

## Freedom of Information Act 2000 (FOIA)

### Decision notice

**Date:** 4 August 2014

**Public Authority:** The Financial Ombudsman Service  
**Address:** South Quay Plaza  
183 Marsh Wall  
London  
E14 9SR

#### Decision (including any steps ordered)

---

1. The complainant requested information concerning his clients' file regarding a case investigated by the Financial Services Ombudsman (the "FOS") and the related legal advice received by the FOS concerning the case. He also requested a copy of communications between the FOS and the Financial Services Authority or "FSA" (now the Financial Conduct Authority or "FCA") relating to the issues raised by the case. The FOS provided some information concerning the case and applied section 42(1) of the FOIA to the requested legal advice. However, with respect to the request for communications with the FSA, the FOS explained it would neither confirm nor deny whether it held further information under section 44(1) and 44(2) of the FOIA. It explained this was because to do so would contravene section 348(1) of the Financial Services and Markets Act (the "FSMA").
2. The Commissioner's decision is that the FOS has correctly applied section 44(2) and section 42(1) of the FOIA to this request. There are no steps to be taken.

#### Request and response

---

3. On 11 January 2013, on behalf of his clients, the complainant wrote to the FOS and requested information in the following terms:

*"We have requested a copy of the FOS file on [clients' name redacted] case.*

*In addition (although they may be included within the above file) we have also requested a copy of any communications that have taken place between the FOS and the FSA with regard to the Enhanced fund issue."*

*"thirdly (although they may be included within the above file) we have requested a copy of the internal (and external, although again I understand you haven't had any) legal advice the FOS has had on the case / the [company name redacted] enhanced fund issue."*

4. The FOS responded on 8 February 2013. It explained it does not share full copies of its complaint files. It also explained that its complaint files contain a considerable amount of personal information which is exempt from disclosure under section 40(2) of the FOIA.
5. The FOS provided:
  - copies of the submissions of the financial business (and its representatives); and
  - two general email exchanges between the FOS and the FSA (now the FCA) with third party personal data redacted under section 40(2) of the FOIA.
6. The FOS suggested that the complainant's clients could submit a subject access request ("SAR") to request a copy of their personal data. However the FOS explained it considered it would seem unlikely that the complainants would be provided with any new information. It explained that it would require a £10 fee to process a SAR.
7. It then explained that as the FOS does not comment publicly on whether or not it has investigated a matter, it was now neither confirming nor denying whether it held any further information under section 44(1) and 44(2) of the FOIA. It explained this was because to do so would contravene section 348(1) of the FSMA.
8. It also explained that it could not share legal advice with the complainant as it is exempt under section 42(1) of the FOIA.
9. On 11 February 2013 the complainant wrote to the FOS and submitted a SAR on behalf of his clients under the Data Protection Act 1998 (the DPA). The complainant complained to the Information Commissioner about the response of the FOS to this SAR and this was investigated as part of case reference RFA0501842.

10. Following the SAR assessment, an FOIA case was then set up to deal with the refusal of the FOS to provide that part of the requested information which fell under the FOIA.
11. On 30 April 2014 the FOS confirmed that it had applied section 42(1) of the FOIA to the withheld legal advice. The FOS explained it would neither confirm nor deny whether it held further information under section 44(1) and 44(2) of the FOIA.

### **Scope of the case**

---

12. The complainant contacted the Commissioner on 10 May 2013 to complain about the handling of his SAR. Once the DPA case was resolved, the FOIA case was set up on 11 March 2014 to investigate the refusal of the FOS to provide that part of the requested information which fell under the FOIA.
13. The Commissioner considers the scope of this case to be concerned with the application of section 42 of the FOIA to the withheld information and with the refusal of the FOS to neither confirm nor deny whether it held further information under section 44(1) and 44(2) of the FOIA.
14. The complainant did not explicitly complain about the FOS's application of section 40(2) to withheld third party personal data. He did not question the above scope of the case when this was confirmed to him by the Commissioner.

### **Reasons for decision**

---

#### **Section 44 – prohibitions on disclosure**

15. Section 44(1) of the FOIA states:
  - (1) Information is exempt information if its disclosure (otherwise than under this Act) by the public authority holding it-
    - (a) is prohibited by or under any enactment,
    - (b) is incompatible with any Community obligation, or
    - (c) would constitute or be punishable as a contempt of court.

16. Section 44(2) of the FOIA provides that the duty to confirm or deny that information is held does not apply if the confirmation or denial would itself be subject to one of the exemptions in subsection 44(1)(a) to (c).
17. The FOS has applied this exemption to information the complainant requested regarding its communication with the FSA.
18. The FOS has explained that it sent the complainant those emails which contained general correspondence about the Enhanced Fund in question. These emails contain information about a financial issue which was discovered as part of performing its statutory function of resolving financial complaints.
19. The FOS has explained that its relationship with the FCA (then FSA) is set out in its Memorandum of Understanding with it. The FOS has explained it has a duty to cooperate with the FCA and in particular to:  
  
*"...consult with one another at an early stage on any issues that might have significant implications for the other organisation..."*
20. The FOS has explained that the communication it has with the FCA is for the benefit of consumers of financial services and the financial services industry. Its Memorandum of Understanding is on its website and accessible to the public and it has no objections to sharing the email exchanges such as the one provided to the complainant.
21. However the complainant is concerned that there may be further email exchanges and would like to see copies of those or information contained within them.
22. The FOS has explained it is unable to confirm or deny under the FOIA whether such exchanges exist under section 44(2) of the FOIA, as under section 44(1) it is prohibited to disclose any such documents, as prohibited by section 348(1) and 348(2) of the FSMA.
23. Section 348(1) of the FSMA states that confidential information must not be disclosed by a primary recipient or by any person obtaining the information directly or indirectly from a primary recipient, without the consent of –
  - (a) the person from whom the primary recipient obtained the information; and
  - (b) if different, the person to whom it relates.

