

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 18 December 2012

Public Authority: Financial Ombudsman Service
Address: South Quay Plaza
183 Marsh Wall
London
E14 9SR

Decision (including any steps ordered)

1. The complainant submitted four requests to the Financial Ombudsman Service (FOS) all of which focused on the FOS' handling of complaints it had received concerning the Royal Bank of Scotland's 'Virgin One' account. The FOS refused to answer requests 1 and 2 on the basis of section 12 of FOIA, it explained that it did not hold any information falling within the scope of request 3, and although it held one document falling within the scope of request 4, it considered this to be exempt from disclosure on the basis of section 41(1) of FOIA. The Commissioner is satisfied that the FOS was entitled to rely on sections 12 and 41(1) to refuse these requests. Furthermore, the Commissioner is satisfied that on the balance of probabilities the FOS does not hold any information that could be used to fulfil requests 1 and 2 within the cost limit, does not hold any information falling within the scope of request 3 and does not hold any information falling within the scope of request 4 other than the document that has been withheld on the basis of section 41(1). The Commissioner does not require the FOS to take any steps as a result of this decision.

Request and response

2. On 25 May 2012 the complainant submitted the following requests to the FOS:

'As before, this FOI request relates to complaints received by the FOS about the failure of RBS to follow Bank of England interest rate changes (from April 2008 onwards) on its Virgin One accounts:

My revised request is as follows:

- 1. In correspondence, the FOS has informed me that they had received numerous such complaints and that these had been formally grouped together in order to achieve consistent outcomes. What is the total number of complaints made to the FOS about the failure of RBS to follow Bank of England interest rate changes on its Virgin One accounts?*
 - 2. How many of these complaints have been upheld?*
 - 3. I require disclosure of all documentation notifying official policy to FOS ombudsmen and other staff as to whether complaints of this type should be upheld or not.*
 - 4. During my correspondence with the FOS, I was regularly informed that my complaint against RBS was one of several such complaints that were on hold whilst the "broader issues" were discussed at a senior level between the FOS and RBS. I require disclosure of all documentation relating to such communications. As with this entire FOI request, reference to individual cases or personal information can be redacted'.*
3. The FOS responded on 26 June 2012. In relation to requests 1 and 2 it explained that it could not provide this information within the appropriate cost limit of £450 and therefore these requests were refused on the basis of section 12 of FOIA. In relation to request 3 the FOS explained that it did not hold any information within the scope of this request. In relation to request 4 the FOS explained that it only held one document within the scope of this request but it considered it to be exempt from disclosure on the basis of section 41(1) of FOIA.
 4. The complainant contacted the FOS on 26 June 2012 in order to query these responses and the FOS replied on 29 June 2012 confirming that its position remained the same.
 5. On 30 June 2012 the complainant contacted the FOS again and asked it to undertake an internal review of its handling of her requests.
 6. The FOS informed the complainant of the outcome of the review on 27 July 2012. In relation to requests 1 and 2 the FOS confirmed that whilst at some point in the past it may have held information which identified all of the complaints concerning the failure of The Royal Bank of Scotland (RBS) to follow Bank of England interest rates on its Virgin One accounts, it did not hold any such information at the time of these requests. Therefore it explained that in its view to answer requests 1

and 2 it would need to manually review each potentially relevant complaint file. This was because its electronic case management systems could not be used to identify complaints which had been specifically made about the failure of RBS to follow Bank of England interest rate changes on its Virgin One accounts. Rather its electronic case management system could only be used to identify a much broader category of cases, namely all complaints made since April 2008 against RBS about 'house mortgages'. This meant that over 700 case files would have to be examined in order to locate, firstly, complaints about the Virgin One account and secondly, establish whether such complaints had in fact been upheld. The FOS estimated it would take at least ten minutes per file to extract any relevant information which would considerably exceed the cost limit. In relation to request 3 the FOS confirmed that it did not hold any information within the scope of this request. In relation to request 4, the FOS confirmed that it was seeking to rely on section 41(1) of FOIA to withhold the one document it held.

