

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 12 June 2018

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

Decision (including any steps ordered)

1. The complainant requested particular communications dealing with the establishment of a new team and containing the word SIPPs. The Financial Ombudsman Service (FOS) refused the request under sections 36(2)(b)(ii), 36(2)(c) – prejudice to the conduct of public affairs and section 40(2) - third party personal information.
2. The Commissioner is satisfied that sections 36(2)(b)(ii), 36(2)(c) and 40(2) are engaged. The Commissioner does not require the public authority to take any action.

Background

3. FOS provided the following as a background.
4. FOS was set up by Parliament under the Financial Services and Markets Act 2000 (FSMA) to resolve disputes that consumers and businesses are not able to resolve themselves. Each case is looked at on its individual merits.
5. There is a two-stage process for investigating complaints. When a consumer or their representative brings a complaint to the service it is investigated and the parties told what the outcome should be. If either party to the complaint disagrees with the outcome they can ask for the complaint to be passed to an ombudsman who will make the final decision.
6. FOS deals with a range of disputes (from current accounts to advice given on an investment) and employs around 2,000 case handlers and

300 ombudsmen to look into and investigate these cases. To help both parties understand how the decisions are reached, FOS shares the material information relied upon and publishes case studies, the ombudsman final decisions and technical notes on its approach to different types of complaints on its website.

7. The complainant represents a financial business on a number of complaints at FOS' service. The communications referred to in the FOI request were with an individual case handler at FOS about a current dispute being looked into.

Request and response

8. This request follows a previous 4-part request for communications about the way the new "specialist team" was set up and dealt with its conduct or processing of claims. (See Annex A below, FOS reference 2738 dated 28 June 2017, considered by the Commissioner in the decision notice FS50692855 which found that section 12 had been cited correctly.)
9. On 14 October 2017 the complainant made a refined request for information to *'search for memos other than emails as highlighted – search for emails [redacted name of case handler] has sent, containing the word SIPPs – that for example, deal with the establishment of the pod, in a six month period.'*
10. This was clarified and confirmed on 24 October 2017 as:
'to search for memos and emails [redacted name of case handler] has sent, containing the word SIPPs – and that deal with the establishment of the pod for 3 months before and 3 months after the special unit was established (so between July 2015 and January 2016).'
11. On 23 November 2017 FOS responded that it did hold a few emails which fall within the scope of the request. The information was withheld under section 36 – prejudice to the effective conduct of public affairs.
12. FOS explained that while some of the emails contain the word 'SIPPs' and refer to the establishment of a new pod, they contain information about how 'we work operationally and how we resource our work':
'[redacted name of case handler] oversees the work of one of our departments (internally called 'pods'), which is responsible for resolving complaints brought to our service. The individuals in [redacted name of case handler]'s pod are responsible for considering complaints about SIPPs, as well as other complaints.'

Part of his role is working with other senior leaders to best decide how to ensure we meet our operational objectives and ensure fair and reasonable outcomes in individual cases. We can only achieve this by having a private discussion space for our senior leaders...'

13. FOS also cited section 40 (personal data of others) as some of the emails refer to individual complaints at its service.
14. The complainant requested an internal review on 25 November 2017. He argued that his requests were to ascertain the extent of interference with the individual decisions of the Ombudsmen.
15. FOS sent him the outcome of its internal review on 21 December 2017 upholding the decision to cite sections 36 and 40. FOS noted that the focus of the complainant's concern appeared to have changed to what directions were given to Ombudsmen to reach decisions on investment cases rather than the communications concerning the setting up of a department looking at complaints. FOS did not consider these representations as relevant to the FOIA request and did not address them.

Scope of the case

16. On 2 January 2018 the complainant wrote to the Commissioner to complain about the way his request for information had been handled. He argued that his request involves the independence of FOS and the independence of individual Ombudsmen.
17. The Commissioner considers the focus of the investigation to be whether FOS was entitled to rely upon the exemptions at section 36 and section 40.
18. It is not within the remit of the Commissioner to consider the independence of FOS or the independence of individual Ombudsmen.

Reasons for decision

Section 36 – prejudice to the conduct of public affairs

19. Section 36(2) of FOIA states that information is exempt if in the reasonable opinion of a qualified person, disclosure of the information –
 - (b) would or would be likely to inhibit:
 - (i) the free and frank provision of advice, or

(ii) the free and frank exchange of views for the purpose of deliberation, or

(c) would otherwise prejudice, or would be likely to otherwise prejudice the effective conduct of public affairs.

