Neutral citation number: [2024] UKFTT 001088 (GRC)

Case Reference: EA/2022/0433

First-tier Tribunal
(General Regulatory Chamber)
Information Rights

Heard Remotely
Heard on: 15 October 2024
Decision given on: 04 December 2024

Before

DISTRICT JUDGE WATKIN
MEMBER SAUNDERS
MEMBER SHAW

Between

STEVE SANDERS

Appellant

and

THE INFORMATION COMMISSIONER (1)

FINANCIAL OMBUDSMAN SERVICE (2)

Respondents

Representation:

For the Appellant: In person

For the First Respondent: No attendance

For the Financial Ombudsman Service: Mr Hopkins

Substituted Decision Notice:

1. The Financial Ombudsman Service is not required to disclose the information requested by the Appellant on 22 January 2022, due to the request being considered to be vexatious pursuant to section 14 of the Freedom of Information Act 2000.

REASONS

BACKGROUND

1. This Appeal dated 15 December 2022 by Mr Steve Sanders (the "**Appellant**") arises following a request for information (the "**Request**") made by the Appellant to the Financial Ombudsman Service ("the **FOS")** on 22 January 2022 in the following terms:

> *"I understand that the FOS does not publish its dismissal decisions but stores them all on an internal database.*
>
> *I understand that a dismissal decision is where a case - that is within FOS' jurisdiction and could therefore investigated – is dismissed without a decision on the merits, because that cause of action is thought to be appropriate.*
>
> *The FOS tells its Ombundsmen and Investigators:*
>
> > "*We should rarely **need** to dismiss a complaint. After all, we were set up to give complainants access to a free alternative way of resolving their problems with a firm. So, to decide that we don't want to do that is a very important decision to make"[Emphasis added]*
>
> *Please could you provide a copy of all such decisions?*
>
> *If you believe there is a valid reason why you cannot provide all the dismissal decisions then please either:*
>
> 1. *Provide as many of the decisions as you can; or*
> 2. *Provide as many of the decisions that include delay as a reason for dismissing the case as you can*
>
> *Please also confirm how many dismissal decisions you hold and the timespan within which the decisions were made.*

If you can provide all the dismissal decisions, then please also (if you can) also provide the dismissal decisions – that include delay as a reason for dismissing the case – in a separate folder or pdf etc also for ease of reference."

2. The FOS responded on 18 February 2022 stating that it was withholding the requested information a citing section 31(1)(c) (law enforcement) and section 40(2) (personal information) of the Freedom of Information Act 2000 ("**FOIA**").

3. The Appellant requested a review from the FOS on 18 February 2022 within this letter, the Appellant added:

> *"I do not understand why therefore you do not provide me with the decisions that are anonymised as you say by implication that some of them are?*
>
> *Furthermore, I do not understand why you cannot simply redact personal details if there are the same on the dismissal decisions?*
>
> *Furthermore in your dismissal decisions do you not refrain from using a person's full name and just use something like Mr A or Ms A etc on the basis that you consider in doing so people can't be identified when you store a copy of the decision on your records?"*

(the "**New Request**").

4. On 4 April 2022, the FOS responded to the request for a review confirming that it was maintaining its position. The FOS did not provide any advice and assistance pursuant to s.16 FOIA in response to the Request.

5. Within the response on 4 April 2022, the FOS also indicated that it would be treating the New Request as a new request. On 11 November 2022 (page 363), the FOS wrote to the Appellant refusing to provide the information set out in the New Request due to the costs of complying with the request exceeding the appropriate limit pursuant to s.12 FOIA. The FOS explains that the limit is £450 or

18 hours at £25 per hour. The New Request is not presently before the Tribunal for consideration.

6. Within the same letter, the FOS highlighted that there were 6,084 decisions that had been made without consideration of the merits ("Dismissal Decisions") on its database and that each one would need to be manually reviewed to identify whether they have been satisfactorily anonymised. Whilst this information had not been provided in relation to the Request, it did provide a partial response to the following which was within the Request:

Please also confirm how many dismissal decisions you hold and the timespan within which the decisions were made.

7. The letter of 11 November 2022, contained the following by way of advice and assistance:

> *"We've considered whether we can provide you with any guidance as to how to refine your request. To an extent it is difficult to this without undertaking the review exercise described above. However, if there is any specific information you would like to obtain, or you would like to obtain information of dismissal decisions issued regarding a specific type product or against a particular firm, that may help us satisfactorily narrow the scope of the request. You may wish to also consider refining your request by limiting it to a specific and perhaps shorter timeframe on when the decision was issued. Please note that we're unable to guarantee that this will bring your request within scope or that the information will be meaningful to you, but we hope this provides some practical assistance."*

8. It is noted that the FOS did not offer to provide a reduced number of the decision. For example, the most recent 100 decisions. However, the FOS did suggest that a shorter timeframe may be appropriate.

