

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 20 January 2020

Public Authority: Financial Ombudsman Service (FOS)
Address: Exchange Tower
London
E14 9SR

Decision (including any steps ordered)

1. The complainant has requested information relating to changes introduced (with effect from July 2015) by DISP Rule 3.3.4AR. FOS responded, it refused to disclose the requested information under section 36(2)(b)(ii), section 36(2)(c) and section 42 FOIA.
2. The Commissioner's decision is that FOS correctly applied section 36(2)(b)(ii) FOIA to all of the withheld information.
3. The Commissioner requires no steps to be taken.

Request and response

4. On 17 March 2019 the complainant made the following request for information under the FOIA for:

"BACKGROUND

This is a request to the Financial Ombudsman Service ("FOS") under the Freedom of Information Act in relation to changes introduced (with effect from July 2015) by DISP Rule 3.3.4AR. The Financial Conduct Authority ("FCA") has told me that the FOS was responsible for drafting the proposed changes to DISP Rule 3.3.4AR, and that the proposed changes were subject to approval by the FCA. Those changes were subject to a consultation paper of the FOS/FCA, FCA Consultation Paper CP14/30. See <https://www.fca.org.uk/publications/consultation-papers/cp14-30-improving-complaints-handling>

If the FCA believes that any documentation responsive to this request is or may be subject to an exemption in Part II of the FOI Act, then (without revealing the contents of any such documentation) the FCA is requested to confirm or deny the existence of the specific documentation that is subject to the corresponding exemption.

REQUEST

Please provide copies of any documentation complying with both A) and B) below, namely:

- A) That were exchanged between the FOS and the FCA before or at the time of the implementation of the changes introduced by DISP Rule 3.3.4AR; and
 - B) That relate (in whole or part) to the actual, or to any proposed or otherwise discussed, changes to be introduced by DISP Rule 3.3.4AR, in particular changes to the grounds on which the ombudsman may dismiss a complaint without considering its merits.”
5. On 17 May 2019 FOS responded. It refused to disclose the requested information under section 36(2)(b)(ii), section 36(2)(c) and section 42 FOIA.
 6. The complainant requested an internal review on 9 June 2019. FOS sent the outcome of its internal review on 16 September 2019. It upheld its original position.

Scope of the case

7. The complainant contacted the Commissioner on 4 August 2019 to complain about the way the request for information had been handled.
8. The Commissioner has considered whether FOS was correct to apply section 36(2)(b)(ii), section 36(2)(c) and section 42 FOIA to the withheld information.

Background

9. FOS was set up by Parliament under the Financial Services and Markets Act 2000 (FSMA) to resolve disputes that consumers and businesses aren't able to resolve themselves. It looks at each case on its individual merits. The rules setting out how it should handle complaints are published as part of the Financial Conduct Authority's Handbook - in the section called Dispute resolution: complaints.

10. FOS has a two-stage process for investigating complaints. When a consumer or their representative brings a complaint to its service, it investigates it and tells the parties what it thinks 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. The ombudsman will then take a look at all the information afresh and issue a decision setting out their findings, as the final stage in its process. It reaches conclusions on each complaint based on its view of what is fair and reasonable in the circumstances of that individual complaint.
11. The service prefers to give a full determination on the merits if it can. However, it also has the discretion to dismiss a complaint without considering its merits. The grounds for dismissal are set out in the Dispute resolution rules. For example – it can dismiss a complaint without consideration of its merits on the grounds that “dealing with such a type of complaint would otherwise seriously impair the effective operation of the Financial Ombudsman Service.” Its service doesn’t dismiss cases lightly – and before doing so, it always gives the complainant the opportunity of making representations. This ensures the discretion is exercised fairly and reasonably in line with natural justice.
12. As well as resolving individual complaints, it also works closely with the regulator of financial services, The Financial Conduct Authority (FCA), and has a legal obligation to disclose certain information to them. FOS and the FCA cooperates and communicates with each other for the benefit of both consumers of financial services and the financial services industry by contributing to the efficient functioning of the statutory systems for conduct regulation and dispute resolution. For example, it passes on information to the FCA about what it’s seeing – and they can decide whether to take further action if something's gone wrong on a wider scale.
13. In July 2015, the Alternative Dispute Resolution (ADR) directive came into effect. This law expressed the need for alternative ways of resolving contractual disputes between consumers and businesses to be widely available across the UK and the EU. The Directive was given effect through the Alternative Dispute Resolution for Consumer Disputes (Competent Authority and Information) Regulations 2015. FOS has been approved as an ADR entity by the Financial Conduct Authority (FCA) which is its “competent authority” under the directive. When the ADR directive came into effect, some changes were made to the Dispute resolution rules that its service follows – including changes to the rules which set out how FOS dismisses complaints at the ombudsman service without consideration of the merits. The Dispute resolution rules set out what the grounds for dismissal were before the ADR directive came into

effect (DISP 3.3.4). The rules also set out the changes to the dismissal grounds following the introduction of the ADR directive (DISP 3.3.4A).

14. In line with its wider objectives, FOS cooperated and engaged with the FCA about the proposed changes to the dismissal grounds before the ADR directive was implemented – and it is these communications that the complainant has requested.

