



**First-tier Tribunal  
(General Regulatory Chamber)  
Information Rights**

**Appeal Reference: EA/2021/0102V**

**Before**

Judge Stephen Cragg Q.C.

and

Ms Raz Edwards  
Mr Stephen Shaw  
*Tribunal Members*

**Heard via the Cloud Video Platform on 19 October 2021**

**Between**

**David Howie and Soula Howie**

Appellant

and

**The Information Commissioner  
Financial Ombudsman Service**

Respondents

The Appellants represented themselves

The Commissioner was not represented

The Financial Ombudsman Service was represented by Mr Leo Davidson

## DECISION AND REASONS

### DECISION

1. The appeal is dismissed.

### MODE OF HEARING

2. The proceedings were held via the Cloud Video Platform. All parties joined remotely. The Tribunal was satisfied that it was fair and just to conduct the hearing in this way.
3. The Tribunal considered an agreed open bundle of evidence, submissions and correspondence, comprising 306 pages.

### BACKGROUND

4. On 17 December 2019 the Appellants wrote to the Financial Ombudsman Service (FOS) and requested information in the following terms:

We're obliged to write again following the IA's input and further detailed discussions with FOS Investigator [Redacted] and the banks. We notify you of the following illegality and request a serious case review.

Firstly, in his final decision, Ombudsman [Redacted] tries to force us to accept the banks' ongoing information rights abuses in order to have our residential mortgage extended. The internally nominated complaint handling organisation at the banks still can't access or even locate the documents we've complained about. No bank or FOS service user should ever be placed in the position of having to accept such illegality before it is unequivocally rectified.

**We understand that senior level FOS discussions took place in May 2018 about the specialist remortgage process which in our case has gone badly wrong and is currently impossible to rectify. We're putting in an FOI request to you now for all the information FOS has about that to assist our own investigations..." (emphasis added).**

5. We have based our description as to how FOS responded to the request from the outline in the Commissioner's decision notice (which we refer to in detail below). FOS responded on 17 January 2020. FOS told the Appellants that its casework team had advised that its senior colleagues had carefully considered the "specialist remortgage process" issue the complainants had referred to. They had decided it was something that could be dealt with routinely, on a case by case basis, by colleagues in casework.
6. FOS confirmed that, because of this, it does not hold central, formal records that the Appellants had asked for. FOS went on to say that it may be the case that its case handlers and senior colleagues had informal discussions about how to progress individual complaints. They may have had face-to-face meetings, and telephone or email discussions about individual cases. So the requested information could be held in a number of different places, for example in individual mailboxes, written notes, or held in individual case files.
7. FOS explained that because the information is not held in an easily searchable format or a central location, in order to provide the Appellants with more details about discussions relating to the 'specialist remortgage process', it would have to carry out extensive searches. These searches would include searching through the mailboxes of case handlers and ombudsmen working on mortgage complaints, for any emails containing the information the complainants had asked for. It would also be necessary to get in touch with individual ombudsmen and case handlers

to ask for any notes or records they may hold about such discussions. FOS said that, in addition, it would have to search through all of the complaints it has received about Bank of Scotland in relation to mortgages, to see if the information is held on individual case files.

8. On the basis of this FOS advised the Appellants that it was reasonable to estimate that searching for any relevant information would take longer than 18 hours. As such, FOS relied on section 12 FOIA to refuse to comply with the request. FOS also advised the Appellants that they might refine their request to bring complying with it within the cost limit. But it also advised that information about other people's FOS cases would be exempt from disclosure under section 40(2) FOIA, which concerns personal data.
9. Following an internal review FOS wrote to the Appellants on 18 March 2020, and provided them with the written recollection of the ombudsman who had dealt with their original complaint to FOS, and this indicates that recorded information relevant to their request was not held. FOS also upheld its position to confirm this would exceed the cost limit under section 12 FOIA.

