First-tier Tribunal
General Regulatory Chamber
Information Rights

Appeal Reference: EA/2020/0039 P

Decided without a hearing
On 2 December 2020

Before

JUDGE HAZEL OLIVER
MICHAEL JONES
PIETER DE WAAL

Between

JONATHAN BARRETT

Appellant

and

INFORMATION COMMISSIONER

Respondent

and

THE FINANCIAL OMBUDSMAN SERVICE

Second Respondent

DECISION

The appeal is dismissed.

REASONS

Background to Appeal

1. This appeal is against a decision of the Information Commissioner (the "Commissioner") dated 20 January 2020 (FS50863534, the "Decision Notice). It concerns information sought from the Financial Ombudsman Service ("FOS") about changes to DISP Rule 3.3.4AR, which regulates FOS's ability to dismiss a complaint without considering its merits.

2. The parties opted for paper determination of the appeal. The Tribunal is satisfied that it can properly determine the issues without a hearing within rule 32(1)(b) of The Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules 2009 (as amended).

3. FOS was set up in 2000 to resolve disputes between consumers and businesses. The rules on how it should handle complaints are set out in the Financial Conduct Authority's ("FCA") Handbook, in a section titled "Dispute resolution: complaints" (the "DISP rules").

4. FOS can dismiss a complaint without considering its merits, on grounds set out in the DISP rules. These were changed after the Alternative Dispute Resolution Directive ("ADR Directive") came into effect in July 2015. Prior to this change, there were 19 grounds that could be relied on to dismiss a complaint, set out in Rule 3.3.4R. These included where "*it is a complaint about the legitimate exercise of a respondent's commercial judgment*". For complaints on or after 9 July 2015, there are only 5 grounds that can be relied on to dismiss a complaint, set out in Rule 3.3.4AR (the "dismissal grounds"). These are the same as the grounds set out in the ADR Directive. There is no ground about exercise of a respondent's commercial judgment. There is a ground, "*dealing with such a type of complaint would otherwise seriously impair the effective operation of the Financial Ombudsman Service*".

5. On 17 March 2019 the appellant made a request for information under the Freedom of Information Act 2000 ("FOIA") to FOS as follows:

> "*BACKGROUND*
>
> *This is a request to the Financial Ombudsman Service ("FOS") under the Freedom of Information Act in relation to changes introduced (with effect from July 2015) by DISP Rule 3.3.4AR. The Financial Conduct Authority ("FCA") has told me that the FOS was responsible for drafting the proposed changes to DISP Rule 3.3.4AR, and that the proposed changes were subject to approval by FCA. Those changes were subject to a consultation paper of the FOS/FCA, FCA Consultation Paper CP14/30. See https://www.fca.org.uk/publications/consultationpapers/-30-improving-complaints-handling*
>
> *If FCA believes that any documentation responsive to this request is or may be subject to an exemption in Part II of the FOI Act, then (without revealing the contents of any such documentation) FCA is requested to confirm or deny the existence of the specific documentation that is subject to the corresponding exemption.*
>
> *REQUEST*
>
> *Please provide copies of any documentation complying with both A) and B) below, namely:*
>
> *A) That were exchanged between the FOS and FCA before or at the time of the implementation of the changes introduced by DISP Rule 3.3.4AR; and*
>
> *B) That relate (in whole or part) to the actual, or to any proposed or otherwise discussed, changes to be introduced by DISP Rule 3.3.4AR, in particular changes to the grounds on which the ombudsman may dismiss a complaint without considering its merits.*"

6. FOS responded on 17 May 2019. It refused to provide the requested information and relied on the FOIA exemptions in sections 36(2)(b)(ii) and 36(2)(c) (qualified person's opinion on prejudice to effective conduct of public affairs), and section 42 (legal privilege).

7. The complainant requested an internal review on 9 June 2019. FOS provided an outcome on 16 September 2019 and upheld its original position. The qualified person considered the request for a review as part of this process.

