

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 27 February 2020

Public Authority: Financial Ombudsman Service

Address: Exchange Tower, Harbour Exchange
London E14 9SR

Decision (including any steps ordered)

1. The complainant has requested information from the FOS in the form of recorded estimates as to how much time was spent on his complaint to it and information regarding the qualifications of the specific ombudsman who dealt with the complaint. The FOS stated that it did not hold recorded information in relation to time estimates, however it did provide the complainant with a link to its annual report and accounts and later with summary sheets containing information as to what actions were undertaken regarding his specific complaint. In relation to the qualifications of the ombudsman, the FOS refused to confirm or deny whether it held such information, citing section 40(5) of the FOIA as a basis for this.
2. The Commissioner's decision is that the FOS is entitled to refuse to confirm or deny whether it holds the relevant requested information. The Commissioner also finds that the FOS breached sections 1(1) and 1(1)(b) of the FOIA. The Commissioner requires no steps to be taken.

Request and response

3. On 11 January 2019 the complainant requested information from the FOS in the following terms:-
 1. In the absence of time sheets can the FOS confirm if there is any other way that the FOS can confirm and/or estimate the time spent by the Adjudicator and the Ombudsman reviewing my case?
 2. Can the FOS confirm if the Ombudsman has any H&S qualifications?
 3. Can the FOS confirm if the Ombudsman has any asbestos qualifications?
 4. Can the FOS confirm if the Ombudsman has any relevant H&S experience ?
 5. Can the FOS confirm if the Ombudsman has any relevant asbestos experience ?
4. The Council responded to the complainant's request on 11 April 2019. It stated that it did not keep individual timesheets or estimates of time and so it did not hold the information requested in part 1 of the complainant's request. It did, however, provide the complainant with a link to its annual report and accounts, which detail the unit cost of resolving a complaint. It also stated that it was refusing to disclose the information requested in parts 2-5 of that request, citing section of the FOIA as a basis for non-disclosure. The complainant sought an internal review of that decision on 15 April 2019, the result of which was sent to him on 13 June 2019. The reviewer upheld the original decision in relation to part 1 of the complainant's request and stated that the FOS could not confirm or deny whether it held information in relation to parts 2-5 of the complainant's request as to do so would reveal personal data about a particular Ombudsman, which under section 40 of the FOIA would breach the first data protection principle under the General Data Protection Regulation 2018 (GDPR).

Scope of the case

5. The complainant contacted the Commissioner on 10 July 2019 to complain about the way his request for information had been handled.
6. Following correspondence and telephone calls between the Commissioner and the FOS, the FOS sent the complainant a summary note, generated by its case management system, of dates and times

when action was taken on his particular case, in response to part 1 of his request. It still maintained its 'neither confirm nor deny' position in relation to parts 2-5 of the complainant's request.

7. The complainant was not satisfied with how long it took the FOS to provide him with a summary of dates and times of action taken regarding his complaint, however he did not raise this directly with the Commissioner. The Commissioner is satisfied that the FOS does not hold any further recorded information in relation to time spent on the complaint.
8. The Commissioner has considered the FOS' handling of the complainant's request, in particular its application of the above exemption as a basis for not confirming or denying whether it holds information within the scope of the complainant's request for the ombudsman's particular qualifications.

Reasons for decision

Section 40 - Personal data

9. Section 40(5B)(a)(i) of FOIA provides that the duty to confirm or deny whether information is held does not arise if it would contravene any of the principles relating to the processing of personal data set out in Article 5 of the General Data Protection Regulation EU2016/679 ('GDPR') to provide that confirmation or denial.
10. Therefore, for the FOS to be entitled to rely on section 40(5B) of FOIA to refuse to confirm or deny whether it holds information falling within the scope of the request the following two criteria must be met:
 - Confirming or denying whether the requested information is held would constitute the disclosure of a third party's personal data; and
 - Providing this confirmation or denial would contravene one of the data protection principles.

Would the confirmation or denial that the requested information is held constitute the disclosure of a third party's personal data?

11. Section 3(2) of the DPA 2018 defines personal data as:-
"any information relating to an identified or identifiable living individual".
12. The two main elements of personal data are that the information must relate to a living person and that the person must be identifiable.

Information will relate to a person if it is about them, linked to them, has biographical significance for them, is used to inform decisions affecting them or has them as its main focus.

