

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 5 March 2020

Public Authority: Financial Ombudsman Service

Address: Exchange Tower
London
E14 9SR

Decision (including any steps ordered)

1. The complainant has requested information connected to a complaint he submitted to the Financial Ombudsman Service (FOS). FOS has withheld the information under section 40(2) of the FOIA (personal data) and section 41 (information provided in confidence) and considers that section 31(1)(c)(law enforcement) is also engaged. The complainant considers the withheld information should be released.
2. The Commissioner's decision is as follows:
 - FOS is entitled to rely on section 40(2) and 41(1) to withhold the disputed information.
3. The Commissioner does not require FOS to take any remedial steps.

Request and response

4. On 24 March 2019 the complainant had submitted an information request to FOS under the data protection and FOI legislation. This was in relation to a complaint he had submitted to FOS that concerned the Co-operative Bank ('the Bank'). In the course of his correspondence with FOS on the matter of his request, on 4 May 2019 the complainant submitted a request for information in the following terms:

"1. I have gone into the disclosed materials via the egress webpage. I am thankful to see that you disclosed to me the email from [name redacted] to the Co-operative Bank on 4 March 2019 in which she gave the Co-operative Bank the encouragement for them not to disclose further materials to me. I believe this sort of letter from an Adjudicator is important for the Ombudsman to review and possibly cure such unfairness.

2. However, you did not disclose (or unredact) the heavily redacted materials that were disclosed to the Financial Ombudsman Service ("FOS") by the Co-operative Bank which it was my understanding were redacted by [name redacted] before she sent to those redacted materials to me probably to frustrate me knowing the full extent of the false representation that were made by the Co-operative Bank so I would not be able to address them to the Ombudsman. I would be grateful if you provide me as a matter of urgency and priority these materials fully unredacted:

(a) The evidence of events as provided to the FOS from the Co-operative Bank before [name redacted] reached her opinion on 12 January 2018.

(b) The materials that were sent to the Ombudsman Anna Keighley on 8 August 2018 and 9 August 2018 by the Co-operative Bank following the Ombudsman email of 3 August 2018.

3. I would be very pleased if you can provide me those materials stated in points 2(a) ad 2(b) as a matter of top priority so that I could make my final submission to the Ombudsman in relation to the false misrepresentation orchestrated by the Co-operative Bank."

5. FOS' correspondence with the complainant about the data protection element of his original request was the subject of a separate data protection complaint to the Commissioner. In the course of the investigation of that complaint, FOS released further information to the complainant that fell within the scope of the above request, withholding some information under section 40(2) and section 41(1).
6. FOS waived carrying out an internal review on this occasion but has effectively re-considered its FOI response to the request as a result of the current complaint. It has confirmed that it considers some of the withheld information also engages the exemption under section 31(1)(c) of the FOIA.

Scope of the case

7. The complainant contacted the Commissioner on 10 May 2019 to complain about the way his request for information of 4 May 2019 had been handled.
8. In correspondence to her of 10 February 2020 the complainant confirmed that the scope of his FOI complaint is FOS' reliance on section 40(2) and 41(1) to withhold information he has requested; namely, (i) the names of Bank officials, (ii) parts of a statement made by a branch manager, (ii) information about the Bank's internal processes and procedures and (iv) a copy of the Bank's authorisation chart/process.
9. In view of her decisions in similar cases, the Commissioner's assessment was that FOS was correct to withhold this information and she invited the complainant to informally withdraw his complaint to her. The complainant preferred to conclude the matter through a formal decision notice.
10. The Commissioner has therefore considered whether the withheld information engages section 40(2) and/or section 41(1) of the FOIA. If necessary, she will consider whether any of the information engages the section 31(1)(c) exemption and the associated public interest test.

Reasons for decision

Section 41 – information provided in confidence

11. FOS is withholding parts of a statement made by a branch manager in an email, information about the Bank's internal processes and procedures and a copy of the Bank's authorisation chart/process under section 41(1) of the FOIA. In its submission to the Commissioner FOS has advised that its position is very similar to its position as set out in FS50743229¹.
12. Section 41(1) provides that information is exempt if the public authority obtained it from any other person and disclosure would constitute an

¹ <https://ico.org.uk/media/action-weve-taken/decision-notice/2019/2614172/fs50743229.pdf>

actionable breach of confidence. This exemption is absolute and therefore not subject to a public interest test.

Was the information obtained from another person?

13. FOS has confirmed in its submission to the Commissioner that the Bank provided to it the information it is withholding under section 41(1). The Commissioner has reviewed the information and she is satisfied that this is the case and that FOS therefore obtained the information from another person ie the Bank.

Would disclosure constitute an actionable breach of confidence?