8. The appellant complained to the Commissioner on 4 August 2019. The Commissioner decided that FOS was correct to apply section 36(2)(b)(ii) to the withheld information:

a. The exemption was engaged as the opinion of the qualified person is reasonable. The Commissioner had seen the submissions put to the qualified person and a copy of her opinion. She concluded that the withheld information reflects "*free and frank exchange of views regarding the changes to the dismissal rules*", was considered highly confidential, and was only available to a small number of individuals.

b. FOS was entitled to a safe space at the time of making the decision to implement the changes, but once the decision had been taken the need for a safe space is no longer required.

c. The chilling effect argument was given some weight, as the process of complying with the ADR Directive is an ongoing one, and FCA continues to engage with FOS as its competent authority. Disclosure of the withheld information would be likely to impact on the candour of ongoing communications between FCA and FOS relating to compliance. This outweighs the public interest in favour of disclosure, which is the public interest in transparency and accountability.

The Appeal and Responses

9. The appellant appealed on 24 January 2020. His grounds of appeal can be summarised as follows:

a. The Commissioner wrongly concluded that the exemption was engaged on the basis of the "chilling effect". The qualified person's opinion reasoning was not set out in the FOS refusal notice or internal review outcome. In addition, the opinion did not indicate any real and significant risk of prejudice (using the words "may" and "might"), particularly taking into account the fact the documents were created more than four years before, and was not rational.

b. Even if this exemption was correctly engaged, the Commissioner failed to properly apply the public interest balancing test. The conclusion on the balancing test was incorrect, and the Commissioner failed to consider all of the other public interest issues the appellant had referred to – suspicion of wrongdoing, presenting a full picture, public interest in the issue and public interest in the information.

10. The Commissioner's response maintains her decision. The qualified person recorded in her opinion that disclosure was "likely" to cause the relevant prejudice, and this was objectively reasonable. There was a public interest in providing the public with a greater understanding of the way in which FOS and FCA liaise and work together, but the public interest in maintaining

the exemption was greater, taking into account the ongoing nature of discussions between FOS and FCA.

11. FOS was made a party to the appeal on 13 March 2020, and has also provided a response. This can be summarised as follows:

a. Section 36(2)(b)(ii) was engaged. The opinion of the qualified person met the threshold test of rationality – she was provided with the information and submissions on that information, and her opinion engaged with the issues raised by the potential disclosure. She also reviewed her opinion and confirmed her view that disclosure would be likely to inhibit the free and frank exchange of views for the purposes of deliberation, and prejudice the effective conduct of FOS's public affairs.

b. As well as general transparency and accountability, the public has an interest in how the DISP rules are developed and the ADR Directive implemented. But, there is a significant amount of public information available already through public consultation and a policy paper. These interests are outweighed by the strong interest in maintaining the exemption – the information goes to the heart of the exemption, FOS and FCA have statutory obligations which make it important to have open and honest conversations, the information is relevant to ongoing communications on continued compliance with the ADR Directive as FCA is the FSO's competent authority, and the information is highly confidential.

c. The opinion of the qualified person was unimpeachable, and she was sufficiently well informed to form a reasonable opinion. It was also entirely appropriate for FOS to present and expand on arguments in support of this opinion.

d. The same arguments extend to section 30(2)(c) FOIA, which FOS also relies on.

e. Section 42 is relied on for a narrow subset of the information. Some of the information is covered by legal professional privilege, and the public interest in maintaining this exemption outweighs the public interest in disclosure.

f. Section 40(2) was also relied on with respect to personal data of junior employees. This is no longer a live issue, as the appellant has agreed that personal data consisting of name, job title, email address or other information which goes solely to the identity of the individual concerned, can be redacted from the information.

12. The appellant has provided a reply to both responses. The points he makes overlap with his detailed submissions. We have taken all of these replies and submissions into account, and they are considered in the discussion below

Applicable law

13. The relevant provisions of FOIA are as follows.

> ***1 General right of access to information held by public authorities.***
>
> *(1) Any person making a request for information to a public authority is entitled—*
>
> *(a) to be informed in writing by the public authority whether it holds information of the description specified in the request, and*

(b) if that is the case, to have that information communicated to him.

……

2 Effect of the exemptions in Part II.

…….

