



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

Appeal Reference: EA.2017.0143

**Decided without an oral hearing
On 30 January 2018**

Before

**JUDGE CLAIRE TAYLOR
MICHAEL JONES
NIGEL WATSON**

Between

GUY GURTON

Appellant

and

INFORMATION COMMISSIONER

Respondent

and

FINANCIAL OMBUDSMAN SERVICE

Second Respondent

DECISION

We dismiss the appeal for the reasons set out below.

REASONS

Background

1. The Financial Ombudsman Service ('FOS') has a statutory function to provide an independent and informal scheme to resolve disputes related to the financial services industry, without the need to resort to the courts.¹
2. FOS explains that when it receives a complaint, it allocates an adjudicator to it. The adjudicator investigates and issues an opinion on the complaint and its likely outcome. The opinion is not binding on either party or FOS.
3. If the complainant or business is unsatisfied with the opinion, the complaint is passed to an ombudsman, who reviews the matter afresh and issues a final decision.² The ombudsman is not bound by any opinion of the adjudicator. The ombudsman's determination is binding on the business if accepted by the complainant. The final decision can be challenged only by way of judicial review.
4. The Appellant referred a complaint to FOS about a subsidence insurance claim. It was handled by employee 'X' whose opinion partly upheld the complaint. The matter was then referred to an ombudsman whose decision also partly upheld the complaint.
5. The Appellant complained to the FOS's independent assessor about the standard of service from FOS and employee X. On 30 March 2017, the independent assessor awarded £500 compensation to the Appellant for delays and lack of professionalism by X in communications with the business.³

The Request

6. On 1 March 2017, the Appellant requested from FOS as a 'public authority' for the purposes of the Freedom of Information Act 2000 ('FOIA'),
 - "1) I would like to know over the last seven years how many subsidence cases [name redacted ('X')] has adjudicated over?
 - 2) Out of these, I would like to know how many [X] found in favour of the business and how many [X] found in favour of the consumer?
 - 3) Of the cases that [X] found in favour of the business, how many were escalated to be decided by an ombudsman?
 - 4) Of the ones that went before an ombudsman how many were upheld and how many were overturned?" "
7. On 13 March 2016, FOS refused to provide the information relying on s.40(1)FOIA (personal data). FOS clarified reliance on section 40(2) instead of section 40(1) after an internal review. FOS stated that it had resolved 286 subsidence complaints in 2016, and 40% resulted in a change of outcome in favour of consumers.
8. The Appellant proceeded with a complaint to the Commissioner. The Decision Notice (Ref. FS50674756) of 3 July 2017, found that section 40(2) had been correctly relied

¹ ee s.225 the Financial Services and Markets Act 2000 ('FSMA').

² The ombudsman determines the matter "by reference to what is, in the opinion of the ombudsman, fair and reasonable in all the circumstances of the case. See s.228(2) FSMA

³ Her findings are set out at pages 37 to 46 of the Open Bundle, in minimally redacted form.

on to withhold the information. The Appellant now appeals the matter, effectively disputing the application of section 40(2).

The Task of the Tribunal

9. The Tribunal's remit is governed by section 58 FOIA. This requires the Tribunal to consider whether the decision made by the Commissioner is in accordance with the law or whether he should have exercised any discretion he had differently. The Tribunal is independent of the Commissioner, and considers afresh the Appellant's complaint. The Tribunal may receive evidence that was not before the Commissioner, and may make different findings of fact from the Commissioner. This is the extent of the Tribunal's remit in this case. We have found the Appellant's concerns as to the adequacy of the in-house FOS review process of the independent assessor to be outside our remit in this case.
10. We have received a bundle of documents and submissions, including in CD format and the requested information. We have carefully considered all material and submissions even if not specifically referred to below. Part of the decision has been issued on a closed basis. This is because it indicates the contents of the disputed information and amounts to X's personal data that needs to be withheld. The 'open' decision indicates where text has been redacted.

The Law

11. Under s.1(1) of FOIA, a person making an information request to a public authority is entitled to be informed in writing whether the public authority holds the requested information and to have it communicated to him, unless it is exempt from disclosure under the Act.
12. So far as is relevant to this appeal, s.40(2) and (3) FOIA provides:

“(2) Any information to which a request for information relates is.. exempt information if-

- (a) it constitutes personal data which do not fall within subsection (1), and*
- (b) either the first or the second condition below is satisfied.*

(3) The first condition is -

(a) in a case where the information falls within any of paragraphs (a) to (d) of the definition of “data” in section 1(1) of the Data Protection Act 1998, that the disclosure of the information to a member of the public otherwise than under this Act would contravene—

- (i) any of the data protection principles...”*

Emphasis added.

13. Personal data is defined in s1(1) Data Protection Act 1998 ('DPA') as:

“data which relate to a living individual who can be identified – (a) from those data, or (b) from those data and other information which is in the possession of, or is likely to come into the possession of, the data controller..”

14. The first data protection principle has been identified in this appeal as of relevance. This provides that:

“1. Personal data shall be processed fairly and lawfully and, in particular, shall not be processed unless -

- (a) at least one of the conditions in Schedule 2 is met...” (See para.1 Sch 1 DPA).*

15. The condition in Schedule 2 DPA addressed by the parties is that the disclosure is *'necessary for the purposes of legitimate interests pursued by the data controller or by the third party or parties to whom the data are disclosed, except where the processing is unwarranted in any particular case by reason of prejudice to the rights and freedoms or legitimate interests of the data subject.'* (See para.s 6 Sch. 2 DPA).

16. We accept and adopt the Commissioner's analysis of this exemption set out in paragraphs 19 to 24 of its Response, which has not been contested.⁴

Issue 1: Is the requested information X's personal data?

17. The Appellant has stated that the requested material is not personal information.⁵ However, we have not found any of his arguments about this compelling. X has been named in the request. From a review of the disputed material, it is clear that the information is data that relates to X. Whilst the material relates to the individual's work, the request focuses on aspects of performance standard, which the Appellant considers the data would help to ascertain. Given that the information concerns issues of performance, it is 'biographically significant', and focuses on X. Accordingly, in our view it is clearly highly personal data for the purpose of FOIA and the DPA. That the requested information is statistical does not negate that it constitutes personal data in this case.

Issue 2: Would disclosure contravene the first data protection principle?

18. We turn to whether disclosure would contravene the first data protection principle. (See para. 14 above.) As regards to fairness, we accept the following facts, which we consider suffice to find that disclosure would be unfair.

- a. X has not consented to disclosure. We accept that (a) FOS has never indicated to the employee that this information of this nature would be made public. We accept that FOS keeps the information confidential even within the organisation, such that it is kept between the employee and line manager.
- b. The material is personal. Whilst the information concerns his/her work, it is nonetheless highly personal. This is because, as stated above, it appertains to his performance statistics, which the Appellant is seeking to draw conclusions from. This includes information about his workload, how many opinions consumers were not happy with and how many an ombudsman did not agree with. This information is confidential notwithstanding that we do not find the adjudicator to be a junior member of staff, and regardless of whether the statistics contained in the withheld information are particularly high, low or middling.
- c. The equivalent information concerning the other adjudicators is not made public.
- d. In the particular circumstances of this case, X would reasonably expect the information not to be disclosed based on the cumulative effect of (a) to (c) above. This in itself suffices to conclude that disclosure would be unfair.
- e. *[A sub-paragraph (e) appears in the Closed Decision.]*

⁴ See pages 19 to 20 of the Open Bundle.

⁵ See page 50 of the Open Bundle.

