

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 11 January 2018

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

Decision (including any steps ordered)

1. The complainant made a freedom of information request to the Financial Ombudsman Service (FoS) for details of its response to two consultations from the Financial Conduct Authority. The FoS refused the request under the exemptions in section 36(2)(b)(ii) and 36(2)(c) (prejudice to effective conduct of public affairs etc.)
2. The Commissioner's decision is that the FoS correctly applied the section 36(2)(b)(ii) and 36(2)(c) exemptions and that the public interest in maintaining the exemptions outweighs the public interest in disclosure. The Commissioner requires no steps to be taken.

Request and response

3. On 2 December 2016 the complainant made a freedom of information request to the Financial Ombudsman Service which asked for the following:
 - 1) *Your response to FCA consultation CP15/39, and*
 - 2) *Your responses to FCA consultation CP16/20*
4. The FoS responded to the request on 4 January 2017 when it explained that it had not formally responded to either of the consultations. This led to the complainant contacting the FoS again on 24 January 2017 as follows:

"...have you responded informally or otherwise input to FCA - either by email(s) or by meeting? - If so please let me have the appropriate

records. Alternatively, if you have had no contact with FCA on the subjects in these consultations please confirm..."

5. The FoS appear to have treated this as a new request for information and responded on 14 March 2017. It now confirmed that it held relevant information but that this was being withheld under the exemptions in section 36(2)(b)(ii) and section 36(2)(c) (prejudice to effective conduct of public affairs etc).
6. The complainant subsequently asked the FoS to carry out an internal review and it presented its findings on 24 April 2017. The review upheld the initial response to the request.

Scope of the case

7. On 11 July 2017 the complainant contacted the Commissioner to complain about the way his request for information had been handled.
8. The Commissioner considers that that the scope of her investigation is to decide whether the FoS is entitled to rely on section 36(2)(b)(ii) and/or section 36(2)(c) as a basis for refusing to provide the withheld information.

Reasons for decision

Section 36 – prejudice to effective conduct of public affairs

9. Section 36(2)(b)(ii) and 36(2)(c) provide that information is exempt if in the opinion of a public authority's qualified person, disclosure would or would be likely to inhibit:
 - (ii) the free and frank exchange of views for the purposes of deliberation, or*
 - (c) would otherwise prejudice, or would be likely otherwise to prejudice, the effective conduct of public affairs.*
10. For the exemption to be engaged the proper qualified person for the public authority must have given his or her opinion on the application of the exemption. In this case the FoS provided the Commissioner with evidence to show that the proper qualified person, its Director of Engagement, Annette Lovell provided her opinion on the application of

the exemption on 14 March 2017. The FoS also provided the Commissioner with a copy of a letter from the then Economic Secretary to the Treasury authorising the holder of the post of Director of Engagement (and other posts) to act as qualified person for the purposes of section 36.

11. In order to determine whether the exemption is engaged the Commissioner must then go on to consider whether the opinion was reasonable with regard to the following:
 - whether the prejudice claimed relates to the specific subsection of section 36(2) that the FoS is relying upon;
 - the nature of the information and the timing of the request; and
 - the qualified person's knowledge of or involvement in the issue.
12. The Commissioner has issued guidance on section 36 of the FOIA. With regard to what can be considered a 'reasonable opinion' it states the following:

"The most relevant definition of 'reasonable' in the Shorter Oxford English Dictionary is 'In accordance with reason; not irrational or absurd'. If the opinion is in accordance with reason and not irrational or absurd – in short, if it is an opinion that a reasonable person could hold – then it is reasonable."
13. It is important to note that when considering whether section 36 is engaged the Commissioner is making a decision not on whether she agrees with the opinion of the qualified person, but whether it was reasonable for him or her to reach that opinion.
14. The Commissioner has considered the information placed before the qualified person and is satisfied that it included the relevant arguments. The qualified person was provided with a submission outlining the reasons for applying the exemption as well as the counter arguments in favour of disclosure. The qualified person also had access to the withheld information and the Commissioner is satisfied that the qualified person was sufficiently well informed to allow them to form a reasonable opinion on whether or not the information should be disclosed.
15. The qualified person's opinion was that in order to meet its legal obligations and to share information with the FCA, the FoS needed a 'safe space' to share information as well as discuss any trends, issues or concerns it may have. She said that if the FoS were to confirm what discussions or input it has with the FCA it would be likely to prejudice its

ability to share information with the FCA and have open and honest conversations with them. For these reasons the qualified person concluded that the exemptions in section 36(2)(b)(ii) and 36(2)(c) would apply.