(2) In respect of any information which is exempt information by virtue of any provision of Part II, section 1(1)(b) does not apply if or to the extent that—

(a) the information is exempt information by virtue of a provision conferring absolute exemption, or

(b) in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information.

……..

36 Prejudice to effective conduct of public affairs

(1) This section applies to—

(a) information which is held by a government department or by the Welsh Assembly Government and is not exempt information by virtue of section 35, and

(b) information which is held by any other public authority.

(2) Information to which this section applies is exempt information if, in the reasonable opinion of a qualified person, disclosure of the information under this Act—

………

(b) would, or would be likely to, inhibit—

(i) the free and frank provision of advice, or

(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.

…….

42 Legal professional privilege.

(1) Information in respect of which a claim to legal professional privilege or, in Scotland, to confidentiality of communications could be maintained in legal proceedings is exempt information.

…….

58 Determination of appeals

(1) If on an appeal under section 57 the Tribunal considers—

(a) that the notice against which the appeal is brought is not in accordance with the law, or

(b) to the extent that the notice involved an exercise of discretion by the Commissioner, that he ought to have exercised his discretion differently,

the Tribunal shall allow the appeal or substitute such other notice as could have been served by the Commissioner; and in any other case the Tribunal shall dismiss the appeal.

(2) On such an appeal, the Tribunal may review any finding of fact on which the notice in question was based.

14. The application of the section 36 exemption involves a two-stage analysis, as set out in ***Information Commissioner v Malnick and ACOBA*** [2018] UKUT 72 (AAC). Firstly, is there a reasonable opinion of a qualified person that one of the listed prejudices would or would be likely to occur? Secondly, if so, in all the circumstances of the case, does the public interest in

maintaining the exemption outweighs the public interest in disclosing the information? The question for the Tribunal is whether the qualified person's opinion was substantively reasonable.

15. The opinion of the qualified person should be given appropriate consideration in relation to the likely occurrence of the prejudice (***Malnick***, above). The approach to be taken in assessing prejudice was set out in the First Tier Tribunal decision of ***Hogan v Information Commissioner*** [2011] 1 Info LR 588, as approved by the Court of Appeal in ***Department for Work and Pensions v Information Commissioner*** [2017] 1 WLR 1:

a. Firstly, the applicable interests within the relevant exemption must be identified.
b. Secondly the nature of the prejudice being claimed must be considered. It is for the decision maker to show that there is some causal relationship between the potential disclosure and the prejudice, and that the prejudice is "real, actual or of substance".
c. Thirdly, the likelihood of occurrence of prejudice must be considered. The degree of risk must be such that there is a "real and significant risk" of prejudice, or there "may very well" be prejudice, even if this falls short of being more probable than not.

Issues and material before the Tribunal

16. The issues are:

a. Is section 36(2)(b)(ii) engaged? The appellant says that the Commissioner wrongly accepted that disclosure would engage the "chilling effect", the reasoning of the qualified person was inadequate, and the qualified person's opinion was irrational.

b. If section 36(2)(b)(ii) was engaged, did the Commissioner correctly apply the public interest balancing test? The appellant says the balancing test favours disclosure. Does the public interest in maintaining the exemption outweigh the public interest in disclosing the information?

c. In the alternative, is section 36(2)(c) engaged and, if so, does the public interest in maintaining the exemption outweigh the public interest in disclosing the information?

d. In the alternative, is section 42 engaged in relation to a subset of the information and, if so, does the public interest in maintaining the exemption outweigh the public interest in disclosing the information?

17. By way of evidence and submissions we had the following, all of which we have taken into account in making our decision:

a. An agreed bundle of open documents.
b. A closed bundle of documents containing the withheld information.
c. A redacted open witness statement from Debbie Enver
d. A closed unredacted witness statement from Debbie Enver
e. Submissions and final submissions from the appellant
f. Open submissions and reply submissions from FOS
g. Closed written submissions from FOS with annex
h. A clarificatory letter from FOS

i. Bundles of authorities from the appellant and FOS.

