

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 11 May 2021

Public Authority: Financial Ombudsman Service
Address: Harbour Exchange Square
Isle of Dogs
London
E14 9SR

Decision (including any steps ordered)

1. The complainant, acting on behalf of a client, has requested information pertaining to a complaint submitted against its client by a particular individual. The Financial Services Ombudsman ("the FOS") initially relied on sections 40 (personal data), 41 (breach of confidence), 21 (reasonably accessible) and 31 (prejudice to a law enforcement function) of the FOIA to withhold information.
2. The Commissioner's decision is that any information the FOS held would be the personal data of a third party and, as there is no lawful basis for the personal data to be disclosed, the FOS is entitled to rely on section 40(2) of the FOIA to withhold it.
3. The Commissioner does not require further steps.

Background

4. In 2018, the FOS concluded a complaint brought by an individual ("the Claimant") against the firm ("the Firm") that the complainant represents. The Individual has since chosen to pursue the matter further via a claim in the High Court.

Request and response

5. On 10 March 2020, the complainant wrote to the FOS on behalf of the Firm and requested information in the following terms:

"We believe the ombudsman's file for [the Individual]'s complaint will contain information which could assist the parties and the court in better understanding the various issues in dispute, including whether cover on an own occupation basis would have been available to [the Individual] in 2008. As such, and to assist with the fair resolution of this dispute, we should be grateful if you would provide us with a complete copy of the ombudsman's file within 14 days of this email."

6. The FOS responded on the following day. It noted that:

"I've spoken to our information rights team and they've advised me that they cannot process a SAR for you. That's because a business can't make a subject access request."

7. The complainant replied on the same day. It accepted that the Firm was unable to make a SAR, but asked for the request to be dealt with under the FOIA.

8. The FOS issued its initial response on 3 April 2020. It confirmed that it held information within the scope of the request, however it considered that that information would be covered under one or more exemptions. Correspondence it had exchanged with the complainant or with the Firm would be exempt under section 21 of the FOIA because it was reasonably accessible to both the complainant and the Firm. The remaining information, it withheld, relying on sections 40(2), 41(1) and 31(1)(c) of the FOIA to do so.

9. On 6 May 2020, the complainant sought an internal review. The complainant referred to the text of the complaint outcome in which the FOS had stated that, as part of the process of assessing the complaint, it had sought information from four insurance companies regarding the Individual's circumstances. The complainant stated that:

"Our revised request for information pursuant to the Act is as follows: please could you provide us with copies of the correspondence the Ombudsman exchanged with the four insurers, as referred to in the above extract from her Provisional Decision, regarding whether they would have provided [the Individual] with own occupation cover in 2008. To the extent there are any attendance notes (or other documents) summarising oral

discussions the Ombudsman had with those four Insurers, please could you also provide us with copies of those documents."

10. The FOS dealt with this correspondence as an internal review and wrote to the complainant on 8 June 2020. It stated that it was satisfied that it had applied exemptions appropriately to the original request. In respect of the refined request, it stated that it still wished to rely on section 41(1) and section 31(1)(c) of the FOIA to withhold information. It did not mention section 40(2) of the FOIA.

Scope of the case

11. The complainant contacted the Commissioner on 7 September 2020 to complain about the way his request for information had been handled.
12. On 21 April 2021, the Commissioner wrote to the complainant to set out her provisional view that any relevant information the FOS held would be the personal data of the Individual and that she had been unable to identify a lawful basis on which this could be disclosed. She recommended that the complaint be withdrawn and gave the complainant seven days in which to consider its next steps.
13. A week later, the complainant responded. It noted that it was unable to withdraw the complaint without instructions from the Firm and stated that it would require a further three weeks to obtain instructions. It asked the Commissioner to either wait for a further three weeks or issue a decision notice straight away.
14. Given that the issues involved were straightforward and that there was no guarantee that the complaint would be withdrawn, even once instructions have been received, the Commissioner considers that it is appropriate to proceed to a decision notice.
15. Based on the wording of the request, the responses the FOS has already provided and her expertise as regulator of Data Protection legislation, the Commissioner considers that she has sufficient evidence on which to base a decision. She has therefore not sought a formal submission from the FOS – although she did give the FOS a week to notify her if it wished to add anything to its previous responses (the FOS had not responded to the correspondence at the date of this notice).
16. The Commissioner considers that the scope of her investigation is to determine whether section 40(2) would apply to the withheld information. If it does, she does not need to consider any other exemption.