16. The 'safe space' argument usually refers to the need for a safe space to develop ideas, debate live issues, and reach decisions away from external interference and distraction. This argument will generally only apply to live issues where there is a need for a safe space to prevent debate being hindered by external comment or media involvement. However, the Commissioner understands that when the complainant made his request the consultations had already been concluded and the FCA had presented its final plans. Therefore a safe space was no longer needed at this point. Rather, the FoS's argument would appear to be more that disclosure would make it harder for it to share information with the FCA in future and this would prejudice its ability to meet its legal obligations and carry out its functions. The Commissioner would accept, that depending on the nature of the withheld information and the circumstances of the request, section 36(2)(c) can be applied on this basis. The reasons for applying section 36(2)(b)(ii) appear to be essentially the "chilling effect" argument which is concerned with the argued loss of frankness and candour in debate / advice which, it is said, would lead to poorer quality advice and less well formulated policy and decision.
17. The Commissioner has reviewed the withheld information and is satisfied that the qualified person's opinion that disclosure would both prejudice its ability to share information with the FCA and inhibit its free and frank exchange of views with the FCA, is a reasonable one. The information concerns two consultations in relation to Payment Protection Insurance (PPI). The first, consultation CP15/39 was titled "*rules and guidance on payment protection insurance complaints*". It set out and asked for stakeholder's views on the FCA's proposal for a new rule that would set a deadline by which consumers would need to make their PPI complaints or else lose their rights to have their complaint considered by the FoS. Consultation CP16/20 was the paper the FCA wrote to give feedback on the responses to CP15/39 and further consult on an amended set of proposals. The FoS explained that whilst it had not responded formally or informally to the consultations, as part of its engagement with the FCA it had had discussions which covered the consultations.
18. The Commissioner understands that the FoS relies heavily on information sharing both from its own stakeholders and with the FCA. Indeed, it has a statutory obligation under section 232 of the Financial Services and Markets Act 2000 (FSMA) to share information with the FCA.

"the Financial Ombudsman Service Limited must disclose information to the FCA where in its opinion it considers that the information would or might be of assistance to the FCA in advancing one or more of the FCA's operational objectives".

19. The FoS also has a Memorandum of Understanding (MoU) with the FCA which sets out its framework on information sharing. This is publicly available on the FoS's website. In particular, the FoS drew attention to paragraph 14(e) of the MoU which provides that the FCA may share "(for comment) at an early stage, draft documents (such as consultation papers and briefings) that affect the other's functions". Further to this, as set out at paragraph 19(e) the FCA also gives the ombudsman service information about "proposed changes to rules or guidance on complaints-handling". The FoS said that these provisions for sharing information are vital to both its own and the FCA's abilities to effectively carry out their independent roles.
20. The FoS argued that if the information was disclosed there would be a risk that the FCA would engage less on potential changes that will impact upon it as well as its ability to have open and honest conversations with the FCA.
21. The Commissioner is mindful that the information is shared solely for the purpose of allowing both the FCA and the FoS to fulfil their statutory functions. As such the FCA would not have expected the FoS to have disclosed this particular information more widely. The FoS further explained that due to the sensitivity of some of the information it shares as well as the fact that it may be in draft form, means that it is not suitable for wider disclosure. The Commissioner has reviewed the withheld information and accepts that due to the sensitive nature of the withheld information and the fact that it relates to draft proposals disclosure would be against the expectations of the FCA. In the Commissioner's view it was at least reasonable for the qualified person to conclude that disclosure would be likely to lead to an increased reluctance on the part of the FCA to share information or consult on proposals with the FoS. This would in turn make it harder for both organisations to fulfil their statutory functions as effectively as possible and thereby prejudice the effective conduct of public affairs.
22. As regards section 36(2)(b)(ii) the Commissioner would also accept that in the circumstances of this case disclosure would be likely to inhibit the free and frank exchange of views between the FoS. As already noted, the information relates to sensitive discussions between the two organisations and the FoS has confirmed that these discussions were considered highly confidential and privileged and were only available to

a pre-approved list of individuals approved by the FCA. The FoS argued that section 36(2)(b)(ii) would also apply because the FCA would be less likely to consult with the FoS in future. The Commissioner has already discussed this line of argument around information sharing. However, the FoS also suggested that disclosure might restrict its ability to informally deliberate and consider its approach to proposals put forward by the FCA. It also said that disclosure would be likely to restrict free and frank discussions between the FoS and the FCA. It said that the withheld information related to consultations which involved the FCA changing the FoS' rules and that if discussions of this kind were not protected it was reasonable to conclude that in future the FCA would be less candid and that the FoS would feel less able to share what it described as 'valuable insight' with the FCA.

23. The Commissioner has taken into account the sensitive nature of the issues under discussion and that the information was relatively recent at the time of the request. In the Commissioner's view the qualified person's opinion was a reasonable one.
24. The Commissioner has decided that section 36(2)(b)(ii) and 36(2)(c) are engaged and so she has now gone on to consider the public interest test, balancing the public interest in maintaining the exemption against the public interest in disclosure

Public interest test

Public interest arguments in favour of disclosure

25. The complainant advanced the following arguments in favour of disclosure:

The decision is no longer live. FCA have issued their final guidance so "safe space" and "chilling effect" arguments are entirely speculative now. Indeed FOS should have responded formally to the consultation given the significant impact (as per FOS's Board Minutes referred to previously) - disclosure of what was said could only lead to a better process and at least equally considered advice in the future. FOS's advice on such a significant matter (parts of which it is eminently more qualified than FCA to assess) should be clear, concise and open to examination. Informal, secret musings by FOS on a public consultation is very poor practice.