Open Evidence

18. We had a detailed witness statement from Debbie Enver, the Head of External Relations at FOS. This contained a closed section and a number of other redactions of closed material, which have been considered by the Tribunal but have not been seen by the appellant.

19. A summary of the relevant evidence in Ms Enver's open statement is as follows.

20. ***Role of FOS and FCA***. FOS was established under the Financial Services and Markets Act 2000 ("FSMA"). FOS administers and operates a scheme for resolution of disputes about certain financial businesses by an independent person. The FCA is the financial conduct regulator, and is responsible for ensuring the FOS is capable of fulfilling its statutory functions. The rules for FOS complaints handling are made by FCA and FOS, and set out in the FCA Handbook under "Dispute Resolution: Complaints" ("DISP"). FOS is responsible for making scheme rules, which set out the procedure for reference of complaints and for their investigation, consideration and determination by an ombudsman. FSMA provides that scheme rules must be made in a way which enables FOS to qualify as an ADR entity and meet the requirements of the ADR Directive.

21. The FSMA requires FOS and FCA to cooperate with each other in the exercise of their functions. There is a Memorandum of Understanding between them, which gives a framework for them to cooperate and communicate constructively in order to carry out their independent roles and functions.

22. ***Background to DISP changes***. The ADR Regulations came into effect on 09 July 2015, and implemented the ADR Directive. FOS was approved as an ADR Entity by FCA under the ADR Regulations. Article 5(4) of the ADR Directive gives six specified grounds for refusing to deal with a dispute, and these were implemented in the ADR Regulations. DISP 3.3.4R previously set out 19 grounds. New DISP 3.3.4AR sets out 5 grounds.

23. ***How the request was dealt with.*** FOS's Information Rights department collected all communications and documents that fell within the scope of the appellant's request. These were provided to Anette Lovell, the Director of Strategy and Engagement, who is the qualified person for FOS under section 36 FOIA. Ms Lovell was also provided with a draft response to the request. She asked various questions. She disagreed with part of the legal advice and stated that she did not consider some paragraphs in the draft response were appropriate. These questions were dealt with by email and in a meeting with the Information Adviser. Ms Lovell signed the qualified persons form on 16 May 2019, setting out her opinion that disclosure would be likely to prejudice the effective conduct of public affairs.

24. ***How the review was dealt with.*** The appellant's request for a review was considered by the Information Rights team, and this was sent to Ms Lovell together with a draft response and the original material. She was asked to review the information and confirm whether, in her reasonable option, the section 36 exemption was still engaged. Ms Lovell confirmed by email on 15 September 2019 that she had reviewed the appellant's submission, original material and draft reply, and it was her opinion that FOS should continue to apply the exemption.

25. ***Prejudice to the free and frank exchange of views.*** Ms Envers says that full and frank conversations about rule changes between FOS and FCA are needed in order to reach mutually acceptable, regulation compliant solutions. This discussion would be inhibited if every exchange could potentially be made public. People would focus on how things might look, particularly taken out of context. Conversations would need to be framed appropriately for the record. There would be need for legal and senior sign-off of routine exchanges, increasing time and costs. This could inhibit early discussions, or discourage discussion about some issues at all. This would all affect FOS's and FCA's ability to comply with their obligations to cooperate with each other in the exercise of their functions, and affect the robustness and transparency of the rule making process. There is also a risk people will not make notes, or will call rather than email, which is not in the best interest of working together in the most effective and efficient way. FOS also has a statutory duty to disclose information to FCA if it has information which might assist FCA in advancing its operational objectives, meaning FOS's priority is to "share more rather than less". This would be inhibited by wider concerns about positioning.

26. Ms Envers also refers to the need for a safe space to talk with stakeholders about sensitive issues, including HM Treasury, and at times this needs to be shared with FCA. Stakeholders would be less likely to share information if they are concerned that this would then be shared with FCA and could be publicly available.

27. ***The age of the documents.*** Ms Envers explains that FCA is under an ongoing obligation to satisfy itself that FOS continues to meet the ADR requirements in relation to the dismissal grounds, and this involves ongoing communication. FCA is the "competent authority" for FOS, and so engages with FOS about its compliance with the ADR Regulations.