9. There is no evidence that the Appellant responded to the above guidance and, on 16 November 2022, he complained to the Information Commissioner (the "**ICO**") in respect of the refusal to provide the information in response to the Request. It is important that the Tribunal does not conflate the two requests. No advice or assistance was provided in relation to the Request, but it was provided in relation to the New Request. Whilst the Tribunal has been made aware that there are other proceedings ongoing before the Tribunal, it is not known whether there is an appeal ongoing in relation to the New Request and neither party considered that the New Request was before the present Tribunal. Unless and until the New Request has been considered by the ICO, the Tribunal would have no jurisdiction in relation to it.

10. The ICO's decision is recorded in a decision notice (the "**Decision Notice**") dated 16 November 2022. The ICO upholds the decision of the FOS and finds that the withheld information engages section 31(1)(c) and the public interest lies in maintaining the exemption. The ICO considers that if the details of a complainant were disclosed, that would be likely to prejudice the administration of justice and would undermine the reassurance given to parties involved in the FOS complaint process that their details will not be shared and that only an anonymised version of the decision will be published.

11. Whilst the Decision Notice referred to both section 31(1)(c) and section 40(2), there appears to be a failure to distinguish between section 31(1)(c) (law enforcement) and section 40(2) (personal information). The ICO concludes that the Dismissal Decisions are not routinely published and contain personal data. The ICO was also satisfied that de-personalising the decisions would involve the decisions being rewritten in an anonymised format which would result in new information being created. FOIA does not create any obligation on public authorities to create new information. However, the ICO did not consider whether section 31(1)(c) applied separately to the circumstances where the information had not been anonymised.

12. Having focused on section 31(1)(c), the ICO applied the public interest test in relation to decisions that were not anonymised and concluded that the public interest in disclosure did not outweigh the need to protect the FOS's processes, particularly as the Appellant did have recourse to the FOS' complaints process. The ICO then states that it did not further consider section 40(2).

13. The ICO did not consider the question of whether the Request was vexatious. This was not raised by the FOS until these proceedings. Within the FOS's Response (page A319), the FOS contends that the Request imposed a manifestly disproportionate burden. As such, section 14(1) FOIA (vexations requests) is also relied on.

14. The FOS considers that the FOIA does not require them to create new information and that, as it may be necessary to re-write the reasoning within the decisions to ensure that individuals cannot be identified (in addition to the redaction of names), this would result in the creation of new information.

THE ISSUES

15. The issues to be determined are:

    a. Is the information exempt pursuant to section 31(1)(c)
    b. If the information is exempt pursuant to section 31(1)(c), does the public interest in maintaining the exemption outweigh the public interest in disclosure?
    c. Is the information exempt pursuant to section 40(2)?
    d. Is the request vexatious pursuant to section 14.

THE RELEVANT LAW

Relevant Financial Services Legislation

16. S.230A of the Financial Services and Markets Act 2000 ("**FSMA**") was inserted by paragraph 39 of the Financial Services Act 2012. It states:

> "**230A Reports of determinations**
>
> (1) The scheme operator must publish a report of any determination made under this Part.
>
> (2) But if the ombudsman who makes the determination informs the scheme operator that, in the ombudsman's opinion, it is inappropriate to publish a report of that determination (or any part of it) the scheme operator must not publish a report of that determination (or that part).
>
> (3) Unless the complainant agrees, a report of a determination published by the scheme operator may not include the name of the complainant, or particulars which, in the opinion of the scheme operator, are likely to identify the complainant.
>
> (4) The scheme operator may charge a reasonable fee for providing a person with a copy of a report."

17. Schedule 17 of FSMA (incorporated by s.225(4), provision is made for the ombudsman scheme. The rules are set out within the FCA Handbook and are known as the Dispute Resolution rules ("DISP"). Paragraph 14(1) of Schedule 17 provides that:

> "(1) The scheme operator must make rules, to be known as "scheme rules", which are to set out the procedure for reference of complaints and for their investigation, consideration, and determination by an ombudsman.
>
> (2) Scheme rules may, among other things—
>
> (a) specify matters which are to be taken into account in determining whether an act or omission was fair and reasonable;

(b) provide that a complaint may, in specified circumstances, be dismissed without consideration of its merits;

(c) ...

(3) The circumstances specified under sub-paragraph (2)(b) may include the following—

(a) the ombudsman considers the complaint frivolous or vexatious;

(b) legal proceedings have been brought concerning the subject-matter of the complaint and the ombudsman considers that the complaint is best dealt with in those proceedings; or

(c) the ombudsman is satisfied that there are other compelling reasons why it is inappropriate for the complaint to be dealt with under the ombudsman scheme."

18. DISP 3.3 relates to "Dismissal without consideration of the merits and test cases"

19. Provision 3.3.4A of DISP states:

"The *Ombudsman* may dismiss a *complaint* referred to the *Financial Ombudsman Service* after 9 July 2015 without considering its merits if the *Ombudsman* considers that:...." (various grounds are given)

20. DISP 3.6 relates to "Determination by the Ombudsman". DISP 3.6.1 states:

"The *Ombudsman* will determine a *complaint* by reference to what is, in his opinion fair and reasonable in all the circumstances of the case."

