

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 26 May 2021

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

Decision (including any steps ordered)

1. The complainant has requested information from the Financial Ombudsman Service (FOS) which had been provided to the Financial Conduct Authority (FCA). The request concerns the FOS's requirements as a certified alternative dispute entity as set out in the Alternative Dispute Resolution Regulations 2015. The FOS provided some information but withheld part of the information citing section 36(2)(c) and, later, section 36(2)(b)(ii) - prejudice to the effective conduct of public affairs.
2. The Commissioner's decision is that the FOS correctly cited section 36(2)(b)(ii) with regard to the withheld information and that the public interest favours non-disclosure. However, the FOS has breached section 10(1) of the FOIA in that it failed to provide a valid response to the request within the statutory timeframe of 20 working days.
3. The Commissioner does not require any further steps to be taken.

Background

4. The FOS explained to the Commissioner that it was set up by Parliament under the Financial Services and Markets Act 2000 (FSMA) to resolve certain disputes that customers and businesses aren't able to resolve themselves. The FOS looks at each case on its individual merits. The rules setting out how it handles complaints are published as part of the Financial Conduct Authority's Handbook - in the section called Dispute Resolution: Complaints.
5. There is a two stage process for investigating complaints. In most cases a case handler will initially provide an assessment when a complaint is brought. If either party disagrees with this initial assessment they can ask for the complaint to be passed to an ombudsman. The ombudsman then looks afresh at the complaint and issues a decision. This is the final stage, at which point the complainant is asked if they accept or reject the final decision. If it is accepted, the decision is binding.
6. The FOS is independent but works closely with the FCA. Their work together includes the following:
 - Governance arrangements eg the FCA appoints the FOS chairman, board of non-executive directors, approves its annual budget, determines the scope of its jurisdiction and the complaint handling rules for firms.
 - The FOS responds to regulation by closely understanding any changes the FCA makes to regulation and readying itself for changes to the type and number of complaints it receives. The FOS has a duty to cooperate with the FCA under the FSMA.
 - The FOS also has a duty to disclose relevant information to the FCA under the FSMA eg insights into complaint trends and business behaviour.
7. The FOS has also provided an explanation of the Alternative Dispute Resolution Directive 2013/11/EU (the ADR Directive). It came into effect in 2015 and provides alternative options for consumers and traders to settle contractual disputes quickly and inexpensively without going to court. The Directive was transposed into UK law¹ and is known as the ADR Regulations.
8. ADR providers wishing to gain certification as an "ADR entity" must meet and maintain certain standards with regards to independence,

¹ Alternative Dispute Resolution for Consumer Disputes (Competent Authorities and Information) Regulations 2015 (SI 2015/542)

impartiality and expertise. The FOS had met many of these standards before the ADR Regulations came into force. In order to become a certified ADR entity, the FOS's chief ombudsman and chief executive wrote to the chairman of the FCA in July 2015 to provide the information required by regulation 9(2) of the ADR Regulations. She also provided a reasoned statement which set out how the FOS complied with the requirements of schedule 3 of the Regulations. This statement is published on the FOS website. The FCA is the competent authority for the FOS.

9. The FOS explained that it is obliged by Schedule 6 of the ADR directive to provide certain information every two years but does not require it to be published.

Request and response

10. On 24 January 2020 the complainant made the following request for information to the FOS under the FOIA -

'Information request regards your requirements set out in the Alternative dispute resolution for Consumer dispute (Competent Authorities and Information) Regulations 2015 (the ADR reg) under schedule 3, as a certified ADR entity.

In order for the FOS to be certified as an ADR entity you applied to the FCA (the competent authority) detailing your explanation and evidence of how the FOS meet the criteria laid down in schedule 3 of the ADR reg. The FOS, issued your ADR reasoned statement published on your portal, dated 7 July 2015. Your reasoned statement has provided helpful information and narrowed down scope of the request significantly. However the document links are outdated and/or broken.

Further, the information request relates only to your Informal resolution procedure by an investigator and/or Ombudsman. Resolution by this method equates to approximately 90% of all resolutions; signifying its importance. The request does not relate to the remaining 10% of your resolutions under your formal resolution procedure only by an Ombudsman - final decision/determination. Further, The information request is narrowed down to these particular requirements under schedule 3, s.5(n) and s8(c)(d) of the ADR reg.

Request 1; ADR reg schedule 3 - Transparency s.5(n) - Informal resolution: • Request the; original documentation from the links (now broken) provided. • Request the; as of today, the applicable

documentation and/or links FOS relies on.