7. During course of the Commissioner's investigation the FOS contacted the complainant again on 5 October 2012 and provided her with some information falling within the scope of requests 1 and 2. The FOS explained that following further discussions it appeared likely that the vast majority, if not all, of the final decisions issued in relation to complaints about this particular financial product were issued by one ombudsman, Clare Mortimer. In view of this the FOS had, within the cost limit, identified all of the final decisions issued by this ombudsman for complaints concerning RBS and 'house mortgages' between 1 January 2008 and the date of the request. The FOS explained that it had then examined each of these final decisions and established 18 related to the subject matter of the complainant's requests, and of these 18 complaints, 16 involved a change in the outcome in the consumer's favour, i.e. they were 'upheld'.
8. In the same letter the FOS also explained to the complainant that it has a two stage process for resolving disputes between consumers and financial businesses. In the first instance a complaint will be considered by a case handler and they will issue an opinion. If either party disagrees with the opinion, then the next stage is for the complaint to be reviewed by an ombudsman who will issue a final decision. The FOS explained that the relevance of this is that whilst it had been able to locate the relevant complaints and identify the final decision for all complaints considered by one particular ombudsman, the same process would not be a practical way of locating cases where only an opinion and not a final decision was issued. This is because as at June 2012 the FOS employed 1,300 case handlers. The FOS therefore remained of the view that to provide a full response to requests 1 and 2, to include all final decisions issued by any other ombudsmen **and** cases where a final decision had not been issued, would take in excess of 18 hours. This

was because excluding the case files that the FOS had now reviewed, it would still need to consult in excess of 600 cases files.

9. Following these disclosures the complainant contacted the Commissioner with a number of comments about the information provided by the FOS. The complainant disputed the FOS' position that the vast majority, if not all, of the final decisions issued in complaints of the nature she is interested in were issued by one ombudsman (i.e. Clare Mortimer). Rather, the complainant's understanding was that similar complaints were also dealt with by another ombudsman, Michael Ingram. The Commissioner discussed this issue with the FOS and as a result the FOS agreed to conduct the same exercise for cases dealt with by Mr Ingram as it had with cases dealt with by Ms Mortimer.
10. The FOS subsequently contacted the complainant again on 30 October 2012 and explained that it had identified all of the final decisions issued by Mr Ingram for complaints concerning Royal Bank of Scotland and 'house mortgages' between 1 January 2008 and the date of the complainant's request. Having reviewed all of the final decisions in relation to these cases the FOS had established that only one related to the failure of RBS to follow Bank of England interest rate changes on its Virgin One accounts and that in this one case the complaint was 'upheld'. The FOS reiterated its position that for the reasons previously explained to the complainant, providing a full response to requests one and two to include decisions made by any other ombudsmen and case handlers would exceed the cost limit.

Scope of the case

11. The complainant initially contacted the Commissioner on 27 July 2012 in order to complain about the way the FOS had handled all four of her requests. The complainant also provided the Commissioner with further comments about the FOS' handling of her requests following the additional information it had provided to her on 5 and 30 October 2012.
12. In relation to requests 1 and 2, the complainant argued that because the FOS had apparently grouped together all similar complaints concerning RBS and its Virgin One account it therefore must hold information which could be used to answer these requests within the cost limit. Furthermore, even if such recorded information was not in fact held, the complainant asked the Commissioner to consider the validity of the FOS' position that even using its case management system to identify any relevant information it would still have to examine 700 plus files and that this process would exceed the appropriate cost limit of £450.

13. In relation to request 3, the complaint believed that the FOS would be likely to hold some policy or guidance documentation which included specific reference to the RBS Virgin One accounts.
14. In relation to request 4, the complainant believed that the FOS would hold more than the one document which it had located and withheld on the basis of section 41(1) of FOIA. She also asked the Commissioner to consider the FOS' reliance on section 41(1) of FOIA to withhold this document; in particular, she suggested that this document could be disclosed in a redacted form.

Reasons for decision

15. The Commissioner has considered the FOS' handling of each of the complainant's requests in turn. Where there is some overlap between the complainant's various points of complaint or the FOS' responses, e.g. for all four requests the complainant has argued that the FOS holds information which has not been disclosed, the Commissioner has simply referred to previous points he has made rather than repeat particular issues.

Requests 1 and 2 – the application of section 12

16. Section 12(1) of FOIA allows a public authority to refuse to comply with a request if the estimated cost of doing so exceeds the appropriate cost limit. With respect to the FOS this limit is £450, representing 18 hours work at a charge of £25 per hour. The only activities that a public authority can take into account are set out in The Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations (the 'Fees Regulations') and are the following:
 - determining whether it holds the information;
 - locating the information, or a document containing it;
 - retrieving the information, or a document containing it; and
 - extracting the information from a document containing it.
17. When refusing a request on the basis of section 12 a public authority does not need to have made a precise calculation of the costs of complying with the request, rather it only needs to have made an estimate of the cost. However, in the Commissioner's opinion, such estimates need to be sensible, realistic and supported by cogent evidence.

