



Appeal number: EA/2016/ 0174

**FIRST-TIER TRIBUNAL
GENERAL REGULATORY CHAMBER
INFORMATION RIGHTS**

DAVID ERIC PLATTS

Appellant

- and -

**THE INFORMATION COMMISSIONER
FINANCIAL OMBUDSMAN SERVICE**

Respondent

TRIBUNAL: JUDGE ALISON MCKENNA

Determined on the papers, the Tribunal sitting in Chambers on 20 January 2017

Date of Decision: 20th January 2017

Date Promulgated: 23rd January 2017

DECISION

1. The appeal is allowed. The Financial Ombudsman Service is not required to take any steps.

REASONS

Background to Appeal

2. The Appellant made complaints to the Financial Ombudsman Service (“FOS”) in 2008 and 2009. In March 2009, the Principal Ombudsman found a complaint made by the Appellant to be vexatious and concluded that any future similar complaints he were to make should be dismissed without considering their merits. In October 2009, the Appellant made a further complaint and, without knowledge of the earlier decision, it was accepted by FOS and assessed. In June 2010 it was realised that this complaint had not been handled in accordance with the earlier decision, and so it was dismissed. The Appellant made a complaint about the service he had received to FOS’s Independent Assessor. She issued an opinion in August 2010, recommending that FOS should design and implement a robust and fair filter system, to ensure that once a warning has been issued further cases are dealt with appropriately. FOS accepted this recommendation.

3. The Appellant made a request to FOS for a copy of the documents which show how the Independent Assessor’s recommendation was implemented. FOS told the Appellant that the filter process was agreed in a face to face meeting so that it did not hold the requested information.

4. The Respondent issued Decision Notice FS50604601 on 12 July 2017, upholding FOS’s response.

5. Since the Decision Notice was issued, FOS has discovered some information falling within the scope of the request. This was an e mail exchange held in the archived inbox of a member of staff. This has now been disclosed to the Appellant.

Appeal to the Tribunal

6. The Appellant’s Notice of Appeal dated 13 July 2016 relies on grounds that it was clear from the Decision Notice that there had been an instruction issued to staff to implement an electronic filter, and that this instruction should be available on FOS’s backup server so that it is “held” for the purposes of the Freedom of Information Act 2000. He submitted that FOS had not conducted appropriate searches so that the Information Commissioner’s Decision Notice was flawed in relying on FOS’s evidence.

7. The Information Commissioner’s Response dated 18 May 2016 maintained the analysis as set out in the Decision Notice. The Commissioner was satisfied that, on the balance of probabilities, FOS did not hold the information the Appellant had

requested. She had reached this conclusion after making appropriate enquiries of FOS, as recorded in the Decision Notice.

8. FOS's Amended Response dated 17 October 2016 supported the analysis set out in the Decision Notice. However, it acknowledged that information had now been found which fell within the scope of the Appellant's request. This was further explained in the witness statement of Graham Price, dated 17 October 2016. FOS invited the Tribunal to find that it holds no further information within the scope of the request.

9. The Appellant replied to FOS's submissions to the effect that he considers further information may be held by FOS.

10. The parties and the Tribunal agreed that this matter was suitable for determination on the papers in accordance with rule 32 of The Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules 2009, as amended. The Tribunal considered an agreed open bundle of evidence comprising 175 pages, including submissions made by all parties, for which we were grateful.

The Law

11. FOS, as a public authority, is under a duty to comply with the Freedom of Information Act 2000 ("FOIA"). S. 1(1) (a) of FOIA provides that a person making a request for information is entitled to be informed in writing by the public authority whether it holds information within the scope of the request. S. 84 of FOIA defines information as "information recorded in any form". There is no requirement for a public authority to take steps to record information if none is held at the time of the request.

12. The powers of the Tribunal in determining this appeal are set out in s.58 of FOIA, as follows:

"If on an appeal under section 57 the Tribunal considers -

(a) that the notice against which the appeal is brought is not in accordance with the law, or

(b) to the extent that the notice involved an exercise of discretion by the Commissioner, that he ought to have exercised his discretion differently,

the Tribunal shall allow the appeal or substitute such other notice as could have been served by the Commissioner, and in any other case the Tribunal shall dismiss the appeal.