Request 2; ADR reg schedule 3 - Fairness - s.8(c)(d) - informal resolution: • Request the; original documentation from the links (now broken) provided. • Request the; as of today, the applicable documentation and/or links FOS relies on. • Request the; changes made that would be in place by 9.7.15 in relation to your statement: "For (i) (ii) and (iii) our case handlers talk to customers throughout their complaint and regularly explain our process to them. We are currently looking at the written information we provider to consumers to see if we can make any of this clearer - any changes we make will be in place by 9 July 2015."

Request 3; FOS provided FCA information which reviewed and confirmed on 20.9.17 the FOS continued to meet requirements of the ADR reg. • Request the; Information FOS provided to the FCA.'

11. The FOS wrote to the complainant on 12 February 2020 and asked him for clarification of his request regarding what links he was referring to and where. The clarification was provided on the same day.
12. On 3 April 2020 the FOS responded to the complainant by providing information, links, and two factsheets regarding parts one and two of the request. Part three of the request was withheld under section 36(2)(c) of the FOIA.
13. On the same date the complainant requested an internal review.
14. An internal review was sent to the complainant by the FOS on 5 May 2020. The review provided factsheets from 2015 rather than 2017, addressed the issues about broken links that had been provided and directed the complainant to the historic pages on the National Archives website. However, the FOS maintained its position in withholding the requested information at part three of the request that had been withheld under section 36.

Scope of the case

15. The complainant contacted the Commissioner on 8 July 2020 to complain about the way his request for information had been handled.
16. After the Commissioner began her investigation, the FOS also cited section 36(2)(b)(ii) in relation to the withheld information.

17. The Commissioner considers the scope of this case to be the FOS's citing of section 36(2)(b)(ii) and section 36(2)(c) to the requested information. The Commissioner will also look at any procedural matters that may have arisen.

Reasons for decision

Section 36 – Prejudice to the effective conduct of public affairs

18. 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.”

19. The FOS has cited section 36 in relation to the withheld information. The FOS has stated that it applies to all the withheld information. The Commissioner has been provided with this information. She is unable to describe the withheld information in any detail for obvious reasons.
20. The Commissioner is required to consider the qualified person's opinion as well as the reasoning which informed that 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.
21. The exemptions at section 36 can only be engaged on the basis of the reasonable opinion of a qualified person. The qualified person in respect

of the FOS is Annette Lovell, Director of Strategy and Engagement. The Commissioner is satisfied that Annette Lovell was the appropriate qualified person to give an opinion. The opinion of the qualified person was sought on 4 March 2020 in order to respond to the complainant. She was shown a copy of the ICO qualified person form, a copy of the withheld information, different proposed draft responses and a copy of the request in order that the qualified person could see the different options for responding. At that point the FOS was only citing section 36(2)(c).

22. In the qualified person form there were arguments both in favour of withholding and in favour of disclosing the information. The FOS also arranged a meeting and a call with the qualified person and the Head of External Relations (government, regulator and media) responsible for the FOS's engagement with the FCA in order that the request and the information could be discussed in detail. The qualified person gave her opinion on 3 April 2020.
23. At internal review stage, the qualified person was asked again to consider her reasonable opinion. She confirmed on 4 May 2020 that the FOS should continue to apply the exemption at section 36(2)(c).
24. On 1 April 2021 the qualified person also gave the opinion that section 36(2)(b)(ii) applied before the FOS responded to the Commissioner.
25. The Commissioner next needs to establish whether the qualified person's opinion was reasonable. The approach of the Commissioner to this subsection is that it should only be cited in relation to a prejudice that would not be relevant to any of the other exemptions in Part II of the FOIA.

Is the qualified person's opinion reasonable?

26. The FOS's statutory function and primary purpose is to resolve individual complaints quickly and with minimal formality. In order to offer an effective public service and fulfil its statutory obligations, the FOS needs to cooperate and communicate constructively and effectively with a number of official bodies such as the FCA. There are specific legal obligations for it to do so and it quotes from section 232A of the FSMA,

"The Financial Ombudsman Service Limited must disclose information to the FCA where in its opinion it considers that the information would or might be of assistance to the FCA in advancing one or more of the FCA's operational objectives."

27. The FOS has a memorandum of understanding with the FCA which sets out their framework for sharing information. The FOS talks about working with the regulator in its annual reviews and it publishes information about its performance, timeliness and the cases it has considered in its annual reviews, reports and accounts. However, it does not make publicly available individual conversations and discussions it has with the FCA.

