

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 9 July 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 information relating to a named company from the Financial Conduct Authority (FCA). The FCA refused to provide the information requested at part 1 of the request under section 44(1)(a) and section 43(2) FOIA. It refused to confirm or deny whether it held the information requested at part 2 of the request under section 31(3), 40(5), 42(2), 43(2) and 44(3) FOIA. It also refused to confirm or deny whether it held the information requested at part 3 of the request under section 30(3), 40(5), 43(3) and 44(2) 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 correctly withheld the information requested at part 1 of the request under section 44(1)(a) and section 43(2) FOIA. The Commissioner also considers that the FCA was correct to neither confirm or deny whether it held the information requested at parts 2 and 3 of the request under section 43(3) and section 44(2) FOIA.
4. The Commissioner requires no steps to be taken.

Request and response

5. The complainant made a request for the following information:
 - "1. Under the Freedom of Information Act please provide me with a copy of any correspondence received or documents held by the Financial Services Authority between the dates of January 2010 and today's date [7 September 2012] concerning any concerns raised with it about [named company]. By correspondence I mean email, letter, record of phone call, reports and other documents.*
 - 2. Please also provide any copies of documents, emails, letters, notes of meetings or phones calls concerning any action the FSA took as a result of the above concerns received.*
 - 3. Please also provide any copies of documents, emails, letters, notes of meetings or phones calls concerning any contact between the FSA and Serious Fraud Office and or any other external agencies following the above concerns."*
6. On 5 October 2012 the FCA responded. In relation to part 1 of the request, it confirmed that whilst it held some information, this was exempt from disclosure under section 43(2) and section 44(1)(a) FOIA. In relation to part 2 of the request, it refused to confirm or deny whether this information was held under section 31(3) FOIA. Finally in relation to part 3 of the request, again it refused to confirm or deny whether this information was held under section 30(3) and 44(2) FOIA.
7. The complainant requested an internal review on 10 October 2012, the FCA sent the outcome of its internal review on 29 November 2012. It upheld its original position.

Scope of the case

8. The complainant contacted the Commissioner on 10 October 2012 to complain about the way his request for information had been handled.
9. During the course of the Commissioner's investigation, the FCA also applied section 42 and section 40(2) FOIA to some of the information requested at part 1 of the request. It also refused to confirm or deny whether the information requested at part 2 of the request was held under section 40(5), 42(2), 43(3) and 44(2) FOIA and whether the

information requested at part 3 of the request was held under section 40(5) and 43(3) FOIA.

10. The Commissioner has considered whether the FCA was correct to apply the exemptions cited.

Reasons for decision

Part 1 of the request

11. Section 44(1)(a) FOIA has been applied to incoming correspondence and information provided to the FCA. Section 43(2) FOIA has been applied to information created or provided by the FCA. The application of both exemptions has been considered below.

Section 43(2)

12. Section 43(2) FOIA provides an exemption from disclosure of information which would or would be likely to, prejudice the commercial interests of any person (including the public authority holding it). This is a qualified exemption, and is therefore subject to the public interest test.
13. The FCA has explained that the complainant requested information relating to concerns about a named company. It has explained that it considers that the named company's commercial interests would be likely to be prejudiced if this information were disclosed.
14. In order to determine whether the exemption is engaged the Commissioner has first considered whether the prejudice claimed relates to the named company's commercial interests.
15. The term 'commercial interests' is not defined in the FOIA. However the Commissioner has considered his awareness guidance on the application of section 43. This comments that,

 "...a commercial interest relates to a person's ability to participate competitively in a commercial activity, i.e. the purchase and sale of goods or services."
16. The Commissioner considers that the [named company] provides a service for profit and it is the FSA's contention that disclosure of information about any concerns about that company would be likely to impact its ability to participate competitively in this commercial activity.

17. The Commissioner therefore considers that the withheld information falls within the scope of the exemption.
18. The Commissioner has gone on to first consider how any prejudice to the commercial interests of the successful bidder would be likely to be caused by the disclosure of the requested information.
19. The FCA has explained that disclosure of information about any concerns raised about [named company] would be likely to prejudice the commercial interests of that company. It has provided further details in support of this position, contained at paragraph 1 in the confidential annex attached to this Notice.
20. In this case the FCA has not contacted the company to obtain its views on disclosure and whether it considers the prejudice would be likely to occur. The Commissioner must determine whether the prejudice claimed is "real, actual or of substance". In this case, having viewed a sample of the withheld information and the FCA's submissions contained in the confidential annex attached to this Notice, the Commissioner is satisfied the prejudice claimed is real, actual and of substance despite the fact that it has not obtained the company's views on disclosure in this case.
21. The Commissioner therefore considers that section 43(2) FOIA was correctly engaged in this case.
22. As section 43(2) is a qualified exemption, the Commissioner has gone on to consider the public interest arguments in this case.