18. As explained above, the FOS' position is that in order to fulfil requests 1 and 2 it would need to identify and then examine all of the case files for complaints it had received concerning Royal Bank of Scotland and 'house mortgages' between 1 January 2008 and the date of the complainant's request in order to locate any relevant information. This would involve the manual examination of 745 files in total. The FOS explained that this manual process of examining cases files was necessary because its electronic management systems could not be used to identify specific complaints about the failure of RBS to follow Bank of England interest rate changes on its Virgin One account. As part of his investigation the Commissioner asked the FOS to explicitly confirm whether or not it could refine these search results of 745 complaints by using keywords, for example '*Virgin One*'. The FOS explained that this could not be done.
19. The Commissioner also asked the FOS to clarify the basis upon which it had estimated, as stated in the internal review, that it could take, on average, 10 minutes to examine each case file in order to locate and extract any relevant information. The ICO asked the FOS to validate this figure by undertaking a sampling exercise of a certain number of case files in order to determine how accurate this figure was. The Commissioner specifically asked the FOS to clarify whether or not the case files would always have some sort of 'decision letter' or summary document contained on them, and if this was the case whether such a document could potentially be identified and examined in less than 10 minutes. The Commissioner also asked the FOS to clarify that when it referred to examining the case files it meant electronic versions of manual paper files.
20. In response the FOS explained that depending upon the stage at which a complaint is closed, most complaints will have had either a final decision issued by an ombudsmen and/or an opinion issued by case handler. Both documents are usually relatively easy to locate on the paper or electronic case file. However it is not unusual for these documents not to specify the exact financial product complained about. For example, a decision or an opinion may refer to simply to a '*mortgage*' or a '*current account*'. In such cases it would be necessary to review the file in more detail to determine whether the complaint referred to a Virgin One account and moreover the '*the failure of RBS to follow Bank of England interest rate changes*'. Similarly, if a final decision or opinion had not been issued it would be necessary to carry out a more detailed review of the complaint file. It is also noted that not every hardcopy submission is available in an electronic format, so it may be necessary to retrieve paper files from the FOS' archives.
21. In order to validate the estimated figure of 10 minutes per case, the FOS explained that it had reviewed 10 case files, picked at random from a spread sheet listing the remaining 645 cases (the 100 other cases

being the ones considered by Ms Mortimer or Mr Ingram and which the FOS had already reviewed during the course of the ICO's investigation). The FOS explained that it was more appropriate to select these 10 random cases, than to base its validated estimate on the time taken to examine the cases considered by Ms Mortimer or Mr Ingram because to do so would not take sufficient account of the different ways in which individual case handlers or ombudsman may have organised case files witch they had worked on.

22. The FOS explained to the Commissioner that it took in total 25 minutes and 31 seconds to check the 10 files selected, or an average of 2 minutes 33 seconds per case file. The shortest time was 1 minute 47 seconds and the longest was 3 minutes 3 seconds.
23. Having considered the FOS' explanation as to how it would use its systems and complaint file records to fulfil requests 1 and 2 the Commissioner is satisfied that using the process described by the FOS would exceed 18 hours work. The Commissioner has reached this conclusion for the following reasons. It seems clear that the FOS' electronic management systems are not sufficiently sophisticated to allow an electronic search to be run to identify complaints which only concerned *'the failure of RBS to follow Bank of England interest rate changes on its Virgin One accounts'*. Rather its systems can only be used to identify a broader group of potentially relevant cases, i.e. complaints about RBS' house mortgages. Consequently the FOS' suggestion that it would have to examine all 745 potentially relevant complaint files seems a logical and reasonable one.
24. With regard to how long it would take to examine each file, it is clear that following the validation exercise undertaken by the FOS, its original estimate of 10 minutes per case file was clearly too high. Nevertheless, the Commissioner accepts that on the basis of the revised (and validated) estimate it would take longer than 18 hours to examine all 745 case files and thus fulfil request 1 and 2: if it takes on average 2 minutes 33 seconds per case file it would take 1899 minutes, or just over 31 hours, to examine all 745 cases. The Commissioner is therefore satisfied that the FOS can rely on section 12(1) to refuse to comply with requests 1 and 2
25. In submissions to the Commissioner the complainant argued that the FOS' suggestion that they were having *'difficulty in ascertaining information about these particular complaints is because they formed a small minority of overall complaints about Virgin One house mortgages'* was incorrect. The complainant referred the Commissioner to a letter from a FOS caseworker about a particular complaint in which it was stated that *'we are considering a number of cases relating to the Virgin One account, **the majority of which** surround the issue of promises*