Section 36(2)(b)(ii)

28. The qualified person in relation to the exemption at section 36(2)(b)(ii) must give an opinion that the release of the requested information would or would be likely to inhibit the free and frank exchange of views for the purposes of deliberation.
29. The FOS confirmed that, in Annette Lovell's reasonable opinion the exemption under section 36(2)(b)(ii) is engaged. The Commissioner will look firstly at the arguments provided under this exemption.
30. It is the qualified person's reasonable opinion that the exemption under this section is engaged because releasing the information would be likely to inhibit the free and frank exchange of views for the purposes of deliberation. If the FOS was to share its confidential communications it would be likely to prejudice its ability to have open and honest conversations with the FCA. If the FCA and the FOS cannot talk to each other openly and freely this is likely to create a 'chilling effect' whereby individuals at both organisations may be less likely to speak and communicate on sensitive topics. If the FOS cannot provide information it would be likely to affect the decision-making of the FCA regarding its obligations under ADR and hinder free and frank discussions.
31. In referring to the 'chilling effect' the FOS cited previous decisions of the Commissioner [FS50690384](#) and [FS50863534](#) which involved communications between the FOS and the FCA. FS50863534 was appealed to the First Tier Tribunal EA/2020/0039 and the FTT found in the FOS's favour stating:

"The FOS and FCA are independent from each other but they work closely together, and have a statutory obligation to cooperate with each other and exchange information. This is in order to ensure the FOS fulfils its statutory dispute resolution functions effectively. It is clearly in the public interest for these discussions to be as open and frank as possible. It is also in the interest of stakeholders and the public more generally for discussions to take place quickly, so that decisions can be taken and issues resolved as soon as possible... this is likely to be inhibited by disclosure of the

free and frank exchange of views contained in the withheld information, due to concern that other similar exchanges would also be made public.” (paragraph 49)

32. The complainant does not accept that the opinion of the FOS qualified person exemption under s.36(2) applies to request 3. His view is that the FOS qualified person's opinion is unreasonable.
33. He argues this by providing background to his complaint. The FOS is a public authority for the purpose of the FOIA. The information requested relates to the FOS information and disclosure obligations as an ADR applicant and certified ADR entity under the ADR regulations 2015 and he provided a link to the legislation².
34. The complainant states that it is important to emphasise the title of the ADR regulation 2015 and the fact that the regulations are regarding consumer protection.
35. He explains that in the spring and summer of 2015 the FOS wished to be certified as an ADR entity pursuant to the ADR 2015 requirements. The FOS supplied the designated competent authority information required under schedule 2. This information is disclosed in the public domain, and he provided the ADR reasoned statement link³. In addition the FOS discloses annual activity report information required under schedule 5. This information is also disclosed in the public domain in the ADR activity report 2018-19.
36. He stresses that following the FOS's successful application and certification as an ADR entity it is required to supply the designated competent authority with information set out under schedule 6 every two years and also provided a link.⁴ The complainant explained to the Commissioner that the FOS performed this task in or around September 2017 and December 2019. On both occasions the competent authority re-certified the FOS as a ADR entity offering ADR services through compliant ADR procedures.

² <http://www.legislation.gov.uk/uksi/2015/542/contents/made>

³ <http://www.legislation.gov.uk/uksi/2015/542/schedule/2/made>

⁴ <http://www.legislation.gov.uk/uksi/2015/542/schedule/6/made>

37. He went on to state that he had raised concerns regarding the FOS's alleged compliant ADR procedures and sought to scrutinise the information supplied under ADR 2015 schedule six which resulted in the competent authority public law decision to re-certify.

38. The complainant contends that:

- The FOS provided information regarding part one and two of his request (he states under schedule two and five) but would not do so regarding request three (he states under schedule six) which he describes as "*wholly unreasonable*".
- There is no reasonable basis for the FOS's opinion that disclosing this information will cause prejudice but the information it has disclosed does not. He does not believe that schedule six information obligations are exceptional.
- He suggests that parliament did not intend the information provided by an ADR entity to remain confidential and undisclosed because it did not say so.
- He contends that it is the FOS's choice to seek ADR entity certification. As a result it is obligated to supply information which is used by the competent authority to make a public law decision of direct significance to consumers and their protection. It is unreasonable to deny consumers disclosure of that information.