19. We would note for the sake of completeness that we do not accept the Respondents argument that X is not a senior member of staff. FOS notes that junior members of staff are generally entitled to a greater degree of privacy than senior members of staff. Whilst adjudicators are not as senior as an ombudsman, we find that FOS adjudicators are not particularly junior. They take on positions of responsibility, liaising with the public and investigating and issuing opinions that may serve as final binding decisions for a significant number of cases, when, for instance the matter is not progressed to the ombudsman. We accept the Appellant's submissions that adjudicators make decisions, mediate and come up with compromises. We additionally find that as a consequence, there is public interest in the outcomes reached and number of complaints considered when compared with the ombudsman's statistics.
20. A finding that disclosure is unfair is sufficient to conclude that the information should not be disclosed. However, we additionally do not find that any condition set out in schedule 2 of the DPA would be met disclosing the information. The only condition that has been identified to us as of relevance is paragraph 6. (*See para. 15 above.*) In considering any legitimate interests we have taken into account the Appellant's stated interests for disclosing the data. These include:
- a. He had found X appeared very biased in favour of the insurers and had meddled trying to steer the case whilst the Ombudsman was involved. He submitted a CD disc recording telephone conversations including between X and the insurers. Whilst he had been told X's involvement at the time was purely administrative, the conversation of 23 February 2015 showed that (a) X was liaising between the ombudsman and business taking on an advisory role; (b) illustrated a tone of over-familiarity; and (c) giving the insurers a 'heads up'. In this, he was biased, unprofessional and factually incorrect.
 - b. He wanted to establish whether X was consistently biased and believed the information would show a pattern of bias. This would highlight an opportunity for adjudicators to be better trained and monitored.
 - c. There is public interest in ascertaining whether FOS is fit for purpose and whether processes need to be re-engineered to give consumers a better chance of fairness. Adjudicators make up a large proportion of FOS' decisions and their statistics should be made public.
 - d. Disclosing the requested information would not affect X unless it showed wrongdoing.
 - e. He believed that FOS were hiding statistics that show they are not fulfilling their objectives.
21. FOS responds that the independent assessor had taken into account the telephone conversations.
22. We consider there to be legitimate interests in knowing whether FOS operates a fair independent scheme that complies with its role under FSMA. This includes ensuring that adjudicators are not biased or unprofessional. There is an interest in knowing matters such as the numbers or proportion of complaints that reach the ombudsman and how the outcomes compare between the two tiers. However, we do not find that disclosing the requested information is 'necessary' for the purposes of those interests. This is because the requested information would not satisfy those interests. Publishing statistics related to one adjudicator without context of the particular cases or comparison to other adjudicators would not in our view assist in ascertaining how

fair or independent the scheme is. Even if we were wrong about this, disclosure would not be necessary as FOS would be able to publish generic data without the need to disclose personal data of its staff. *[The Closed Decision contains additional sentences in this paragraph.]*

23. Even if we were wrong in our findings in paragraph 22, we are strongly of the view that disclosing the data would “*prejudice the rights and freedoms or legitimate interests of*” X to such a degree that disclosure would be unwarranted. As already made clear, the Appellant has made strong allegations as to the performance standard of X, and he considers the data would help to ascertain a consistency of bias. Regardless of what the statistics show, the Appellant seeks to use these to judge issues of performance. In this context, when combined with the purpose for which the Appellant seeks the information, we consider the material to be very strongly personal, and disclosure (to the world at large) would contravene the adjudicator’s right to privacy.

24. We accept that the Appellant has a legitimate private interest in the information. However, this is outweighed by X’s legitimate expectation of privacy such that disclosure to the world at large would be unwarranted.

25. Our decision is unanimous.

Other

26. We note that the Appellant supports his case partly on the basis that X has been biased and has provided evidence he claims substantiates this. We have considered that evidence, including listening to the conversation the Appellant drew our attention to and others. However, we do not consider it necessary to make a finding on whether X has been biased. This is because our decision would be the same regardless of this.

27. FOS has explained data it publishes to be open and transparent.⁶ Whilst not a matter for this Tribunal, we can see value in additionally publishing data (broken down by business) as to the number of complaints that proceed to the ombudsman and proportion that result in a change of outcome in favour of the consumer.

Signed

Claire Taylor

Judge of the First-tier Tribunal

Date: 19 February 2018

Promulgation date

27 February 2018

⁶See para. 67 of page 33 of the Open Bundle.