made by Virgin One in 2001 when it said that the product interest rate would follow Bank of England base rate' (emphasis added by complainant).

26. In relation to the parameters of this search the Commissioner does not believe that the complainant's comments in the preceding paragraph affect his decision in relation to section 12(1). The FOS' difficulty in locating relevant complaints to requests 1 and 2 was not because they formed a small minority of overall complaints about the Virgin One house mortgages, but because they formed a small minority of overall complaints about RBS house mortgages. As explained the FOS' electronic systems could only be used to identify cases about RBS house mortgages; the electronic systems could not be used to identify cases about the failure of the Virgin One account to follow Bank of England base rates, or even cases simply involving any aspect of the Virgin One account, as the complainant would seem to suggest.
27. Section 16 of FOIA provides an obligation on public authorities 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. Section 16 notes that any public authority which provides advice and assistance which conforms to the section 45 code of practice will be taken to have complied with the duty set out at section 16 of FOIA.
28. Paragraph 14 of the section 45 Code of Practice states that where a public is not obliged to comply with a request because it would exceed the appropriate limit to do so, then it:

"...should consider providing an indication of what, if any, information could be provided within the cost ceiling. The authority should also consider advising the applicant that by reforming or re-focussing their request, information may be able to be supplied for a lower, or no, fee."
29. Clearly when initially refusing requests 1 and 2 the FOS did not provide the complainant with any advice and assistance to allow her to refine her requests so that some information could be provided within the cost limit. However, the Commissioner notes that the FOS has, during the course of his investigation, effectively provided such advice and assistance by providing the complainant with numbers, and outcomes, of the complaints dealt with by two different ombudsmen.

Requests 1 and 2 – is any further recorded information held?

30. The FOS does not dispute that it holds the information falling within the scope of requests 1 and 2, simply that to provide this information would

require it to examine all potentially relevant case files and this process would exceed the appropriate cost limit. For the reasons set out above the Commissioner is satisfied that to fulfil the requests in this manner would indeed exceed the appropriate cost limit.

31. However as noted above, the complainant has argued that because the FOS had apparently grouped together similar complaints concerning RBS and its Virgin One account it must therefore hold further information which could be used to answer these requests within the cost limit. In other words such information could be used to fulfil requests 1 and 2 without the FOS having to examine all of the potentially relevant case files. In order to explain why she was of this view, the complainant provided the Commissioner with copies of letters she had received from the FOS in relation to her own complaint about the Virgin One account which indicated her complaint was one of number of similar cases that had been grouped together.
32. The complainant also suggested that the fact that the FOS had received a significant number of complaints about this aspect of the Virgin One account, and that the cases clearly represented a serious issue, reflected by the fact that the cases took a notable length of time to be considered by the FOS and were handled at a senior level, added to the likelihood that the FOS would have retained information relevant to her four requests. On a practical level the complainant argued that the two ombudsmen in question, along with the case adjudicator who had dealt with her complaint (and as far as she was aware also dealt with a number of similar cases) would be reasonably expected to have some recall of the relevant facts/files and should reasonably be expected to share details of their personal filing systems in order to identify any information relevant to her requests. Furthermore, the complainant argued that the fact that these cases appeared to have been dealt with by a small number of staff in the FOS suggested that the FOS had formally linked the cases in some way and that a record of the grouped cases was therefore likely to be held.
33. In scenarios such as this where there is some dispute between the public authority and a requester as to whether any further information is in fact held, the Commissioner, following the lead of a number of Information Tribunal decisions, applies the civil standard of the balance of probabilities. In deciding where the balance lies, the Commissioner will consider the scope, quality, thoroughness and results of the searches carried out by the public authority as well as considering, where appropriate, any other reasons offered by the public authority to explain why the information is not held.
34. The FOS explained to the Commissioner that it did not dispute that the letters it sent to the complainant dated 21 October 2009, 9 August 2010

and 18 November 2010 clearly indicated that complaints similar to hers had been '*grouped*' together. However, the FOS explained that in considering these FOI requests it had examined the complainant's case file, both paper and electronic, and there was no record of any kind of a '*grouping*' of cases or a list of case references. The FOS explained that this particular search was relevant because based upon its usual procedures it would be reasonable to assume that if complaints were formally grouped together there would be an entry on the complainant's complaint file in order to alert others who may not be familiar with the background of the case.