21. DISP 3.6.8 states:

Reports of Determinations

(1) The *FOS Ltd* will publish a report of any *Ombudsman's* determination, save that if the *Ombudsman* who made the determination informs the *FOS Ltd* that, in the *Ombudsman's* opinion, it is inappropriate to publish a

report of that determination (or any part of it), the *FOS Ltd* will not publish a report of that determination (or that part, as appropriate).

(2) Unless the complainant agrees, a report will not include the name of the complainant, or particulars which (in the opinion of the *FOS Ltd*) are likely to identify the complainant.

(3) The *FOS Ltd* may charge a reasonable fee for providing a copy of a report.

Freedom of Information Act 2000

22. The Tribunal considers that the following sections of FOIA need to be considered:

23. Section 1(1):

"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."

The Exemptions

24. Section 2(2) provides that the public authority is not obliged to provide the information as required by section 1(1) where:

a. an absolute exemption applies (as listed in s.2(3); or
b. one of the exemptions set out in Part II applies and the public interest in maintaining the exemption outweighs the public interest in disclosing the information.

Personal Information

25. By Section 40(2), information is exempt if the data constitutes personal data. Pursuant to s.2(3)(fa), the exemption is absolute.

Administration of Justice Exemption

26. By Section 31(1)(c), information is exempt information if its disclosure under this Act would or would be likely to prejudice the administration of justice. This exemption is qualified and, therefore, is subject to the public interest test set out at section 2(2)(b).

The Public Interest Test

27. The public interest test is to be carried out on the date that the request for information should have to have been dealt (***Montague v IC and DIT*** [2022] UKUT 104 (AAC) at [47]-[90]).

28. In ***O'Hanlon v IC*** [2019] UKUT 34 (AAC) at [15], the Upper Tribunal considered:

> *"The first step is to identify the values, policies and so on that give the public interests their significance. The second step is to decide which public interest is the more significant. In some cases, it may involve a judgment between the competing interests. In other cases, the circumstances of the case may (a) reduce or eliminate the value or policy in one of the interests or (b) enhance that value or policy in the other. The third step is for the tribunal to set out its analysis and explain why it struck the balance as it did*":

29. The Tribunal will weigh up the actual harm that the proposed disclosure may cause with the potential benefits its disclosure ***APPGER v IC*** [2013] UKUT 560 at [74]-[76] and [146]-[152]. In doing so, the Tribunal will consider the content of the information and the possible consequences of disclosure or non-disclosure.

Vexatious

30. Under section 14, a Public Authority is not obliged to comply with a request for information if the request is vexatious.

31. At paragraph 78 of ***Dransfield v The Information Commissioner and Devon CC [2015] EWCA Civ 454*** ("***Dransfield"),*** the Court of Appeal considered the meaning of "vexatious" and compared it with the meaning of "manifestly unreasonable" (as use in the Environmental Information Regulations 2002*:*

> *"Leaving the word "manifestly" to one side for a moment, if I am right that the approach to section 14 should primarily be objective and should take as its starting point the approach that "vexatious" means without any reasonable foundation for thinking that the information sought would be of value to the requester or the public or any section of the public, then the difference between the two phrases is vanishingly small."*

32. In relation to the approach to be taken in identifying whether a request was vexatious or manifestly unreasonable, Lady Justice Arden in Dransfield sets out:

> *"68. …I consider that the emphasis should be on an objective standard and 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 any section of the public. 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. If it happens that a relevant motive can be discerned with a sufficient degree of assurance, it may be evidence from which vexatiousness can be inferred. If a requester pursues his*

rights against an authority out of vengeance for some other decision of its, it may be said that his actions were improperly motivated but it may also be that his request was without any reasonable foundation. But this could not be said, however vengeful the requester, if the request was aimed at the disclosure of important information which ought to be made publicly available.

69. ...

70. In responding to any request, the authority has to exercise its judgment in good faith in the light of all the information available to it"

Advice and Assistance

33. Pursuant to s.16, a public authority is required to provide advice and assistance:

"(1) It shall be the duty of a public authority to provide advice and assistance, so far as it would be reasonable to expect the authority to do so, to persons who propose to make, or have made, requests for information to it.

(2) Any public authority which, in relation to the provision of advice or assistance in any case, conforms with the code of practice under section 45 is to be taken to comply with the duty imposed by the subsection (1) in relation to that case."

DOCUMENTS

34. Prior to the hearing, the Tribunal was provided with a 1023-page open bundle, a 214 page supplementary bundle, a closed bundle and a 353 page authorities bundle. The Tribunal also received a skeleton argument on behalf of the FOS. The Appellant apologised at the start of the hearing for not having provided as skeleton argument and the Tribunal confirmed that it was not necessary for him to do so.

35. Any references to page numbers within this decision are to page numbers within the open and the supplementary bundles. The numbering is sequential.