## THE LAW

10. Section 1(1) FOIA sets out the basic right of the freedom of information regime:-
  - 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.
11. Section 12(1) of the FOIA states that:-

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.

12. This limit is set in the Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2004 (the Fees Regulations) at £600 for central government departments. The Fees Regulations also specify that the cost of complying with a request must be calculated at the rate of £25 per hour, meaning that section 12(1) effectively imposes a time limit of 24 hours in this case. Such costs are 'attributable to the time which persons undertaking any of the activities mentioned in paragraph (3)[see below] on behalf of the authority are expected to spend on those activities'.

13. Under regulation 4(3) of the Fees Regulations, when making its cost estimate, the public authority may take account only of the costs it reasonably expects to incur in relation to the request in carrying out four specified activities, namely:-

- (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.

#### THE DECISION NOTICE

14. The Commissioner's decision notice of 18 March 2021 explained that the scope of the investigation focused on whether FOS was entitled to refuse to comply with section 1(1)(a) FOIA in respect of the request, applying

section 12(2) FOIA, and also whether FOS had complied with its duty under section 16(1) FOIA to offer the Appellants advice and assistance.

15. The Commissioner sets out some information about the FOS functions to resolve certain disputes that customers and businesses are not able to resolve themselves and states:-

21. FOS has explained that the complainants in this case disagreed with the decision reached by the investigator and the ombudsman on their case. Their request for information was, FOS considers, likely related to an email from the investigator to the complainants on 30 April 2018 which said “part of your complaint is about you being asked to complete a specialist re-mortgage from Birmingham Midshires to Bank of Scotland in order to extend the term on your residential mortgage account. Our approach to these types of applications is currently being considered at a higher level within our service”.

16. The Commissioner records that FOS explained it had contacted the lead of the relevant practice group and asked him for information about the request. The lead explained that high level discussions had not taken place on this topic and, as such, the information was not held. Essentially it is said that what had occurred was an informal discussion about the issue between the investigator and the ombudsman for which records would not have been made.

17. The FOS explained to the Appellants that the information sought was not held on their case, but did acknowledge (taking a wider view of the request) that it was possible that other investigators may have sought advice from ombudsmen on similar topics and received ad hoc advice on a case by case basis, but that this information would likely be held on individual complaint files, of which it was estimated there would be about 1,100, or perhaps over emails dealing with the issue more generally. The FOS explained that even if it took 30 minutes to review each file, it would take 550 hours to complete the search. If the advice had been received by

an investigator more generally, that would need to be searched for in 1,395 individual investigator mailboxes.

18. On that basis the Commissioner was satisfied that the Appellants request engaged the exemption under section 12(2) FOIA and that FOS was not obliged to comply with it. The Commissioner was also satisfied that FOS offered the Appellants adequate advice and assistance for the purposes of s16(1) FOIA. The FOS had suggested how the Appellants might narrow down the scope of their request by providing specific names or requesting searches of certain mailboxes as an example. It also advised them that, even if it was able to confirm whether it holds relevant information, any information about other people's complaints would be exempt under section 40(2) of the FOIA.

#### THE APPEAL AND RESPONSE

19. On 15 April 2021, the Appellant filed an appeal against the decision notice, which states:-

B) In summary, section 12 of the Freedom of Information Act 2000 (FOIA) does not apply. The public authority, the Financial Ombudsman Service (FOS), must release the information requested by the complainants under section 1(1) of the FOIA.

C) The information requested was appropriately specified by the complainants to the systemic aspects of their individual case which were subject to a notified prearranged meeting between an FOS Practice Group Leader and the FOS Investigator. During the meeting, the requisite information was conveyed by the former to the latter and acknowledged in writing to the complainants as received by the latter. The former later became the FOS Ombudsman in the complainants' case.

D) The complainants have been clear that they particularly require to be communicated to them the reasoning behind the FOS Practice Group Leader's decision to exclude consideration of the clear illegality of the systemic aspects of the complainants' family household case. This information is absent from both the FOS

Investigators formal view and the FOS Ombudsman's final decision.

