

The AFCA Approach to special circumstances

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We have created a series of AFCA Approach documents, such as this one, to help consumers and financial firms better understand how we reach decisions about key issues.

These documents explain the way we approach some common issues and complaint types that we see at AFCA. However, it is important to understand that each complaint that comes to us is unique, so this information is a guide only. No determination (decision) can be seen as a precedent for future cases, and no AFCA Approach document can cover everything you might want to know about key issues.

1 At a glance

1.1 Scope

Before we make a formal written decision (called a determination), we must make sure that the consumer and the financial firm have had the chance to look at any documents the other party has provided to us, if we plan to rely on those documents in the determination. We cannot reach a decision in a determination if we need to rely on documents that the other party hasn't had a chance to see. The only exception is if we decide that the document should not be exchanged with the other party because special circumstances apply.

The approach has been adopted from AFCA's predecessor scheme, the Financial Ombudsman Service.

1.2 Summary

Who should read this document?

1. financial firms, consumers and consumer representatives who have a complaint at AFCA.
2. anyone who wants to understand how AFCA considers requests for special circumstances.

Summary of the AFCA Approach

We think it is fair to give consumers and financial firms the opportunity to see and respond to information that we plan to use in a decision. We believe that it is generally unfair for us to reach a decision against a consumer or financial firm if the decision is reached using information that hasn't been made available to them.

If information is provided to us and the consumer or financial firm asks us not to show it to the other party, then we cannot use the information to make a decision adverse to the party that hasn't had access to it. The only exception to this is if we consider that special circumstances apply.

- we may decide that special circumstances apply if, for example:
 - > the information may harm or embarrass someone if it is released
 - > the information may endanger a third party
 - > the information includes commercially sensitive information, or
 - > it is appropriate to delay the release of the information.

We consider that special circumstances exist in only a very small number of cases. If it is possible, we prefer to remove confidential or sensitive content from the information rather than completely withhold the document from the other party. This

gives the consumer or financial firm the opportunity to respond to the document, and makes our decision process fairer and more transparent.

If a consumer or financial firm does not want us to share information with the other party, but still wants us to use that information to help us make a decision adverse to the other party, they need to show us that special circumstances apply to the information.

The [Operational Guidelines](#)¹ to our [Rules](#)² outline how we decide whether special circumstances apply, and explain how we can use information that hasn't been seen by all parties.

2 In detail

2.1 The AFCA Approach

What to do if you think special circumstances apply

Write to AFCA stating clearly that you believe special circumstances apply to certain documents. Attach the document(s) in question to your letter and clearly identify that you do not want those documents shared with the other party. This is particularly important in complaints where a large number of documents are submitted to AFCA, but only some are relevant to the application for special circumstances.

Provide reasons for your application. The AFCA [Operational Guidelines](#) give some examples of when special circumstances may apply.

Suggest ways in which you might be able to provide the information in an alternative format so that the other party can see and respond to it. For example, you may be able to block out a witness's name and details, but still leave the majority of the information intact.

There may be other ways we can provide the information to the other party – for example, by providing an extract, deleting non-essential information, or asking the other party certain agreed questions.

How we assess whether special circumstances apply

Using our Rules and Operational Guidelines, we will assess whether special circumstances apply to any or all of the documents.

As part of this process, we will look at the options you have suggested for providing the information to the other party in a way that allows them to see and respond to it.

¹ Operational Guidelines (<http://afca.org.au/og>)

² AFCA Rules (www.afca.org.au/rules)

If you cannot provide suggestions for alternative ways of sharing the information, then we will not be able to use the information to reach an outcome that is adverse to the other party unless we consider that special circumstances apply.

In a very limited number of instances, we may decide that special circumstances do apply to the information submitted.

For example, an insurance company alleged the consumer had not been truthful in relation to their claim and therefore it denied the claim. The insurance company provided information to us that the consumer, who had a history of violence, had made actual threats towards a witness the insurer was relying on. In these circumstances, we decided that special circumstances did apply to the document that named the witness, because the witness could still be identified from other information in the statement even if their name was deleted. We did not share the document with the consumer, but we took it into account when we dealt with the complaint – even though it led to an outcome that was adverse to the consumer.

What about legal professional privilege?

Legal professional privilege protects the confidentiality of communications between a lawyer and their client when seeking or giving legal advice.

Legal professional privilege is not the same as special circumstances, but we may agree that special circumstances apply to some legally privileged documents.

If a party wants us to take any sort of document into account without having shared it with the other party, we need to assess whether special circumstances apply. This includes legal professionally privileged documents.

If a consumer or financial firm wants us to have regard to particular legal principles, they need to set out those principles so that we can inform the other party. This can be done without providing the actual legal advice.

If you provide us with a document and claim legal professional privilege, you should ensure the claim is properly made.

