

## **Freedom of Information Act 2000 (FOIA)**

### **Decision notice**

**Date:** 16 July 2019

**Public Authority:** Financial Conduct Authority  
**Address:** FCA Head Office  
12 Endeavour Square  
London  
E20 1JN

#### **Decision (including any steps ordered)**

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1. The complainant has requested information regarding the Financial Conduct Authority's (FCA) investigation of the management fees charged on closet tracker funds. So far as is relevant, the FCA refused the first and third part of the request under the exemptions provided by section 31 – law enforcement, section 43 – prejudice to commercial interests and section 44 – statutory prohibition. It also refused part five of the request under section 12 – on the basis that complying with that element of the request would exceed the appropriate (cost) limit. During the course of the Commissioner's investigation the FCA withdrew its reliance on section 12 in respect of part five and instead applied the exemptions provided by sections 31, 43 and 44 to that information.
2. The Commissioner's decision is that the FCA is entitled to withhold the requested information under the exemptions provided sections 31 and 44.
3. The Commissioner does not require the public authority to take any further action in this matter.

#### **Request and response**

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4. On 11 May 2018 the complainant wrote to the FCA regarding its investigation of closet index tracker funds and requested information of the following description:

"1. Pursuant to the FCA's announcement, 64 out of the 84 funds subject to the FCA's review have not been adequately describing how investors' money were being managed and have been asked to make changes to their marketing materials. Please provide details of these funds and please also confirm which (if not all) of these asset managers are involved in the £34m compensatory scheme?

2. Please also detail which and how, the 64 funds referred to above, communicated any required changes in their marketing materials to their existing clients?

3. Please provide details of the quantitative and qualitative criteria that the FCA analysed to identify these 64 funds.

4. Which asset manager is facing enforcement action from the FCA (as reported) for "*very misleading*" marketing information?

5. What is the basis for the compensation provided and how is the loss of the investors calculated?"

5. On 9 July 2018 the FCA responded. It refused to provide the information requested in questions 1, 2 and 4 under a combination the exemptions provided by:

- section 31(1)(g) – law enforcement by virtue of subsections (2)(a),(b) and (c)
- section 43 - commercial interests
- section 44 – statutory prohibition

6. Specifically, question 1 was refused under all the exemptions listed above, question 3 was refused under the exemptions provided by section 31 and question 4 was again refused under all the exemptions cited.

7. In respect of questions 2 and 5 the FCA provided explanations of procedures the FCA had followed.

8. The complainant requested an internal review on 25 July 2018, at which time he challenged the FCA's response to question 1 and asked for clarification of certain issues relating to the FCA's responses to questions 3 and 5. The FCA sent him the outcome of this internal review on 12 September 2018.

- In respect of question 1, the FCA provided the number of funds involved in the voluntary payments, but continued to withhold the rest of the requested information under the exemptions provided by sections 31, 43 and 44.
  - In respect of question 3 the FCA maintained its reliance on section 31 to withhold the requested information.
  - The FCA did not review its position in respect of question 5, but instead provided some clarification of the FCA's original response. That is, it provided a more detailed explanation of the FCA's involvement in the calculation of the compensation provided to investors. The FCA went on to advise the complainant that if he remained dissatisfied he was welcome to seek a review of that response.
9. Having received the FCA's clarification of question 5, the complainant wrote to the FCA on 11 October 2018 asking it to carry out a review of its response to that question. When doing so he commented on the explanations provided to date and asked for further explanations about the FCA's involvement in the award of compensation.
  10. The FCA wrote to the complainant on 12 December 2018 informing him of the outcome of the internal review of question 5. In response to his latest comments, the FCA provided a further explanation of the procedures that had been followed, but said that to extent that the request was seeking the underlying information, the FCA was refusing to disclose the information captured by question 5 on the basis that to do so would exceed the appropriate limit established under section 12 of the FOIA.
  11. In the meantime the complainant had written to the Commissioner on 1 November 2018. At that time he asked the Commissioner to investigate whether the FCA was entitled to rely on the exemptions cited to withhold the names of the funds requested in question 1 and the criteria requested in question 3.
  12. The Commissioner acknowledged this complaint on 15 November 2018.
  13. Once the complainant received the outcome of the FCA's internal review of question 5 on 12 December 2019, he wrote to the Commissioner on 14 February 2019 and asked her to investigate the FCA's response to that question too.
  14. During the course of the Commissioner's investigation, in a letter to the Commissioner dated 17 April 2019, the FCA withdrew its application of section 12 to part 5 of the request. However it continued to withhold the information under the exemptions provided by sections 31, 43 and 44.