36. Due to the size of these bundles, and other commitments of the Tribunal, it was not possible for the Tribunal panel to have read the full bundle prior to the hearing. The parties were given the opportunity to draw the panel's attention to any documents which they considered to be relevant.

Closed Bundle

37. The closed bundle contained sample decisions relating to complaints to the FOS and included details of the complainants, any representatives, the organisation about which they were complaining, dates that complaints were made and the background circumstances which may include ill health or other key information relating to the parties.

THE HEARING

38. The hearing was held in person, pursuant to adecision of the Tribunal dated 7 August 2023 which determined that reasonable adjustments were required to ensure that all parties were able to take part.

39. It is understood that a previous hearing had been listed and aborted on the day due to an issue in relation to the provision of the bundles. This issue was not explored at the hearing. The Appellant indicated at the end of the hearing that there was an outstanding issue in relation to the costs of the previous hearing but, as the panel had not been made aware of the issue in advance, the ICO was not present to respond to the application, and due to shortage of time (partially arising from the Appellant having arrived to the Tribunal an hour late for the hearing), the Tribunal invited the Appellant to set out his application in Form

GRC5 in order that it can be considered separately and with notice being given to the ICO.

40. The hearing commenced at around 11am, one hour later than the scheduled time, due to the Appellant having been delayed. Whilst this did place the Tribunal and the parties under some time pressure, it was possible to conclude the hearing within the day allocated, save for the Appellant's application for costs, which it may not have been appropriate to determine in the absence of the ICO in any event.

41. At the commencement of the hearing, the Tribunal ensured that the Appellant was able to deal with matters and that he did not require any further measures to be taken to enable him to fully engage with the hearing. He was invited to let the Tribunal know if he required a break at any time. He confirmed that he was content to proceed.

42. The Tribunal heard submissions and evidence from the Appellant and the FOS was represented by Mr Hopkins with evidence being given by Mr Sceeny, an ombudsman leader employed by the FOS.

EVIDENCE AND ANALYSIS OF EVIDENCE

The Appellant

43. Initially, the Tribunal attempted to direct the parties to address it on an issue-by-issue basis. However, it became apparent that the Appellant was unable to listen to the direction and needed to present his case in his own way. Therefore, the Tribunal allowed the Appellant to set out his case in full at the outset.

44. It was apparent from the Appellant's demeanour that he was very frustrated about historic events in relation to a situation in which he had been involved with

AXA insurance. He felt that he had not been treated fairly by AXA. He had complained to the FOS, but his complaint had been dismissed for being late.

45. The Appellant was particularly aggrieved due a telephone conversation involving an officer of the FOS on 7 July 2020 which he considers shows that the FOS had improperly predetermined the outcome of his complaint. He had requested a copy of the recording, and, on more than one occasion, it had been refused. Eventually, after lawyers became involved on behalf of the FOS, the telephone recording was disclosed, revealing the conversation which caused the Appellant concern.

46. Whilst the FOS had accepted the error in relation to the failure to disclose the recording, it was apparent that the Appellant had not forgiven the FOS for this error. The Appellant used many words to describe the FOS, from fraudulent through to negligent.

47. Many of the issues raised by the Appellant were not directly relevant to the Appeal. It seemed that the Appellant's intention was to undermine the FOS through casting doubt on the integrity of the officers due to past events.

48. It was suggested to the Appellant that he had sent 100s of emails to the FOS, directed to hundreds of people who were not connected to his case and made repeated calls (page H974). He did not deny this excessive contact the FOS and in an email dated 1 February 2023 (page H924) he simply states that he was "*chasing compliance with the promises made …*"

49. It appeared that, as a result of the background and the lack of trust towards the FOS, that when his complaint was dismissed, he was not satisfied and considered that he had been dealt with unfairly. He had read that it was "rare" for the FOS to dismiss a complaint without a determination on the merits and, as he considered that the dismissal may have been pre-determined and personal, he wanted to

consider the occasions when this had occurred previously to establish whether complaints by others had been dismissed in the same way. Therefore, he considered that it would be helpful for him to consider all previous Dismissal Decisions. This was the reason that he gave for making the Request.

50. The Appellant confirmed that when he made the Request, he was unaware of how many such decisions there would have been. However, he did accept that when he received the FOS's refusal on 18 February 2022, a link was contained within it which enabled him to access an annual activity report which showed how may Dismissal Decisions were issued each year. Therefore, at this point, he became aware of the volume of decisions he was asking for. However, it is apparent from the letter itself (page C431) that he was not informed, at that time, that the reason for refusing the disclosure of the information was, in any way, connected to the volume of the decisions. The FOS relied only on section 31(1)(c) and section 40(2).

51. At the end of his evidence, the Tribunal asked the Appellant directly to set out the basis of the Appeal. He was asked to confirm whether he considered that the documents were exempt from disclosure if they contained personal information. He confirmed that he agreed with this, in principle, but that he did not accept that the Dismissal Decisions had not been anonymised. He considered, on the balance of probabilities that the FOS will have anonymised the Dismissal Decisions and that the Tribunal should determine that the Dismissal Decisions have been anonymised and order their disclosure. He considered that evidence given by the FOS should be given less weight due to their previous failures to disclose the telephone recording, and the contents of that telephone recording, which he considered showed the officers of the FOS to be dishonest or, at best, unreliable.