35. The FOS explained that when it had first considered these requests, it had asked the ombudsman and case handler responsible for determining the complainant's case whether they held any information relevant to these requests. The FOS explained that these individuals were approached because they had overseen this complaint and therefore if information was held it was likely that they would be aware of it, or indeed be in possession of the information themselves. Both individuals confirmed that they did not hold information relevant to these requests (with the exception of the document in the scope of the request four and withheld on the basis of section 41(1)), although it was suggested that two other ombudsmen may have been involved in liaising with RBS and may have records relating to the complaints. The FOS confirmed that in fact neither of these ombudsmen, one of whom was Mr Ingram, held any records relevant to the complainant's requests. The FOS therefore explained, as noted in the refusal notice, whilst it may have been the case that it held information about linked complaints at some point in the past, its position was that it did not hold any recorded information concerning the '*grouping*' of these complaints at the point when the complainant's requests had been submitted.
36. Given the nature of the comments in the letters the complainant received from the FOS regarding its handling of her case, the Commissioner can certainly understand why the complainant expects that the FOS would have a list of all similar complaints. However, the Commissioner accepts that the rationale of the FOS' explanation that if the decision had been at the time of dealing with the complainant's case to formally record the grouped cases then details of these additional cases would in all likelihood have been added to the complainant's own case file. As noted above the case file in question did not contain details of any grouped cases. Furthermore, the Commissioner believes that the FOS decision to ask the ombudsmen and case handler in question whether they had held any recorded information which would identify linked cases is a sensible one, indeed this approach was one suggested by the complainant herself. However, as noted above none of these individuals in questions had retained any recorded information which could be used to fulfil requests 1 and 2.

37. In conclusion, whilst the Commissioner can understand why the complainant would assume that information regarding the grouping of cases would be held, he is satisfied that on the balance of probabilities it is not. He has reached this conclusion on the basis of the thorough and logical searches that the FOS had conducted for information, none of which have yielded any relevant information.

Request 3 – does the FOS hold any information falling within the scope of this request?

38. The complainant believes that the FOS would hold policy or guidance documentation which included specific reference to the RBS Virgin One accounts for the following reasons. As noted above, she had been informed by the FOS that complaints of this nature had been grouped together and that this had involved senior officials at RBS and the FOS holding discussions about these complaints in relation to the Virgin One accounts. She argued that it was logical to assume that the FOS staff dealing with these complaints would have been informed about the outcome of these discussions. Furthermore, the complainant noted that the FOS continues to receive complaints about these accounts and thus it could be reasonably assumed that some policy / guidance documentation which sets out how these complaints should be assessed would still be needed by the FOS and would presumably be available on its intranet.
39. The complainant also argued that it is difficult to understand how individual employees at the FOS would know how to decide similar cases consistently without guidance documentation of the nature requested under request 3. Indeed the complainant noted the FOS' website explained that *'we dedicate a considerable amount of resource to monitoring the quality and consistency of our work. Our decision-making processes are embedded in an intranet-based knowledge management system'*.
40. In its submissions to the Commissioner the FOS explained that when it had first considered these requests it had asked the case handler who dealt with the complainant's case whether he was aware of any official policy regarding these types of complaint. This was on the basis, the FOS suggested, that if such a policy existed then the case handler would be likely to be aware of it. The case handler explained that he was not aware of any official policy and that, in line with the FOS' general approach, each complaint would be considered on its own particular circumstances.
41. Furthermore, the FOS explained that if there was an official policy about complaints of this nature then it would be expected that this would be

referred to in the complainant's case file but this was not in fact the case.