Reasons for decision

Section 40 – personal information

17. Section 40(2) of the FOIA provides that information is exempt from disclosure if it is the personal data of an individual other than the requester and where one of the conditions listed in section 40(3A)(3B) or 40(4A) is satisfied.
18. In this case the relevant condition is contained in section 40(3A)(a)¹. This applies where the disclosure of the information to any member of the public would contravene any of the principles relating to the processing of personal data ('the DP principles'), as set out in Article 5 of the General Data Protection Regulation ('GDPR').
19. The first step for the Commissioner is to determine whether the withheld information constitutes personal data as defined by the Data Protection Act 2018 ('DPA'). If it is not personal data then section 40 of the FOIA cannot apply.
20. Secondly, and only 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 DP principles.

Is the information personal data?

21. Section 3(2) of the DPA defines personal data as:

"any information relating to an identified or identifiable living individual".

22. The two main elements of personal data are that the information must relate to a living person and that the person must be identifiable.
23. An identifiable living individual is one who can be identified, directly or indirectly, in particular by reference to an identifier such as a name, an identification number, location data, an online identifier or to one or more factors specific to the physical, physiological, genetic, mental, economic, cultural or social identity of the individual.

¹ As amended by Schedule 19 Paragraph 58(3) DPA.

24. Information will relate to a person if it is about them, linked to them, has biographical significance for them, is used to inform decisions affecting them or has them as its main focus.
25. In this particular case, both the original request and the refined request refer to the Individual by name. The complainant is not seeking information about any complaint the FOS has dealt with, but a very specific complaint, submitted by a specific individual, who is named in the request.
26. It is an established principle of FOIA that a public authority is entitled to consider any relevant information, not just in isolation, but also in conjunction with the precise wording of the request.
27. Therefore, any information the FOS were to disclose must, by definition, relate to the individual – if it does not relate to the Individual's complaint, it does not fall within the scope of the request. No amount of redaction would be capable of breaking the link between the information and the Individual. The Individual is therefore identifiable from the information.
28. Furthermore, it is apparent from the wording of the refined request that the complainant is seeking copies of responses the FOS received from four insurance companies who were informed of the Individual's business and financial circumstances. The Commissioner is therefore satisfied that this is information used to inform decisions made about the Individual and therefore also relates to the Individual.
29. In the circumstances of this case, having considered the withheld information, the Commissioner is satisfied that this information both relates to and identifies the Individual. This information therefore falls within the definition of 'personal data' in section 3(2) of the DPA.
30. The fact that information constitutes the personal data of an identifiable living individual does not automatically exclude it from disclosure under the FOIA. The second element of the test is to determine whether disclosure would contravene any of the DP principles.
31. The most relevant DP principle in this case is principle (a).

Would disclosure contravene principle (a)?

32. Article 5(1)(a) of the GDPR states that:

"Personal data shall be processed lawfully, fairly and in a transparent manner in relation to the data subject".

33. In the case of an FOIA request, the personal data is processed when it is disclosed in response to the request. This means that the information can only be disclosed if to do so would be lawful, fair and transparent.
34. In order to be lawful, one of the lawful bases listed in Article 6(1) of the GDPR must apply to the processing. It must also be generally lawful.
35. Article 6(1) of the GDPR specifies the requirements for lawful processing by providing that "*processing shall be lawful only if and to the extent that at least one of the*" lawful bases for processing listed in the Article applies.
36. The Commissioner considers that the lawful basis most applicable is basis 6(1)(f) which states:

"processing is necessary for the purposes of the legitimate interests pursued by the controller or by a third party except where such interests are overridden by the interests or fundamental rights and freedoms of the data subject which require protection of personal data, in particular where the data subject is a child"².

