

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 18 June 2014

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

Decision (including any steps ordered)

1. The complainant has requested information relating to a complaint made to the Financial Ombudsman Service. The FOS identified information within the scope of the request and provided the majority of this to the complainant on a discretionary basis. The remaining information was withheld on the basis of section 40(2), 41 and 42(1) of the FOIA. Having considered the exemptions, the Commissioner's decision is that the FOS has correctly withheld the remaining information under sections 40(2) and 42(1) of the FOIA.

Request and response

2. On 11 September 2013, the complainant wrote to the Financial Ombudsman Service ("FOS") and requested information in the following terms:

"... we would be obliged if you could supply us with all information and documents relating to the complaint against RCC Insurance Brokers Plc (Christie Insurance) and all documents produced for and/or prepared by Mr Ward, the Adjudicator, (other than documents submitted by ourselves, Christie Insurance.)"
3. The FOS responded on 28 October 2013 and stated that it had now processed the subject access request and enclosed documents. Following this the complainant's solicitors responded to the FOS on 1

November 2013 stating its dissatisfaction with the failure of the FOS to supply all the information requested under the FOIA.

4. The FOS treated this as a request for an internal review and responded on 29 November 2013. The FOS considered the remaining information within the scope of the request that had not already been provided to the complainant under section 7 of the Data Protection Act. The FOS identified further information but considered it exempt from disclosure on the basis of section 40(2), 42(1), and 43(2) of the FOIA.
5. On 17 December 2013 the complainant's solicitors responded to the FOS to complain about this response and the FOS replied on 18 December reaffirming its position. On 20 January 2014 the FOS sent a further explanatory letter to the complainant stating that it had provided the majority of the requested information on a discretionary basis and the only information which was still being withheld was one document under section 42(1) and a few sentences from some emails under section 40(2).
6. The complainant wrote to the FOS on 28 January 2014 to query whether all correspondence within the file had been provided. He listed a number of emails which referred to other correspondence or reports that had not been disclosed or mentioned as being withheld. The FOS responded to each of these points on 7 February 2014, providing some additional information.

Scope of the case

7. The complainant contacted the Commissioner on 12 February 2014 to complain about the way his request for information had been handled.
8. During the course of the Commissioner's investigation the FOS explained that it also considered the section 41 exemption to apply to the information it had been withholding under section 42(1). However, as this exemption was not applied initially, the focus of the Commissioner's investigation has been on the use of section 40(2) and 42(1) to withhold the remaining information within the scope of the request.

Reasons for decision

Section 40 – personal information

9. Section 40(2) of the FOIA provides that information which is the personal data of a third party is exempt if a disclosure of the information would breach any of the data protection principles.
10. The first question which the Commissioner has considered is whether the information is personal data for the purposes of the Data Protection Act 1998 (DPA). Personal data is defined in the 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."*
11. In this case the information withheld under section 40(2) consists of three sentences within two emails which have otherwise been provided to the complainant. This information relates to the personal financial information of that individual. The Commissioner is satisfied this information relates to a living individual and accepts that it is personal data as defined by the DPA.
12. Having determined that the information is personal data, the next question which the Commissioner must consider is whether a disclosure of that information would breach any of the data protection principles.
13. The most relevant data protection principle in this case would be the first data protection principle. This requires that information is processed 'fairly and lawfully'. The Commissioner must therefore decide whether a disclosure of the information would be 'fair'.
14. In considering whether disclosure would be fair the Commissioner takes into account the following factors:
 - Whether disclosure would cause any unnecessary or unjustified damage or distress to the individual concerned;
 - The individual's reasonable expectations of what would happen to their information; and
 - Balancing the rights and freedoms of the data subject with legitimate interests.

15. The Commissioner has considered the information redacted under section 40(2) and the fact that the individual would have had no reasonable expectation that information about his personal finances provided to a solicitor would then be made publicly available.
16. The Commissioner's view is that when considering what information individuals should expect to have disclosed about them a distinction should be drawn as to whether the information relates to the individual's public or private life. In this case the information relates to the individual's private life and so the expectation of privacy is increased. The Commissioner fails to see how any individual would reasonably expect information of this type to be placed in the public domain.
17. The Commissioner has next gone on to consider whether the release of the information would cause unnecessary or unjustified harm to the individual involved. As the information relates to the personal finances of the individual it is not unreasonable to consider this would cause unwarranted distress or unjustified damage if it was to become widely known.
18. In relation to the final factor, the legitimate interest in the public knowing this information, the Commissioner does not consider there is any public interest in the release of this information as it is not relevant to the complaint and would not provide any insight into the situation or contribute towards any debate on the matter. The Commissioner acknowledges that usually disclosure of information will increase transparency and accountability.
19. In making his decision the Commissioner has considered whether disclosure of the information would lead to a greater infringement of the individual's legitimate right to privacy than is outweighed by the legitimate interest in disclosure. The Commissioner has not been convinced there is any legitimate public interest in disclosure of an individual's personal financial information beyond simply increasing transparency within the public authority. In considering this point, the Commissioner has to consider the fact that the FOS did not receive this information directly and only received it in the course of carrying out its role as an Ombudsman. As such, the arguments for increased transparency are limited in this case. Balanced against this, the Commissioner does consider the disclosure of this information may cause unwarranted or unjustified damage or distress.
20. The Commissioner therefore considers that disclosure of this information would be unfair and in breach of the first data protection principle. As such, section 40(2) is engaged and the information is therefore exempt from disclosure.