This is because not all communication between a lawyer and their client is privileged information. For example, an insurance company may have instructed solicitors in order to gain assistance in assessing a high number of flood-related claims. While some of these claims may ultimately result in legal proceedings, the main reason for instructing the solicitors was to investigate rather than to seek legal advice. In these circumstances, we would not consider the related communications to be privileged, and we would expect the information to be shared with the consumer if the financial firm wanted us to take it into account when reaching a decision.

In some circumstances we may accept that legal professional privilege applies only to part of certain documents, and we will share the documents with the other party on that basis. By doing this, we can take the content of the shared documents into

account when making a decision on the complaint, and the consumer or financial firm can retain privilege over the other information referred to in the documents.

For example, a financial firm may have instructed solicitors to issue legal proceedings to recover a consumer's house because they had not made the required mortgage repayments. The consumer may complain about the solicitor's legal costs, which the lender passes on to the consumer's loan. AFCA would need to consider the solicitor's invoices to work out whether the services the solicitor provided were reasonable and were charged in accordance with the legal services agreement between the solicitor and the lender. The description of services in the solicitor's invoices may include legal advice, but this would not prejudice the lender's ability to claim privilege over the advice.

3 Context

The case studies below are based on determinations by one of AFCA's predecessor schemes, the Financial Ombudsman Service, in which awards were made for non-financial loss. While previous determinations (by AFCA or by its predecessor schemes) are not binding precedents, where relevant they will inform AFCA's approach to an issue.

3.1 Case studies

Case study 1

Rob's financial firm denied his motor vehicle claim because it did not believe Rob had been truthful about the circumstances surrounding the loss of his vehicle. Rob lodged a complaint with FOS.

When it investigated the claim, the financial firm interviewed Malcolm, whose comments indicated that Rob may have had a hand in his vehicle's disappearance. The financial firm did not want to share the transcript of Malcolm's interview with Rob because it believed that Rob may attempt to intimidate Malcolm into changing his version of events. The financial firm asked FOS to agree that special circumstances applied to the document.

We said that we would not compel the financial firm to share this information with Rob. However, we decided that special circumstances would not apply to the document because:

The financial firm could not show that there may have been repercussions for Malcolm if his version of events was released to Rob. For example, there had been no threats made against Malcolm or his family.

The financial firm did not suggest any alternative way that it could present the information so that Rob could see and respond to it.

The information was very important to the issues in complaint, and if Rob could not respond to the comments then his side of the story would have been prejudiced.

In these circumstances, we decided that allowing special circumstances would be contrary to procedural fairness and our commitment to dealing with complaints fairly and transparently. We let the financial firm know that if it wanted to rely on the information contained in the transcript of Malcolm's interview, it would need to share the document with Rob.

Case study 2

Judith owns a small business which suffered a loss when a fire severely damaged the business premises. She made an insurance claim for stock loss, shop refit and business interruption. The financial firm had suspicions about how the fire started and denied the claim.

Judith lodged a complaint with FOS. Although we could not consider her business interruption claim, Judith asked us to consider the other two claims and she provided us with a comprehensive report in order to establish her entitlement to payment under her policy.

Judith said there was an extract in that report that contained commercially sensitive information. She wanted FOS to consider the report because it assisted her case, but asked that it not be shared with the financial firm.

We considered that Judith had provided a satisfactory explanation as to why she did not want to share that piece of information with the financial firm, and we agreed with her proposal for an alternative way to provide the information. This involved blocking out enough information to prevent the disclosure of the commercially sensitive information, while at the same time providing sufficient information to the financial firm to allow them the opportunity to respond to it.

In these circumstances we accepted that special circumstances applied, due to the commercially sensitive information and because Judith had suggested a suitable way for the financial firm to be able to respond to the general content of the report.

Case study 3

Sarah lodged a complaint with FOS about her financial firm's decision to lend to her \$400,000 to help her purchase a home. The financial firm provided us with its lending policy applicable to the assessment of Sarah's loan application, but did not want this information shared with Sarah. The financial firm said that the lending policy was commercially sensitive.

We considered that relevant parts of the policy were important to the complaint, and that Sarah needed to have the opportunity to respond to them. The financial firm did not suggest any alternative way for the information to be shared with Sarah so we told it that we could not take the lending policy into account when making a decision

adverse to Sarah. The financial firm then agreed that we could quote the relevant extract from the policy when making our decision.

3.2 References

Definitions

Term	Definition
Consumer	An individual or small business owner who uses the services of a financial firm
Financial firm	A financial firm that is a Member of AFCA

Useful links

The [AFCA website](#) contains more information about what we do, the types of complaints we can consider, and our complaint resolution processes.

- www.afca.org.au

We have published other documents that outline [the AFCA Approach](#). You can see them all at

- www.afca.org.au/approach