42. The FOS also informed the Commissioner that it would expect a record of any official policy to be included on its intranet, but a search with the phrase 'virgin one accounts' did not retrieve any relevant results.
43. Finally the FOS highlighted the fact that whilst it published extensive guidance on its general approach to product types or common issues such as mortgage early repayment charges and mortgage underfunding, it is uncommon for it to produce guidance on specific financial products. Rather, complaints are considered on an individual, case-by-case basis with careful attention to the submissions of both parties.
44. Again, on the balance of probabilities the Commissioner has concluded that the FOS does not hold any information falling within the scope of request 3. He has reached this conclusion because given the way the FOS operates it does not appear to have any apparent business need to hold such information and furthermore it has conducted logical and focussed searches to locate any relevant information and none has been found.

Request 4 – does the FOS hold any more information other than the one document withheld on the basis of section 41(1) of FOIA?

45. The complainant argued that the FOS' own correspondence to her indicated an ongoing series of correspondence over several months at a senior level between the FOS and RBS and thus clearly the FOS would hold more than the one document it had identified.
46. In its submissions to the Commissioner the FOS explained that there did not appear to be an ongoing dialogue with the RBS concerning complaints and the failure of its Virgin One account to follow the Bank of England interest rate charges. In light of this, the FOS explained that there did not appear to be any particular purpose for it retaining the one document that had been located other than as historical record.
47. In light of this response the Commissioner asked the FOS to clarify how the one document it was withholding on the basis of section 41(1) had in fact been located. The FOS explained that this document had been located in the paper files of one particular ombudsman. Usually any documents would be filed electronically but not always as this one paper record indicated. The FOS also explained that no similar documentation had been located in the papers of the other two ombudsmen who, as explained above, it also believed may have been involved in dealing with complaints about interest rates and the Virgin Once account.

48. The Commissioner accepts that the correspondence which the FOS sent to the complainant when it was dealing with her case gives the impression that there was ongoing correspondence between the FOS and RBS about this issue. However, as with the previous requests, the Commissioner believes that the FOS have undertaken reasonable and sufficiently detailed searches for information so that, on the balance of probabilities, if any further information was held at the time of the complainant's requests it would have been located.

Request 4 – section 41(1) information provided in confidence

49. Section 41(1) states that:

'Information is exempt information if -

- (a) it was obtained by the public authority from any other person (including another public authority), and
- (b) the disclosure of the information to the public (otherwise than under this Act) by the public authority holding it would constitute a breach of confidence actionable by that or any other person.'

50. Therefore for this exemption to be engaged two criteria have to be met; the public authority has to have obtained the information from a third party **and** the disclosure of that information has to constitute an actionable breach of confidence.

51. With regard to section 41(1)(b), in most cases the approach adopted by the Commissioner in assessing whether disclosure would constitute an actionable breach of confidence is to follow the test of confidence set out in *Coco v A N Clark (Engineering) Ltd* [1968] FSR 415. This judgment suggested that the following three limbed test should be considered in order to determine if information was confidential:

- Whether the information had the necessary quality of confidence;
- Whether the information was imparted in circumstances importing an obligation of confidence; and
- Whether an unauthorised use of the information would result in detriment to the confider.

52. However, further case law has argued that where the information is of a personal nature it is not necessary to establish whether the confider will suffer a detriment as a result of disclosure.

Was the information obtained from a third party?

53. The document that has been withheld is a letter sent to the FOS by RBS and therefore the Commissioner is satisfied that the information was clearly obtained by a third party.

Does the information have the necessary quality of confidence?

54. The FOS argued that the information clearly had the necessary quality of confidence because it was not publically available or accessible by other means, and given its content, clearly not trivial. The Commissioner agrees with his assessment and accepts that the withheld information has the quality of confidence.

Does the information have the necessary obligation of confidence?

55. With regard to the circumstances in which the information was imparted, the FOS explained that although the document was not explicitly provided in confidence, a condition of confidentiality can be implied from the circumstances, namely the fact that it was an exchange between senior representatives of RBS to senior staff at the FOS and indeed from content of the letter itself. The FOS explained that it had contacted RBS to obtain its views on this point; RBS responded by confirming that the document contained confidential information which had been provided with an implicit duty of confidentiality. The Commissioner agrees that it is clear that the information was provided with a clear expectation on the part of RBS that it would not be disclosed.

Would disclosure be detrimental to any party?