28. ***Public interest balancing.*** Ms Envers explains how transparency was met by the public consultation process, which provides a record of the rationale for the changes. FCA and FOS have duties to publish certain information about draft rules. FCA published a consultation paper in December 2014. Chapter 5 was issued jointly by FOS and FCA. It explained the proposals to change the dismissal grounds, included a copy of the proposed amendments, and invited representations from the public. FCA published a Handbook Notice in April 2015 which confirmed the changes to DISP 3, set out some of the consultation feedback, and gave FCA's response to this feedback. This included concerns from respondents about an expansion of the ombudsman's remit through the reduction of dismissal grounds, and an explanation that the ombudsman would only have discretion to dismiss a complaint in the more limited circumstances permitted by the ADR Directive.

Closed Evidence

29. We have seen a copy of the withheld information, unredacted copies of redacted material in the open bundle, the redacted material in Ms Envers' witness statement, and closed submissions – this is the closed material. The Registrar has made various Case Management Directions which confirmed that this material can be considered by the Tribunal but will not be disclosed to anyone except the Commissioner and FOS, as to do otherwise would defeat the purpose of the proceedings. Having viewed this material, we are satisfied that its wider disclosure would give away the context, nature or substance of the withheld information.

30. The appellant has asked for a gist of the closed material. He also says that the Decision Notice provides some information about the content of the closed material, so this is already

public information. He has asked to provide further submissions after the closed material or a gist of the redactions has been provided to him.

31. The Tribunal can direct that certain documents or information may be disclosed to the Tribunal panel but not to one or more of the parties under Rule 14(6). The Tribunal must then conduct proceedings and record its decision and reasons appropriately so as not to undermine the effect of this direction. It is normal practice to provide a gist of the evidence given in closed proceedings to the parties who were excluded from that part of the hearing. This is covered in the Practice Note on Closed Material in Information Rights Cases (2012), which states that after a closed hearing the Tribunal should discuss with the remaining parties what summary of the closed hearing can be given to the excluded party without undermining the Rule 14(6) direction. It is not normal practice to provide a gist of closed material in a paper case.

32. We note that the Decision Notice does give some additional information about the content of the information, in particular at paragraphs 21 and 24. This is now public information. Having viewed the withheld information, we can confirm the following:

a. There are emails containing policy considerations about whether the changes to the dismissal rules were necessary, views and debates about whether the grounds for dismissing complaints were non-exhaustive, and confidential drafts about changes to the legislation (FSMA) and the DISP rules.
b. HM Treasury were involved in the ongoing discussions between FOS and FCA, and the material includes information about HM Treasury's preferred approach to the changes.
c. These discussions were between a small number of individuals at FOS, FCA and HM Treasury.
d. The material reflects a free and frank exchange of views about proposed changes to the dismissal rules.

33. The closed material in Ms Enver's statement provides further detail about the participants in these discussions and the nature of those discussions. The statement also provides an explanation in relation to each item of the withheld information.

34. It would defeat the purpose of the proceedings to disclose further details about the closed material, and undermine the effect of the Rule 14(6) direction. We are satisfied that we can deal with these proceedings fairly without providing the appellant with more information or the opportunity to make further submissions. The Tribunal has an investigatory function which involves considering and testing the closed material itself, having regard to the competing rights and interests involved (see ***Browning v Information Commissioner***, [2014] EWCA Civ 1050). In this case, we can view the closed material and make a decision based on this material together with the already extensive submissions from both parties.

Discussion and Conclusions

35. In accordance with section 58 of FOIA, our role is to consider whether the Commissioner's Decision Notice was in accordance with the law. As set out in section 58(2), we may review any finding of fact on which the notice in question was based. This means that we can review all of the evidence provided to us and make our own decision. We deal in turn with the issues.

36. **Is section 36(2)(b)(ii) engaged?** The appellant says that the Commissioner wrongly accepted that disclosure would engage the "chilling effect", the reasoning of the qualified person was inadequate, and the qualified person's opinion was irrational.

