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A draft order is soon expected to extend routine disclosure to the Financial Ombudsman Service

KEY POINTS

- On 6 September, a draft order, made under Section five of the Freedom of Information Act 2000, extending the Freedom of Information Act to the FOS was laid before Parliament
- Subject to parliamentary approval the order will come into effect by 17 October this year
- Once in force, the order will mean that all information held by the FOS will be disclosable upon request to any person, irrespective of their identity, motive or purpose

The coalition's Programme for Government, published in May last year, stated that "the government believes we need to throw open the doors of public bodies, to enable the public to hold politicians and public bodies to account."

Since this date, a number of transparency-bolstering measures have been introduced, ranging from the publication of detailed crime statistics to the disclosure of all central government spending and contracts over £25,000.

Now it is the turn of the doors of the Financial Ombudsman Service to be thrown open. On 6 September, a draft order, made under Section five of the Freedom of Information Act 2000, extending the Freedom of Information Act to the FOS was laid before Parliament. Subject to parliamentary approval, it will come into effect by 17 October this year.

Despite concerns voiced by many in industry, there will be no transitional period and no additional safeguards to protect sensitive information and its impact will be significant, for both businesses and the FOS.

Although Section five requires the secretary of state to specify the functions in respect of which the public body is being made subject to the Freedom of Information Act, the order states baldly that the FOS is designated in respect of: "The administration of an ombudsman scheme in accordance with Part 16 of, and Schedule 17 to, the Financial Services and Markets Act 2000(c)."

This essentially amounts to all of FOS's functions. Part 16 of and Schedule 17 to, the Financial Services and Markets Act cover all the FOS's jurisdictions – the consumer credit jurisdiction as well as its compulsory and voluntary jurisdiction. Despite concerns raised during consultation, the scope of the designation seems to leave little, if any, room for arguing that any information provided to the FOS relates to non-designated purposes and is, therefore, outside the scope of the Freedom of Information Act.

Once in force, the order will mean that, as well as requiring the FOS to set up a publication scheme for the routine disclosure of substantial amounts of information, all information held by the FOS will be disclosable upon request to any person, irrespective of their identity, motive or purpose.

The information that will be disclosable includes information provided to the FOS by, and relating to, third parties, such as regulated businesses and information compelled by the FOS using its powers under Section 231 of the Financial Services and Markets Act 2000. Given the breadth of the designation, it would appear that the information covered will include not only that relating to the informal determination of complaints but also to FOS' voluntary and informal work, and its wider activities in relation to complaints issues.

Unlike the case of the FSA, there is no additional statutory protection for confidential information provided to FOS. Accordingly, a request for information may only be refused by FOS on the basis of the specific statutory exemptions provided for in Freedom of Information Act itself.

EXEMPTIONS

Those exemptions are important, but limited. Those most likely to apply cover:

- Information provided to FOS by a third party, the disclosure of which would be an actionable breach of confidence (Section 41); and
- Information that, if disclosed, would be likely to prejudice the commercial interests of any person.

It is clear that regulated businesses will sometimes have serious concerns about the disclosure of sensitive information provided to the FOS, and that these exemptions may well be engaged. However, businesses face a number of difficulties in ensuring that such information is kept confidential.

While broad in scope, both exemptions are subject to a "public interest test", which significantly reduces their efficacy in preventing disclosure. In the case of Section 43, this is express. Section two states that disclosure under Section 43 may only be refused where the public interest in maintaining the exemption outweighs the public interest in disclosing the information.

In the case of Section 41, while the Freedom of Information Act test does not apply, the public interest defence in breach of confidence actions means that a very similar test applies in practice. Moreover, on a practical level, although cited as good practice in the Ministry of Justice Code of Practice, there is no requirement for a public body to consult the person who provided the information or the person to whom the information relates before disclosure, and there is no right of appeal once publication has taken place.

In that light, early mitigation of the risks of disclosure is crucial. The first and best means of mitigation is, of course, to avoid disclosing information to the Fos other than where necessary. While the Fos can compel information under Section 231 of FSMA and businesses will wish to continue to co-operate in Fos's resolution of complaints, businesses will need to scrutinise much more closely what is being sought and the information that they are providing to ensure that unnecessary risk is not being taken. This may include erring on the side of caution when deciding whether certain information is covered by a Section 231 request and redacting information that is not strictly relevant.

This more cautious approach to providing information to the Fos is likely to be particularly significant where the Fos is acting outside its core function of formally determining complaints. By way of example, one task performed by the Fos is that of working with the FSA and the Office of Fair Trading on a consumer protection committee, to deal with cases that may cause significant consumer detriment where it may be appropriate for the issue to be addressed with a regulatory response.

ESSENTIAL

In such cases, it is clearly essential that Fos can effectively investigate a problem that has been brought to its attention. That may include asking businesses to provide information voluntarily to the Fos. Previously, that information was not subject to the Freedom of Information Act and so could be kept confidential. Once the order comes into effect, however, information voluntarily provided to Fos by a financial institution will potentially be disclosable under the Freedom of Information Act.

Some practical steps can be taken to manage the risk of disclosure. For example, businesses should make it very clear to the Fos when information is regarded as confidential and/or commercially sensitive. Where possible, businesses should also seek to obtain agreement from the Fos that information will be treated confidentially before disclosing.

However, in the absence of such comfort, it is foreseeable that businesses may have no choice but to reduce the amount of information that they are willing to provide on a voluntary basis: businesses will certainly have to think long and hard before volunteering such information where it is sensitive.

One of the unforeseen consequences could be a real reduction in the effectiveness of the Fos in dealing with wider issues.

Businesses may in future prefer to deal with the FSA, in order to benefit from Section 348 of the FSMA, which will also cover information passed to the Fos by the FSA. As such, the direct communication between the Fos and industry in respect of consumer protection cases seems likely to dry up. That

would be bad for Fos, bad for consumers and bad for the businesses themselves.

Given the real risk that concerns about disclosure will be a barrier to free and candid dialogue between businesses and the Fos, it is surprising that no moves have been made to introduce a similar provision to Section 348 of the FSMA in respect of the Fos.

The absence of such a provision makes it all the more important for financial institutions to seek to engage with the Fos now, including to secure working assumptions or guidance to provide comfort and predictability on Fos's likely approach in future. However, no guidance can provide absolute certainty, and an ongoing dialogue between the Fos and businesses about the protection of particular pieces of sensitive information seems set to become essential.

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