## Scope of the case

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15. As set out above the complainant originally contacted the Commissioner on 1 November 2018 to complain about the way the FCA had handled questions 1 and 3 of his request. This information had been withheld under a combination of the exemptions provided by sections 31, 43 and 44. Later, on 14 February 2019 the complainant asked the Commissioner to also consider had dealt with question 5 of his request. At that time the FCA was relying on section 12 to refuse that element of the request. However during the course of the Commissioner's investigation the FCA withdrew its reliance on section 12 and applied the exemptions provided by sections 31, 43 and 44.
16. The Commissioner considers that the matter to be decided is whether any of the information captured by questions 1, 3 and 5 is exempt under the exemptions provided by sections 31, 43 or 44. Section 44 is an absolute exemption, i.e. it is not subject to the public interest. However where the Commissioner considers the application of the exemptions provided by either section 31, or section 43, the Commissioner will go on to consider the application of the public interest test.
17. The Commissioner will start by looking at whether section 31 is engaged in respect of the information to which it has been applied.

## Reasons for decision

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### Section 31 – law enforcement

18. This exemption has been applied to all the information captured by questions 1 and 3 of the request, together with a limited amount of the information captured by question 5.
19. The FCA is relying on section 31(1)(g) by virtue of section 31(2)(c) as its basis for withholding the requested information. So far as is relevant section 31(1) of the FOIA provides that,

Information which is not exempt information by virtue of section 30 is exempt information if its disclosure under this Act would, or would be likely to, prejudice –

(g) the exercise by any public authority of its functions for any of the purposes specified in subsection (2),

Section 31(2) - the purposes referred to in subsection 1(g) are -

(c) the purpose of ascertaining whether circumstances which would justify regulatory action in pursuance of any enactment exist or may arise.

20. As set out above, section 31 cannot be applied to information which is exempt under section 30. In broad terms, section 30 provides an exemption for information which was held by a public authority at any time for the purposes of a criminal investigation. The Commissioner is satisfied that the FCA had not held the information captured by the request for the purpose of any criminal investigations and that therefore the exemption provided by section 31 is available to the FCA.
21. The exemptions provided by section 31 can be applied on the basis that the public authority considers the alleged prejudice either 'would' occur, or that they would only be 'likely' to occur. From the FCA's submission the Commissioner understands the FCA to be applying section 31 on the basis that the prejudice to its functions would occur. No one can say with absolute certainty what may happen in the future, but the term 'would' is taken to mean that it is more probable than not that the prejudice would occur if the information was disclosed.
22. Furthermore for the exemption to be engaged the prejudice must be more than hypothetical or trivial. It must be real, actual and of substance.
23. As a result of its review of the financial markets 'Meeting Investors' Expectations', published April 2016, the FCA had become aware of potential issues around the way in which some funds were being marketed in terms of how those products were being described to consumers. It therefore identified and then reviewed a number of funds and provided feedback to the firms concerned. Some of those firms were asked to take further action in order to ensure consumers would have a clearer understanding of how their funds were managed. The requested information was collected, or created as part of that investigation.
24. The FCA has explained that under Part XI of the Financial Services and Markets Act 2000 (FSMA) the FCA has the function of monitoring firms' compliance with the FCA's requirements and of inquiring into, investigating and, if appropriate, taking action in relation to the firms it regulates. Under Part 1A, Chapter 1C FSMA, the FCA has a consumer protection objective in securing an appropriate degree of protection for consumers. The FCA has explained that it was exercising these functions when reviewing, what it refers to as, closet tracker funds. It is these functions that the FCA argues would be prejudiced if the information which is being withheld under section 31 was disclosed.
25. The FCA gathered information about a number of funds and the performance of those funds. From its analysis of this information the

FCA identified those funds which had characteristics associated with closet tracker funds. However this was simply the start of the process and the FCA needed to hold detailed discussions with the firms in question, and to gather more detailed information from them, in order to properly determine the nature of those funds and whether any action was required to protect consumers. The FCA argued that public disclosure of any opinions, views or judgements of the FCA, could be interpreted negatively by external commentators. Consumers may interpret any suggestion that a particular fund had been investigated by the FCA as a cause of concern and lead to them avoiding that fund or, if they had already invested in the fund, withdrawing from it. This would have a detrimental impact on firms managing those funds. It could also harm the interests of investors if a misinterpretation of the FCA's engagement with a firm resulted in well performing funds being avoided or withdrawn from. This would also be counter to the FCA's regulatory objectives.