56. With regard to the specific detriment that the unauthorised disclosure of the information would cause, the FOS explained that RBS had advised that in its opinion disclosure of the letter may constitute a breach of confidence actionable to itself and to the individuals referred to in the letter. Furthermore, the FOS argued that disclosing the information may undermine the principle of confidentiality in so much as individuals and organisations may be discouraged from approaching the FOS if it was to make information previously accepted in confidence publically available. This in turn may prejudice the FOS' ability to perform its statutory function to resolve complaints against financial businesses quickly and with the minimum formality.
57. In the Commissioner's view disclosure of the letter would clearly be detrimental to the individuals whose cases are referred to in the letter as it would place into the public domain that they had complained to the FOS about the operation of the Virgin One account they held with RBS.

Furthermore, the Commissioner accepts that disclosure of the information would be detrimental to the interests of the RBS as it would place into the public domain RBS' position in respect of complaints made to the FOS about the Virgin One account. The Commissioner also accepts that disclosure of this letter could have a broader detrimental impact on the FOS as he accepts that it is logical to suggest that individuals and business would be unlikely, or at the very least less willing, to share information with it if it had previously disclosed information provided to it in confidence.

58. The Commissioner notes the complainant's suggestion that the letter could be provided to her in a redacted format with the details of individuals cases removed. Although redacting information which identifies the individual RBS customers would ensure that disclosure would not be detrimental to them, for the reasons discussed above disclosure of the letter even in this redacted format would still be detrimental to the RBS and the FOS. In the Commissioner's opinion if the information that is also detrimental to RBS and the FOS was also redacted, it would render the letter nonsensical.

Would disclosure of the confidential information be actionable?

59. Although section 41 of the FOIA is an absolute exemption and thus not subject to the public interest test contained at section 2 of FOIA, the common law concept of confidence suggests that a breach of confidence will not be actionable in circumstances where a public authority can rely on a public interest defence. The Commissioner must therefore consider whether the public interest in disclosing the information overrides the duty of confidence that is owed. The test to be applied in deciding whether the public interest provides a defence to a breach of a duty of confidence is that the duty should be maintained unless the public interest in disclosing the information outweighs the public interest in protecting confidences.

Public interest in maintaining the confidence

60. The FOS emphasised that it was firmly in the public interest to ensure that obligations of confidence are preserved and furthermore that in this case disclosure of the withheld information would be detrimental to a range of individuals and bodies, namely the individuals whose cases are referred to in the letter, RBS and the FOS.

Public interest in disclosing the information

61. The complainant argued that this information needed to be disclosed so that interested parties could understand the FOS' decision making process in relation to how it had dealt with complaints about the failure

of RBS to follow Bank of England interest changes (from April 2008 onwards) on its Virgin One account. The complainant explained that it was her understanding that the FOS had initially accepted, in a lead case determined by one ombudsman (Michael Ingram), that RBS should be held to undertakings it had allegedly provided to customers about following interest changes and following the outcome of this lead case the FOS initially upheld cases in the favour of customers. However, the complainant argued that the FOS then made a complete U-turn at some point in mid-2010, rejecting all later complaints without any explanation for this completely inconsistent and unexplained change of policy with these later complaints being allocated to a different ombudsman (Clare Mortimer). The complainant suggested that this reversal of approach was presumably as a result of a directive from someone at the FOS more senior than the ombudsman who had adjudicated on the lead case. The complainant argued that such an approach was completely contrary to the ombudsmen's supposed independence and principles of consistency and fairness.

Balance of the public interest

62. The Commissioner believes that there is weighty public interest in public authorities being open and transparent about the work that they do and decisions that they have taken. In the context of this case whilst it would be difficult to argue that the wider public have an interest in how the FOS dealt with these particular types of complaint, the Commissioner acknowledges that the withheld information would clearly be of interest to the individuals, such as the complainant, who have complained to the FOS about the Virgin One account. However, the Commissioner is conscious that disclosure of the withheld information could have a detrimental effect not simply on the individuals who are referred to in the letter and the RBS in the context of its position regarding the Virgin One account cases, but also more broadly on the FOS' ability to resolve a wide range of cases in the future. That is to say third parties may be more reluctant to provide the FOS with free and frank submissions if they believed that such information would be disclosed under FOIA. In light of this widespread potential detriment, and taking into account the inverse nature of the public interest test under section 41(1), the Commissioner accepts that in this particular case, the public interest in protecting the confidence outweighs the public interest in disclosing the information.

Right of appeal

63. 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: 0116 249 4253

Email: informationtribunal@hmcts.gsi.gov.uk

Website: www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm

64. 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.
65. 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

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