14. In considering whether disclosing the information constitutes an actionable breach of confidence the Commissioner considers 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.
15. **Necessary quality of confidence:** 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.
16. The withheld information relates to a dispute between the complainant and the Co-operative Bank. In order for it to investigate cases fairly and fulfil its statutory function, FOS says that financial businesses need to be able to share with it confidential information that is relevant to a complaint. FOS' position in FS50743229, which is relevant to this case, is that FOS shares information between the parties subject to the dispute as part of its usual complaint handling procedures. However, this is not equivalent to disclosure under the FOIA, which effectively means disclosure to the world at large. As in the separate case, the information supplied in this case is information which relates to a private dispute between the complainant and the complained about. Both parties are aware that, although information is shared between them for the purposes of resolving the dispute, the information is otherwise private and confidential.
17. The Commissioner has considered the circumstances in which the information was shared. She is satisfied that the information has the necessary quality of confidence, is not trivial information and is not information that would otherwise be available to the public.

18. **Circumstances importing an obligation of confidence:** The Commissioner refers to the test set out in *Coco v AN Clark (Engineers) Ltd* [1969] RPC 41, specifically:

'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'.

19. FOS has told the Commissioner that it asked the Bank and the Bank confirmed that the information was confidential and not to be shared. The Bank considered that releasing this information could prejudice particular operational and legal obligations. FOS has provided the Commissioner with a little more detail about these obligations, but she does not intend to reproduce these in this notice.
20. 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 expect that the information will remain private and confidential and will not be disclosed to the general public as a result of an FOIA request. She is therefore satisfied that the withheld information was imparted in circumstances which give rise to a duty of confidence.
21. **Detriment to the confider:** The Commissioner's published guidance on section 41 establishes that case law now suggests that "*any invasion of privacy resulting from a disclosure of private and personal information can be viewed as a form of detriment in its own right*".
22. The Commissioner has established that the information that another person - the Co-operative Bank - provided to FOS in the course of FOS' investigation constitutes information of a confidential nature. Its release may well cause that person a degree of damage or distress. It is therefore not necessary for there to be any detriment to the confiders in terms of tangible loss, for this information to be protected by the law of confidence. Therefore, the Commissioner has not considered this issue further.
23. As previously noted, section 41 of the FOIA is an absolute exemption and therefore not subject to the public interest test. However, the common law duty of confidence contains an inherent public interest test. This test assumes that information should be withheld unless the public interest in disclosure outweighs the public interest in maintaining the duty of confidence (and is the reverse of that normally applied under the FOIA).

24. The Commissioner acknowledges that it is clearly in the public interest that public authorities are open and transparent about actions and decisions they take. Such openness can increase the public's trust in the bodies that serve them. In line with this, FOS has released other information relating to the complainant's complaint.
25. In his correspondence to the Commissioner, the complainant has suggested that there is a "strong relationship issue" between FOS and the Co-operative Bank because some ombudsmen are previous employees of the Bank. He also considers that there is [inappropriate] familiarity between one of the ombudsmen assigned to his case and a Bank employee whose name was withheld.
26. The Commissioner has noted the complainant's concerns and why he wants to receive all the information he has requested. He has not presented any evidence to support his suspicions, however. In the Commissioner's view, the complainant's specific arguments for disclosure and the general public interest in openness are outweighed by the compelling public interest served in service users and financial businesses being able to have confidence that FOS will not disclose confidential information provided to it, to the world at large. Without such confidence, financial businesses and service users would be likely to be less willing to share information with FOS, which would compromise FOS' investigations.
27. Having considered the information in question, FOS' submission, the complainant's arguments and all the circumstances associated with this particular request, the Commissioner is satisfied that disclosing the withheld information would be an actionable breach of confidence and is therefore exempt information under section 41(1) of the FOIA.
28. Because she has found that this information is exempt from release under section 41(1) it has not been necessary for the Commissioner to consider FOS' application of section 31(1)(c). The Commissioner considers that the names of Co-operative Bank officials that the complainant has requested also engages the section 41(1) exemption. For completeness, however, she has considered whether this particular information can also be withheld under section 40(2).

Section 40 – personal information

29. FOS has withheld the names and contact details of various Co-operative Bank officials under section 40(2).
30. Section 40(2) of the FOIA says that information is exempt from disclosure if it is the personal data of third persons, ie someone other than the applicant, and a condition under either section 40(3A), 40(3B)

or 40(4A) is also satisfied. 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').

Is the information the personal data of third persons?