24. Any disclosure would be a breach of the FSMA and would be a criminal offence. Such information (if held) would therefore be exempt from disclosure under section 44(1) of the FOIA.
25. Section 348(2) of the FSMA states that 'confidential information' means information which –
  - (a) relates to the business or other affairs of any person; and
  - (b) was received by the primary recipient for the purposes of, or in the discharge of, any functions of the Authority...
26. The FOS has explained that confidential purposes is defined as non-public and non-anonymised information which relates to the business or other affairs of any person and which was received by the FCA for the purposes of, or in discharge of, its functions under FSMA and which is not in the public domain.
27. This includes any information which may have been received from a firm and/or individual during the course of any discussions the FCA may have had with such a firm or individual and which may have been received while the FCA performed its regulatory duties and which was not in the public domain.
28. The FOS has explained that this is essentially the information the complainant is seeking. However the disclosure of any confidential information, without the consent of the provider of the information (and, if different, the consent of the person to whom the information relates) would be a breach of section 348 of the FSMA and would be a criminal offence.
29. The FOS has explained that it does not comment publicly on whether or not it has investigated a matter and has therefore explained it would neither confirm nor deny whether it holds the requested information under 44(2) of the FOIA.
30. The Commissioner is satisfied that confirming or denying whether such information is held would be tantamount to the FOS disclosing that such correspondence may be held by the FCA but not necessarily disclosed to the FOS. The Commissioner is therefore satisfied that the FOS is correct to apply section 44(2) of the FOIA to this part of the request.

## **Section 42 – Legal Professional Privilege**

31. The FOS has confirmed that it has applied section 42(1) to email exchanges and documents prepared by its in-house legal department regarding this case and notes with externally appointed counsel.

32. There are two types of legal professional privilege: litigation privilege and advice privilege. Litigation privilege applies to confidential communications made for the purpose of providing or obtaining legal advice in relation to proposed or contemplated litigation. Advice privilege applies where no litigation is in progress or contemplated. In these cases, communications must be confidential, made between a client and legal adviser acting in a professional capacity, and for the sole or dominant purpose of obtaining legal advice.
33. The category of privilege the FOS is relying on to withhold the information is advice privilege.
34. The withheld documents contain legal advice regarding the jurisdiction of the FOS in dealing with this particular case and stemming from that, how to deal with the case.
35. The FOS has confirmed that these documents were created for the sole purpose of obtaining legal advice about the progression of this lead case. The documents were prepared for the sole purpose of its in house legal department to give advice to the then deputy chief ombudsman and deputy chief executive, its legal director and two lead ombudsmen.
36. The legal adviser was the legal counsel who prepared the documents and the client was the small team of individuals who were responsible for ensuring that the case was progressed and resolved in line with the ombudsman service's jurisdiction.
37. The documents were retained by the legal department and were not disclosed to any parties outside of those individuals who would ultimately use the advice to assist in the progression of this lead case.
38. The Commissioner accepts that the documents fall within the scope of the exemption contained at section 42(1). This is because the dominant purpose of the documents was the provision of legal advice by a professional legal adviser to their client.
39. However, as section 42 is a qualified exemption the Commissioner has gone on to consider the public interest test.

#### **Public interest arguments in favour of disclosure**

40. The FOS has acknowledged that there is a general public interest in openness and transparency.

#### **Public interest in favour of maintaining the exemption**

41. The FOS has argued that there is a strong public interest in ensuring that the principle of legal privilege and legally privileged communications are protected.

### **Balance of the public interest test**

42. In considering the balance of the public interest, the Commissioner accepts that there is a strong element of public interest inbuilt into legal professional privilege in order to protect the confidentiality of communications between lawyers and their clients. However, he does not accept that the factors in favour of disclosure need to be exceptional for the public interest to favour disclosure.
43. The Commissioner considers that there is a strong public interest in promoting openness, transparency and accountability in a public authority's decision making processes. In this particular case, disclosure of the legal advice would provide a greater degree of transparency in relation to the question of the FOS's jurisdiction.
44. With regard to the age of the advice, the Commissioner accepts the argument advanced on a number of occasions by the Information Tribunal that as time passes the principle of legal professional privilege diminishes. This is based on the concept that if advice is recently obtained it is likely to be used in a variety of decision making processes and that these processes are likely to be harmed by disclosure.
45. However, the older the advice the more likely it is to have served its purpose and the less likely it is to be used as part of any future decision making process.
46. In many cases the age of the advice is closely linked to whether the advice is still live. Advice is said to be live if it is still being implemented or relied upon and therefore may continue to give rise to legal challenges by those unhappy with the course of action adopted on that basis.
47. In this case the legal advice concerns the jurisdiction of the FOS and was taken in 2010/2011. The FOS has confirmed that the advice is still live. In light of this the Commissioner considers there is weight to add to the public interest arguments in favour of upholding the exemption.
48. Therefore in light of the strong inherent public interest in maintaining legal professional privilege, the Commissioner has concluded that the public interest favours maintaining the exemption.

## Right of appeal

---

49. 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: 0116 249 4253

Email: [GRC@hmcts.gsi.gov.uk](mailto:GRC@hmcts.gsi.gov.uk)

Website: [www.justice.gov.uk/tribunals/general-regulatory-chamber](http://www.justice.gov.uk/tribunals/general-regulatory-chamber)

50. 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.

51. 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** .....

**Rachael Cragg**  
**Group Manager**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
**Cheshire**  
**SK9 5AF**