52. In relation to the question of whether the information should be exempt from disclosure due to issues relating to the administration of justice, he considered that this point was interlinked with the question of personal data and that if the

information did not contain personal data, he did not consider that it would apply. Otherwise, he was not convinced that a complainant would be dissuaded from bringing a complaint to the FOS due to the risk that a Dismissal Decision would be published as complainants do agree to the determination of their complaint being published and, at that time, they will not be expecting that their complaint will be dismissed.

53. In relation to the whether the Request was vexatious, it was clear that the Appellant was upset at having been called vexatious. On it being explained to him that it was not him who was being called vexatious and being invited to focus on whether the Request was unreasonable, he confirmed that if he had known that the number of decisions that he had requested amounted to over 5,000 that needed to be anonymised he confirmed that he would not be insisting on them being produced.

54. The Tribunal considered from the Appellant's evidence, that he largely accepted the legal position as put forward by the FOS but that he did not accept their evidence and invited the Tribunal to find that they had anonymised the Dismissal Decisions and, therefore, to conclude the exemptions do not apply.

Mr Sceeny

55. The Tribunal heard evidence from Mr Sceeny, an ombudsman leader. Mr Sceeny relied on his evidence in chief which is set out in a witness statement dated (page F611).

56. Mr Sceeny was not involved in the Appellant's dealings with the FOS in relation to the Dismissal Decision or the non-disclosure of the telephone attendance note. Whilst he could assist the Tribunal in relation to general matters concerning the FOS, his main evidence related to the Request.

57. Mr Sceeny explains that there is a statutory obligation (section 230A FSMA) on the FOS to publish any determination it makes under Part XVI of FMSA. Therefore, all of these determinations are anonymised by the removal of personal information likely to identify them or circumstances that might identity them

58. Mr Sceeny referred to Schedule 17 to the FMSA and DISP 3.3.4 which specify that the FOS may dismiss a complaint without considering its merits in certain circumstances (a "**Dismissal Decision**"). Whilst he indicated at paragraph 3.8 of his statement "*FOS is not required to publish Dismissal Decisions",* he did not elaborate on his basis for considering that Dismissal Decisions are not "determinations" for the purposes of S.230A.

59. Whilst it is noted that the requirement to publish determinations is noted at DISP 3.6 (Determination by the Ombudsman) and not at DISP 3.3 (Dismissal without consideration of the merits), there is no indication within s.230A that suggests that a Dismissal Decision is not a determination, or that those decisions should not be published. Section 230A refers to all decisions under Part XVI of the FSMA and Schedule 17 is referred to as *making provision in connection with the ombudsman scheme and the scheme operator*"within s.225 (the first section of Part XVI).

60. Paragraph 14(3)(c) of Schedule 17 appears to suggest that, where "*the ombudsman is satisfied that there are other compelling reasons why it would be inappropriate for the complaint to be dealt with under the scheme"* and, therefore, implies that it would fall outside the scheme in those circumstances. However, this contrasts with paragraph 14(2)(b) which indicates that, even for that to happen, there would need to be a decision to dismiss without consideration of the merits and does not state that such a decision would not be a determination for the purposes of s.230A. Nonetheless, it appears that Dismissal Decisions have not been treated as determinations.

61. Mr Sceeny exhibits a complaint form which includes a statement to be signed by any complainant to show their understanding which reads:

> "*I understand that you have a duty to publish your ombudsman's final decision on your website – with complainants' details removed – but that most cases can be resolved before they reach an ombudsman".*

62. Mr Sceeny also suggests that, unlike final decisions, the parties are not told that Dismissal Decisions are to be published. However, he does not explain how a complainant would know that a "Dismissal Decision" is not a "final decision" which complainants are informed, by the complaint form, will be published. On balance, based on the wording of the complaint form, referred to at paragraph 52 above, the Tribunal considers that a complainant would believe that a Dismissal Decision is a final decision and, therefore, likely to be published.

63. Mr Sceeny explained that, when a final determination is sent to the parties, they are informed that it will be published, and that Dismissal Decisions are excluded from this process. In his evidence, Mr Sceeny explained that this gives a complainant an opportunity to request the removal of any part of that decision and puts them on notice that it will be disclosed. It appeared from Mr Sceeny's evidence, that complainants are not given this same opportunity to request that Dismissal Decisions are modified. Presumably, this is due to the practice of not publishing those decisions. In any event, as set out above, it is not clear that complainants would be aware of the difference between a determination and a Dismissal Decision.

64. Mr Sceeny explains that as a result of s.230A FSMA, determinations (but not Dismissal Decisions) are drafted by the ombudsmen in an anonymous way. This involves not just removing names but also removing any triangulation (that is, ensuring that the facts outlined do not identify a complainant by other means or provide sufficient information to make it possible for a complainant to be

identified). He referred to particular examples of this from the sample Dismissal Decisions which had been provided to the Tribunal. One particular reference was to a County Court judgment of a particular date and for a particular sum which could have been used to work out the identity of the complainant.

