

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 19 October 2016

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

Decision (including any steps ordered)

1. The complainant has requested copies of the guidance used by the staff of the Financial Ombudsman Service (FOS) when dealing with complaints about the miss-selling of Payment Protection Insurance (PPI). The FOS provided some of the requested information but withheld other information under the exemptions provided by section 40(2) – third party personal data and section 43 – prejudice to commercial interests. During the course of the Commissioner’s investigation the FOS also applied section 36(2)(c) – prejudice to the conduct of public affairs.
2. The Commissioner’s decision is that FOS is entitled to rely on section 36(2)(c) to withhold the disputed information.
3. The Commissioner does not require the public authority to take any further action in this matter.

Request and response

4. On 10 September 2015, the complainant wrote to FOS and requested information in the following terms:

“Please can I see what information/guidance you give your staff (adjudicators and ombudsmen) dealing with PPI complaints in relation to exclusions/restrictions/limitations. I presume this would primarily be held in what you (used to?) call the Information Toolkit.

For completeness, this might cover such things as pre-existing conditions, stress and mental health exclusions or back pain limitations.”

5. FOS responded on 14 October 2014. It refused the request under section 12 on the basis that the cost of locating all the information that had been requested would exceed the appropriate limit.
6. The complainant then made a fresh request on 13 January 2016. She narrowed the scope of her request to:

“Please could you refine your search to the relevant guidance:

 1. Held in your “central locations”.
 2. Held, provided or published by your former and current Directors of PPI Casework (I believe the current individuals are [named person1] and [named person 2]).”
7. FOS responded on the 3 February 2016. It provided some of the requested information, but withheld other information under the exemptions provided by section 40(2) – third party personal data, and section 43 – prejudice to commercial interests.
8. The complainant asked FOS to carry out an internal review focussing on the information that had been withheld under section 43. Following that review, FOS wrote to the complainant on 11 March 2016. It maintained its position that the information was exempt under section 43.
9. During the Commissioner’s investigation FOS applied the exemption provide by section 36(2)(c) – prejudice to the conduct of public affairs, to the same information.

Scope of the case

10. The complainant contacted the Commissioner on 11 April 2016 to complain about the way her request for information had been handled. However it was only after she had provided all the required documentation on 20 May 2016 that the request was accepted as being eligible for investigation. In particular the complainant challenged FOS’s use of section 43 to withhold information. This is the same information to which FOS later applied section 36(2).
11. The Commissioner considers that the matter to be decided is whether FOS is entitled to withhold the disputed information under either section 43 or 36. She will start by looking at FOS’s application of section 36.

Reasons for decision

Section 36(2)(c) – otherwise prejudice the conduct of public affairs

12. So far as is relevant, section 36(2) provides that information is exempt if in the reasonable opinion of a qualified person, disclosure of the requested information –
- (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 purpose of deliberation, or
 - (c) would otherwise prejudice, or would be otherwise likely to prejudice the conduct of public affairs.
13. Section 36 is unique in that its application depends on the opinion of the qualified person that the alleged prejudice would, or would be likely to occur. In determining whether the exemption was correctly engaged, the Commissioner is required to consider the qualified person's opinion as well as the reasoning that informed the opinion. Therefore the Commissioner must:
- Ascertain who the qualified person is,
 - Establish that they gave an opinion,
 - Ascertain when the opinion was given, and
 - Consider whether the opinion was reasonable.
14. For the purpose of section 36 FOS's qualified person is its Chief Financial Officer. FOS has provided the Commissioner with a copy of the form documenting the procedure followed when obtaining the qualified person's opinion and recording what that opinion was. The documentation records that the qualified person's opinion was sought and given on 9 September 2016 at which time she was shown the withheld information.
15. The qualified person may apply the exemption on the basis that the prejudice to the conduct of public affairs either 'would' occur or would only be 'likely' to occur. This means that there are two possible limbs upon which the exemption can be engaged. The term 'would' prejudice is interpreted as meaning that the qualified person considers it more likely than not that the inhibition would occur. The alternative limb of

'likely' to prejudice is interpreted as meaning that the chance of the prejudice occurring is more than a hypothetical possibility; there must be a real and significant risk

16. It is clear from the response provided by the qualified person that she considers the prejudice to the conduct of public affairs is only 'likely' to occur.
17. The Commissioner has gone on to look at whether that opinion was reasonable. When considering whether the opinion is reasonable the Commissioner is not required to determine whether it is the only reasonable opinion that can be held on the subject. It is quite possible for two people to hold differing views on the same issue, both of which are reasonable. Nor is it necessary for the Commissioner to agree with the qualified person's opinion.
18. The withheld information concerns the various factors FOS staff should take in to account when assessing whether a company acted fairly when selling PPI. It comprises of synopses of firms which sold PPIs to their customers. These provide information on what the FOS has learnt about that particular company and the PPI it offered on different financial products. This covers aspects such as the terms of the PPI and how it was sold. As well as the synopses there is a document titled Desk Instruction. This provides general guidance (ie not relating to specific companies) on the issue of pre-existing medical conditions (PEMCs). If a customer had a pre-existing medical condition at the time they took out PPI on a loan it could affect the policy holder's ability to make a claim later. It deals with the terms of the clauses on PEMCs and the how those terms were explained to customers.
19. In broad terms, the qualified person considers that if this information was disclosed it would be used by customers and companies when making claims to manipulate the system in order to obtain a favourable outcome. Similarly companies could use the information to shape their submissions to FOS when defending claims in order that they obtained a favourable outcome.
20. The firm synopses and desk instructions were produced to help FOS staff provide consistent responses when investigating complaints. They contain information on how PPI products were sold and can include information based on telephone scripts, training materials and flow diagrams. These have been taken from evidence submitted by firms in previous complaints. The material includes information on how, in the past, ombudsmen have looked at the evidence they were presented with and explains why, in certain circumstances, a complaint may be upheld or rejected.

21. If this information was made publicly available it would enable customers, or the complaint management company that represented them, to make either fictitious complaints or tailor their submission in such a way that it emphasised certain issues while omitting other important factors. FOS has advised the Commissioner that it has had to refer some complaint management companies to the complaint management regulator for such behaviour and that therefore this is a real concern, not just a theoretical possibility.
22. Alternatively if firms understood the significance of particular documentary evidence they may omit such records from their submission if they did not support their defence of a claim. Again, FOS has explained that it has had to refer some companies to the Financial Conduct Authority where it believed they were not supplying relevant information. Such behaviour has caused significant delays in resolving complaints.
23. Having looked at the withheld information the Commissioner is satisfied that it does lend itself to being used in the way described by FOS. Given that FOS has had to report both firms and complaint management companies to their respective regulators in the past for such behaviour, she finds it entirely reasonable for FOS's qualified person to be of the opinion that disclosing the disputed information would be likely to prejudice its ability to determine complaints in a fair, consistent and timely manner. This would constitute a prejudice to public affairs. The Commissioner finds the exemption provided by section 36(2)(c) is engaged.

Public interest test

24. Section 36(2)(c) is subject to the public interest test. This means that although the exemption is engaged the information can only be withheld if in all the circumstances of the case the public interest in maintaining the exemption outweighs the public interest in disclosure.
25. FOS recognises that there is a public interest in disclosing information that may help the public gain a better understanding of its work and that would support the principle of openness and transparency.
26. The complainant has applied these principles directly to the issues that the information relates to. She has argued that as FOS is obliged to give adequate reasons for the decision and adjudications it makes, it should be providing the intelligence it has gathered which guides those decision making processes. She has emphasised the importance of people having access to information about how decisions which affect them have been made.

27. The complainant has also argued that rather than undermining the work of FOS it would enhance FOS's ability to resolve complaints. She has argued that those making complaints to FOS need to understand what information they are expected to provide. This is particularly the case for customers who are not represented by a complaint management company.
28. These arguments have to be weighed against the public interest in withholding the information. These arguments reflect the extent to which disclosing the information would prejudice FOS's ability to resolve complaints.
29. FOS is concerned about the how releasing the information would affect the testimonies it receives and that customers, or their representatives, will be more likely to provide it with certain answers if they think these will support their case even though those issues were not originally the cause of their complaint. FOS has explained that it is not able to ask for sworn statements from the parties concerned.
30. The Commissioner is satisfied that this issue, together with the risk that some of the firms would also be tempted to manipulate the evidence they presented are real concerns.
31. The Commissioner is satisfied that were this to happen it would have a serious impact on FOS's ability to determine whether customers had been treated fairly and to resolve complaints accordingly.
32. FOS has also argued that disclosing the information would mean that its staff would be less willing to contribute useful intelligence to the synopses and desk instructions and that this could in time lead to a lack of consistency in how complaints were handled. The Commissioner can see how the risk of disclosure could stifle the production of such aids, but anticipates that this would be as a result of concerns at an organisational level rather than the decisions of individual officers. Nevertheless disclosure could hinder the production of such guidance and this would prejudice FOS's ability to decide PPI complaints.
33. Regard also has to be had for the large volume of PPI complaints that FOS deals with. An indication of the volumes concerned is provided by the fact that to date the industry has paid out £24 billion in compensation. Therefore the Commissioner is satisfied that disclosing the requested information could impact on a very significant stream of FOS's work.
34. In light of the above the Commissioner is satisfied that public interest arguments in favour of maintaining the exemption outweigh those in

favour of disclosure. FOS is entitled to rely on section 36(2)(c). It is not required to take any further action in this matter.

Right of appeal

35. 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@hmcts.gsi.gov.uk

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

36. 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.
37. 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

Rob Mehan
Senior Case Officer
Information Commissioner's Office
Wycliffe House
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SK9 5AF