

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 14 November 2022

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

Decision (including any steps ordered)

1. The complainant has requested the Financial Ombudsman Service to disclose the 'test of prejudice' results following its determination that some information is commercially sensitive. The FOS responded and confirmed that the requested information is not held.
2. The Commissioner's decision is that, on the balance of probabilities, the FOS does not hold the requested information. He therefore does not require any further action to be taken.

Request and response

3. On 19 July 2021, the complainant wrote to the FOS and requested information in the following terms:

"I refer to your colleague's email of 14 July 2021. I have been informed by the Information Commissioner's Office that the Act requires a 'test of prejudice', to determine if disclosure would cause prejudice to commercial interests. These test results were not included in the above reply. Please supply copies of these 'test of prejudice' results, including the dates they were completed.

The FOI response time has been exceeded since my FOI request on 28 May 2021. The FOS stated ' I'm sorry for any confusion that was caused by us in relation to whether the casework team or the data protection team would be sending you this information. In the circumstances, would you please ensure I receive copies of the above 'test of prejudice' by return."

4. The FOS responded on 24 August 2021 and 1 February 2022, stating that it does not hold the requested information.

Scope of the case

5. The complainant contacted the Commissioner on 4 February 2022 to complain about the way their request for information had been handled. They are unhappy that the FOS is unable to disclose copies of the 'test of prejudice' results and therefore concerned that no 'test of prejudice' was performed by the FOS when determining that information could not be disclosed because it is commercially sensitive. The complainant is concerned that the failure to carry out the 'test of prejudice' is a breach of FOIA.
6. The Commissioner's investigation is limited to the complaint brought to him on 4 February 2022, which was in connection with the complainant's information request of 19 July 2021 and how this has been handled by the FOS. The FOS stated that the requested information is not held and so this investigation has sought to establish whether, on the balance of probabilities, this is correct and in accordance with section 1 of FOIA.
7. For clarity, the Commissioner notes that the information request relates to a private dispute the complainant has with their car insurer. The Commissioner has no remit to consider or indeed comment on this dispute and the involvement of the FOS. He is limited to considering the request of 19 July 2021 and whether this has been handled by the FOS in accordance with its obligations under FOIA.

Reasons for decision

8. The Commissioner notes that prior to this information request the complainant asked the FOS to disclose the supporting statement or justification for their increased insurance premium and the recovered repair cost of their car from a third party. This request related to a private dispute the complainant had relating to an insurance claim and was therefore a request for their own personal data.

9. The FOS' response of 24 August 2021 confirmed that the complainant's original request of 28 May 2021 was processed as a subject access request under the Data Protection Act (DPA). Some information was provided but some information was withheld. Paragraphs three and five of the second page of the FOS's response of 24 August 2021 explained that the information withheld, was withheld under schedule 2, section 11 of the DPA. Paragraph five went on to explain in more detail that this information was withheld under the DPA, as "disclosing the information would prejudice a business' commercial interests...". It was withheld on commercial interests grounds under the DPA (schedule 2, section 11).
10. Referring to the complainant's request for copies of the prejudice test performed by the FOS, it has said that this information is not held. It confirmed that its consideration of the test of prejudice is not held in a separate document but contained in its actual response to the request for information.
11. The Commissioner is satisfied that, on the balance of probabilities, the FOS does not hold separate documentation to the response(s) it issued detailing the test of prejudice and how this was carried out. He accepts that this consideration takes place as part of the overall process of establishing if information is suitable for disclosure or not, whether under the DPA or FOIA. The consideration of the test of prejudice is generally communicated in the response that is provided to the complainant, as part of its explanation as to why a particular exemption applies.
12. The Commissioner has no reason to doubt the FOS' position. He carries out similar tests of prejudice in the work he performs and does not record separately the test of prejudice, as part of the overall consideration of a prejudice based exemption, as a matter of course. It is part of the overall decision making process but then communicated to the applicant in the response that is issued. For these reasons, he has not sought to check with FOS or make additional enquiries, as it appears wholly logical to him that separate documentation would not be held.
13. For the above reasons, the Commissioner is satisfied that, on the balance of probabilities, the recorded information is not held. The FOS has therefore complied with its obligations under section 1 of FOIA by informing the complainant that it does not hold the requested information.

Other matters

14. The Commissioner notes that the complainant requested an internal review on 27 August 2021, yet this process was not completed by the

FOS until 1 February 2022. The section 45 code of practice recommends that public authorities carry out internal reviews within 20 working days of receipt and certainly no later than 40 working days. It is noted that the FOS took just over five months to complete this process.

15. The delay is not acceptable and therefore the Commissioner would like to remind the FOS of the requirements of the code and the importance of completing internal reviews within a timely manner and in accordance with the recommended timeframe.

Right of appeal

16. 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: 0203 936 8963

Fax: 0870 739 5836

Email: grc@justice.gov.uk

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

17. 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.
18. 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

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