cases, the value or purpose may dim over time and subsequent requests may not have a continuing justification. He described this as "vexatiousness by drift". On the evidence before us, however, we do not find that the Appellant's quest has become disproportionate to that original purpose.

75. Finally, although a finding of vexatiousness does not depend on there being harassment or distress of the public authority's staff, vexatiousness may be evidenced *"…by obsessive conduct that harasses or distresses staff, uses intemperate language, makes wide-ranging and unsubstantiated allegations of criminal behaviour or is in any other respects extremely offensive…"* (Dransfield, at paragraph 39).

76. We do not have any evidence before us from any members of staff at FOS about the effect on them of the Request, nor any previous requests made by the Appellant. There is also nothing in the evidence before us to suggest that the Appellant's conduct, language or assertions were such as to have given rise to harassment and/or distress. The presentation of the Request, and ensuing communications have not been in offensive or intemperate terms.

77. For all these reasons, and on balance, we do not agree that FOS has satisfied the "high bar" referred to by the CA for establishing that the Request is vexatious. This does not mean, of course, that any future request(s) made by the Appellant to FOS will not properly be characterised as vexatious. The finding we make is on the evidence before us, and it may well be that if the issue arises in the future, the evidence will support a different finding.

Sections 12 and 16

78. There can be no doubt that FOS was entirely correct in its view that to comply with the Appellant's request, would well exceed the prescribed cost limit. Indeed, the Appellant does not dispute this. It is also well accepted that where section 12 is engaged, a public authority does not have to provide information up to the section 12 cost limits.

79. The only real issue in dispute, in relation to section 12, is whether under section 16, FOS should have engaged with the Appellant, and whether the Appellant would have been able to narrow the Request to what was realistically available within the cost limits.

80. The evidence shows that before refusing the Request, FOS did not engage with the Request or offer the Appellant the opportunity to narrow the Request, much less did they attempt to assist him to do so. This is not a case where the request for information was abusive or frivolous, nor indeed has FOS suggested that it was (notwithstanding its reliance on section 14), such that FOS could be excused for failing to do so.

81. We recognise that in its engagement with the Appellant at and after the hearing on 5 March, FOS went the extra mile, both in the amount of time it spent, as well as the extent of control that it gave to the Appellant, as to the scope of the searches, and that this was beyond what section 16 requires. Nevertheless, the exercise did demonstrate that there were possibilities that could have reasonably been explored. FOS could have offered, for example, to search a certain number of files. As to whether a public authority should be expected to undertake a sampling exercise, we do not say that it would be appropriate in all cases, but it may, in some cases, like this one, be a reasonable way for a public authority to discharge its obligations under section 16.

82. In short, we find that FOS failed to comply with its obligations under section 16. However, because of the steps that it has since taken on and after 5 March, we do not direct FOS to take any further steps in this regard.

Other Points

83. FOS has made an application for costs on the basis that the Appellant has acted unreasonably in continuing with the appeal after FOS had complied with the agreement reached between the parties on 5 March. FOS relies on paragraph 10(1)(b) of the Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules 2009**,** which provides that if the Tribunal considers that a party has acted unreasonably in bringing, defending or conducting the proceedings, it may make an order in respect of costs. Sub

paragraphs (3) to (6) set out the procedures to be followed before the Tribunal makes such an order.

84. The Appellant's reasons for continuing with the appeal and seeking a finding from the Tribunal are set out in paragraphs 46 and 47, above. In our view, the Appellant's decision to continue with the appeal, though accepting that he could not ask for FOS to do anything further in relation to the Request (and indeed, Mr Samson made it clear that the Appellant was not asking the Tribunal to direct FOS to do anything further), does not mean that he has acted unreasonably. He was not obliged to withdraw the appeal and has given reasons for his decision to continue.

85. Finally, we wish to make it clear that while we have found that FOS did not comply with its obligations under section 16, no criticism attaches to Mr Davidson or those instructing him in connection with this appeal. We recognise that FOS, like many public authorities, will have different people involved at different stages. Whatever may have been the case prior to the hearing, we are grateful for the constructive approach taken by FOS in the course of the hearing of this appeal.

Decision

86. This appeal is allowed in part.

87. Our decision is unanimous.

Signed

Anisa Dhanji
Judge

Date: 15 September 2018
Promulgation date: 9 October 2018

At the Appellant's request, some corrections have been made on 8 October 2018, pursuant to Rule 40 of the Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules 2009, which allows for the correction of clerical mistakes or accidental slips or omissions in a decision.