E) The systemic aspects have been informally assessed by the Equality Advisory and Support Service (EASS) as in breach of several articles of the Human Rights Act 1998, including articles 3 and 8. The complainants and their family household continue to receive degrading treatment from the financial and information sectors.

F) The disability provisions of the Equality Act 2010 also apply in relation to the pervasive impact upon the complainants' severely disabled (step)son who lives with them.

G) There is a compelling public interest argument simply due to the systemic illegality intrinsic to the financial sector process which the FOS has overlooked. Public interest in maintaining the FOS's non-disclosure of its reasoning does not outweigh the public interest in disclosure in this case. Furthermore, there are obvious perpetuated harms to the public from non-disclosure, as the complainants' family household has experienced for almost four years at first hand. For example, they have been condemned to repeat and repeat their legitimate complaints and there can be little more offensive than that in view of the main family household member medical disability which is at the centre of the financial sector arrangement.

20. The Appellants have enlarged these arguments in further documents which we have taken into account to understand the points made above.

21. There is a witness statement from Simon Pugh dated 14 September 2021 who is an ombudsman manager working with the FOS. Mr Pugh explains:-

I understand that the Appellants say that I had "senior level discussions" about the "specialist re-mortgage process" with one of our investigators, Ryan, at the time that Ryan was investigating the Appellants' complaint in May 2018. Ryan is an investigator employed by the Ombudsman Service and he investigated the Appellants' complaint about the bank in question ("the Bank"). Following Ryan's investigation, the complaint was allocated to me, as an Ombudsman, to make a determination of the complaint....



.... I confirm that I believe I did speak to Ryan – in or around May 2018 – as he flagged the “specialist re-mortgage process” to me, as something that he had not seen before. This was prior to the complaint being allocated to me to determine, and was flagged to me in relation to my role as practice group lead, rather than as the deciding ombudsman.

..I exhibit to this statement Exhibit [SP1], with an email chain between myself, the colleague from the information rights team and Ryan. In this email chain, I explained that I remembered that Ryan had flagged the “specialist re-mortgage process” to me around this time as something that he had not seen before and thought might merit wider policy consideration. I recalled that I had had a look at it to consider whether it was something that the mortgage practice group needed to take further and thought that, in fact, it was something that could be dealt with on a case by case basis as part of routine casework. I note that Ryan also confirmed within that email chain that that also accorded with his recollection. I also explained that this was the sort of routine thing that happens in practice groups all the time – practice group leads have issues flagged to them to decide whether or not they require wider policy consideration and, if they don’t require wider consideration, there will not be any record of those informal discussions.

## THE APPEAL HEARING

22. At the appeal hearing we took the opportunity of exploring with Mr Howie (on behalf of both of the Appellants) how he interpreted the scope of the Appellants’ request. As we understood it, he disavowed the FOS interpretation which would mean that extensive searches of FOS case files and email accounts needed to take place, which explains the appeal ground set out at (B) above, to the effect that s12 FOIA is not applicable.
23. However, he also said that the scope of the request was not limited to the information which may have passed between Mr Pugh and the investigator as reported in Mr Pugh’s witness statement. Mr Howie said that in addition the Appellants were concerned about the reason why Mr

Pugh had not pursued the wider policy considerations which should have been explored, given the wider public interest in the matter (which we think is reflected in point (D) of the Appellants' appeal). He was also of the view that any search for information to respond to the request should have gone beyond the conversation between Mr Pugh and the investigator, and should have explored the role of others who Mr Howie believed should have been involved in the issue, and a particular official (a Mr Norton) was mentioned who was the investigator's line manager.

24. Mr Pugh gave evidence at the hearing. He stood by the account he gave in his written statement and said that the discussion of the potential wider issues of the 'specialist re-mortgage process' were discussed by him and the investigator, but that he decided that the matter could be dealt with on a case by case basis. He said that he was not aware of any other contact on the potential wider issues between the investigator and Mr Norton, and did not recall any further contact on the issue between himself and Mr Norton.

