

**Practice Note
No. 3
PN3 – Surveillance and Recording Evidence**

Introduction and Explanation

The Investments Life Insurance and Superannuation division of FOS is effectively a successor to the Financial Industry Complaints Service (“FICS”), and the Investments Life Insurance and Superannuation Terms of Reference provide for the same procedures as set out in the FOS Rules as in force immediately before 1 July 2008.

Practice Notes developed by the FICS Panel under its procedures have been adopted by Investments Life Insurance and Superannuation division of FOS, for the guidance of parties.

The procedures set out in this Practice Note will apply from 1 July 2008. Apart from minor changes of terminology, they replicate the procedures of the equivalent FOS Practice Note 3 as in force from 13 June 2007.

Procedural fairness

The Panel is required by the Investments Life Insurance and Superannuation Terms of Reference, ASIC Regulatory Guide 139 and by law to afford procedural fairness to the parties. This means the Panel cannot have regard to evidence or submissions provided by either party to a complaint, unless the other party has been made aware of that material and has been given a reasonable opportunity to respond to that information.

A party cannot ask the Panel to take into account evidence unless that evidence has first been made available to the other party. This is set out explicitly in Clauses 19.4 and 30.1 of the Terms of Reference.

Surveillance and recording evidence

Clauses 19.2 and 19.3 allow the Panel Chair to direct the terms and conditions under which information supplied by one party to FOS is made available to the other party, including when that information should be made available.

There are circumstances in which it may be appropriate to delay the exchange of evidence, or to release it subject to specific terms and conditions. This typically happens when the party wishes to use surveillance or recording evidence to challenge the other party’s credibility. Premature release of the evidence might

allow the other party to tailor their statements to accommodate the contents of the evidence, depriving the party relying on it of a legitimate forensic advantage.

In most cases, the party relying on the evidence should have elicited statements from the other party about the matters covered by the surveillance or recording evidence during the course of the dispute.

Where this has not been the case, such statements should be elicited during FOS' investigation of the complaint, or in the course of the parties' submissions to the Panel, before the evidence would normally be released to the other party.

Once such statements or such evidence has been obtained, the surveillance or recording evidence can be made available to the other party without depriving the party providing it of the forensic advantage to be obtained from that evidence.

Where there has been ample opportunity to elicit statements which can be measured against the surveillance or recording evidence, the Panel Chair will be reluctant to approve further delays in releasing that evidence to the other party without good reason.

However, where a party considers that it has not yet had sufficient opportunity to elicit such statements from the other party, and there are reasons to believe that such statements will be obtained in the near future, the Panel Chair will give serious consideration to delaying the release of the surveillance evidence or directing how the material should be released in order to retain the forensic advantage.

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1. Parties providing surveillance or recording evidence in whatever format are asked to provide two copies of that evidence, one for FOS and one for the other party.
2. If FOS has concerns that surveillance evidence or video / audio recordings have been obtained in circumstances where their legality is in doubt, this issue will be raised with the party providing the evidence. If those concerns are not resolved to FOS' satisfaction, FOS may return the evidence to the party and advise them it will not be taken into account by the Panel.
3. FOS will normally take the following approach to the exchange of surveillance evidence:
 - (a) Where the party has not objected to the immediate exchange of the evidence: immediate exchange (section A, below); or

(b) Where the party has objected to the immediate exchange of the evidence: delayed exchange (section B, below).

4. Where a party objects to the standard approach to exchange of this evidence, it may propose an alternative approach and seek a ruling from the Panel Chair as to how that evidence should be dealt with (section C, “Exceptions to the general rule”, below).

A. Immediate exchange

5. In most cases surveillance evidence (including video tapes and investigators’ surveillance reports) and recordings should be treated in a similar way to all other evidence, and should be exchanged well in advance of the complaint being dealt with by the Panel.

6. If a party does not object to early or immediate release of surveillance or recording evidence they are relying on, then that evidence will be made available to the other party in the ordinary course of exchanging information between the parties.

B. Delayed exchange

7. If a party has objected to early exchange of surveillance or recording evidence it is relying on, then normally the following procedure should be followed:

- (a) Where the party has objected to the early release of such evidence, that evidence will not be released to the other party before all parties have provided their submissions to the Panel and responded to each other’s submissions.
- (b) After the parties have provided their submissions, but before the Panel considers the complaint, the party providing the evidence will be asked if it still objects to showing that evidence to the other party. If the party still objects, that objection will be dealt with under the procedure set out in section C below.
- (c) If the party does not object to showing the evidence to the other party, FOS will provide a copy of the evidence to the other party.
- (d) The other party will provide their response to or comments on the evidence to FOS within 14 days of receiving the evidence.
- (e) A copy of the response will be provided to the party which provided the evidence, and they will be given the opportunity to comment on that response before the Panel determines the complaint.

C. Exceptions to the general rule

8. Where a party providing surveillance or recording evidence does not wish to comply with the above procedure and considers an alternative procedure would be preferable, it must at that time:

- (a) advise FOS of its objection and the reasons for the objection; and
- (b) suggest an appropriate process through which the evidence can be made available to the other party, so they can be given a reasonable opportunity to respond to that evidence.

9. An objection to the release of the evidence to the other party under any circumstances will be treated as a refusal to release the evidence, rather than a request for a ruling on the terms on which the information will be exchanged, and will result in the evidence not being made available to the other party or to the Panel.

10. Objections will be referred to the Panel Chair for a formal ruling on the terms and conditions under which the surveillance evidence should be released.

11. In ruling on an objection, the Panel Chair will take into account the need to balance procedural fairness against any legitimate forensic advantage enjoyed by the party providing the evidence, as well as any other matters specifically raised by that party.

12. If the Panel Chair rules that the material should be released (whether immediately or subject to certain conditions) the party retains the choice of either complying with the terms of the ruling or withdrawing the evidence.

13. If the party accepts the ruling, the procedures set out in the ruling will be implemented.

14. If the party withdraws the evidence, it will not be made available to the other party or to the Panel, and the Panel will determine the complaint without reference to the evidence.