26. As explained above, having initially identified potential closet tracker funds, the FCA had to engage with the firms concerned in order to obtain a better understanding of how their funds were managed. The FCA considers that for the funds to fully engage with these enquiries it is important that the firms have confidence that the matter is dealt with in confidence, at least until such time as any formal action is deemed necessary. The FCA believes that if it was unable to reassure firms that that their dialogue with the FCA would remain confidential, the firms would be reluctant to volunteer the information it required. This would frustrate the FCA's investigations meaning it was not able to identify real issues of concern as swiftly as it does at present. This would be to detriment of investors.
27. The Commissioner acknowledges the complainant's argument that firms have a strong incentive to cooperate with the FCA, as doing so may allow any problems identified by the FCA to be remedied without it having to rely on formal action. However the Commissioner also recognises the value of firms being willing to fully engage in the FCA's investigation and in those firms providing full and frank response to the FCA in a timely manner.
28. The FCA has also argued that if, for example, it disclosed the details it sought from firms when investigating whether a fund was a closet tracker fund, others firms would be alerted to the nature any similar enquiries made of them in the future. This could lead to them providing data in a format that masked the characteristics which the FCA was trying to detect. This would frustrate the purpose of the FCA's investigation and risk misconduct going undetected.
29. A further argument presented by the FCA is that disclosing the requested information would lead to a loss of the flexibility and

judgement it currently exercises in respect of how it uses its procedures for monitoring compliance with how the industry is applying the FCA's rules and guidance. Expanding on this point, the FCA explained it takes a proportionate approach to its regulation of the financial markets, prioritising its work on areas and firms that pose the higher risk. It takes risk based judgements about whether a firm's business model, and how it is run, is fair to consumers and upholds market integrity. If the FCA finds poor practice it has a range regulatory tools that it can use to ensure that firms and individuals who do not follow FCA rules, do not damage consumer interests, or the operation of the financial markets. Therefore the FCA considers it is crucial that its flexibility and judgement is not harmed in any way.

30. The Commissioner recognises it is important for the FCA to retain its flexibility in terms of the regulatory tools it can use and which firms it considers most appropriate to use them on. However, apart from the potential for the disclosure of the withheld information to limit the effectiveness of its monitoring of closet tracker funds, the Commissioner is not satisfied there would any wider constraint placed on the FCA's ability to exercise its regulatory activities and judgement in performing its regulatory functions.
31. Having viewed the information being withheld under section 31 and having considered the arguments raised by the FCA, the Commissioner finds that there are grounds for engaging the exemption on the basis that disclosing the information would prejudice the FCA's regulatory function. In reaching this conclusion the Commissioner has given particular weight to the FCA's argument that disclosing information that would identify the firms involved would signal to those the FCA regulates that information they shared with it may be disclosed to the public at a later date and that as a consequence they would be less willing to cooperate in future investigations. Furthermore, disclosing some of the information would provide other firms with an insight to the nature of the investigation being conducted by the FCA when collating information on potential closet tracker funds in the future.
32. Having found the exemption is engaged the Commissioner has gone on to look at the public interest arguments for and against maintaining the exemption.

### **Public interest**

33. The public interest test is set out in section 2 of the FOIA. It provides that even though the exemption is engaged the information can only be withheld if, in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosure.

34. The FCA recognises the public interest in providing information to the public to assist them in making decision about their dealings with the bodies and sectors it regulates. There is a general public interest in disclosing information where this would lead to greater accountability and transparency. This, the FCA says, is particularly true where disclosure would contribute to the public's understanding of how the FCA uses its statutory powers in respect of matters, such as the marketing of closet trackers, which directly affects consumers.
35. The complainant has presented further public interest arguments in favour of disclosure. The complainant considers that by failing to make the requested information available there is a risk that consumers will be misled. Although the complainant recognises there is some value in the FCA conducting its enquiries in a largely confidential manner, the complainant does not consider this should tip the balance towards those firms found to be at fault, not being held publicly accountable. The complainant argues that not disclosing the requested information would signal to firms that they could engage in misleading conduct with no public sanction or accountability, whereas disclosure would make it clear which types of conduct will not be tolerated and this would help ensure the integrity of the financial markets.
36. Furthermore the complainant argues that without public scrutiny of which funds were found to have misleading marketing material and what steps the FCA took to address those problems, it is not possible for investors to reach an informed opinion of whether the FCA's actions adequately remedied the problems, or whether any financial compensation was adequate.
37. The Commissioner would add that disclosure would not only help investors better understand whether their interests were properly protected, disclosure would also shed light on whether the FCA was carrying out its functions in an effective manner and exercising its discretion appropriately.
38. The FCA argues that it makes a substantial amount of information available via its website which contributes to the awareness of how it operates and what can be expected of it. This, it says, promotes the public interest in transparency of its regulatory action. The FCA argues that therefore there is already sufficient safeguards to the public interest in ensuring accountability for how it is exercising its functions.
39. Whilst recognising that the information published on its website goes some way to explaining how it carries out its role and the particular areas of work it is tackling, the Commissioner certainly does not consider this extinguishes the public interest arguments in favour of disclosure which are considered below.