FOS is the main body established by the FSMA for handling complaints. What it says and what it thinks are important. It plays an important and significant role in the regulatory system and its thoughts on such a subject are of important public interest on its own.

As above it is a public consultation - done precisely because there is a public interest. As per point 6, given the subject matter, FOS's views are (nearly) as important as FCA's - to say they should be kept secret after the final guidance is published is absurd. Of course the public want to know of any feedback you gave.

FOS is responsible for resolving 100,000's of disputes a year - fairly and with reasons. Not only is it a judicial process, and all that entails on transparency, but if it materially disagreed with FCA's approach (or FCA's approach was problematic for FOS) then the public should know. [If its opinion did not materially differ why would disclosure be of any concern?] There is a legitimate public interest if there is any level of disagreement or indeed if there is not. It is irrational to suggest the sharing of this information might impact on FCA carrying out its Statutory Objectives - as above they did the consultation to help them carry out its objectives. It might conceivably (but unlikely) help show that they are not...and indeed that is often confused here - the interests of the public could well be different from the interests of the Public Authority.

There is a general public interest in transparency. If a policy decision has particular public interest or widespread or significant impact then there will invariably be public interest in disclosure. At the very beginning of the Consultation documents (and final Guidance) FCA state who will be interested in the documents. In addition to the obvious candidates (firms, creditors, advocates) there is the telling statement - "consumers who were or may have been sold PPI". Given that amounts to 30 million people by FCA's own estimates and there is at least £50 billion of unclaimed PPI premiums unresolved (and FOS itself has 100,000 plus cases awaiting action in accordance with the guidance) any public interest test in favour of the exemption is simultaneously flawed and absurd before one even starts. On such a massive issue with half the population affected there is a clear public interest in disclosing the advice/thoughts (from such an influential/important (as above) source as FOS) if only to remove any lingering doubts of "spin". If FOS did not give their views in any coherent or complete way that too is of legitimate public interest - because they should have.

The public interest test is supposed to test what is in the best interests of society. There is always always a public interest in accountability and transparency and a public interest in good decision making, integrity and fair treatment for all. But where half the population - according to FCA - have a legitimate interest (on a judicial issue) and where the consultation is public those positions become unarguable particularly

where the final guidance has been issued and the consultation is no longer live.

Public interest arguments in favour of maintaining the exemption

26. The FoS said that that it appreciated that the nature of some of the discussions it had had with the FCA is a topic of public interest. However, it said that this had to be weighed against the public interest in both the FoS and the FCA being able to carry out their statutory functions, share meaningful information and have open and honest conversations.
27. The FCA also pointed to the fact that the FCA had already published its response to the consultation so that the public could understand how and why it had made its decisions. It said that it did not believe that disclosure of its wider discussions with the FCA would further benefit or inform the public, or outweigh the public interest in withholding it.

Balance of the public interest arguments

28. The Commissioner has considered the competing arguments and would accept that there is a public interest in promoting transparency and accountability, and in particular knowing what contribution the FoS made to the FCA's proposals around introducing a deadline for PPI complaints. However, the Commissioner is also satisfied that the general public interest in transparency and accountability has been met to a significant extent by the information placed in the public domain by the FCA which clearly explains the reasons behind its proposals.
29. The complainant has argued that since the information relates to a public consultation there is no reason for withholding contributions made by the FoS now that the FCA has published its guidance on PPI complaints. However, the FoS has already explained that it did not formally respond to the consultations and having reviewed the withheld information the discussions do not appear to be part of any public consultation. Rather they are discussions and information shared in accordance with the MoU.
30. As regards the public interest in maintaining the exemption the Commissioner has already said above that she accepts that a 'safe space' was no longer required in this case because the consultations had already been concluded when the complainant made his request. However the Commissioner also accepts that the arguments around 'chilling effect' and the ability to share information with the FCA are relevant and carry significant weight when balancing the public interest.

The fact that the information was relatively recent at the time of the request, had apparently been shared in the expectation that it would not be disclosed and related to sensitive discussions all lend weight to the public interest in maintaining the exemption.

31. It is clearly important that both organisations are able to share information and seek each other's views where it affects each other's functions. The importance of this is reflected in section 232 of the FSMA and in the Memorandum of Understanding. Having accepted that it was reasonable for the qualified person to conclude that disclosure would damage this relations the Commissioner has attached significant weight to this argument.
32. There are compelling arguments on both sides but the Commissioner has concluded that, having given due weight to the opinion of the qualified person, the public interest in maintaining the section 36(2)(b)(ii) and 36(2)(c) exemptions outweighs the public interest in disclosure.

Right of appeal

33. 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

34. 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.
35. 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

Paul Warbrick
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