

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 9 May 2013

Public Authority: Financial Conduct Authority
Address: 25 The North Colonnade
Canary Wharf
London, E14 5HS

Decision (including any steps ordered)

1. The complainant has requested correspondence from the Financial Reporting Council (FRC) to the Financial Conduct Authority (FCA) about a complaint it had received regarding the audited accounts of a named company. The FCA refused to confirm or deny whether the requested information was held under section 44(2) of the Freedom of Information Act 2000 (FOIA).
2. The complainant's request was made to the Financial Services Authority (FSA). However since the request was made this organisation has changed its name to the Financial Conduct Authority (FCA). This Notice therefore refers to the FCA throughout, however it does relate to a request which was made to the FSA prior to its change of name.
3. The Commissioner's decision is that the FCA has correctly applied section 44(2) FOIA to refuse to confirm or deny whether the requested information is held.
4. The Commissioner requires no steps to be taken.

Request and response

5. On 7 September 2012, the complainant wrote to the FCA and requested information in the following terms:

"Today at 2.37pm I spoke to [named individual] of the Financial Reporting Council who confirmed to me that in early July 2011 the FRC received a complaint/concern regarding the audited accounts of [named company] and other wider issues. I understand as a result she advised

the complainant to contact other agencies including the FSA. I also believe that as a result the FSA was made aware of the complaint by the FRC. Any contact from the FRC to the FSA re this matter, whether email, record of phone call, meeting or letter, would be part of the information I have requested under my FOI."

6. On 3 October 2012 the FCA responded. It refused to confirm or deny whether the requested information was held under section 44(2) FOIA.
7. The complainant requested an internal review on 4 October 2012. The FCA sent the outcome of the internal review on 7 November 2012. It upheld its application of section 44(2) FOIA.

Scope of the case

8. The complainant contacted the Commissioner on 13 November 2012 to complain about the way his request for information had been handled.
9. The Commissioner has considered whether the FCA was correct to neither confirm nor deny whether the requested information is held under section 44(2) FOIA.

Reasons for decision

10. Section 44 FOIA provides that

"(1) Information is exempt information if its disclosure (otherwise than under this Act) by the public authority holding it-

(a) is prohibited by or under any enactment,

(b) is incompatible with any Community obligation, or

(c) would constitute or be punishable as a contempt of court.

(2) The duty to confirm or deny does not arise if the confirmation or denial that would have to be given to comply with section 1(1)(a) would (apart from this Act) fall within any of paragraphs (a) to (c) of subsection (1)."

11. The FCA has explained that section 44(1)(a) exempts information, if held, from disclosure if its disclosure is prohibited by any other enactment or rule of law.

12. The FCA has claimed that the request is for 'confidential information', and if it were held, the release of which under FOIA is prevented by section 348 of the FSMA.
13. Section 348(1) of the FSMA states that –
"Confidential information must not be disclosed by a primary recipient, or by any person obtaining the information directly or indirectly from a primary recipient, without the consent of –
(a) the person from whom the primary recipient obtained the information; and
(b) if different, the person to whom it relates.
14. The operation of the statutory bar is dependent on the consideration of the following issues; firstly, whether the FCA can be classified as a primary recipient, secondly, whether the request is for 'confidential information' and if so, thirdly, whether there is consent to the disclosure or whether this could be obtained.

Is the FSA a primary recipient?

15. A primary recipient is defined at section 348(5) of the FSMA and includes the FCA. The Commissioner therefore accepts that the FCA is a primary recipient for the purposes of the FSMA.

Is the request for confidential information (if it were held)?

16. The FSMA defines 'confidential information' at section 348(2). This describes it as information which relates to the business or other affair of any person and was received by the primary recipient for the purposes of, or in the discharge of, its functions and is not prevented from being confidential.
17. Breaking down the components of the definition, the Commissioner must consider the following questions when seeking to establish whether information is 'confidential' –
 - Does the information relate to the business or other affairs of any person?
 - Was the information received by the primary recipient for the purposes of, or in the discharge of, its functions?
 - Has the information already been made legitimately available to the public?

- Can the information be anonymised?
18. The Commissioner has first considered whether the information, if held, relates to the business or affairs of another person. A person is not defined in FOIA, thus the Commissioner has adopted the usual legal interpretation of a person, namely any entity that is recognised as having legal personality to enter into legal relations.
 19. The Commissioner is satisfied that the information if held does relate to the business or affairs of another person, in this case [named company]. He has therefore gone on to consider whether the information if held was received by the FCA for the purposes of, or in the discharge of, any of its functions.
 20. The FCA has explained that it is concerned with the regulation of financial services and markets in the UK. Under section 19 of the FSMA a person may not carry on a regulated activity in the UK unless he is authorised or exempt. Breach of this prohibition is a criminal offence and also exposes the offender to civil remedies at the hands of its clients as well as the FCA. It confirmed that the FCA has functions of inquiring into, investigating and if appropriate taking action through the courts against persons who breach the prohibition.
 21. In this case the FCA has explained that the named company is not authorised or regulated by the FCA. However the FCA considered that it may have been carrying out a regulated activity for which FCA authorisation is required. It therefore said that the information, if obtained, about the named company's activities would have been received for the purpose of carrying out its function of making inquiries as to whether there had been a breach of the prohibition.
 22. The Commissioner is satisfied that the FCA, without confirming or denying whether it received the information, would be fulfilling a regulatory function in this situation.
 23. Section 348(4) FSMA also states that information may not be deemed confidential information if it has legitimately made available to the public or it can be anonymised.
 24. The Commissioner considers that information, if held will only have been legitimately made available where it has already been placed in the public domain without breaching the FSMA. If the information were held, there is no indication that this has occurred here.
 25. Section 348(4) of the FSMA additionally stipulates that information cannot be confidential information if it can be summarised or so framed that it is not possible to ascertain from it information relating to any particular person. The Commissioner does not consider this to be a

relevant consideration in this case. This is because the direction of the request itself, which makes the named company its subject, removes the possibility of making the information, if held, anonymous.

26. For the reasons outlined above, the Commissioner has determined that the information, if held, is confidential information pursuant to section 348(2) of the FSMA.

If it is confidential information is there consent to its release or can this be obtained?

27. The FSMA allows that information may be disclosed if consent has been received from the person that would have provided the FCA with the information if it were held.
28. The Commissioner has detailed the FCA's submissions in the confidential annex attached to this notice.
29. Section 44(2) of the FOIA provides that the duty to confirm or deny whether information is held does not apply if the confirmation or denial itself would fall within the provisions of section 44(1). The FCA has argued that if it disclosed whether it held information falling within the scope of the request it would be revealing something about the affairs of the company named in the request. This would fall within section 44(1)(a) and hence section 44(2) exempts the FCA from the duty to confirm or deny.
30. Upon consideration of the submissions provided by the FCA, the Commissioner considers that the FCA was correct to neither confirm nor deny whether the requested information is held under section 44(2) FOIA.

Right of appeal

31. 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: 0116 249 4253

Email: informationtribunal@hmcts.gsi.gov.uk

Website: www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm

32. 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.
33. 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

Pamela Clements
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