31. Section 3(2) of the DPA defines personal data as: 'any information relating to an identified or identifiable living individual'. The two main elements of personal data are that the information must relate to a living person and that the person must be identifiable.
32. The information in this case is various people's names and contact details. Clearly those individuals could be identified from this information and, as such, that information is their personal data.
33. The fact that information constitutes the personal data of identifiable living individuals does not automatically exclude it from disclosure under the FOIA. The second element of the test is to determine whether any of the conditions under sections 40(3A), 40(3B) or 40(4A) have been met.

Is a condition under section 40(3A) satisfied?

34. The condition under section 40(3A)(a) of the FOIA is that disclosure would contravene any of the data protection principles. The ICO considers that disclosure would contravene principle (a) under Article 5(1) of the GDPR.
35. 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*".
36. In the case of a FOIA request, 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.
37. 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. The lawful basis most applicable is GDPR 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".
38. In considering the application of Article 6(1)(f) 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
- iii) **Balancing test:** Whether the above interests override the legitimate interest(s) or fundamental rights and freedoms of the data subjects.

39. The Commissioner considers that the test of 'necessity' under stage (ii) must be met before the balancing test under stage (iii) is applied.

Is a legitimate interest being pursued?

40. In considering any legitimate interest(s) in disclosing the requested information under the FOIA, the Commissioner recognises that such interest(s) can include broad general principles of accountability and transparency for their own sakes, as well as case-specific interests.

41. Further, 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. They may be compelling or trivial, but trivial interests may be more easily overridden in the balancing test.

42. The information in this case has been summarised above – it is the names and contact details of Co-operative Bank staff involved in a dispute with complainant and subsequent complaint to FOS. The complainant is interested in this information as he is not satisfied with FOS' handling of his complaint to it and is seeking information relating to his complaint and dealings with the Co-operative Bank, of which the names and contact details of particular Co-operative Bank forms part.

43. There is also a more general legitimate interest, namely FOS demonstrating it is open and transparent.

Is disclosure necessary to meet the legitimate interests?

44. '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 must therefore be the least intrusive means of achieving the legitimate aim in question.

45. To a large degree the Commissioner considers that the complainant's interests, and the general interest in FOS being transparent, have been

satisfied through the information that FOS has released to the complainant. However, for the sake of completeness the Commissioner will accept disclosing the withheld information is necessary to meet the complainant's legitimate interests and she will go on to balance that interest against the data subjects' fundamental rights and freedoms (ie those of the Co-operative Bank staff).

Balance between legitimate interests and the data subject's interests or fundamental rights and freedoms

46. In considering this balancing test, the Commissioner has considered the following factors:
- the potential harm or distress that disclosure may cause
 - whether the information is already in the public domain
 - whether the information is already known to some individuals
 - whether the individual expressed concern to the disclosure; and
 - the reasonable expectations of the individual.
47. In the Commissioner's view, a key issue is whether the individuals concerned have a reasonable expectation that this information will not be disclosed. These expectations can be shaped by factors such as individuals' general expectation of privacy, whether the information relates to employees in their professional role or to them as individuals, and the purpose for which they provided their personal data.
48. In his correspondence to the Commissioner the complainant has noted that the Co-operative Bank had consented to the release of some information. He is dissatisfied that FOS is withholding some personal data when other information has been released. The complainant has referred the Commissioner to an email from the Bank to FOS dated 18 July 2019. In this email the Bank advises what information it is content to be released.
49. The Commissioner observes that the Co-operative Bank may have consented to some information being released – including the personal data of some of its staff. However, as discussed below, it did not consent to the disclosure of the particular information being withheld under section 40(2) that is the subject of this notice. The Bank is entitled to make that judgement.
50. In its submission to the Commissioner FOS has said that its contacts at the Co-operative Bank have a reasonable expectation that their names and contact details will only be used for the purpose of resolving complaints and will not be disclosed to the public. The Bank had also confirmed in communications with its service that it would like the

names of its staff and their contact details to be redacted from any information released.

51. The Commissioner is satisfied that in this case the data subjects' interests and rights and freedoms outweigh such legitimate interests as have been identified. She agrees with FOS that, although the information relates to the individuals in their professional capacity, they would nonetheless have the reasonable expectation that their personal data would not be disclosed. So were it to be disclosed, this would be likely to cause them damage and distress.
52. The Commissioner therefore considers that there is no Article 6 basis for processing and so disclosing the information would be unlawful as it would contravene GDPR Article 5. Because disclosure would be unlawful, the Commissioner considers that she does not need to go on to separately consider whether disclosure would be fair or transparent.
53. The Commissioner has therefore decided that FOS is entitled to withhold the personal data under section 40(2) of the FOIA by way of section 40(3A)(a). This being the case it has not been necessary to consider the remaining conditions under section 40(3A), 40(3B) or 40(4A).

Right of appeal

54. 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

55. 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.
56. 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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