37. Having considered this issue carefully, we find that section 36(2)(b)(ii) is engaged in this case. We have considered the evidence from FOS and the arguments put forward by the appellant.

38. The appellant says that the qualified person's opinion does not show a belief in a significant risk of prejudice. He points to the explanation given in box 12 of the opinion. This states that releasing this information "could" prejudice FOS and FCA. It also states that releasing this information "may" mean that individuals at FOS and FCA "might" be less likely to discuss openly with each other. The appellant says this falls short of the required test.

39. FOS says that the qualified person did apply the correct test of "would be likely to" cause prejudice. Having considered the full written opinion, we agree. Box 9 in the opinion sets out the arguments why sharing the information "would be likely to" prejudice various matters. The start of box 12 also states the qualified person's opinion is that disclosure "would be likely to" cause prejudice to the effective conduct of public affairs. Although the opinion then goes on to use words such as "could" and "might", taken in context we do not find that this indicates the qualified person applied the incorrect test. The test is not whether prejudice is more likely than not – it is whether there is a "real and significant risk" of prejudice, or there "may very well" be prejudice. The full written opinion indicates that the qualified person did apply the correct test.

40. The question for the Tribunal is whether the qualified person's opinion was reasonable, not whether we would have made the same decision in the circumstances. The issue here is the "chilling effect", i.e. the effect that disclosure of past discussions may have on full and frank exchanges of views between FOS and FCA in the future. We have considered the evidence from FOS on the importance of the ability to have a full and frank exchange of views. We have also considered the nature of the communications in the withheld information. As noted above, these do reflect a free and frank exchange of views about proposed changes to the dismissal grounds, and were confidential communications between a small circle of personnel. If this information were to be made public, it is reasonable to have the opinion that this would be likely to inhibit future discussions between FOA and FCA of this nature – whether on this topic or other topics. Individuals would be less likely to communicate so openly in writing if they thought their communications might be made public.

41. FOS and FCA work together and are jointly responsible for the DISP rules. FCA is also the competent authority responsible for ensuring that FOS complies with the ADR Regulations. This means that there will be ongoing communications between them about the ADR Regulations, including the application of the DISP rules and the dismissal grounds. It is reasonable to hold the opinion that these communications could be inhibited by disclosure of the withheld material. Although the material is now some years old, it may still be relevant to current discussions.

42. It is also reasonable to have the opinion that disclosure is likely to prejudice free and frank discussions about other matters. FOS has a statutory duty to disclose information to FCA, as part of their general duty to cooperate with each other in the exercise of their functions under FSMA. These discussions may be about matters other than the DISP rules or the dismissal grounds. As addressed in Ms Enver's witness statement, good early discussions about all

kinds of matters may be inhibited if the discussions in the withheld information were to be disclosed.

43. The appellant has also said that the qualified person's opinion was irrational. He has asked to provide further submissions on this point after being supplied with the closed material or a gist of that material. As explained above, we are satisfied the closed material can be withheld from the appellant and it is not necessary to provide a detailed gist. We are able to make a fair assessment of whether the qualified person's opinion was rational after considering all of the evidence, including the closed material. The qualified person was provided with all of the withheld information, and she asked a number of questions and challenged FOS's original assessment before issuing her opinion. She then reviewed all of the material again in light of the arguments in the appellant's request for a review, before confirming her opinion. We are satisfied that her decision was rational in the circumstances.

44. The appellant has referred to the First-Tier Tribunal decision in ***Nisbet v ICO*** (EA/2017/0067), which he says supports his argument that a "chilling effect" cannot be assumed. We are not bound by this decision, and also note that each case should be considered on its particular facts. As explained, we have considered the particular facts of this case and the relationship between FOS and FCA, and have found the qualified person's opinion to be reasonable on that basis.

45. **If section 36(2)(b)(ii) was engaged, does the public interest in maintaining the exemption outweigh the public interest in disclosing the information?** Having considered the arguments on both sides, we find that the public interest in maintaining the exemption does outweigh the public interest in disclosing the information.

