

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 5 August 2021

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

Decision (including any steps ordered)

1. The complainant asked the Financial Ombudsman Service (FOS) if a complainant had accepted or rejected a decision the FOS made. The FOS refused to provide the requested information under section 31(1)(c) of the FOIA.
2. The Commissioner's decision is that the information requested is exempt from disclosure under section 31(1)(c) and the public interest favours maintaining the exemption.
3. The Commissioner does not require any steps to be taken as a result of this decision notice.

Request and response

4. On 19 June 2020, the complainant wrote to the FOS and requested information in the following terms:

"I would like to ask the following question under Freedom of Information Act:

- In respect of your Ombudsman Decision Ref: DRN1684164, did the Complainant M. reject or accept the Ombudsman decision?"

5. The FOS responded on 17 July 2020 and refused to provide the requested information citing the exemption under section 40(2) of the FOIA on the basis that it was third party personal data.
6. The complainant requested an internal review of the FOS' decision on 18 July 2020. The complainant argued that "complainant M" was not an

identified or identifiable natural person as per the definition of personal data under the General Data Protection Regulation (GDPR), but rather a “juridical person” (ie a firm/company), and therefore that section 40(2) of the FOIA did not apply.

7. Following an internal review the FOS wrote to the complainant on 14 August 2020, revising its position. The FOS still refused to provide the requested information, but now relied on the exemption under section 31(1)(c) of the FOIA to do so, on the basis that disclosure would, or would be likely to, prejudice the administration of justice.

Scope of the case

8. The complainant contacted the Commissioner on 16 August 2020 to complain about the way his request for information had been handled.
9. The Commissioner considers the scope of her investigation to be to determine if the FOS has correctly withheld the requested information under section 31(1)(c) of the FOIA.

Reasons for decision

Section 31 – law enforcement

10. Section 31 of the FOIA provides a prejudice-based exemption which protects a variety of law enforcement interests. Consideration of this exemption is a two-stage process. Firstly, in order for the exemption to be engaged, disclosure of the requested information would need to prejudice, or be likely to prejudice, one of the law enforcement interests protected by section 31 of the FOIA. Secondly, the exemption is subject to a public interest balancing test. This means that the information should be disclosed if the balance of the public interest favours this, even where the exemption is engaged.
11. The relevant part of section 31(1) of the FOI states that:

“(1) Information which is not exempt information by virtue of section 30 is exempt information if its disclosure under this Act would, or would be likely to, prejudice—

(c) the administration of justice...”
12. In order to engage a prejudice-based exemption, such as section 31, there must be at least a likelihood that disclosure would cause prejudice

to the interest that the exemption protects. In the Commissioner's view, there are three criteria which must be met for this to be the case:

- first, the actual harm which the public authority alleges would, or would be likely, to occur if the withheld information was disclosed has to relate to the interests protected by the exemption (in this case, the administration of justice).
- secondly, the public authority must be able to demonstrate that some causal relationship exists between the potential disclosure of the information being withheld and the prejudice which the exemption is designed to protect. Furthermore, the resultant prejudice, which is alleged must be real, actual or of substance; and
- thirdly, it is necessary to establish whether the level of likelihood of prejudice being relied upon by the public authority is met – ie whether disclosure "*would be likely*" to result in prejudice or disclosure "*would*" result in prejudice.

13. The FOS stated that it is an alternative dispute resolution service set up by Parliament to resolve financial disputes that consumers and microenterprises are not able to resolve with a financial business. It advised that last year, it received over 650,000 enquiries and took on over 270,000 new cases. It stated that in order to resolve these cases fairly and reasonably in line with its statutory function, it needs to be able to investigate and make decisions. Complainants who use the service also need to know that whether they accept or reject the FOS' findings on an individual complaint will remain confidential.

14. The FOS stated that if it were to disclose whether a specific complainant had brought a complaint, and whether or not they had accepted an ombudsman's decision, this would be likely to:

- Undermine the FOS' complaints process and the reassurance given to parties that their details will not be shared any wider, and that only an anonymised version of the decision will be published.
- Deter consumers and small businesses from bringing complaints to the FOS in the future if they think the FOS could disclose information about their complaint without their agreement.
- Prejudice the fair resolution of any ongoing complaints.
- Intrude upon a confidential safe space needed for candid internal discussion and decision-making if the complainant wants to discuss

the acceptance or refusal of the decision with the case handler before making a decision.