20. As section 36(2)(c) is worded specifically as “would otherwise prejudice”, it is the Commissioner’s opinion that if a public authority is claiming reliance on section 36(2)(c) of the FOIA the prejudice claimed must be different to that which would fall in section 36(2)(b)(i) and (ii).
21. The Commissioner considers section 36(2)(c) of the FOIA is concerned with the effects of making the information public. It can refer to an adverse effect on the public authority’s ability to offer an effective public service or to meet its wider objectives or purpose. She considers the effect does not have to be on the authority in question; it could be an effect on other bodies or the wider public sector. It may also refer to the disruptive effects of disclosure, for example, the diversion of resources managing the effect of disclosure.
22. The Commissioner will first consider if section 36(2)(b)(ii) has been cited correctly by FOS.

Section 36(2)(b)(ii) – inhibit the free and frank exchange of views for the purpose of deliberation

23. Section 36 is unique in that its application depends on the opinion of the qualified person that the inhibition envisaged would, or would be likely to occur. To determine whether the exemption was correctly engaged by FOS, the Commissioner is required to consider the qualified person’s opinion as well as the reasoning that informed the opinion. Therefore the Commissioner must:
 - Ascertain who the qualified person is,
 - Establish that they gave an opinion,
 - Ascertain when the opinion was given, and
 - Consider whether the opinion was reasonable.
24. The qualified person for FOS is Julia Cavanagh, its Chief Financial Officer. FOS has advised the Commissioner that the qualified person’s opinion was sought at the time of the initial request, was shown a copy of the withheld information and gave her opinion on 22 November 2017.
25. The Commissioner is therefore satisfied that the qualified person did provide her opinion that the information in question was exempt under sections 36(2)(b)(ii) and 36(2)(c).

26. The exemption can be engaged on the basis that the prejudice to public affairs either 'would' or would be 'likely' to occur. In this case, FOS has applied the exemption on the basis that disclosing the information in question would be 'likely' to prejudice the free and frank discussions. This is taken to mean that the qualified person considers the likelihood of the inhibition occurring to be more than a hypothetical possibility; that there is a real and significant risk, even if that risk is less than 50%.
27. The Commissioner now needs to consider whether this opinion is a reasonable opinion to hold. It is important to highlight that it is not necessary for the Commissioner to agree with the opinion of the qualified person in a particular case. The opinion also does not have to be the only reasonable opinion that could be held or the 'most' reasonable opinion. The Commissioner only needs to satisfy herself that the opinion is reasonable or, in other words, it is an opinion that a reasonable person could hold. The qualified person's opinion can only be considered unreasonable if it is one that no reasonable person could hold.
28. FOS has explained that the named case handler is one of the ombudsman leaders and part of the role is working with other senior leaders to best decide how to ensure that operational objectives are met and to ensure fair and reasonable outcomes in individual cases. The withheld information refers to matters of resourcing and running the department in order to deal with what were then evolving issues, and are still live:

'Because they are emerging complaint issues more discussion and deliberation amongst ombudsmen is needed to ensure we are being fair and consistent in our answers and that we are meeting our statutory duty.'
29. FOS also stated that in 2016/2017 it received 1,574 complaints about SIPPs. The senior leaders needed to have an open and private discussion space before making any decisions to ensure achievement of commitments, effective handling of complaints and development of staff.

'Restricting such discussions would be likely to cause a 'chilling effect' which would impact how we share information, how we respond effectively and promptly to complaints in line with our statutory responsibilities and how we develop and support our people.'
30. Having viewed the withheld information, the Commissioner is satisfied that the qualified person's opinion (that disclosure would be likely to inhibit the free and frank exchange of views for the purpose of deliberation) is a reasonable opinion to hold. Internal discussions on how

to meet evolving demands on the service need a safe space to ensure that there can be a candid analysis of the issues faced and the resources required and that it would not necessarily be helpful to publish these discussions to a wider audience.

Section 36(c) – otherwise prejudice the effective conduct of public affairs

31. FOS stated that it is the qualified person's opinion that disclosure of the requested information in this case would be likely to prejudice the effective conduct of public affairs for a number of reasons:
- Our statutory function and primary purpose is to resolve individual complaints quickly and with minimum formality. This is set out under section 225 of the Financial Services and Markets Act 2000 (FSMA), which says: "This Part provides for a scheme under which certain disputes may be resolved quickly and with minimum formality by an independent person".
 - We receive around 1.4 million enquiries each year, take on around 300,000 new complaints for investigation and resolve around 400,000 complaints. Each of these complaints are considered individually on their own merits and can range across a variety of different products from PPI to current accounts to car insurance and also from payday loans to interest rate hedging products to SIPPs. Whilst some of the complaints we see may be of a similar nature, such as a complaint about a PPI policy or a complaint about a bank charge, others will be much more complicated, such as SIPP complaints.
 - On these more complicated complaints we need to think about these complaints collectively to ensure that we are giving fair and consistent answers to all of our customers.
 - This means that we have to carefully work through different considerations in order to provide answers that are fair and reasonable in each case.
32. The complainant informed the Commissioner that he was trying to ascertain the extent of external interference on the decisions of the Ombudsmen. He understood that the selection of various ombudsman is on a 'taxi rank principle'. The Commissioner understands this to mean that the first available individual will deal with the next complaint.
33. FOS explained that it is continuously reviewing how it works and how it can best provide answers to customers across a range of complaints as quickly as possible in line with its statutory obligation.