65. Mr Sceeny also explained that the FOS has an automated system, known as Phoenix, which checks all decisions and flags up any nouns within the document to draw attention to nouns that may require anonymisation. However, Phoenix is not able to identify a set of facts that may identify a complainant.

66. Mr Sceeny explained that the FOS also has a Quality Team that selects decisions at random for checking by an Ombudsman Leader, a line manager. They will then check that there are no publication errors, such as a complainant's name or details that could identify them.

67. Whilst section 230A came into force in January 2013, Mr Sceeny indicates that Dismissal Decisions prior to September 2019 had no anonymisation at all there was no expectation that they would be published. No explanation is given as to why the Dismissal Decisions were not anonymised prior to September 2019. However, he states that since September 2019, FOS has obscured names, by use of initials but that th facts would not necessarily be written in a way to ensure that the identify of the complainant was not revealed.

68. Mr Sceeny was questioned about guidance on a database known as Discovery. (page G673). The Appellant had drawn the Tribunal's attention to this document. The guidance includes the following:

> *"Anonymising your decision*
>
> *In Phoenix, all decisions we issue (final, provisional, jurisdiction and dismissal decisions) need to be written in a way that prevents the consumer from being identified.*

We do that because final decisions are published on our website, and so can't contain personal details that would allow a reader to identify the person who complained (or any third parties we might need to refer to in the decision).

And all types of decision can be accessed internally through our decisions database. There's no reason to see a customer's personal details when accessing those decisions - so storing that data wouldn't be in line with our data protection principles.

There are some guidelines below to help you make sure you've anonymised your decisions correctly."

69. The Appellant considered that this was clear guidance to the ombudsman setting out that Dismissal Decisions should be anonymised and that, if they are not anonymised, even though they are not published, it could amount to a data breach as the decisions are stored and there is no reason for any personal details to be stored on the internal decisions database.

70. This was put to Mr Sceeny who confirmed that all ombudsmen do try to follow the guidance but that he had concerns that anonymisation (including triangulation, see above) may not have been in the forefront of their minds in drafting a Dismissal Decision in the same way as it would be in a determination which are published. He confirmed that Dismissal Decisions were equally subject to the quality control checks. He confirmed that they would wish to give good service to every case and that it was not that they were not anonymising the Dismissal Decision but simply that he could not be as certain.

SUBMISSIONS AND ANALYSIS

71. Having heard all the evidence and submissions, the Tribunal considers the exemptions relied on the FOS in turn. However, it is first necessary to establish the relevant facts.

Are Dismissal Decisions Anonymised?

72. It appeared to the Tribunal that Mr Sceeny's position was one of caution. He indicated that the Dismissal Decisions prior to September 2019 were not anonymised and that he was not comfortable with the Dismissal Decisions for post September 2019 to be disclosed without them first being reviewed and anonymised, if necessary

73. Despite the guidance and requirement for Dismissal Decisions to be anonymised, Mr Sceeny expressed concerned that, after September 2019, the ombudsmen may not take the same level of care to ensure that the Dismissal Decisions were anonymised as they do other determinations.

74. The Tribunal concludes that Mr Sceeny is acting reasonably in his desire to exercise caution and, therefore, the Tribunal concludes that the Dismissal Decisions should not be considered suitable for publication without all decisions being reviewed and further anonymised if necessary.

Administration of Justice

75. In relation to the exemption at s.31(1)(c), the Tribunal initially understood this to be linked with the question of personal data. It was understood that the contention was that complainants and any third parties would be unlikely to access the FOS' services if they believed that the decisions were to be published. However, if the Dismissal Decisions contained personal data, and were not anonymised, they would be exempt under s.40(2) – an absolute exemption. Therefore, it must be appropriate for s.31(1)(c) to be considered separately and on the basis that the Dismissal Decisions are anonymised or can be anonymised. If they are not, they will not be disclosed in any event due to the exemption under s.40(2).

76. The Tribunal considers that the complainants were unlikely to anticipate that their complaint would culminate in a Dismissal Decision at the time the complaints

were made. At that time, they signed a statement confirming that they understood that any final determination of the case would be published. The Tribunal does not accept that publication of Dismissal Decisions would prevent a complainant who accepts that the determination of their complaint will be published, and who is sufficiently concerned about a matter to take it to the FOS, would be deterred by the publication of Dismissal Decisions. Furthermore, it is not accepted that the complainants were aware that Dismissal Decisions are treated any differently to determinations on the merits and, therefore, it is likely that, at the time they sign the statement (at paragraph 57 above) confirming that they understand that the final decision will be published, they do so in the belief that the final decision on their complaint will be published, irrespective of whether the decision is based on the merits or otherwise.