- Prejudice the interests of parties in ways that would diminish their voluntary co-operation in the future.
15. The FOS stated that, in turn, this would be likely to hinder its ability to determine fair and reasonable outcomes for complainants and financial businesses, and therefore the overall administration of justice.
 16. The Commissioner considers the term “administration of justice” to be fairly broad. It applies to the justice system as a whole. She considers it will protect a wide range of judicial bodies such as courts, coroner’s courts and tribunals from disclosure that would in any way interfere with their efficiency and effectiveness, or the ability to conduct proceedings fairly. Anything that would make it harder for the public to access the justice system could also engage the exemption.
 17. As the FOS has pointed out, it was set up to provide a dispute resolution service for consumers and microenterprises for those disputes they have been unsuccessful in pursuing with the relevant business. It is an Ombudsman given statutory powers by the Financial Services and Markets Act 2000 to help settle disputes. It has the authority to request or require that a company offer financial compensation, correct a consumer’s credit file, or offer an apology as a means of dispute resolution. It makes decisions on the basis of what is fair and reasonable in the particular circumstances of the case. The Commissioner considers that the service the FOS provides falls within the broad term of the “administration of justice”, as justice effectively means ensuring just behaviour and treatment; it is the quality of being fair and reasonable in a given case.
 18. The Commissioner refers back to the expectations of complainants and those parties complained about in such circumstances, in particular the FOS’ stance of investigating and determining complaints on a confidential and private basis. This is the general expectation of those involved. They may expect certain information to be shared on a limited basis for the purposes of the dispute, to those party to the dispute or other relevant parties. But they generally do not expect the contents of the dispute, the investigation conducted and so on to be disclosed to the world at large. If disclosure were ordered in this case, it would be likely to prejudice the FOS’ ability to carry out its statutory function effectively, which in turn would be likely to prejudice the administration of natural justice. People and those businesses subject to such disputes would be deterred from using the service, as well as volunteering and sharing information freely and quickly, and this would be likely to hinder the service the FOS offers and its ability to resolve disputes informally

and as quickly as possible. Financial businesses would be less co-operative and less willing to share information and hold free and frank discussions about a particular dispute. Both of these are key to the dispute resolution service operating effectively and fairly.

19. For these reasons, the Commissioner is satisfied that disclosure would be likely to prejudice the administration of justice, and therefore that the exemption under section 31(1)(c) is engaged in this case.

Public Interest Test

20. Section 31(1)(c) is subject to a public interest test. This means that even though the exemption is engaged, the information may only be withheld if, in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information.

Public interest arguments in favour of disclosing the information

21. The FOS has argued that releasing the information would benefit the public in the general interest of openness and transparency.

Public interest arguments in favour of maintaining the exemption

22. The FOS has argued that there is no wider public interest in releasing the information. It stated that the complainant wants the information because he believes it relates to a personal matter and he was not party to the complaint in question.
23. The FOS also argued that releasing whether the decision was accepted or rejected by the company which made the complaint may result in further action, which could cause harm to the microenterprise or the financial business.
24. The FOS stated that there is an inherent public interest in the administration of justice and it being able to fulfil its statutory function, which is to resolve disputes between customers and financial businesses fairly and reasonably as an alternative to the courts.
25. The FOS argued that if consumers or small businesses thought that it could disclose information about their complaint without their agreement, it is likely that more consumers and small businesses would choose to use the court system rather than the FOS in order to resolve their disputes with financial businesses. This would, in turn, place additional pressure on the court system, and so prejudice the administration of justice by the Courts.

26. The FOS stated that there is a public interest in its service being able to have free and frank conversations with customers and for them to express in confidence whether or not they accept the decision, given that accepting the decision makes it legally binding.
27. The FOS argued that if it were to release the information to the world at large, this could deter customers who are microenterprises or SMEs from bringing complaints to its service if they do not think they can be brought in confidence or if they feel they have less protection than individual consumers.
28. The FOS stated that as part of its case handling process, the parties to the complaint would have access to the information via other routes.

Balance of the public interest

29. In carrying out the statutory balancing exercise in this case, the Commissioner considers that appropriate weight must be afforded to the public interest inherent in the exemption - that is, the public interest in avoiding likely prejudice to law enforcement matters. Clearly, it is not in the public interest to disclose information that may compromise this.
30. The Commissioner considers that some weight must also always be given to the general principle of achieving accountability and transparency through the disclosure of information held by public authorities. This assists the public in understanding how public authorities make their decisions and carry out their functions, and in turn fosters trust in public authorities. The Commissioner considers that this is met, to some extent, by the FOS' publication of its determinations which would increase the public's understanding of the FOS' regulatory function.
31. The Commissioner considers that the principle of confidentiality is important. Undermining this by disclosing information which is supplied by individuals to assist the FOS perform its regulatory functions would not be in the public interest, as it is important that there is trust in a regulator so it can have open and frank communications with individuals in order that it can make the right regulatory decisions.
32. There is also a significant public interest in ensuring that the FOS, with its statutory functions under the Financial Services and Markets Act 2000 to resolve disputes between customers and businesses, can operate efficiently and effectively, something which the Commissioner has determined would be negatively affected by disclosure. Against this, she does not consider the arguments for disclosure outweigh the public interest in maintaining the exemption.

33. The Commissioner has therefore concluded that, in all the circumstances, the weight of the public interest lies with maintaining the exemption under section 31(1)(c) of the FOIA.

Right of appeal

34. 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

35. 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.
36. 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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