

## **Freedom of Information Act 2000 (FOIA)**

### **Decision notice**

**Date:** 22 August 2019

**Public Authority:** Financial Ombudsman Service

**Address:** Exchange Tower  
London  
E14 9SR

#### **Decision (including any steps ordered)**

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1. As part of a wider request, the complainant has requested information associated with a response the Financial Ombudsman Service (FOS) provided to a previous request he submitted to it, about its dispute resolution rules. FOS refused to comply with part 3 of the request under section 12(1) of the FOIA (cost of compliance exceeds appropriate limit) and did not provide a response to part 4 of the request. The complainant has confirmed to the Commissioner that his complaint is focussed on the timeliness of FOS' responses, and not FOS' reliance on section 12(1).
2. The Commissioner's decision is as follows:
  - FOS breached section 17(5) of the FOIA with regard to part 3 of the request as it did not issue the complainant with a refusal notice within 20 working days.
  - FOS breached section 10(1) with regard to part 4 as it did not comply with section 1(1) within 20 working days, with regard to this part.
3. FOS has now issued the complainant with a response to part 4 of the request and the Commissioner does not require FOS to take any remedial steps.

## Request and response

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### Background

4. On 3 October 2018 the complainant wrote to FOS and requested information in the following terms:

*"Section 226(2) of the FSMA 2000 requires, in the case of compulsory jurisdiction, that a complaint to the Financial Ombudsman Service ("FOS") should be determined "with reference to what is, in the opinion of the ombudsman, fair and reasonable in all the circumstances of the case". Rule DISP 3.6.4 R of the FCA Handbook provides that in considering what is fair and reasonable, the Ombudsman will take into account relevant a) laws and regulations b) regulators rules, etc., c) codes of practice and (d) where appropriate, what (s)he considers to have been good industry practice at the time. There is no reference in DISP 3.6.4 R to any 'commercial judgement' test.*

*DISP 3.3.4, item 11 made it clear that in relation to complaints filed BEFORE 9 July 2015, the Ombudsman may dismiss a complaint about the "legitimate exercise of a respondent's commercial judgment". That ground for dismissal does not apply under the revised DISP (3.3.4A R) to complaints filed AFTER 8 July 2015. Nonetheless, many (700+) published Ombudsman decisions after 1 January 2017 dismissing the complaint indicate that weight, in many cases very significant weight, is given to a commercial decision/judgment of the respondent. For instance, decisions using wording such as the adjudicator/ombudsman "cannot interfere with the way a financial institution exercises its commercial judgement" or that the adjudicator/ombudsman is "reluctant to interfere with a commercial decision" of the financial institution.*

*I wish to receive information/documentation establishing the basis under Rule DISP 3.6.4 R (or otherwise, if applicable) for the Financial Services Ombudsmen to give any particular weight to the 'commercial judgment' of a financial institution, in particular (if such specific information/documentation exists) in the case of an existing customer and an existing service/facility supplied/granted to that customer. In other words, identifying the relevant a) law/regulation b) rule c) code of practice or d) industry practice (including specific details of where that 'industry practice' is published or otherwise appears) that indicates that the 'commercial judgment' of a financial institution has any particular relevance in determining what is 'fair and reasonable'.*

*I am willing initially to consider a narrative (letter form) response to this request.*

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*Alternatively (in the absence of an acceptable narrative response), I make the following request for documentation.*

*1. Please provide copies of documentation (whether that documentation is in physical or electronic form) sufficient to demonstrate:*

*1.1. whether the FOS gives any guidance or orientation to decision makers (i.e. adjudicators or Ombudsmen) within the FOS as to whether a financial institutions' 'commercial judgment', 'commercial decision' or similar should be given any particular weight in determining (as between the Claimant and the Respondent) what is "fair and reasonable in the circumstances"; and*

*1.2. If such guidance is given, what it is.*

*{Note: my concern in this and the following request relates especially to determination of complaints against a financial institution in relation to changes in the provision of existing services already being provided to existing customers, i.e. not in relation to new customer or new business. In the absence of any specific guidance relating to such existing customers/services, please provide details of any general guidance.}*

*2. Please provide copies of documentation (whether that documentation is in physical or electronic form) sufficient to demonstrate:*

*2.1. whether and to what extent the FOS is aware of any*

*2.1.1. law,*

*2.1.2. rule,*

*2.1.3. code, or*

*2.1.4. good industry practice*

*which mandate or suggest that a bank's 'commercial judgment', 'commercial decision' or similar should be given any particular weight in determining (as between the Claimant and the Respondent) what is "fair and reasonable in the circumstances", including identify the corresponding law, rule, code or good practice and the specific provisions applicable and including (in the case of good industry practice) indicating where that practice is published or otherwise appears.*

*To the extent any documentation is provided, I request it is provided in electronic format, whatever its original format.*

*If complying with this request would cause the FOS to exceed the financial limits applicable, I request the assistance of the FOS in narrowing the request."*

5. FOS responded on 31 October 2018 – its reference FOI 3237. It provided a narrative response to the complainant's questions. FOS said that any related documentation or guidance it holds would not be held in one central location but would be stored in the mailboxes and personal computers of individuals across the organisation. It explained that it has around 2,000 case handlers and ombudsmen that work at FOS, and that to ascertain whether it holds such information would require a search of all their mailboxes and computer folders. FOS therefore considered that to comply with the request under the FOIA would exceed the cost limit under section 12(1).
6. With regard to refining the request, FOS said that given the scope of the request, it was unable to suggest how it might be refined.
7. The complainant requested a review on 1 November 2018 and FOS provided two responses on 4 December 2018. In the first (reference FOI 3313), which FOS described as a response to the complainant's Freedom of Information request, FOS confirmed that it did not hold any documents seeking, giving or relating to any legal advice with regard to its response of 31 October 2018, but that it had sought guidance from one of its ombudsmen who had relevant expertise. In the second response of 4 December 2018 (reference FOI 3237), which FOS described as an internal review response, FOS maintained its reliance on section 12(1) but provided the complainant with advice and assistance as to how his request might be refined to bring complying with it within the cost limit.
8. On 7 December 2018, the complainant wrote to FOS again, as follows:

*I am afraid that I do not agree that the FOS has provided the required advice and assistance in the formulation of my request, or has otherwise complied with its obligations under the FOI Act.*

*1 I note that the FOS has neither confirmed nor denied the existence of any documents covered by item 5 of my 1 November message. Of course, I understand this may be an oversight. If no such documents exist, please let me know within 7 days.*

*a. For clarification, Item 5 of my 1 November message asked: "Without revealing the content of any such documents, please confirm or deny the existence of any documents seeking, giving or relating to any legal advice concerning the formulation and preparation of your response 31 October 2018, ref FOI 3237"*

*2 The FOS' reply ref FOI 3237 dated 31 October 2018 states "In some cases, it's obvious from the outset that the complaint is purely about commercial judgment, in which case we might exercise the discretion to dismiss on the basis that it seriously impairs our effective function to consider such matters".*

*I wish to know if there are any specific cases/decisions to which this part of the reply refers, or if it is just a general hypothetical statement made without any specific known factual basis. Accordingly (and bearing in mind that my original request related only to decisions after 1 January 2017) in relation to the cases there referred to, please provide the following documents to the extent they are known or available to any individual involved in the drafting of this statement [Commissioner's emphasis]:*

*a. A copy of the relevant part of any adjudicator's decision dismissing any claim pursuant to DISP Rule 3.3.4A(5) because, in the opinion of the adjudicator as expressed in that decision (or as otherwise known to the individual concerned in the drafting the corresponding part of the FOS' reply ref FOI 3237 dated 31 October 2018) it would "seriously impair the effective operation of the Financial Ombudsman Service" to determine a claim "purely about commercial judgment" or about a "commercial decision" (or similar) of a respondent. By 'relevant part' I mean the part of the decision indicating the basis on which the Claim was dismissed. Alternatively, I would of course accept a full copy of that decision.*