37. In considering the application of Article 6(1)(f) of the GDPR in the context of a request for information under the FOIA, it is necessary to consider the following three-part test:-
 - i) **Legitimate interest test:** Whether a legitimate interest is being pursued in the request for information;
 - ii) **Necessity test:** Whether disclosure of the information is necessary to meet the legitimate interest in question;

² Article 6(1) goes on to state that:-

"Point (f) of the first subparagraph shall not apply to processing carried out by public authorities in the performance of their tasks".

However, section 40(8) FOIA (as amended by Schedule 19 Paragraph 58(8) DPA) provides that:-

"In determining for the purposes of this section whether the lawfulness principle in Article 5(1)(a) of the GDPR would be contravened by the disclosure of information, Article 6(1) of the GDPR (lawfulness) is to be read as if the second sub-paragraph (dis-applying the legitimate interests gateway in relation to public authorities) were omitted".

- iii) **Balancing test:** Whether the above interests override the legitimate interest(s) or fundamental rights and freedoms of the data subject.
38. The Commissioner considers that the test of 'necessity' under stage (ii) must be met before the balancing test under stage (iii) is applied.

Legitimate interests

39. In considering any legitimate interest(s) in the disclosure of the requested information under FOIA, the Commissioner recognises that a wide range of interests may be legitimate interests. They can be the requester's own interests or the interests of third parties, and commercial interests as well as wider societal benefits. These interest(s) can include broad general principles of accountability and transparency for their own sakes, as well as case-specific interests. However, the narrower or more trivial the interest, the less likely it is that the interest will outweigh the rights of the data subject.
40. The Commissioner recognises that there will always be a legitimate interest in public authorities being transparent and accountable, particularly in the way that they are spending public money.
41. Secondly and specific to this case, the complainant has identified that the Firm has a legitimate interest in receiving this information in order to participate in the legal proceedings brought by the Individual. Whilst this is an interest of little importance to the broader public, the Commissioner recognises that it is one that is legitimate and which would be satisfied by disclosure.

Is disclosure necessary?

42. 'Necessary' means more than desirable but less than indispensable or absolute necessity. Accordingly, the test is one of reasonable necessity and involves consideration of alternative measures which may make disclosure of the requested information unnecessary. Disclosure under the FOIA – which is of course publication to the world at large – must therefore be the least intrusive means of achieving the legitimate aim in question.
43. In this case, the Commissioner does not consider that disclosure under the FOIA is necessary to achieve either legitimate interest.
44. In relation to transparency and accountability, the FOS' work is already scrutinised by the FCA, the Treasury and Parliament. If a person is unhappy with the outcome they receive in their individual complaint,

they have the right to pursue the matter in court. Neither of these routes require as much intrusion into the privacy of the Individual as publishing her personal data and therefore disclosure is not necessary to achieve this interest.

45. In respect of any extant legal proceedings, once again, the Commissioner does not consider that disclosure under FOIA is necessary to achieve this interest. Courts have extensive powers to require individuals and organisations to hand over information that is pertinent to cases under their consideration. This process of information sharing is much less intrusive than disclosure under FOIA because information can be shared only with the relevant parties involved, rather than disclosed to the world at large.
46. As the Commissioner has decided in this case that publication is not necessary to meet the legitimate interests in disclosure, she has not gone on to conduct the balancing test. As disclosure is not necessary, there is no lawful basis for this processing and it is unlawful. It therefore does not meet the requirements of principle (a).
47. As disclosure would have breached one of the data protection principles, the FOS was entitled to rely on section 40(2) of the FOIA to withhold all of the requested information. She has not therefore considered it necessary to consider any other exemptions applied by FOS.

Other matters

48. The FOS originally responded to this request to say that it was unable to process a Subject Access Request on behalf of a company because a company is not entitled to make a SAR. Whilst this statement is perfectly correct in law, having reviewed the relevant correspondence, the Commissioner can find no indication that the complainant wished its correspondence to be dealt with as such.
49. However, even if the complainant had explicitly asked for its correspondence to be dealt with as a SAR, the FOS should still have dealt with the request under the FOIA straight away and explained to the complainant why it was doing so. The Commissioner does not generally expect requestors to be aware of the access regime likely to be most generous in the circumstances of each request – nor should they be penalised for being unaware. It is the responsibility of the public authority to identify potential information requests and to determine the correct access regime for processing each request.

Right of appeal

50. 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

51. 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.
52. 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

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