- Private discussions are particularly important and beneficial for our senior ombudsman and leaders because we are constantly responding to evolving issues and evolving financial products which have no previously determined approach and which require deliberation and discussion and researching in order to be able to understand how best to determine these complaints.
 - Similarly, our ombudsmen need to be able to exchange ideas, discuss issues or concerns and make changes to existing approaches without worrying that those deliberations may be disclosed to the world at large.
 - To do this, we need a safe space to work out how to do this practically and what this means operationally for our service.
34. The withheld information concerns communications about setting up a new team to deal with evolving issues impacting on a large number of cases. FOS stated that to disclose this information would be likely to prejudice the effective conduct of its service – that being primarily to resolve complaints quickly and informally.
35. The Commissioner is satisfied that the qualified person's opinion (that disclosure would be likely to prejudice the effective conduct of public affairs) is a reasonable opinion to hold. Internal discussions on how to meet evolving demands on the service need a safe space to ensure that FOS can effectively comply with its statutory function and primary purpose - which is to resolve individual complaints quickly and with minimum formality.
36. For these reasons, the Commissioner finds that the exemption provided by section 36(2)(c) is engaged.

Public interest test

37. Section 36 is subject to the public interest test as set out in section 2 of the Act. This means that although the exemption is engaged, the information can only be withheld if in all the circumstances of the case the harm that disclosing the information would cause is greater than the public interest in its disclosure.
38. The Commissioner's approach to the competing public interest arguments in this case draws heavily upon the Information Tribunal's Decision in the case of Guardian Newspapers Limited and Heather Brooke v Information Commissioner and BBC (the Brooke case)¹. The Commissioner notes, and adopts in particular, the Tribunal's conclusions that, having accepted the reasonableness of the qualified person's opinion the Commissioner must give weight to that opinion as an

¹ EA/2006/0011; EA/2006/0013

important piece of evidence in her assessment of the balance of the public interest.

39. Although the Commissioner has accepted the qualified person's opinion to be a reasonable one in respect of the withheld information, and will therefore give some weight to that opinion, she will reach her own view on the severity, extent and frequency of that inhibition to the decision making process occurring.

Public interest arguments in favour of disclosure

40. The complainant argued that it is in the public interest to know the extent to which directions are given to individual Ombudsmen that may influence their decision. He argued that *'there can be no prejudice to the Department in being open and transparent as to the discussions that take place within the Department....'* This is important *'particularly where principles of natural justice apply'*.
41. FOS stated that it is committed to being as transparent and open as possible. It publishes a wealth of information on its website including resources, funding, anonymised final decisions, case studies and technical notes.
42. The Commissioner accepts that there are public interest arguments in favour of disclosure. There is a public interest in openness and transparency.

Public interest arguments in favour of maintaining the exemption

43. FOS considered that it is in the public interest in FOS being able to carry out its statutory functions and to have open and honest conversations.
44. FOS did not consider that disclosure of internal discussions on resourcing a department to handle a specific type of complaint would benefit or inform the public, or outweigh the public interest in withholding the information.
45. The Commissioner is satisfied that there are public interest arguments in favour of maintaining the exemption.

Balancing the public interest arguments

46. FOS has stated that the qualified person acknowledges the strong public interest in openness and transparency but recognised that there is a strong public interest in the Ombudsman being free to effectively

conduct its public affairs and fulfil its statutory aims. Disclosure of internal communications would inhibit its ability to do this.

47. The Commissioner has considered both the complainant's and FOS's public interest arguments.
48. The Commissioner notes that considerable information is already available on the website and that further disclosure could increase understanding of the decision making processes and could generate public confidence in the integrity of the procedures being adopted and followed.
49. However, the Commissioner also recognises the value in allowing FOS the safe space in which to discuss and develop its proposals on the resourcing required to deal with evolving types and numbers of complaints.
50. Both the need for candour and the value of safe space are important if FOS is to have the best opportunity to overcome the challenges it faces and to fulfil its statutory function and primary purpose which is to resolve individual complaints quickly and with minimum formality.
51. In light of the above, and having viewed the withheld information, the Commissioner is satisfied that the public interest favours withholding all this information. The Commissioner finds that FOS is entitled to withhold the requested information under sections 36(2)(b)(ii) and 36(2)(c).
52. Although the Commissioner has found that all the withheld information was correctly withheld under sections 36(2)(b)(ii) and 36(2)(c), she will now go on to consider the exemption for third party personal information that was applied to a small number of employee names, case reference numbers with names of consumers within the withheld information.