Public interest arguments in favour of disclosing the requested Information

23. The Commissioner considers that there is a public interest in the FCA operating in an open and transparent way and that the FCA is held accountable for the decisions it makes. The FCA regulates the financial services industry which is accessed by the majority of the population and therefore, as the regulator of this industry, there is a strong public interest in disclosing information which demonstrates that it is carrying out this work effectively.

Public interest arguments in favour of maintaining the exemption

24. The FCA has explained that it believes the following public interest arguments favour maintaining the exemption:
 - The FCA has said that it would not be in the public interest to disclose information about its inquiries where no decision has been reached to take formal enforcement action. It said that this would be

likely to prejudice the commercial interests of the company concerned and this would not be in the public interest.

Balance of the public interest

25. The Commissioner considers that there is a public interest in openness and transparency, and in accountability in relation to the regulatory activity of the FCA. The Commissioner also considers that there is a public interest in disclosure of information which will inform the public about how decisions are made.
26. The Commissioner does however consider that there is a strong public interest in not disclosing information which would be likely to commercially disadvantage private companies which may have been investigated by the FCA, but as a result no decision has been reached to take formal enforcement action.
27. On balance, the Commissioner considers in this case that the public interest arguments in favour of disclosure are outweighed by the public interest arguments in favour of maintaining the exemption.

Section 44(1)(a)

28. 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.

29. The FCA has explained that section 44(1)(a) exempts information from disclosure if its disclosure is prohibited by any other enactment or rule of law.
30. The FCA has claimed that the request is for 'confidential information', the release of which under FOIA is prevented by section 348 of the FSMA.
31. 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.

32. 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 release of the information or whether this could be obtained.

Is the FCA a primary recipient?

33. 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.
34. The FCA has explained that its application of section 44 extends to the FCA's views, considerations and other internally-created information, where the 'created' information incorporates information received by the FCA from an external party. It said that disclosure of the 'created' information would disclose the content or nature of the confidential information which has been received by the FCA, given the inextricable link between these types of information.
35. The Commissioner accepts the FCA's application of section 44 to the withheld information on this basis.

Is the request for confidential information?

36. The FSMA defines 'confidential information' at section 348(2). This describes it as information which relates to the business or other affairs 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.
37. 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?
38. The Commissioner has first considered if the information 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.
 39. The Commissioner is satisfied that the information 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 was received by the FCA for the purposes of, or in the discharge of, any of its functions.
 40. The FSMA 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.
 41. 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 it obtained about the [named company's] activities was received for the purpose of carrying out its function of making inquiries as to whether there had been a breach of the prohibition.
 42. The Commissioner is content that the FCA was fulfilling a regulatory function by receiving the information.
 43. Section 348(4) FSMA also states that information may not be deemed confidential information if it has legitimately been made available to the public or it can be anonymised.
 44. The Commissioner considers that information will only have been legitimately made available where it has already been placed in the public domain without breaching the FSMA. There is no indication that this has occurred here.
 45. 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 focus of the

request itself, which makes [named company] its subject, removes the possibility of making the information anonymous.

46. For the reasons outlined above, the Commissioner has determined that the information 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?

47. The FSMA allows that information may be disclosed if consent has been received from the person that provided the FCA with the information, in this case [named company].
48. The Commissioner understands that [named company] has not given its consent to the release of the requested information. As such, he considers that the information remains confidential information for the purposes of the statutory bar provided by section 348 of the FSMA.
49. The FSA was therefore correct to rely on section 44(1)(a) of FOIA to withhold the requested information.
50. As the Commissioner considers that section 44(1)(a) FOIA was correctly applied to withhold the information requested at part 1 of the request, he has not gone on to consider the application of section 40(2), section 42 or section 43(2) FOIA any further.