46. We have found that the qualified person's opinion was reasonable and so the exemption was engaged. In applying the public interest test, we have gone on to consider whether we agree that disclosure of the withheld information would be likely to prejudice the free and frank exchange of views for the purposes of deliberation. We find that this is likely, applying the test of a real and significant risk of prejudice. We have taken into account the various matters discussed in paragraphs 40 to 44 above, and seen the nature of the withheld information ourselves. In accordance with ***Malnick***, we have taken into consideration the opinion of the qualified person.

47. The appellant says that trusted personnel should not have their honesty affected by disclosure of their communications, or act in breach of their statutory duty. However, we accept that future discussions are likely to be affected. This does not mean that they will be less honest, but rather less open as well as less rapid. As explained in Ms Envers' statement, there would be greater need for senior sign-off of communications, an avoidance of notes and written communications, and the avoidance of some more controversial discussions altogether.

48. The appellant says that discussions about more changes to the DISP rules are not likely, particularly as these changes were made to implement an EC directive which won't happen again. The appellant also says there is no evidence about ongoing discussions with FCA as the competent authority, as opposed to in its role as regulator. We agree that discussion about further changes to the DISP rules prompted by EU law may not be likely. But, we accept FOS's position that there may be related discussions about how the new DISP rules are being implemented as part of FCA's role in ensuring FOS complies with the ADR Regulations. As already explained, the "chilling effect" is also wider than simply discussion about the subjects

of the withheld information. Future discussions between FOS and FCA, on related or others subjects of a similar nature, will also require the necessary space for openness and frankness and are likely to be inhibited by public disclosure of the withheld information.

49. Having found that prejudice to free and frank exchange of views is likely, we find that there is considerable public interest in maintaining the exemption in this case. The FOS and FCA are independent from each other but they work closely together, and have a statutory obligation to cooperate with each other and exchange information. This is in order to ensure the FOS fulfils its statutory dispute resolution functions effectively. It is clearly in the public interest for these discussions to be as open and frank as possible. It is also in the interest of stakeholders and the public more generally for discussions to take place quickly, so that decisions can be taken and issues resolved as soon as possible. As explained above, this is likely to be inhibited by disclosure of the free and frank exchange of views contained in the withheld information, due to concern that other similar exchanges would also be made public.

50. In relation to the public interest in disclosure, there are general interests in transparency and accountability, and understanding how the FOS and FCA work together. There is also a more specific public interest in understanding how the DISP rules are developed, and how the ADR Directive was implemented, including why decisions were made to draft rules in a certain way.

51. FOS argues that there is a lot of public information on this issue already. There was the public consultation process, and we have seen the document "Improving complaints handling" from December 2014. This included a section on implementing the ADR Directive. Paragraphs 5.30 to 5.33 explained the proposed changes to the dismissal grounds and the reasons for this, including new guidance on what could be considered as "seriously impairing the effective operation of the ombudsman service". The paper asked whether consultees agreed with the proposed revision of the dismissal grounds. We have also seen the FCA Handbook Notice from April 2015. Paragraphs 3.50 to 3.54 address the feedback on the proposed revision of the dismissal grounds. This includes a concern from some respondents about the expansion of the ombudsman's remit, by removing the ability to dismiss a complaint about the legitimate exercise of a firm's commercial judgment. The response says that the reduction in dismissal grounds does not alter the scope of the ombudsman's jurisdiction, and going forward the service will only have discretion to dismiss a complaint in the more limited circumstances permitted by the ADR Directive.

52. The appellant's submissions make it clear that he has a specific concern about how "commercial judgment" is still being used by FOS to dismiss cases. He says there is a concern about wrongdoing, and there are serious questions about whether FOS is misinterpreting the legislation and its own rules. Disclosure of the requested information is in the public interest for this reason, to expose potential wrongdoing and give a full picture of the changes to the DISP rules in relation to dismissal grounds.