Section 42 – legal professional privilege

21. The FOS has withheld one document on the basis of section 42(1) which provides that information is exempt from disclosure if it is protected by legal professional privilege.
22. There are two types of legal professional privilege: litigation privilege and advice privilege. Litigation privilege applies to confidential communications made for the purpose of providing or obtaining legal advice in relation to proposed or contemplated litigation. Advice privilege applies where no litigation is in progress or contemplated. In these cases, communications must be confidential, made between a client and legal adviser acting in a professional capacity, and for the sole or dominant purpose of obtaining legal advice.
23. The category of privilege the FOS is relying on to withhold the information is advice privilege.
24. Although the legal advice was not provided directly to the FOS it considers it is still subject to legal advice privilege as it was a document created for the purpose of offering legal advice to the solicitors acting on behalf of the consumer involved in the dispute with the complainant's organisation.
25. The Commissioner has previously accepted in other decisions (*FS50269559 and FS50398765*) that the section 42 exemption can be engaged even when the advice is not advice generated by the public authority. The Commissioner notes that in the cases listed above the legal advice was provided to the clients and not directly to the public authority and he accepts that section 42 can still be engaged.
26. The complainant's solicitors had argued that the advice could no longer be said to be privileged because it appeared to have been distributed beyond the original recipient and had been provided to the Adjudicator.
27. In the Commissioner's view in a FOI context, legal professional privilege will only have been lost if there has been a previous disclosure to the world at large with no restrictions on its use. In such circumstances the information can no longer be considered to be confidential. The Commissioner understands in this case the information was not released in an unrestricted fashion.
28. The Commissioner accepts that the document falls within the scope of the exemption contained at section 42(1). This is because the dominant purpose of the document was the provision of legal advice by a professional legal adviser to their client. However, as section 42 is a qualified exemption the Commissioner has gone on to consider the public interest test.

Public interest arguments in favour of disclosure

29. The FOS did not specifically highlight any reasons why disclosure of the information falling within the scope of section 42 may be in the public interest beyond the general public interest in openness and transparency.
30. The complainant's solicitors also emphasised the importance of transparency and openness and the need for Adjudicator's to be even handed when dealing with both parties. As the complainant's solicitors did not agree that there would be any damage to commercial affairs of the other party it did not accept that full disclosure could not be made.

Public interest in favour of maintaining the exemption

31. The FOS stressed the importance of protecting the lawyer-client relationship inherent in the exemption. Protecting the privilege between legal advisers and clients is important to ensure that free and frank advice can continue to be provided.

Balance of the public interest test

32. Although the Commissioner accepts that there is a strong element of public interest inbuilt into legal professional privilege, he does not accept, as previously argued by some public authorities that the factors in favour of disclosure need to be exceptional for the public interest to favour disclosure. The Information Tribunal in *Pugh v Information Commissioner* (EA/2007/0055) were clear:

'The fact there is already an inbuilt weight in the LPP exemption will make it more difficult to show the balance lies in favour of disclosure but that does not mean that the factors in favour of disclosure need to be exceptional, just as or more weighty than those in favour of maintaining the exemption'. (Para 41).

33. Consequently, although there will always be an initial weighting in terms of maintaining this exemption, the Commissioner recognises that there are circumstances where the public interest will favour disclosing the information. In order to determine whether this is indeed the case, the Commissioner has considered the likelihood and severity of the harm that would be suffered if the advice were disclosed by reference to the following criteria:

- how recent the advice is; and
- whether it is still live.

34. In order to determine the weight that should be attributed to the factors in favour of disclosure the Commissioner will consider the following criteria:
- the number of people affected by the decision to which the advice relates;
 - the amount of money involved; and
 - the transparency of the public authority's actions.
35. With regard to the age of the advice, the Commissioner accepts the argument advanced on a number of occasions by the Information Tribunal that as time passes the principle of legal professional privilege diminishes. This is based on the concept that if advice is recently obtained it is likely to be used in a variety of decision making processes and that these processes are likely to be harmed by disclosure. However, the older the advice the more likely it is to have served its purpose and the less likely it is to be used as part of any future decision making process.
36. In many cases the age of the advice is closely linked to whether the advice is still live. Advice is said to be live if it is still being implemented or relied upon and therefore may continue to give rise to legal challenges by those unhappy with the course of action adopted on that basis.
37. In this case the Commissioner understands the legal advice dates back approximately 18 months from the time of the request. The advice itself relates to the possible outcomes of the ongoing legal dispute between the complainant and a third party. The FOS has not made it clear if this issue has since been resolved or is still ongoing, however as the complainant is one of the parties involved in the dispute it is reasonable to assume that the advice may still be live in that it may still be relied upon for any legal action. In light of this the Commissioner considers there is weight to add to the public interest arguments in favour of upholding the exemption.
38. With regard to the public interest in disclosure of the information, whilst there may be a general public interest in increased transparency, it is difficult to envisage how a significant number of people are affected by the decision to which the advice relates as is specific to the circumstances.
39. Therefore in light of the strong inherent public interest in maintaining legal professional privilege and the fact that the parties to the legal dispute may still seek to rely on the advice, the Commissioner has concluded that the public interest favours maintaining the exemption.

Right of appeal

40. 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: GRC@hmcts.gsi.gov.uk

Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

41. 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.
42. 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

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