25. On behalf of the FOS, Mr Davidson argued that the witness statement of Mr Pugh, his evidence, and the email exchange engendered by the Appellant's request (which included contributions from Mr Pugh and the investigator), all pointed to the conclusion that the limit of the consideration of the wider issues by FOS (in relation to the Appellant's case at least) was the informal discussion between the investigator and Mr Pugh about which there were no formal records.

26. Mr Davidson also submitted that FOS was entitled to consider the much wider interpretation of the request. It had a duty to consider the request objectively and therefore when the Appellants requested 'all the information FOS has about **that**' (**emphasis added**) in relation to 'senior level FOS discussions took place in May 2018 about the specialist

remortgage process', it was reasonable to conclude that the request went beyond any discussions which may have taken place in relation to the Appellant's case.

27. After the hearing Mr Howie sent a further submission to the Tribunal which provided us with more information as to what he calls the 'back story' of this case, which he says has been misunderstood and trivialised.

## DISCUSSION

28. We explained to Mr Howie that the Tribunal was limited in relation to some of the points he wished to pursue in this case. In particular, the Appellants are concerned about the reasons why Mr Pugh (or anyone else) did not consider the wider issues raised by specialist remortgage process. However, our role is not to consider what could or should have been done by employees of a public authority in the exercise of their duties, and not even to consider what could or should have been recorded by those officials. Our role is to consider whether the public authority does, in fact, hold the requested information.

29. The Appellants may or may not have a good argument that wider issues raised by the specialist remortgage process should have been considered by FOS, but this Tribunal does not have the jurisdiction (nor the expertise) to draw conclusions on that issue.

30. Thus, we are not in a position to comment as to whether Mr Pugh or anyone else should have done more so that more information was available on the issue.

31. We have, however, read and heard the evidence of Mr Pugh and seen the email exchanges exhibited to his statement from him and the investigator. In our view it was sufficient for FOS to make enquiries of Mr Pugh and the investigator to reach a decision as to whether the information requested was held by FOS. Both Mr Pugh and the investigator referred to a routine discussion on the issue and that there were no records created. Neither the investigator nor Mr Pugh referred to discussions with others at FOS about the issue, and Mr Pugh's evidence was that he did not recall any contact with Mr Norton, when that issue was put to him. On the balance of probabilities we find that FOS did not hold any of the requested information in relation to the Appellant's case.
32. We also find that, on an objective reading of the request, FOS were entitled to form the view that the Appellants could have been seeking information on a wider basis. (We note that assistance was offered to the Appellants to refine their request but this offer was not taken up). In considering that wider basis, in the alternative, we accept the account given to the Commissioner by FOS that a search of investigator files and relevant email boxes would easily have exceeded the eighteen hour limit imposed by the Fee Regulations such that the application of the s12 FOIA exclusion from responding to the wider interpretation of the request was triggered.
33. We note that the Appellants have emphasised the public interest in disclosing the information sought, and we accept that there may well be a wider public interest in the matters raised about the specialist remortgage process. However, the public interest cannot assist if the information is not held, as it cannot be disclosed in any event. Public interest arguments also do not assist in the application of s12 FOIA as there is no requirement to consider the public interest when a public authority seeks to rely on s12 FOIA. Once a public authority has established that it has made a reasonable assessment that the time limits will be exceeded it is entitled

not to take any further steps in searching for or disclosing the information, without the need to consider any balancing public interest factors.

## CONCLUSION

34. We recognise the frustration felt by the Appellants that the FOI process is unable to advance the issues they want to pursue any further, but in our view the Commissioner and FOS have correctly applied the provisions of the FOIA in this case.
35. On that basis this appeal is dismissed.

**Stephen Cragg QC**

**Judge of the First Tier Tribunal**

**DATE OF DECISION: 25 October 2021.**