



Tribunals Service
Information Tribunal

Information Tribunal Appeal Number EA/2008/0082
Information Commissioner's Ref: FS50130697

Heard at Procession House, London, EC4
On 1 December 2008

Decision Promulgated
19 December 2008

BEFORE

CHAIRMAN

ANNABEL PILLING

and

LAY MEMBERS

JACQUELINE BLAKE
ROGER CREEDON

Between

MRS J JAMAL

Appellant

and

THE INFORMATION COMMISSIONER

Respondent

Subject matter:

Information Tribunal (Enforcement Appeals) Rules 2005
Application for striking out, Rule 9

Cases:

Bennett v ICO EA/2008/0033

Representation:

For the Appellant: Mrs J Jamal

For the Respondent: Adam Sowerbutts

Decision

The Tribunal grants the application of the Information Commissioner and this Appeal is struck out under Rule 9 of the Information Tribunal (Enforcement Appeals) Rules 2005.

Reasons for Decision

Introduction

1. The Appellant has an on-going complaint involving Halifax plc and Halifax Insurance Ireland Ltd. This Appeal concerns a request for information made to the Financial Services Authority (the 'FSA'), an independent non-governmental body which takes its powers under the Financial Services and Markets Act 2000.

The Request for Information

2. By letter dated 1 August 2006, the Appellant made a request for information under the Freedom of Information Act (the 'FOIA') that the FSA provide her with answers to a number of questions regarding the handling of her mortgage account and associated insurance by Halifax plc and Halifax Insurance Ireland Ltd. The Appellant's request consisted of some forty questions, some with multiple parts.
3. The following day, the Appellant wrote to the Information Commissioner (the 'Commissioner') asking the Commissioner to approach the FSA and compel it to respond to her request for information.
4. The Commissioner made enquiries and the FSA advised that the request for information had not been received. On 11 September 2006 the Commissioner provided the FSA with a copy of the Appellant's request and asked the FSA to provide the Appellant with a response within twenty working days of receipt.
5. The FSA replied substantively on 11 October 2006 by way of a sixteen page letter. Where the questions raised by the Appellant related to, or were within, the FSA's remit, answers were provided, save for three of them. In respect of the remaining questions (which related to the Appellant's individual issues with either Halifax plc or Halifax Insurance Ireland Ltd), the FSA referred the Appellant either back to the relevant company or to the Financial Ombudsman Service (the 'FOS'), as the appropriate complaints body.
6. However, the FSA refused to confirm or deny that information was held in relation to question 10 of the Appellant's request, citing section 31 of FOIA (law enforcement).

It regarded question 13 as hypothetical and also refused to provide the information in what the Commissioner has referred to as the second part of question 40 (the latter requests having no numbering in the original letter), claiming that the information was exempt from disclosure under sections 21 (accessible by other means), 43 (commercial interests) and 44 (prohibition on disclosure) of FOIA. Those questions were:

“10. How many complaints or investigation have FSA undertaken against Halifax PLC and Halifax Insurance Ireland Limited?;

13. Would FSA release any other correspondences and where necessary forward copies of them for my attention?;

40. ... [The first part of question 40 was addressed by the FSA]...

Furthermore, I would also request for you to forward to me copies of any Halifax correspondences and any documents that Halifax PLC & Halifax Insurance Ireland Limited send to FSA.”

7. On 13 October 2006 the Appellant requested an internal review of the FSA's decision.
8. The FSA completed its internal review and communicated its findings to the Appellant on 10 January 2007. The internal review upheld the decision to rely on section 31 of FOIA to neither confirm nor deny that information was held in relation to question 10 and upheld the application of the exemptions under sections 21, 43 and 44 of FOIA to the withheld information.

The complaint to the Information Commissioner

9. On 31 January 2007 the Appellant contacted the Information Commissioner to complain about the decision of the FSA to withhold information.
10. The Commissioner began his investigation in April 2008. Due to the wide scope of the original forty questions, the Commissioner wrote to the Appellant to clarify matters and to explain that the information withheld by the FSA under sections 21, 31 and 44 of FOIA related to the information requested in questions 10, 13 and the

second part of question 40. The Commissioner informed the Appellant that, consequently, he would be focusing his investigation on the handling of those three information requests unless the Appellant made representations to the contrary. She did not do so. The Commissioner noted that the FSA had complied with the bulk of the forty requests made by the Appellant.

11. The Commissioner also began correspondence with the FSA, asking it to provide a copy of the withheld information and for further explanation regarding the application of the exemptions.
12. The FSA responded, and with regard to question 40, indicated that it now considered that this information was also exempt under section 12 of FOIA. Section 12 of FOIA provides that a public authority is not obliged to comply with a request for information if it estimates that the cost of complying with the request would exceed the appropriate cost limit, as set by The Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2004.
13. During the course of the correspondence, the FSA concluded that, although it had initially regarded question 13 as a hypothetical question rather than an actual request for information, it now considered that the cost of complying would exceed the appropriate cost limit and therefore was exempt under section 12 of FOIA.
14. The FSA further stated that whilst it would take less time to comply with question 10, it had concluded that all the information was exempt under section 12 of FOIA in light of Regulation 5 of The Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2004. This provides that where two or more requests for information are made by the same person and relate, to any extent, to the same or similar information, the estimated cost of complying with any of the requests is to be taken to be the total costs of complying with all of them.
15. The FSA provided information as to the quantity of the withheld material. Although the initial request was for information regarding Halifax plc or Halifax Insurance Ireland Ltd, following a merger in September 2001, both these brands had become part of the HBOS PLC Group, divided into a number of business units or divisions. The FSA holds a large amount of information concerning the Halifax brand, both in paper and electronic format; in paper format at least 62 files (of several hundred

pages each) in relation to the Halifax brand alone, and over 1500 electronic files containing documents with the word “Halifax” in. The FSA estimated that it would take 20 minutes to locate and retrieve the information from each paper file and 3 minutes for each electronic file, making a total of 96 hours, therefore exceeding the appropriate cost limit.

16. The Commissioner concluded that the FSA had correctly applied section 12 of FOIA in relation to the withheld information.

17. However, the Commissioner found that the FSA were in breach of section 1(1)(a) and 1(1)(b) of FOIA in initially treating the Appellant’s question 13 as a hypothetical rather than actual request for information.

18. The Commissioner also found that the FSA were in breach of section 17(5) of FOIA by failing to inform the Appellant in its initial refusal notice that it was also seeking to rely on section 12 of FOIA.

19. The Commissioner also found that the FSA failed in its obligation to provide advice and assistance to the Appellant in accordance with the provisions of section 16 of FOIA and the Code of Practice under section 45 of FOIA by not inviting the Appellant to refine her request.

20. A Decision Notice, dated 4 September 2008, was served setting out the Commissioner’s conclusions.

21. Although he did not find that there had been a breach of section 16 of FOIA, the Commissioner required that the FSA to offer further advice and assistance to the Appellant in order to assist her in bringing the remaining elements of her information request within the appropriate limit and should then provide the information requested or issue a refusal notice compliant with section 17 of FOIA.

The Appeal to the Tribunal

22. On 30 September 2008 the Appellant appealed to the Tribunal against the Decision Notice. “Some” of the grounds of appeal were set out. The Appellant provided a further letter containing submissions dated 27 October 2008.

23. The Information Commissioner served a Reply dated 27 October 2008 submitting that the Notice of Appeal disclosed no valid grounds of appeal and applying for the appeal to be struck out under Rule 9 of the Information Tribunal (Enforcement Appeals) Rules 2005.
24. The Tribunal issued Directions dated 5 November 2008. The Appellant was given the opportunity to provide written representations as to:
- i) what reasonable grounds of appeal were disclosed in the Notice of Appeal such that the appeal should not be struck out under Rule 9;
 - ii) whether the Appeal has a realistic prospect of success such that the appeal should not be dismissed summarily under Rule 10;
 - iii) whether an oral hearing would be necessary if she disagreed with the Information Commissioner's view that the matter could properly be dealt with by way of a paper hearing.
25. The Appellant was also provided with a copy of The Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2004. This was to ensure that she understood that the FSA and the Commissioner had applied the relevant Regulations as to the application of the appropriate limit under section 12 of FOIA. In respect of the FSA, under Regulation 3(2), the appropriate limit referred to in section 12 of FOIA is £450.00. Under Regulation 4(3), in estimating the cost of complying with a request, a public authority may take account only of the costs it reasonably expects to incur in relation to the request in
- (a) determining whether it holds the information,
 - (b) locating the information, or a document which may contain the information,
 - (c) retrieving the information, or a document which may contain the information, and
 - (d) extracting the information from a document containing it.

