

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 25 April 2017

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 correspondence between the Financial Ombudsman Service (FOS) and the Financial Conduct Authority (FCA) relating to a complaint from a named individual. The FOS refused to either confirm or deny if the information was held by virtue of section 40 and 36 of the FOIA.
2. The Commissioner's decision is that the FOS has correctly applied the provision at section 40(5) to neither confirm nor deny if the requested information is held as to do so would be a disclosure of personal data. She requires no steps to be taken.

Request and response

3. On 28 April 2016, the complainant wrote to the Financial Ombudsman Service (FOS) and requested information in the following terms:

"We request disclosure of the following documents touching or concerning [name redacted] complaint:

(1) All letters and emails written from or to FOS the [sic] to or from FCA;

(2) All file notes recording any conversations between officers of the FOS and FCA;

(3) All submissions made by the FOS to FCA;

(4) All internal memoranda dealing with any communication between officers of the FOS and FCA."

4. The FOS responded on 10 June 2016. It stated that it could neither confirm nor deny if the requested information was held as to do so would be likely to inhibit the free and frank exchange of views for the purposes of deliberation (section 36(2)) or would disclose personal data (section 40).
5. Following an internal review the FOS wrote to the complainant on 14 July 2016. It upheld its decision to neither confirm nor deny if the information was held by virtue of sections 40 and 36(2) of the FOIA.

Scope of the case

6. The complainant contacted the Commissioner on 21 July 2016 to complain about the way his request for information had been handled.
7. The Commissioner considers the scope of her investigation to be to determine if the FOS correctly applied the provisions of either section 40(5) or 36(3) to neither confirm nor deny if the requested information was held.

Reasons for decision

Section 40(5)

8. When a public authority receives a request for information under FOIA, it normally has a duty under section 1(1)(a) of the FOIA to tell the requester whether it holds the information. This is called "the duty to confirm or deny". However, in certain circumstances, this duty does not apply and the public authority is not obliged to say whether or not it holds the information; instead, it can give a "neither confirm nor deny" response.
9. Section 40(5) of FOIA sets out the conditions under which a public authority can give a "neither confirm nor deny" response where the information requested is, or would be, personal data. It includes provisions relating to both personal data about the requester and personal data about other people.
10. If the information would constitute personal data relating to someone other than the requester, then the public authority does not have to confirm or deny whether it holds it if one of the conditions in section 40(5)(b)(i) or (ii) applies.

11. There may be circumstances, for example requests for information about investigations or complaints, in which simply to confirm whether or not a public authority holds that personal data about an individual can, itself, reveal something about that individual. To either confirm or deny that the information is held could indicate that a person is or is not involved in a complaint or investigation. If to do so would contravene data protection principles, for example because it would be unfair, then the public authority is not obliged to confirm or deny that it holds the information.

If held, would the information be personal data?

12. The Commissioner has first considered whether the requested information would be the personal data of any person.
13. The Data Protection Act 1998 (DPA) categorises personal data as data that relates to a living individual from which that individual can be identified. FOS has stated that, if held, the information would relate to the fact that a named individual is involved in a complaint with the FOS and the FCA.
14. Therefore, the Commissioner is satisfied that the requested information would be personal data. If held, it would tell the public something about the individual, namely whether or not the person had a complaint with the FOS.

Would confirming or denying the information is held breach any of the data protection principles?

15. The FOS has said that the condition under subsection 40(5)(b)(i) applies, namely that confirming or denying it holds the information would contravene the first data protection principle – that personal data should be processed fairly and lawfully.
16. In assessing fairness, the Commissioner considers the reasonable expectations of individuals concerned and what might be the likely consequences resulting from disclosure.
17. The FOS says that confirming or denying whether the information is held would communicate whether or not a complaint was held from the named individual.
18. The Commissioner notes here that there may be situations in which it could be argued that giving the confirmation or denial to a requester would not necessarily contravene data protection principles because the requester already knows or suspects whether the public authority holds or does not hold the information.

19. The FOIA is motive and applicant 'blind', and the test is whether the information can be disclosed to the public at large, not just to the requester. Therefore an authority can only disclose or confirm or deny it holds information under the FOIA if it could disclose it, or confirm or deny it holds the information, to any member of the public who requested it.
20. The Commissioner recognises that individuals have a reasonable expectation that a public authority, in its role as a responsible data controller, will respect confidentiality in this regard.
21. The FOS has explained that complaints are brought to its service with an expectation of confidentiality. Section 230A of the Financial Services Act 2012 requires the FOS to anonymise decisions it publishes on its website to protect the identities of consumers.
22. Given the expectation of confidentiality which is evident in the FOS service, the Commissioner considers that confirming or denying if the information is held in this case could lead to an intrusion into the private life of the individual concerned. Confirming or denying if correspondence between the FOS and the FCA is held would confirm or deny if a complaint from a named individual exists and would be unfair as it may cause that individual some distress given the confidential nature of FOS complaint investigations.
23. In conclusion, the Commissioner is satisfied that confirming or denying that the requested information is held would be unfair and thus contravene the first data protection principle. Therefore the Commissioner finds that the FOS is entitled to refuse the request on the basis of section 40(5)(i)(b) of the FOIA.
24. As the Commissioner has determined that it would be unfair to confirm or deny if the information is held, it has not been necessary to go on to consider whether this is lawful or whether one of the schedule 2 conditions is met.

Right of appeal

25. 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: 0870 739 5836

Email: GRC@hmcts.gsi.gov.uk

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

26. 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.
27. 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

Jill Hulley
Senior Case Officer
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF