Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 17 January 2019

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

Decision (including any steps ordered)

1. The complainant has requested all correspondence, documents, notes of conversations and recording of conversations passed between the Financial Ombudsman Service (FOS) and a bank in relation to a complaint that was raised with the FOS. The FOS refused to disclose the information citing sections 31 and 41 of the FOIA.

2. The Commissioner's decision is that the FOS is entitled to withhold the requested information under sections 31 and 41 of the FOIA. She therefore does not require any further action to be taken.

Request and response

3. On 3 April 2018, the complainant wrote to the FOS and requested information in the following terms:

"Would you please provide paper copies of all correspondence, documents, notes of conversations, recordings of conversations, passing between the following parties:

1. HSBC Bank Plc, and

2. Financial Ombudsman Service Limited t/a Financial Ombudsman Service

Arising out of the complaint under reference."

4. The FOS responded on 27 April 2018. It stated that the information is exempt from disclosure under section 40(1) of the FOIA but could potentially be accessed via the Data Protection Act (DPA) if a subject access request was submitted.

5. The complainant referred the matter to the Commissioner on 1 May 2018. The complainant stated that it is a limited company and therefore was unsure whether the FOS had taken the correct approach with its request or not.

6. The Commissioner wrote to the FOS on 12 May 2018 and requested that it responds to the request in accordance with the FOIA within 10 working days. She advised the FOS that the complainant is a limited company and therefore has no right of access under the DPA unless individual directors made a subject access request to the FOS in their own right.

7. The FOS wrote to the complainant on 21 May 2018. It refused to disclose the information citing sections 40(2), 21 and 41 of the FOIA.

8. The complainant requested an internal review on 1 June 2018.

9. The FOS completed an internal review on 3 July 2018 and notified the complainant of its findings. It upheld its previous handling of the request and again advised the complainant that it may be possible for the directors of the limited company to access their own personal data under the DPA if they were to make subject access requests in their own right to the FOS.

Scope of the case

10. The complainant contacted the Commissioner on 10 July 2018 to complain about the way their request for information had been handled. The complainant believes the requested information can be provided to it under the FOIA and asked the Commissioner to consider whether the FOS had handled their request correctly.

11. During the Commissioner's investigation the majority of the requested information was disclosed to the complainant on a discretionary basis outside of the FOIA. Under the FOIA the FOS wishes to maintain its original decision – that all the requested information is exempt from disclosure under the FOIA. The FOS claimed a late reliance on section 31 of the FOIA and advised the Commissioner that it considered all the requested information was exempt under sections 41 and 31.

12. During the Commissioner's investigation the complainant raised various issues with the disclosures received and also asked the Commissioner to decide whether the small amount of remaining information, which the FOS was not willing to disclose on a discretionary basis or otherwise, can be provided.

13. The Commissioner regulates the Freedom of Information Act. Therefore she can only consider whether the requested information can be disclosed under the FOIA or not. She has no remit to comment or indeed adjudicate on any disclosure made outside the realms of the FOIA.

14. As she can only determine whether the requested information (essentially the complaint file) can be disclosed under the FOIA, she has assessed whether the requested information as a whole (which therefore includes those remaining elements of the discretionary disclosure) can be disclosed under FOIA.

15. No specific complaint has been raised about the application of section 40 to HSBC staff. So this notice will address the FOS' application of section 31 and 41 of the FOIA to the remaining information. Section 41 has been applied to all information supplied to the FOS from a third party and section 31 has been applied to all other information falling within the request (for example the correspondence and information generated by the FOS itself during the handling of the complaint in question). In terms of section 41, it is noted that the complainant in this case is also the complainant for the FOS complaint investigation. The complainant will be in receipt of all information they supplied to the FOS so this notice will concentrate on the information supplied to the FOS by HSBC.

Reasons for decision

Section 41 – information provided in confidence

16. Section 41(1) provides that information is exempt if it was obtained by the public authority from any other person and disclosure would constitute an actionable breach of confidence. This exemption is absolute and therefore not subject to a public interest test.

Was the information obtained from another person?

17. The Commissioner is satisfied that the information withheld under this exemption was supplied to the FOS by another person i.e. HSBC and therefore this element of the exemption is met.

Would disclosure constitute an actionable breach of confidence?

18. In considering whether disclosure of information constitutes an actionable breach of confidence the Commissioner will consider the following:

    - Whether the information has the necessary quality of confidence;
    - Whether the information was imparted in circumstances importing an obligation of confidence; and
    - Whether disclosure would be an unauthorised use of the information to the detriment of the confider.

19. Dealing with the first bullet point, the Commissioner finds that information will have the necessary quality of confidence if it is not otherwise accessible, and if it is more than trivial.

20. The withheld information relates to a dispute between the complainant (which is a limited company) and HSBC. It was referred to the FOS for adjudication. The information is not trivial information or information which is otherwise accessible to the world at large. The FOS has confirmed that although it shares information between the parties subject to the dispute as part of its usual complaint handling procedures this is not equivalent to disclosure under the FOIA which effectively means disclosure to the world at large. The information supplied is information which relates to a private dispute between the complainant and the complained about and both parties are aware that although information is shared between them for the purposes of resolving the dispute and in the interests of natural justice, the information is otherwise private and confidential and remains so.

21. The Commissioner has considered the information supplied during such disputes, the cirumstances in which it is shared and she is satisfied that the information has the necessary quality of confidence. It is not trivial information and it is not information that would otherwise be available to the public.

Was the information imparted in circumstances importing an obligation of confidence?

22. The Commissioner refers to the test set out in Coco v AN Clark (Engineers) Ltd [1969] RPC 41, specifically:

23. *'If the circumstances are such that any reasonable man standing in the shoes of the recipient of the information would have realised that upon reasonable grounds the information was being provided to him in*

confidence, then this should suffice to impose upon him an equitable obligation of confidence'.

24. The FOS confirmed that when complainants bring complaints to its service they are made aware that it will keep their information confidential and it will only share their details with the financial business and any relevant third parties in order to investigate their complaint. The financial businesses complained about hold the same expectation. They supply information to the FOS on the understanding that it will be treated as confidential and only used to determine the dispute at hand. The businesses too will have the expectation that the information may be shared with the complainant or other relevant third parties but they will have no expectation that the information could be disclose to the public.

25. The FOS advised that both parties have the understanding that the information will be treated as private and confidential and will only be shared on a limited basis for the purposes of the dispute. They both are therefore owed a duty of confidence.

26. The Commissioner has considered the circumstances in which the requested information was shared with the FOS. She is satisfied that both parties to the dispute will hold the expectation that the information will remain private and confidential and will not be routinely disclosed to the general public. She is therefore satisfied that the withheld information was imparted in circumstances which give rise to a duty of confidence. The FOS will owe the complainant and the complained about a duty of confidence.

Would disclosure be of detriment to the confider?

27. The FOS has said that the complaint involved discussing and considering the policies and procedures HBSC has for dormant accounts and preventing fraud. HSBC advised the FOS that it was concerned about the potential public sharing of such information due to the issue of preventing fraud in relation to dormant accounts. It argued that if the information relating to its policies and procedures in this regard were disclosed into the public domain it could be used to commit crime. It stated that it could make the bank and its customers vulnerable to criminal activities including fraud.

28. Although the FOS has not specifically addressed what detriment the confider could suffer as a result of disclosure in this case, the Commissioner is satisfied that HSBC would be likely to suffer some detriment.

29. With regards to its specific concerns about dormant accounts and how the information it supplied to FOS in confidence could be used, it follows that if the information could indeed be used to commit crime or to potentially access and therefore utilise dormant accounts, disclosure would be likely to result in commercial detriment both to customers and the bank. Identification and prevention of fraud costs banks and the UK itself significant sums of money each year. Disclosing information which may assist those wishing to offend would inevitably impact negatively on the bank's ability to manage and combat this problem and increase the costs of doing that.

30. More generally in terms of complaint disputes, the Commissioner accepts there is a reason why such disputes are handled, investigated and resolved in private. There is the obvious intrusion into the private and personal lives of complainants and the commercial detriment routine publication of such disputes could cause the businesses concerned.

Is there a public interest defence for disclosure?

31. Section 41 is an absolute exemption and so there is no requirement for an application of the conventional public interest test. However, disclosure of confidential information where there is an overriding public interest is a defence to an action for breach of confidentiality. The Commissioner is therefore required to consider whether the FOS could successfully rely on such a public interest defence to an action for breach of confidence in this case.

32. The Commissioner accepts that there is a general public interest in public authorities being open and promoting transparency and accountability. However, the Commissioner notes that this is already met by a considerable degree by the FOS' current practice of sharing information between the parties subject to the dispute as part of its complaint handling procedures outside the realms of the FOIA to aid resolution and in the interests of natural justice.

33. The Commissioner is mindful of the wider public interest in preserving the principle of confidentiality. The Commissioner recognises that the courts have taken the view that the grounds for breaching confidentiality must be valid and very strong since the duty of confidence is not one which should be overridden lightly.

34. Having considered all the circumstances of this case, the withheld information, and given the information already disclosed to the complainant on a discretionary basis outside of the FOIA, the Commissioner has concluded that there is a stronger public interest in

maintaining the obligation of confidence than in disclosing the details contained in the withheld information.

35. Therefore, the Commissioner finds that the information was correctly withheld under section 41 of the FOIA.

Section 31 – law enforcement

36. Section 31 states that information is exempt from disclosure if its disclosure would or would be likely to prejudice law enforcement. The FOS has claimed reliance of subsection 31(1)(a) and (c), which are:

    - The prevention or detection of crime (section 31(1)(a)).
    - The administration of justice (section 31(1)(c)).

37. The Commissioner has considered the application of this exemption to the withheld information not caught by section 41 namely any information FOS generated itself during the investigation and handling of the complaint referred to it.

38. The Commissioner has considered the application of section 31(1)(c) and is satisfied that it does apply. She will now explain why.

39. 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 themselves with a financial business. It advised that it receives over a million enquiries each year and takes on over 400,000 new cases. In order to resolve these cases fairly and reasonably in line with its statutory function it needs to be able to discuss the facts of the cases with both parties including policies and procedures businesses may put in place. If disclosure were ordered, when it is clearly set that such matters are conducted on a private and confidential basis, it would be likely to prejudice the FOS's ability to resolve cases effectively. In turn this would be likely to hinder the FOS' ability to determine fair and reasonable outcomes for the consumers and businesses it serves and therefore the overall administration of justice.

40. 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 interefere 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.

41. 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 a company to 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 the service 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.

42. 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 determing 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 this 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, 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; such information which is key to the dispute resolution service operating effectively and fairly.

Public interest test

43. In terms of the public interest test the FOS said that it acknowledges the public interest in openness, transparency and accountability. It also recognised the public interest in disclosing information to the public about the service it offers, the disputes that are brought to it and in knowing how these have been handled. However, it considered the public interest rests in maintaining the exemption. It stated that there is an inherent public interest in the administration of justice and the FOS being able to fulfil its statutory functions, which is to resolve complaints between consumers and financial businesses fairly and reasonably as an alternative to the courts. It argued that there is a public interest in its service being able to have free and frank conversations with financial businesses in order to resolve complaints fairly for both parties.

44. The Commissioner has considered the public interest arguments for and against disclosure. She notes that there is a public interest in the general openness, transparency and accountability of public authorities. She also accepts that providing the public with access to information assists them in understanding how certain functions are being carried out, evaluate the effectiveness of that function and assess whether the resolutions reached are indeed fair and reasonable.

45. However, it is noted that the FOS routinely shares information between both parties during the investigation stage i.e. provides much of the requested information to the complainant and complained about outside of FOIA. She considers this negates somewhat the public interest in disclosure under FOIA.

46. Additionally the Commissioner considers there is a greater public interest in ensuring that the FOS is able to offer an effective and fair service to consumers and it is not in the interests of the wider public to disclose information which would be likely to prejudice its ability to carry out its statutory functions and administer justice.

Right of appeal

47. 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

48. 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.

49. 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
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