53. The appellant also says that a response from FOS of 31 October 2018 to his earlier FOIA request shows that there are issues with how "commercial judgment" is being used to dismiss cases. He had asked for information and documentation about the use of "commercial judgment" in decisions made by the ombudsman. FOS provided a five-page response, which included the statement, "*In some cases, it's obvious from the outset that the complaint is purely about commercial judgment, in which case we might exercise the discretion to dismiss on the basis that it seriously impairs our effective function to consider such matters*." FOS sent a

"clarificatory letter" to the Tribunal on 26 October 2020, which says that the 2018 FOIA response was not intended to put forward a new public position on this issue, and seeks to explain that the response was dealing with decisions on the merits of a complaint rather than dismissal of a complaint. The appellant maintains that the letter of 31 October 2018 raises legitimate and serious questions of suspicion of wrongdoing, it is a public document, and it did not need clarification.

54. The appellant also says that FCA did not have concerns about disclosing the information for these reasons. He made an earlier FOIA request to FCA for the same information, and it was refused on the grounds it could not be provided without FOS's consent – not on the basis of prejudice to the ability to carry out its functions.

55. We agree with the appellant that the response of 31 October 2018 does appear to state clearly that commercial judgment might still be used to dismiss a complaint. He alleges that this indicates wrongdoing. However, this does not mean that disclosure of the withheld information is necessarily in the public interest.

56. The appellant refers to the need to present a full picture, in order to remove any suspicion of manipulating the facts, or 'spin'. He also refers to general public interest in this issue based on criticism of the way FOS handles disputes, and the lack of a level playing field. Again, these points all relate to his underlying concern, that FOS is not applying the rules correctly in relation to dismissal of complaints.

57. We find that the information sought by the appellant is of limited public interest, taking into account the information that has already been published about the changes to the DISP rules through the consultation process and FCA Handbook Notice. The appellant has a concern about a narrow issue, the use of commercial judgment as a dismissal ground. This is addressed in the Handbook Notice. He is concerned about wrongdoing, and says this is shown by the 31 October 2018 response to his earlier FOIA request. However, we do not agree that disclosure of discussions about how to change the DISP rules would assist with that issue, when there was a consultation process on the proposals and the rules have now been changed. If the ADR Directive has not been properly implemented, this can be ascertained from the current rules and how they are being applied – not from discussions about draft legislation. Views expressed in 2014 will not show whether FOS is acting lawfully today. The appellant says there is a difference between the FOS's position in 2015, when the new rules were published, and its stated position in 2018. Again, this is about how the rules have actually been changed and implemented - views from 2014 will not address this issue.

58. We have also made this assessment after considering the withheld information. We cannot give the appellant details of what is contained in that information. However, if there were communications in that information which did indicate any wrongdoing or misconduct, that might tip the balance in favour of disclosure. There is not any indication of wrongdoing or misconduct in the information we have seen. There is no "smoking gun" in relation to the application of the commercial judgment dismissal ground.

59. For the reasons explained above, we therefore find that this exemption was engaged, and the public interest in maintaining the exemption does outweigh the public interest in disclosing the information.

60. **In the alternative, is section 36(2)(c) engaged and, if so, does the public interest in maintaining the exemption outweigh the public interest in disclosing the information?** It is not necessary for us to decide this point, as we have found that the exemption in section 36(2)(b)(ii) applied.

61. **In the alternative, is section 42 engaged in relation to a subset of the information and, if so, does the public interest in maintaining the exemption outweigh the public interest in disclosing the information?** We have considered whether to make a finding on this exemption in the alternative. Some of the documents are clearly legal advice provided to a client. However, for some of the documents relied on by FOS under this exemption it is not clear to us who the individuals involved in the exchanges are and whether this would amount to advice between lawyer and client. It is not necessary for us to decide this point, as we have found that the exemption in section 36(2)(b)(ii) applied to all of the information.

62. In conclusion, the appellant clearly has concerns about the changes to the DISP rules and how they are being applied. However, the Tribunal is not able to determine the merits of FOS's approach to these rules, or how they have been amended and implemented. For the reasons given above, we find that the information requested by the appellant is exempt from disclosure under FOIA.

63. We dismiss the appeal and uphold the decision of the Commissioner.

Signed:

Hazel Oliver
Judge of the First-tier Tribunal

Date of Decision: 28 December 2020
Date Promulgated: 05 January 2021