*b. A copy of, or alternatively precise directions to the information so that it can be found without difficulty, of any such decision of any Ombudsman.*

*3 In response to your kind invitation to "refine my request in order to bring it within the appropriate limit by describing where you'd like us to carry out a search", **please let me know whether any information covered by item 1 (including 1.1 and 1.2) of my original request for documentation has already been identified by, or is otherwise known to, any person involved in the drafting of the FOS' reply ref FOI 3237 dated 31 October 2018, and if so, please provide copies of that information. To avoid doubt, I am only interested in such documentation as known to the relevant individual that has been applicable since 1 January 2017*** [Commissioner's emphasis].

*a. For clarification, Item 1 of my original request asked "1. Please provide copies of documentation (whether that documentation is in physical or electronic form) sufficient to demonstrate:*

*1.1. whether the FOS gives any guidance or orientation to decision makers (i.e. adjudicators or Ombudsmen) within the FOS as to whether a financial institutions' 'commercial judgment', 'commercial decision' or similar should be given any particular weight in determining (as between the Claimant and the Respondent) what is "fair and reasonable in the circumstances"; and*

*1.2. If such guidance is given, what it is.*

*{Note: my concern in this . . . request relates especially to determination of complaints against a financial institution in relation to changes in the provision of existing services already being provided to existing customers, i.e. not in relation to new customer or new business. In the absence of any specific guidance relating to such existing customers/services, please provide details of any general guidance.}*"

9. On 8 December 2018 the complainant wrote to FOS again to say it could disregard item 1 of his 7 December 2018 request but that items 2 and 3 continue to apply. The complainant then added item 4, as follows:

*"4 Please provide copies of any documents seeking, giving or relating to any advice or guidance sought or given concerning the formulation and preparation of the FOS response 31 October 2018, ref FOI 3237."*

10. On 11 December 2018, FOS wrote to the complainant and advised that it had nothing to add further to its internal review response.
11. As a result of the Commissioner's investigation FOS provided a further response to the complainant on 14 June 2019 – its reference FOI 3544. The complainant had asked FOS to disregard part [1] of his 7 December 2018 request but FOS provided a response to this part, again advising that it did not obtain legal advice to address his request of 3 October 2018.
12. FOS refused to comply with part [2] of the request under section 12(1) of the FOIA. It gave the complainant details on the categories under which it records information when a complaint is dismissed.
13. With regard to part [3] of the 7 December 2018 request, FOS referred to its 31 October 2018 response to the complainant's earlier request in which it had relied on section 12(1) and its previous review response in which it had given advice as to how that request could be refined.
14. The Commissioner understands that the complainant went on to submit a separate, refined request to FOS and that FOS had responded to this request on 30 July 2019 – its reference FOI 3552. The Commissioner notes that in its initial submission to her FOS gives the date of this

refined request as 16 June 2019. In its response to the complainant – which FOS provided to the Commissioner – FOS gives the date of the request as 13 June 2019.

15. However, FOS' 14 June 2019 response did not appear to address part 4 of the request, which the complainant had submitted on 8 December 2018. Following further enquiries from the Commissioner on 20 August 2019 FOS acknowledged that it had overlooked the 8 December 2018 part of the request. FOS issued the complainant with a response to part 4 of his request on 20 August 2019 (reference FOI 3641) and the complainant subsequently confirmed to the Commissioner that, apart from the length of time it took to receive it, he was satisfied with the response.

## **Scope of the case**

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16. The complainant first contacted the Commissioner on 12 December 2018 to complain about FOS' handling of his request.
17. The correspondence between FOS and the complainant presents a somewhat complex picture and it took further correspondence with both the complainant and FOS for the Commissioner to establish the scope of the complainant's complaint to her.
18. In correspondence to the Commissioner on 14 August 2019 the complainant confirmed that the Commissioner should issue a decision notice recording that it took FOS longer than 20 working days to issue a response to the "*relevant part of the refined request of 7 December 2018*".
19. In further correspondence of 20 August 2019 the complainant confirmed quite clearly that his concern is the timeliness of FOS' responses to particular parts of his request, namely part 3 of 7 December 2018 and part 4 of 8 December 2018. The Commissioner's investigation has therefore focussed on FOS' compliance with section 10(1) or section 17(1), as appropriate, with regard to these two parts of the complainant's request.