Section 40(2)

53. The Data Protection Act 1998, which was in force when the request was made, defines personal data 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, and includes any expression of opinion about the individual and any indication of the intentions of the data controller or any other person in respect of the individual."

54. If the Commissioner is satisfied that the requested information is personal data, she must establish whether disclosure of that data would breach any of the data protection principles under the DPA.

Is the withheld information personal data?

55. The Commissioner's guidance on what is personal data² states that if information 'relates to' an 'identifiable individual' it is 'personal data' regulated by the DPA.
56. In this instance the Commissioner has viewed the information that has been withheld and accepts that the small number of named employees and the names with case reference numbers of cases that consumers have brought to the service, is personal data.

Would disclosure breach the Data Protection Principles?

57. The Data Protection Principles are set out in Schedule 1 of the DPA. The first principle and the most relevant in this case states that personal data should only be disclosed in fair and lawful circumstances. The Commissioner's considerations below have focused on the issue of fairness.
58. In considering fairness, the Commissioner finds it useful to balance the reasonable expectations of the individuals, the potential consequences of the disclosure and whether there is legitimate public interest in the disclosure of the information in question.

Reasonable expectations

59. Whether an individual might reasonably expect to have their personal data released depends on a number of factors. These include whether the information relates to an employee in their professional role or to them as individuals, the individual's seniority or whether they are in a public facing role.
60. The Commissioner understands that FOS would not routinely make public the names of its employees or its consumers:

'The individuals have a reasonable expectation that any information about them and their role would be kept confidential between senior managers and only used for the purpose of management information or for employment purposes. There is no expectation that this information would be made public.'

²<https://ico.org.uk/media/for-organisations/documents/1554/determining-what-is-personal-data.pdf> & https://ico.org.uk/media/for-organisations/documents/1549/determining_what_is_personal_data_quick_reference_guide.pdf

'The names and case reference numbers are personal data because they are unique and identify consumers who have brought cases to our service to consider. Consumers bring complaints to our service on the understanding that their information will be kept confidential and not shared with anyone or used other than for the purpose they consented to, which is to resolve their complaint quickly and informally.'

Balancing the rights and freedoms of the individuals with the legitimate interests in disclosure

61. Given the importance of protecting an individual's personal data, the Commissioner's 'default' position in cases where section 40(2) has been cited is in favour of protecting the privacy of the individuals. Therefore, in order to find in favour of disclosure, it would need to be shown that there is a more compelling interest in disclosure which would make it fair to do so.
62. In this case, the Commissioner is not convinced that the specific information requested is of sufficient wider public interest to warrant overriding the protection of the third party personal data of those concerned.
63. The Commissioner is satisfied that on balance, the legitimate public interest would not outweigh the interests of the individuals named within the emails and that it would not be fair to disclose the requested information in this case.

Conclusions

64. In view of the above, the Commissioner finds that disclosing the withheld information would contravene the first data protection principal because it would be unfair, and that the application of section 40(2) was correct.

Right of appeal

65. 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

66. 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.

67. 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

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

Annex A – The previous request dated 28 June 2017, FOS reference 2738, considered in the decision notice FS50692855

On 28 June 2017, the complainant wrote to FOS and requested information in the following terms:

'This is a request under the freedom of information Act

1. In a communication dated 25th November 2015 timed 15:53:05 it is stated "I just wanted to confirm that your case has moved with me to a new specialist team focussing solely on cases such as yours. This is to ensure we reach consistent views on these cases."

A copy of this note is provided see below. [1] Please provide copy of all disclosable communications setting up this team and any communications that it has dealing with its conduct or processing of claims, or indication as to how it should deal with points arising or may arise during the consideration of claims. For the avoidance of doubt no document dealing with a specific case is requested.

2. In a document headed "Outgoing Call" dated Monday 10 October 2016 timed 11:37 pm it states "Ombudsman is aware and will issue as soon as possible. In the long term the process has been delayed by the FCA's decision to review DB redress."

Copy supplied see below

Please supply all FCA correspondence relating to this issue to or from the FOS or from FOS to the author of the note.

3. In a document dated 15.10.2015 timed at 11:36:54 the communication says "We have been considering the issues associated with this case which are wide ranging – very carefully, that has taken a long time."

Copy supplied see below

Please supply all documentation (other than that of named parties) that were considered. State what were the issues considered.

4. In an undated document, it is stated "Asked for update. Explained that this issue was very high profile and was reliant on other external issues. Copy supplied. Please provide all documents disclosable in connection with the "other external issues." Please say why the issue was high profile and all documents relating to it

Copy supplied see below.'