Regulation 4(4) prescribes the rate to undertake those tasks at £25.00 per person per hour. This means that the estimate of the time taken to comply with the request

would have to be less than 18 hours otherwise a public authority could, if it chose, rely on the exemption at section 12 of FOIA.

26. The Appellant responded by letter dated 10 November 2008. She stated that she enclosed the grounds of appeal, submitted that the Appeal had a realistic prospect of success and agreed that the Appeal should be dealt with by way of written submissions.

The Powers of the Tribunal

27. The Tribunal's powers in relation to appeals under section 57 of the FOIA are set out in section 58 of the FOIA, as follows:

(1) 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.

28. Under Rule 4 of the Information Tribunal (Enforcement Appeals) Rules 2005, an appeal against a Decision Notice must be made in writing and must state the grounds of appeal.

29. The Commissioner's Decision was that the FSA dealt with the application of section 12 in accordance with FOIA and that the cost of complying would exceed the appropriate limit - it is therefore this Decision that the Appellant is appealing against. There was no consideration of the exemptions raised earlier by the FSA (that is, sections 21, 31, 43 and 44 of FOIA).

The Issues for the Tribunal

30. The Information Commissioner has applied for the appeal to be struck out under Rule 9 of the Information Tribunal (Enforcement Appeals) Rules 2005 on the basis that the Notice of Appeal discloses no reasonable grounds of appeal. The material parts of Rule 9 provide as follows:

9. (1) where the Commissioner is of the opinion that an appeal does not lie to, or cannot be entertained by, the Tribunal, or that the notice of appeal discloses no reasonable grounds of appeal, he may include in his reply under Rule 8(2) above a notice to that effect stating the grounds for such contention and applying for the appeal to be struck out.

(2) An application under this rule may be heard as a preliminary issue or at the beginning of the substantive appeal.

(3)

31. There is little guidance provided for the Tribunal on the circumstances in which it will be appropriate to strike out an appeal under Rule 9. We have adopted the approach taken by a differently constituted panel of this Tribunal in the case of Bennett v Information Commissioner EA/2008/0033, which, in fact, consisted of two of the same members of the panel for this Appeal.

32. The Tribunal did not consider it to be in the interests of either party, or in the wider public interest, for this matter to proceed to a full hearing in light of the application made by the Information Commissioner for the appeal to be struck out. We reiterate what was said in Bennett, that although there may be occasions in which it is considered appropriate to direct that the parties prepare for the substantive hearing before the application under Rule 9 is determined, bearing in mind the inevitable costs and time that would be expended, we are of the opinion that these occasions will be rare.

33. Although no procedure for the determination of an application under Rule 9 is prescribed by the Rules, the Tribunal considered it appropriate in this case, as in Bennett, to adopt the procedure prescribed under Rule 10. As outlined above, the

Appellant was notified that the Tribunal proposed to determine the issue, she was given the opportunity to make written representations against the proposal and to request the Tribunal to hear oral representations

34. The Tribunal must consider whether the grounds of appeal advanced by the Appellant contain a reasonable ground of appeal under the test established in Bennett:

a reasonable ground of appeal is one that is readily identifiable from the Notice of Appeal, relates to an issue the Tribunal has jurisdiction to decide and is realistic not fanciful.

35. If there is no reasonable ground of appeal, the Tribunal must grant the application of the Information Commissioner for the appeal to be struck out under Rule 9.

36. We have considered each of the eight grounds that can be identified from the letter submitted by the Appellant as her Notice of Appeal.

37. We note that the Appellant is not legally represented and it may be that she does not fully understand the jurisdiction and remit of the FSA, the Commissioner's Office and this Tribunal. We have, for example, no powers to order the FSA or the FOS to conduct any further investigation into her original complaints about her mortgage provider.

1. That neither the FSA nor the ICO "have fully taken into account the quality of the responses made by either the FSA and/or ICO."

38. Our role as a Tribunal is not quality checking the work of the Commissioner, although it would be a matter of concern to us if the Commissioner came to a decision on the basis of inadequate consideration of the issues. That is not the case here.

39. While the submissions do not specifically address the findings of the Commissioner in respect of the application of section 12 of FOIA, we note that we are satisfied that the Commissioner did fully consider the responses of the FSA with regard to the calculations used to estimate the time that it would take to comply with the request. It is clear from the large volume of material that the FSA holds, that to locate and

retrieve the information requested would take considerably longer than the 18 hours envisaged by the Regulations.