Parts 2 and 3 of the request

51. Section 44(2) FOIA has been applied to information, if held, that would be incoming correspondence. Section 43(3) FOIA has been applied to information, if held, that would have been created or provided by the FCA. The application of both exemptions has been considered below.

Section 43(3)

52. Section 43(3) FOIA provides an exemption from confirming or denying whether or not information is held where this would or would be likely to, prejudice the commercial interests of any person (including the public authority holding it). This is a qualified exemption, and is therefore subject to the public interest test.
53. For the reasons set out at paragraphs 13-17 above, if the information were held it would fall within the scope of the exemption.
54. The Commissioner has gone on to first consider how any prejudice to the commercial interests of the [named company] would be likely to be

caused by confirming or denying whether the requested information is held.

55. The FCA has explained that confirming or denying whether any action has been taken or whether it has contacted the Serious Fraud Office about any concerns raised about [named company] would be likely to prejudice the commercial interests of that company. It has provided further details in support of this position, contained at paragraph 2 in the confidential annex attached to this Notice.
56. In this case the FCA has not contacted the company to obtain its views on confirming or denying whether the requested information is held and whether it considers the prejudice claimed would be likely to occur. The Commissioner must determine whether the prejudice claimed is "real, actual or of substance". Based upon the FCA's submissions contained in the confidential annex attached to this Notice, in this case the Commissioner is satisfied the prejudice claimed is real, actual and of substance despite the fact that it has not obtained the company's views on disclosure in this case.
57. The Commissioner therefore considers that section 43(3) FOIA was correctly engaged in this case.
58. As section 43(2) is a qualified exemption, the Commissioner has gone on to consider the public interest arguments in this case. When considering a neither confirm or deny response the effect of section 2(1)(b) of FOIA is to release the public authority from the obligation to confirm or deny that it holds the information requested if the public interest in neither confirming nor denying outweighs the public interest in disclosing whether it holds the information

Public interest arguments in favour of disclosing whether or not the Information is held

59. The Commissioner considers that there is a public interest in the FCA operating in an open and transparent way and that the FCA is held accountable for the decisions it makes. The FCA regulates the financial services industry which is accessed by the majority of the population and therefore, as the regulator of this industry, there is a strong public interest in disclosing whether or not the information, is held which demonstrates that it is carrying out this work effectively.

Public interest arguments in favour of neither confirming nor denying if the information is held

60. The FCA has explained that it believes the following public interest arguments favour maintaining the exemption:

- The FCA has said that it would not be in the public interest to confirm or deny whether any further action was taken or whether concerns were discussed with the Serious Fraud Office, where no decision has been reached by the FCA to take formal enforcement action. It said that this would be likely to prejudice the commercial interests of the company concerned and this would not be in the public interest.

Balance of the public interest

61. The Commissioner considers that there is a public interest in openness and transparency, and in accountability in relation to the regulatory activity of the FSA. The Commissioner also considers that there is a public interest in disclosure of information, if held which will inform the public about how decisions are made.
62. The Commissioner does however consider that there is a strong public interest in not confirming or denying whether information is held which would be likely to commercially disadvantage private companies which may have been investigated by the FCA, but as a result no decision has been reached to take formal enforcement action.
63. On balance, the Commissioner considers in this case that the public interest arguments in favour of confirming or denying whether the information is held are outweighed by the public interest arguments in favour of neither confirming nor denying whether the information is held.
64. 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 under Parts 2 and 3 of the request is held under section 43(2) FOIA. He has not therefore gone on to consider the application of the other exemptions to these parts of the request.

Section 44(2)

65. 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)."

66. 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.

67. 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.

68. 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.

69. 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?

70. 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)?

71. 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.

72. 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?
73. The Commissioner has first considered if 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.
74. 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.
75. 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.
76. 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 if it obtained information about the named company's activities this 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.
77. The Commissioner is content that the FCA was fulfilling a regulatory function if it received any such information.

78. 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.
79. The Commissioner considers that the fact as to whether or not the requested information is held, will only have been legitimately made available where it has already been placed into the public domain without breaching the FSMA. There is no indication that this has occurred.
80. 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.
81. 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?

82. 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.
83. The Commissioner has detailed the FCA's submissions in the confidential annex attached to this notice.
84. 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.
85. 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 under Parts 2 and 3 of the request is held under section 44(2) FOIA. He has not therefore gone on to consider the application of the other exemptions to these parts of the request.

Right of appeal

86. 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

87. 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.
88. 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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