13. The FOS argued that complying with section 1(1)(a) of the FOIA would reveal the personal data of a particular ombudsman, i.e. it would disclose whether the Ombudsman did or did not have experience or qualifications in Health and Safety and asbestos.
14. The Commissioner agrees with the FOS's position. If the FOS did not hold any information, then confirmation of that fact would not necessarily reveal that the ombudsman did not hold such qualifications, as these are not necessary criteria in order to effectively carry out the job of an ombudsman and therefore it would not be inconceivable that the FOS did not hold information in relation to them as it would not be relevant to the ombudsman's ability to carry out their role.
15. However, if the FOS did hold any information, then confirmation of that fact would reveal (not definitively, but making it more likely than not) that the ombudsman did hold such qualifications, as the FOS would be likely to hold such information contained in a CV or elsewhere in a HR file. In the second scenario such information clearly relates to the ombudsman and is biographically significant to him/her and therefore is his/her personal data.
16. The fact that confirming or denying whether the requested information is held would reveal the personal data of the ombudsman does not automatically prevent the FOS from refusing to confirm whether or not it holds this information. The second element of the test is to determine whether such a confirmation or denial would contravene any of the data protection principles.

Would confirming whether or not the requested information is held contravene one of the data protection principles?

17. Article 5(1)(a) GDPR states that:-

"Personal data shall be processed lawfully, fairly and in a transparent manner in relation to the data subject"

18. In the case of a FOIA request, the personal data is processed when it is disclosed in response to the request. This means that the information can only be disclosed – or as in this case the public authority can only confirm whether or not it holds the requested information - if to do so would be lawful (i.e. it would meet one of the conditions of lawful processing listed in Article 6(1) GDPR), be fair, and be transparent.

Lawful processing: Article 6(1)(f) GDPR

19. Article 6(1) of the GDPR specifies the requirements for lawful processing by providing that *“processing shall be lawful only if and to the extent that at least one of the”* conditions listed in the Article applies. One of the conditions in Article 6(1) must therefore be met before disclosure of the information in response to the request would be considered lawful.
20. The Commissioner considers that the condition most applicable on the facts of this case would be that contained in Article 6(1)(f) GDPR which provides as follows:-

“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”.

21. In considering the application of Article 6(1)(f) GDPR 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 confirmation as to whether the requested information is held (or not) 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 subject.
22. The Commissioner considers that the test of “necessity” under stage (ii) must be met before the balancing test under stage (iii) is applied.

(i) Legitimate interests

23. In considering any legitimate interests in confirming whether or not the requested information is held in response to a FOIA request, the Commissioner recognises that such interests can include broad general principles of accountability and transparency for their own sakes as well as case specific interests.
24. 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.
25. The FOS argued that the complainant may have a private interest in knowing whether it holds information about the ombudsman's qualifications, and that there is a legitimate interest in ensuring that ombudsmen are sufficiently trained and qualified to carry out their role. However, Health & Safety and asbestos qualifications or experience are not required for the role. The FOS considers that the public interest is adequately met by its robust recruitment process, the quality checks that are carried out on the work of its ombudsmen and the comprehensive training it provides on core skills to help them give fair and reasonable answers to consumers. The FOS also publishes some information about the backgrounds of its ombudsmen on its website – because they have given their consent for the FOS to do so. The final decisions of the ombudsmen are also published on the website – in case anyone wishes to see how they have reached decisions on individual complaints.
26. The Commissioner considers that confirming or denying whether the requested information is held does not meet the first part of the three part legitimate interests test outlined above, as the qualifications and experience asked about in the complainant's request are not a necessary requirement for the ombudsmen to be able to adequately perform in their role.
27. The Commissioner has therefore concluded that the requirements of Article 6(1)(f) of the GDPR have not been met and so confirming or denying whether the requested information is held would not be lawful.

28. Given the conclusion the Commissioner has reached above on lawfulness, the Commissioner considers that she does not need to go on to separately consider whether confirming or denying whether the information is held would be fair and transparent. The Commissioner has therefore decided that the FOS was entitled to refuse to confirm whether or not it held the requested information on the basis of section 40(5)(B) of FOIA.

Procedural breaches

29. As the FOS did not release the recorded information it holds which falls within the scope of part 1 of the complainant's request within 20 working days of the request the Commissioner has found the FOS in breach of section 1(1)(b).
30. As the FOS also failed to confirm that it does hold recorded information falling within the scope of part 1 of the request (i.e. initially informed the complainant that it does not hold the information, when it does), the Commissioner has recorded a breach of section 1(1)(a).

Right of appeal

31. 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

32. 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.
33. 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

Deirdre Collins

Senior Case Officer

Information Commissioner's Office

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