40. We also note that the Commissioner was not, in fact, satisfied with the quality of the FSA's responses and found that the FSA had breached provisions of FOIA and that he requested the FSA to comply with the requirement under section 16 to provide further advice and assistance to the Appellant to refine her request to bring it within the cost limit.

41. This does not amount to a ground of appeal.

2. That the Appellant either does not understand, or disagrees with, the application of a calculation for the costs of complying with her request based upon a rate of £25.00 per person per hour, and a total of £450.00. She wishes to have the "criteria", "procedure" and "methodology" used in reaching those figures explained.

42. The Tribunal hopes that now the Appellant has been provided with a copy of The Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2004 she understands how the FSA came to apply those figures. These Regulations are part of the statutory framework governing the way in which requests for information to public authorities made under FOIA are dealt with. The prescribed limits set by the Regulations apply to all public authorities, not just the FSA. The fact that the Appellant disagrees with the fact that the FSA have calculated the cost of complying with the request for information in accordance with the statutory guidance does not relate to any issue this Tribunal has jurisdiction to decide and is not a ground of appeal against the Decision Notice.

3. That the FSA should have anticipated that it would receive RFIs from "customers", like the Appellant and, consequently, should organise its records in such a way that all information it holds was readily available and free of charge to "customers", like the Appellant.

43. It appears that the Appellant has misunderstood the role and remit of the FSA and perhaps confused it with the FOS. The FSA is an independent non-governmental

body, wholly financed by the financial services industry, that is, the firms it regulates. Its funding is not provided by private individuals or the tax payer. It does not deal with private individual's complaints about specific financial institutions; such complaints are dealt with by the FOS.

44. As stated above, the FSA, as a public authority falling within the category at Regulation 3(2) of The Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2004, was entitled to rely upon the exemption at section 12 of FOIA if it estimated that the cost of complying with the request would exceed the appropriate limit. We have seen no evidence to suggest that the FSA proposed to charge for the communication of information as it could choose to do under section 13 of FOIA. To do so would not give rise to a reasonable ground of appeal.

45. This does not therefore amount to an issue the Tribunal has jurisdiction to decide and is not a reasonable ground of appeal against the Decision Notice.

4. That the FSA should have organised its filing and retention system to be able to deal specifically with RFIs such as that pursued by the Appellant. Also that the Appellant should have been told both the time and cost of copying the information held onto memory disk.

46. The FSA are limited in how they reach the estimate of the cost of complying with the request. Under Regulation 4(3), a public authority can only take account of the estimated time taken to carry out the prescribed tasks and no other. The Appellant appears to be criticising the FSA for organising their filing systems in such a way that to locate and retrieve every document that fell within the wide request made by her would take longer than 18 hours. This is not a matter within our jurisdiction; we have no power to order a public authority to keep its business records in a particular way.

47. The Appellant also submits that the FSA should have addressed the time and cost of copying the information held onto a memory disk. Whilst it is open to an applicant to request that information be provided in an electronic format, a public authority is required by section 11 of FOIA to give effect to that preference "so far as reasonably practicable", having regard to all the circumstances, including the

cost of doing so. In this case it is clear that the prior cost of locating and retrieving the information requested from the electronic and paper files would exceed the appropriate limit.

48. This submission does not relate to an issue the Tribunal has jurisdiction to decide and is not a reasonable ground of appeal against the Decision Notice.

5. That the FSA have chosen to set up and maintain their information system “without any input from their customers who have already paid for this and I should not be forced to pay for it.”

49. Again, the Appellant appears to have misunderstood the role of and nature of her relationship with the FSA.

50. How the FSA set up and maintain their information system is not a matter this Tribunal has jurisdiction over and does not amount to a reasonable ground of appeal against the Decision Notice.

6. That neither the FSA nor the Commissioner have “fully accounted for the supervisory quality of the FSA in its dealing of ensuring the full disclosure of information from them and FOS.”

51. This is a complaint about the supervisory quality of the FSA and/or the FOS and not a matter that this Tribunal has any jurisdiction over. It does not amount to a reasonable ground of appeal against the Decision Notice.

52. We note that the Commissioner states in his Reply that the “Commissioner satisfied himself that the quality of the FSA’s responses as they related to the Appellant’s information request and the application of FOIA were satisfactory.” We find this statement to be misleading in light of the breaches of FOIA found by the Commissioner in the Decision Notice. It is clear that the Commissioner was far from satisfied with some of the responses by the FSA and required that it take further action to comply with its duties under section 16 of FOIA.