39. The Commissioner's guidance⁵ regarding the definition of "reasonable" is as follows:

"In this context an opinion either is or is not reasonable. In deciding whether an opinion is reasonable the ICO will consider the plain meaning of that word, rather than defining it in terms derived from other areas of law...The most relevant definition of 'reasonable' in the Shorter Oxford English Dictionary is: "in accordance with reason; not irrational or absurd". If the opinion is in accordance with reason and not irrational or absurd – in short, if it is an opinion that a reasonable person could hold – then it is reasonable."

⁵ <https://ico.org.uk/media/for-organisations/documents/2260075/prejudice-to-the-effective-conduct-of-public-affairs-section-36-v31.pdf>

40. In order to determine whether section 36(2)(b)(ii) is engaged the Commissioner must determine whether the qualified person's opinion was a reasonable one. In doing so the Commissioner has considered the following factors -
- Whether the prejudice/inhibition relates to the specific subsection that has been cited, in this case 36(2)(b)(ii). If the prejudice or inhibition is not related to the specific subsection the opinion is unlikely to be reasonable.
 - The nature of the information and the timing of the request.
 - The qualified person's knowledge of, or involvement in, the issue.
41. Although the Commissioner understands the complainant's view, she accepts that the Qualified Person's reasoning covers section 36(2)(b)(ii) and that her opinion is one that a reasonable person could hold. The release of this information would be likely to inhibit the free and frank exchange of views for the purposes of deliberation. She agrees that the likelihood of inhibition is at the lower level, "would be likely to inhibit". The qualified person was provided with arguments at the relevant time. She gave her opinion again after the Commissioner began her investigation. She signed to that opinion and the Commissioner's view is that her opinion is reasonable.

Public interest

42. Even though section 36 is engaged, the Commissioner needs to consider whether it is in the public interest to disclose the requested information.

Public interest factors in favour of disclosing the information

43. The complainant has put forward his public interest arguments in favour of disclosing the information. He argues that non-disclosure would be contrary to the enhancement of consumer protection policy matters pursued under the ADR which would erode consumer trust and confidence.
44. His view is that disclosure is fundamental to openness and transparency for the enhancement of consumer protection in the context where the information sharing is between an ADR entity and the competent authority.
45. He does not accept that there is sufficient prejudice arising from disclosure, therefore it is not in the public interest. This was before the FOS cited section 36(2)(b)(ii) therefore the Commissioner has extended his arguments to include "inhibition".

46. The FOS stated that disclosing the information would be in the interests of openness and transparency.

Public interest factors in favour of maintaining the exemption

47. The FOS went on to argue that this needs to be weighed against the public interest in both the FCA and the FOS being able to carry out their statutory functions, share meaningful information and have free and frank conversations – not least to avoid a ‘chilling effect’.
48. In the interest of transparency and accountability the FOS publishes a wealth of information on its website on its performance, timeliness, and how it is measuring against its commitments. The FOS also publishes information about the ADR directive on its website, including copies of its annual activity reports, which include data on how many complaints it has received and how long they take, on average, to resolve. The FOS suggests that its wider discussions with the FCA will not further benefit or inform the public.

The balance of the public interest

49. The FOS has stressed the ‘chilling effect’ of the disclosure of this information on its communications with the FCA. The Commissioner is conscious that any argument, resting as it does on the concept of a generalised chilling effect on future discussions, needs to be questioned. She has determined, however, that the FOS’s ongoing relationship and exchanges with the FCA would be likely to be inhibited and less free and frank if the requested information was to be disclosed. This would not be in the public interest. She acknowledges that the FOS has considered what it is able to publish in the interests of transparency and public understanding. The FOS needs to be able to offer an effective public service to meet its functions, purpose and wider objectives. In the Commissioner’s opinion disclosing the withheld information, despite the passage of time, would be likely to cause inhibition to both the FOS and the FCA which is not in the public interest. She does not consider that there is a persuasive public interest argument in disclosing information from 2017 that would outweigh this.
50. As the Commissioner has found the public interest to lie in maintaining the exemption at section 36(2)(b)(ii) regarding the information the FOS withheld, she has not gone on to consider the exemption at section 36(2)(c).

Section 10 – time for compliance

51. Section 10(1) of the FOIA states that:

"Subject to subsections (2) and (3), a public authority must comply with section 1(1) promptly and in any event not later than the twentieth working day following the date of receipt."

52. The complainant requested information on 24 January 2020. The FOS asked him to clarify part of his request on 12 February 2020. He did so immediately but the FOS did not respond until 3 April 2020, over three weeks later than the time for compliance. In doing so, the FOS breached section 10(1) of the FOIA.

Right of appeal

53. 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

54. 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.

55. 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
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