77. However, in his submissions on behalf of the FOS, Mr Hopkins put the approach to the administration of justice exemption differently. He suggested that disclosure of these decisions would result in a negative impact on administration of justice as it would lead to the FOS of having to commence anonymising all future Dismissal Decisions due to the likelihood of a further order for disclosure.

78. The Tribunal notes the guidance (page G673) which, even if not binding, clearly demonstrates an internal expectation for ombudsmen to be anonymising all decisions. Furthermore, it raises the question of whether all decisions should be anonymised prior to being placed on the internal database. Therefore, it is apparent that the FOS should already be anonymising all Dismissal Decisions and an order of this Tribunal which might lead the ombudsman to start drafting all decisions in an anonymised manner would not add anything more than is already provided for within internal guidance.

79. Whilst it is noted that adding the additional safeguard of asking the complainants to confirm whether they wish for any information within Dismissal Decisions to be removed may add an additional burden, it would also enable the FOS to use

standardised letters which could then be sent out with either determinations or Dismissal Decisions. Furthermore, a burden will only arise from any responses where there is a request for further anonymisation – which is unlikely to be frequent, but which would be of value to ensure FOS compliance with the internal guidance.

80. Furthermore, it is not clear to this Tribunal that the obligation in s.230A FSMA for the FOS to to anonymise all determinations does not apply to Dismissal Decisions. In so far as it applies to all determinations, whether on their merits or otherwise, Dismissal Decisions should be fully anonymised in any event.

81. On balance, therefore, the Tribunal does not accept that the exemption in s.31(1)(c) is engaged, no further burden is imposed on the administration of justice as a result of the requirement for Dismissal Decisions to be published. In any event, the publication of the decisions that have been requested by the Appellant does not affect whether further Dismissal Decisions are published. It is the guidance and the legislation that provides for that. It is, therefore, not necessary for the Tribunal to consider the public interest balance in relation to the application of the exemption at s.31(1)(c)

Personal Information

82. The Appellant accepts that it would not be appropriate for documents containing personal information to be disclosed. Therefore, the application of this exemption is not in dispute.
83. Personal data, for the purposes of the FOIA is the same as in Parts 5 to 7 of the Data Protection Act 2018. Section 3(3) defines "*personal data*" as *'any information relating to an identified or identifiable living individual …"*
84. The Appellant indicated within his email of 18 February 2022 that he was content for the Dismissal Decisions to be redacted. As this was treated as a separate request, the New Request was not the subject of a complaint to the ICO and is

outside the scope of the Tribunal's jurisdiction. Therefore, the Tribunal can only consider the Request which did not refer to redaction. However, the FOS would be obliged to redact personal information where possible but is not obliged to create new information, as may be the case where anonymisation is necessary.

85. Therefore, based on the Tribunal's findings, the Tribunal considers it reasonable for all decisions from prior to September 2019 to be considered exempt due to not having been sufficiently anonymised. Furthermore, the Dismissal Decisions which have not been anonymised and postdate September 2019 will be exempt. This would not prevent the disclosure of any decisions which do not contain personal information from being disclosed following the Request, as such decisions will not be exempt under section 40(2).

Vexatious

86. The final reason for refusing disclosure by the FOS was included within the FOS's Response to these proceeding (page A319) and had not been included earlier within the FOS's decision or the Decision Notice. As the Tribunal is entitled to consider the decision afresh, as if in the position of the ICO, it may consider all reasons for declining disclosure and not simply those which were mentioned by the FOS at the time of refusing to disclose the information.

87. The FOS contends that the Request is manifestly unreasonable as it requested the production of 6,084 decisions.

88. The Tribunal focuses on the guidance provided within ***Dransfield*** and considers whether there is any reasonable foundation for thinking that the information would be of value to the Appellant or any section of the public and approaches the issue in the manner suggest by Lady Justice Arden (see above).

89. The Tribunal takes an objective view. The Appellant has indicated in this evidence that he was not aware that there would be over 6,000 decisions when he made the Request. His motive for requiring the information was to enable him to see the approach taken in relation to previous Dismissal Decisions. Whilst the Tribunal considers this to be a valid foundation for requesting some decisions, it considers the request for all decisions to be excessive. Even without being aware of how many decisions there were, to request "all" such decisions, is excessive. The Tribunal considers that, for the purpose, the Appellant only needed a small number of Dismissal Decisions, perhaps only 10 such decisions that were dismissed due to delay (if these could have been easily selected by the FOS) or up to 100 general decisions from which the Appellant could identify those relating to delay. Therefore, for the Appellant to request 6,084 decisions when 100 may have been more than sufficient is undoubtedly excessive.

90. The Tribunal is mindful that the word "*vexatious*" is a strong word and that a high bar has been set. The Tribunal must take great care before declaring any request vexatious. All the circumstances need to be considered. In this Appeal, the Appellant was not aware of the high number of decisions requested by him at the time of the Request. However, it is foreseeable that a request for all the Dismissal Decisions was likely have resulted in him achieving far more information than he required. Whilst it may be that most of the Dismissal Decisions are immediately exempt, due to them not having been anonymised, this does not alter the fact that the Request was for **all** decisions.