7. "As to why contents of my letters of... a (date), b (date), c (date) and d (date)"

53. This ground does no more than identify four letters and makes no further statement, assertion or submission. Accordingly we cannot identify any issue that this ground relates to and conclude that it does not amount to a reasonable ground of appeal against the Decision Notice.

8. The FSA and companies complained about are hiding behind sections of the law to avoid doing the right thing which means that there is no accountability from the FSA and/or companies complained about. "Some of these include FSA:-

- (a) Have not given me a specific figure as to how much it would take to print and supply a stamped addressed envelope.
- (b) Are unwilling to supply definitions of what "reasonably accessible" is.
- (c) Are not using these sections to avoid carrying out its ethical, moral and legal obligations to investigate the complaint.
- (d) Whether they are not simply flogging me off by hiding behind sections 21, 31 (and 44) and section 348 of the FSMA 2000, regardless of whether there are any merits in my complaint.
- (e) Have not addressed many of the issues and questions that I have raised with them. The two prime example are:
 - (a) Exit fees charged by the mortgage lender
 - (b) How much time did FSA spend on points 8 and 5 of my letter of 13.10.06 and 4.11.06 respectively?

54. We are of the opinion that the submissions made in relation to this ground relate, in the main, to the substantive complaint the Appellant has against her mortgage provider. In particular points (a), (b), (c) and (e) above clearly relate to the primary grievance and are not matters that this Tribunal has any jurisdiction over. This Tribunal is concerned with the complaint about the Commissioner's decision in the Decision Notice.

55. The Commissioner submits that this ground appears to be based upon a serious misunderstanding of the Commissioner's statutory role and the powers devolved to him under the terms of FOIA.
56. Neither the FSA nor the Commissioner nor this Tribunal are permitted to disregard the operation of legislation in order to consider "the wider picture" or "be creative" as the Appellant suggests, however it may be perceived by any party, including the Commissioner himself.
57. We note that with regard to point (d) above, the Appellant appears to be challenging the FSA's initial decision to refuse to provide information on the basis of exemptions in other sections of FOIA. This Tribunal is concerned with the decision of the Commissioner in the Decision Notice. The Commissioner concluded that the FSA was correct in its application of section 12 of FOIA and he did not go on to consider the possible application of the exemptions claimed previously.
58. In responding to this particular ground of appeal, the Commissioner, in his Reply, states that "he is satisfied that the provisions of FOIA have been applied in this case". As we have already noted in relation to a similar submission, we find this statement to be misleading in light of the breaches of FOIA found by the Commissioner in the Decision Notice. It is clear that the Commissioner was far from satisfied that all the provisions of FOIA had been applied in this case, and required that the FSA take further action to comply with its duties under section 16 of FOIA.
59. For the reasons given, we are not satisfied that any of the matters raised by the Appellant in relation to Ground 8 amount to a ground of appeal.
60. We have also considered the submissions made to the Tribunal by the Appellant in her letters of 27 October 2008 and 10 November 2008. Some of these are submissions about the substantive complaint about the Appellant's mortgage lender, some about bodies following Rules and Regulations. We do not consider it necessary or appropriate to respond to each submission in turn but we do have some observations.

61. In her letter of 27 October 2008, the Appellant refers to subsequent requests for information which are outside the scope of this Appeal. She also raises the question of “compensation” which is not a matter this Tribunal has any power to order.

62. In her letter of 10 November 2008, the Appellant appears to challenge the estimate made by the FSA that it would take over 18 hours to comply with the request but without providing any submissions as to the basis for that challenge. As we have stated above, it is clear from the volume of material identified by the FSA that it would take considerably longer than 18 hours to comply. This does not amount to a realistic ground of appeal.

Conclusions

63. It would appear that the Appellant does not fully understand the limited jurisdiction of this Tribunal. We have no power to order the FSA or any other party to investigate her complaint against a mortgage lender.

64. We are satisfied that the Appellant **has** been provided with a copy of The Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2004.

65. Although the Appellant would wish it otherwise, the Tribunal, as well as the FSA and the Commissioner, must apply the legislation; we cannot be “creative” as the Appellant suggests.

66. For the reasons set out above, we have concluded that the Notice of Appeal discloses no reasonable ground of appeal and accordingly the appeal must be struck out under Rule 9 of the Information Tribunal (Enforcement Appeals) Rules 2005.

67. Our decision is unanimous.

Signed:

Annabel Pilling
Deputy Chairman

Date: 19 December 2008