On such an appeal, the Tribunal may review any finding of fact on which the notice in question was based."

13. I note that the burden of proof in satisfying the Tribunal that the Commissioner's decision was wrong in law or involved an inappropriate exercise of discretion rests with the Appellant.

Evidence

14. FOS relies on a witness statement made by Graham Price on 17 October 2016. Mr Price is a solicitor employed by FOS. He explains the functions of FOS and the background to the Appellant's request. He describes the searches which were undertaken by FOS and communicated to the Information Commissioner during her enquiries. He describes the further searches he arranged to be carried out when making his witness statement, including the archived inboxes of FOS staff. He states that an e mail exchange was found in a member of staff's archived inbox, which gave the instruction to FOS's IT Department to set up the inbox into which the Appellant's e mails would be channelled, so as to filter them in accordance with the Independent Assessor's recommendation. This email exchange has now been disclosed to the Appellant (redacted as to the personal data of the staff involved). It is also exhibited to Mr Price's Statement.

15. Mr Price explains that the policy for retention of FOS e mails is to keep them for 12 months only, so his view is that FOS did not and does not hold any further information falling within the terms of the request.

Conclusion

16. The task for the Tribunal under s. 58 FOIA is to decide whether the Decision Notice was erroneous. I have no jurisdiction to decide whether the Independent Assessor's recommendation was complied with, or might have been complied with differently. I note that FOS has provided an explanation of how it has implemented the recommendation to the Appellant direct.

17. The Appellant's grounds of appeal were that information falling within the scope of his request was more likely than not to be held on a backup server at FOS. It transpired that he was right about that and, as the factual findings in the Decision Notice were therefore erroneous, his appeal is allowed.

18. I have considered the evidence before me from Mr Price, to the effect that no more information within the scope of the request is held. I am grateful to Mr Price for the detailed information contained within his witness statement. I find it reliable, and in so finding I take into account the fact that he is a solicitor with a duty of candour to this Tribunal. I also take into account his knowledge of the workings of FOS and of this case.

19. Mr Price's evidence is that the decision as to how to implement the Independent Assessor's recommendation was taken at a face to face meeting in respect of which no information was recorded. I accept that evidence. His evidence is that the decision taken in that meeting was implemented by the sending of an email to the IT Department, requesting the establishment of a dedicated inbox to which the Appellant's correspondence would be channelled. It is apparent that there was then a

telephone conversation about the request, followed by an email back from the IT Department confirming that the mail box had been set up. I see no obvious reason for there to have been any additional information recorded about that matter, as it is clear from that exchange that the required work had been completed. I accept Mr Price's evidence that there is no further information held.

20. It is unfortunate that the archived e mail exchange was found only after the Decision Notice had been issued. I understand that, given FOS's retention policy, it would not have been anticipated by FOS that an e mail of that vintage would have been retained on its system. I am grateful to Mr Price for arranging the additional searches which uncovered it.

21. The Appellant, understandably, is not in a position to offer evidence to contradict the evidence of Mr Price. He asks me to draw an inference for which there is no evidential basis.

22. In all the circumstances, I am satisfied on the balance of probabilities that FOS held information falling within the scope of the information request at the time it was made. That information was the e mail exchange exhibited to Mr Price's witness statement, which has now been disclosed to the Appellant with appropriate redactions.

23. On the basis of the evidence before me, I am satisfied on the balance of probabilities that FOS has now disclosed all the information it holds falling within the scope of the request and that there is no further information held. This means that, whilst this appeal is allowed, I direct no steps to be taken by FOS.

ALISON MCKENNA

DATE: 20 January 2017

PRINCIPAL JUDGE

**Amended pursuant to rule 40 of The Tribunal Procedure (First-tier Tribunal)
(General Regulatory Chamber) Rules 2009 on 23 January 2017**