91. The Tribunal also considers the history between the parties and, in particular, the hundreds of emails which he accepts having sent to the FOS, directed to hundreds of people who were not connected to his case and the repeated calls made (page H974).

92. Irrespective of the whether the interpretation of s.230A applies to Dismissal Determinations (and it would appear, the Tribunal notes that the FOS has not

been publishing the Dismissal Decisions, did not anonymise the Dismissal Decisions at all until September 2019 and have not carried out the safeguarding checks of asking complainants to inform them of any aspects of the decisions which they consider not appropriate for publication. Therefore, if any of the decisions are to be made publicly available, they would require reviewing which would be an onerous task. Whilst the Tribunal accepts that the Appellant has a legitimate reason for seeing some such decisions, he has no need to see 6,084 or even just all of those which postdate September 2019.

93. On balance, therefore, taking all the circumstances into account, the Tribunal does consider the Request to be vexatious. Whilst the Appellant states that he did not realise how many Dismissal Decisions there were at the time of the Request, it is the view of the Tribunal that he should have been mindful of the possibility that there would have been far more Dismissal Decisions than he required for his purpose in existence at the time the Request was made.

94. Whilst the Tribunal does accept that there is a value to the Dismissal Decisions being available to the public, the Tribunal does not consider that there is any benefit to the volume of historic Dismissal Decisions requested being made available.

95. Whilst the findings of the Tribunal are that the FOS would only need to consider decisions postdating September 2019 as being available for disclosure (decisions prior would be exempt due to section 40(2)), the FOS would still have needed to dedicated over 2.5 weeks (5 minutes x say 1200 decisions) of an officers time to review the decisions post September 2019 if there was to be compliance with the Request. This would be in circumstances where the Appellant has, at the very highest, no need for any more than 10% of those which may be available to be disclosed.

Advice and Assistance

96. The Tribunal is also mindful that no s.16 guidance was provided to the Appellant in relation to the Request. The Tribunal considers that the FOS should have contacted the Appellant at an early stage to enquire about his purpose for requesting the information and to suggest that it may be possible for the FOS to disclose a small number of delay related dismissal cases (obtained through a search of the database) or a higher number of non-specific dismissal requests if a refined request was received.

97. Whilst it is disappointing that advice and assistance was not provided to the Appellant in relation to the Request, advice and assistance was provided in relation to the New Request in the letter dated 11 November 2022 (A55). As the Appellant did not accept or acted on the guidance, the Tribunal finds as a fact that if the Appellant had been given advice and assistance at the time the Request was made, that he would not have acted on it.

SUMMARY OF DECISION

98. In conclusion, therefore, the Tribunal does not consider that the exemption in sections 31(1) is engaged as it is already recommended, within its own internal guidance, that the FOS will anonymise future Dismissal Decisions. Furthermore, this is necessary to minimise risk of data breaches. It is also not accepted that complainants will cease using the service. Complainants use the service in the knowledge that determinations will be published. Therefore, it seems unlikely that they would not use the service if Dismissal Decisions are published. In light of this conclusion, there is no need for the Tribunal to consider the public interest balance (section 2(2).

99. In relation to the application of the exemption in s.40(2), on the balance of probabilities, the Tribunal considers that all decisions issued prior to September 2019 are likely to be exempt pursuant to s.40(2). Therefore, the Tribunal considers

that the personal information exemption is engaged in respect of these decisions. There are believed to be around 5,000 such decisions.

100. There would be around 1,200 decisions that postdate September 2019. These may or may not be anonymised. It is estimated that it would take FOS a total of 100 hours to review all these cases. In light of the background to this matter, the Tribunal concludes that this results in the request being vexatious due to the Appellant having no need for this volume of information and on taking into account the background of a high level of correspondence from the Appellant together with the ill-feeling that the Appellant displays towards the FOS.

101. Finally, the Tribunal has carefully considered whether the FOS failed in its duty to provide advice and assistance in relation to the Request. The Tribunal considers that the FOS did fail but that, overall, given the background of ill-feeling, and as the Appellant took no action to refine his request when he was given guidance in relation to a different request, the Tribunal does not consider it appropriate for the FOS to provide further advice and assistance. The fact that the advice and assistance was not accepted in November 2022 is evidence that it is unlikely to be accepted if repeated or if it had been given in relation to the Request.

102. Therefore, the Tribunal considers that the ICO did not exercise its discretion correctly in determining that the FOS was not obliged to provide the information as a result of the exemption at section 31(1)(c) (law enforcement). However, based on the background history to the matter and the volume of documents sought, the Tribunal considers that the FOS was not obliged to comply with the Request as it was so manifestly unreasonable in the circumstances as to be considered vexatious.

APPEAL

If either party is dissatisfied with this decision an application may be made to this Tribunal for permission to appeal to the Upper Tribunal, General Regulatory Chamber. Any such application must be received within 28 days after these reasons have been sent to the parties under Rule 42 of The Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules 2009.

Judge R Watkin