Reasons for decision

Section 36

15. Section 36 FOIA provides that,

“Information to which this section applies is exempt information if, in the reasonable opinion of a qualified person, disclosure of the information under this Act-

(2)(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 purposes of deliberation, or

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

16. In this case FOS has applied section 36(2)(b)(ii) and section 36(2)(c) FOIA. FOS provided the Commissioner with a copy of the withheld information. It marked the material up to confirm where the exemptions applied and where information fell outside the scope of the request. Section 36(2)(b)(ii) and section 36(2)(c) has been applied to all withheld information.
17. In determining whether the exemption was correctly engaged, the Commissioner is required to consider the qualified person’s opinion as well as the reasoning which informed the opinion. Therefore in order to establish that the exemption has been applied correctly the Commissioner must:
 - Establish that an opinion was given;
 - Ascertain who was the qualified person or persons;
 - Ascertain when the opinion was given; and

- Consider whether the opinion was reasonable.
18. FOS explained that the qualified person was Annette Lovell, Director of Engagement. The qualified person's opinion was that section 36(2)(b)(ii) and section 36(2)(c) are applicable in this case as disclosure would be likely to prejudice the free and frank exchange of views for the purposes of deliberation or would be likely to otherwise prejudice the conduct of public affairs. FOS explained that the qualified person had access to all relevant material including the withheld information. A copy of the submissions put to the qualified person were provided to the Commissioner as well as a copy of the qualified person's opinion dated 16 May 2019.
 19. The Commissioner has considered the application of section 36(2)(b)(ii) in the first instance, FOS explained ICO guidance says that section 36(2)(b)(ii) applies if "disclosure would, or would be likely to inhibit the ability of public authority staff and others to express themselves openly, honestly and completely when giving their views as part of the process of deliberation".
 20. It went on that in the qualified person's opinion this exemption is engaged because the disclosure of the information requested would be likely to inhibit the free and frank exchange of views for the purpose of deliberation. It confirmed that it was relying on the threshold of "would be likely to".
 21. FOS said that the emails that fell within the scope of the request contained policy considerations about whether the changes to the dismissal rules were necessary, views and debates about whether the grounds for dismissing a complaint were non-exhaustive and confidential drafts about changes to the legislation (FSMA) and the Dispute resolution rules. HM Treasury were also involved in the ongoing discussions between its service and the FCA. So, confidential information about HM Treasury's preferred approach to changes to be made to FSMA and the Dispute resolution rules also fell within the scope of the request. These discussions were considered highly confidential and were only available to a small number of individuals at the FCA, HM Treasury and FOS.
 22. FOS acknowledged that the communications between its service and the FCA were exchanged some years ago. However, the qualified person considers that the disclosure of the information would be likely to inhibit the process of exchanging views with the FCA for the purpose of deliberation.
 23. FOS highlighted that the process of complying with the terms of the ADR directive and the Alternative Dispute Resolution for Consumer Disputes (Competent Authority and Information) Regulations 2015 is

an ongoing one - and the FCA continues to engage with FOS as its competent authority about its compliance with its terms. The exchanges are therefore relevant to ongoing communications between the FCA and FOS.

24. The Commissioner considers that the withheld information reflects free and frank exchanges of views regarding the changes to the dismissal rules. The qualified person considers that the prejudice claimed would be likely to occur in this case should the withheld information be disclosed. Given that the withheld information was considered highly confidential and was only available to a small number of individuals at the FCA, HM Treasury, the Commissioner does consider that the opinion of the qualified person is reasonable and therefore section 36(2)(b)(ii) was correctly engaged to all of the withheld information.
25. As the Commissioner has decided that the exemption is engaged, she has gone on to consider whether the public interest in maintaining the exemption outweighs the public interest in disclosing the information.

Public interest arguments in favour of disclosing the requested information

26. FOS explained that there is a public interest in transparency and accountability, it went on to say that both a consultation paper and a policy statement were published providing the FCA and the FOS's joint proposals and final positions on these changes.

Public interest arguments in favour of maintaining the exemption

27. FOS explained that if it were to share with the public, its communications about the changes to the dismissal rules, this would be likely to prejudice its ability to have open and honest conversations with the FCA. If the FCA and FOS cannot talk to each other openly and freely, this is likely to create a 'chilling effect' whereby individuals in both the FCA and FOS may be less likely to speak frankly and communicate on sensitive topics.
28. FOS said that the communications that form the subject matter of the request are a good example of when a 'safe space' between both the FOS and the FCA is required, as the discussions involved the FCA changing its complaint-handling rules.

Balance of the public interest arguments

29. The withheld information would provide the public with a greater understanding of the way in which FOS and the FCA liaise and work

together in making decisions such as in this case relating to the changes to the dismissal rules. Disclosure would provide transparency and accountability particularly for the individuals using the service and affected by the changes.

30. The withheld information does contain free and frank exchanges of views for the purpose of deliberation.
31. The Commissioner accepts that FOS was entitled to a safe space at the time of making the decision to implement the changes. However once this decision had been taken the need for a safe space is no longer required.
32. The chilling effect argument presented by FOS will always be strongest when an issue is still live. In this case the decision had been taken to implement the changes and therefore as explained above the decision making process could no longer be said to be live at the time of the request. However FOS has explained that the process of complying with the terms of the ADR directive and the Alternative Dispute Resolution for Consumer Disputes (Competent Authority and Information) Regulations 2015 is an ongoing one - and the FCA continues to engage with FOS as its competent authority about its compliance with its terms. The Commissioner does therefore attribute some weight to the chilling effect argument as disclosure of the withheld information would be likely to impact on the candour of ongoing communications between the FCA and FOS relating to compliance.
33. Based upon the arguments presented in this case and on viewing the withheld information, the Commissioner considers despite the age of the withheld information there remains a need to preserve the frankness and candour of discussion regarding compliance between FOS and the FCA. The public interest in favour of disclosure is outweighed by the public interest in maintaining the exemption.
34. In this case the FOS has applied section 36(2)(c) and 42 FOIA in addition to section 36(2)(b)(ii) to some of the withheld information. As the Commissioner has found section 36(2)(b)(ii) FOIA to be engaged in relation to all of the withheld information, she has not considered the application of the other exemptions any further.

Right of appeal

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

36. 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.
37. 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.....

Gemma Garvey
Senior Case Officer

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