## **Reasons for decision**

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### **Section 10 and section 17 – time for compliance**

20. Section 1(1) of the FOI says that anyone who requests information from a public authority is entitled under subsection (a) to be told if the

authority holds the information and under subsection (b) to have the information communicated to him or her if it is held and is not exempt information.

21. Section 10(1) of the FOIA says that an authority must comply with section 1(1) promptly and within 20 working days following the date of receipt of a request.
22. Section 17(5) of the FOIA says that where an authority is relying on section 12 (or section 14) it should provide the applicant with a refusal notice within the time for complying with section 1(1).
23. Part 3 of the request, submitted on 7 December 2018, is as follows:

*"...please let me know whether any information covered by item 1 (including 1.1 and 1.2) of my original request for documentation has already been identified by, or is otherwise known to, any person involved in the drafting of the FOS' reply ref FOI 3237 dated 31 October 2018, and if so, please provide copies of that information. To avoid doubt, I am only interested in such documentation as known to the relevant individual that has been applicable since 1 January 2017"*
24. In correspondence to the complainant on 11 December 2018, FOS had advised that it had nothing to add further to its internal review response of 4 December 2018 (to his request of 3 October 2018).
25. Technically, this is a response. However, the Commissioner has reviewed the complainant's request of 3 October 2018 and his request for a review of 1 November 2018. It appears to the Commissioner that FOS' correspondence of 11 December 2018 had focussed on the complainant's previous request and matters raised in the internal review request and not on the somewhat distinct information that was being requested in part 3 on 7 December 2018.
26. In its further response of 14 June 2019 FOS advised the complainant that it had reviewed the request of 7 December 2018 to see if it had addressed all his questions and acknowledged that it could have provided some more information. FOS went on to confirm that it was relying on section 12(1) to refuse to comply with part 3 of the request.
27. Having considered all the correspondence provided to her, the Commissioner has decided that because FOS did not issue a section 12 refusal notice with regard to part [3] of the request of 7 December 2018 within 20 working days of receiving this specific request, FOS breached section 17(5) of the FOIA.

28. The complainant submitted part 4 of his request on 8 December 2018. FOS did not provide a response to this request until 20 August 2019 and therefore breached section 10(1) with regards to this part.
29. FOS explained that it overlooked part 4 because of the complex nature of the complainant's requests and correspondence with it, and because at least some of the complainant's requests are for very similar information. The Commissioner agrees that some of the complainant's correspondence and requests are somewhat difficult to interpret.
30. However, the complainant pointed out to the Commissioner that FOS introduced an element of confusion to the correspondence by providing two separate responses on 4 December 2018, and that his separate requests of 7 and 8 December 2018 were a result of this.
31. To conclude, FOS has acknowledged that it could have handled the complainant's requests more satisfactorily and that there are lessons it has learned from this case.

## Right of appeal

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32. Either party has the right to appeal against this decision notice to the First-tier Tribunal (Information Rights). Information about the appeals process may be obtained from:

First-tier Tribunal (Information Rights)  
GRC & GRP Tribunals  
PO Box 9300  
LEICESTER  
LE1 8DJ

Tel: 0300 1234504  
Fax: 0870 739 5836  
Email: [grc@justice.gov.uk](mailto:grc@justice.gov.uk)  
Website: [www.justice.gov.uk/tribunals/general-regulatory-chamber](http://www.justice.gov.uk/tribunals/general-regulatory-chamber)

33. If you wish to appeal against a decision notice, you can obtain information on how to appeal along with the relevant forms from the Information Tribunal website.
34. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

## Signed

**Pamela Clements**  
**Group Manager**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
**Cheshire**  
**SK9 5AF**