40. Weighed against the public interest factors in favour of disclosure are those in favour of maintaining the exemption. By finding the exemption is engaged the Commissioner has accepted that there is more than fifty percent risk of a real and actual prejudice to the regulatory functions of the FCA.
41. The arguments in favour of maintaining the exemption presented by the FCA stress the importance placed on the firms it regulates being willing to enter into open and candid discussions with the FCA. The FCA argues, and the Commissioner accepts, that disclosing information that would identify the firms involved would be damaging to them. If the FCA was not able to obtain the voluntary cooperation of such firms, because those firms were concerned the nature of their discussion could be disclosed at a later date, the FCA would not be able to collect the information it required in order to make informed decisions about the measures needed to protect investors.
42. If the FCA could not rely on the voluntary cooperation of those whom it regulates it would have to rely on formal regulatory tools to obtain the information it required. This would not only delay the FCA's consideration of the matters under investigation, but also formal enforcement action is more costly. It is therefore in the public interest that the FCA can exercise discretion over where and when it uses those powers.
43. The FCA argued that the information could be misconstrued, or misinterpreted. Normally the Commissioner is dismissive of such arguments, as a public authority can always provide additional context to a disclosure in order to mitigate the risk of misinterpretation. However, in this particular case the Commissioner is willing to acknowledge that it would be more difficult to reduce the potential reaction of investors and so the harm to the firms concerned. Furthermore if investors withdrew or avoided funds where steps had already been taken to address the FCA's concerns, this could have a negative impact on the financial health of investors.
44. If the requested information related to a historic investigation by the FCA the impact of disclosing the information would be less significant. However the information is still considered by the FCA to be current. Therefore firms would be much more sensitive to the disclosure of information which had only fairly recently been provided to the FCA on the assumption it would remain private. Similarly, the reaction of investors would be greater.
45. The FCA also contends that as there is no routine publication of the material it holds about specific firms or groups of firms, then disclosure of the requested information would attract disproportionate attention which would heighten the harm to both firms and investors, so

increasing the potential for the firms to be more cautious when engaging with the FCA in the future.

46. Finally the FCA argues that as the firms at fault have now taken steps to remedy the problems, those investors affected, should have received a voluntary payment from the firms, or a letter explaining the changes that had been made to their funds. Similarly, would be investors should have more accurate information available to them to inform their choice of investments.
47. In weighing the competing arguments for and against disclosure the Commissioner understands the rationale of the argument that these funds should be named and that the steps which the FCA has required the firms managing those funds to take, should be disclosed. However the FCA has already taken steps to protect the integrity of the market and investors. Even so, there is a risk of an adverse response by investors if those funds were identified. This would have an adverse effect on both the firms and, potentially, investors, if this led them to unnecessarily avoiding particular funds.
48. There is still a very strong public interest in having access to information which would allow the public to assess whether, having publicly stated that problems had been found with a number of unidentified funds, the steps taken by the FCA are appropriate and whether the level of any recompense is adequate.
49. However meeting that public interest would be at the cost of the cooperation which the FCA requires from the firms it regulates when investigating concerns. This would undermine the ability of the FCA to gain a thorough understanding of an issue and determine what action is required so as to protect consumers as swiftly as possible.
50. In light of the above the Commissioner finds that the public interest in maintaining the exemption outweighs the public interest in disclosure. The FCA is entitled to rely on section 31 to withhold the information to which it has been applied.

#### **Section 44 – statutory prohibition on disclosure**

51. Having found that section 31 can be relied on to withhold all the information captured by questions 1 and 3, together with some of the information captured by question 5, the Commissioner will now look at the FCA's arguments for withholding the remaining information, i.e. the rest of the information requested in question 5. All of this information has been withheld under section 44 of the FOIA.
52. Section 44(1) of the FOIA states that;

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

(a) is prohibited by or under any enactment."

53. The FCA argues that section 348 of the FSMA prohibits the disclosure of any confidential information that it has received in carrying out regulatory functions except in certain limited circumstances, none of which apply to this case. So far as is relevant the section 348 of the FSMA is as follows:

Section 348 FSMA – Restrictions on disclosure of confidential information

(1) 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

(2) In this Part "confidential information" means information which -

(a) relates to the business or other affairs of any person;

(b) was received by the primary recipient for the purposes of, or in the discharge of, any function of the FCA, the Prudential Regulation Authority or the Secretary of State under any provisions made by or under this Act: and

(c) is not prevented from being confidential by subsection (4).

(4) Information is not confidential information if -

(a) it has been made available to the public by virtue of being disclosed in any circumstances in which, or for any purposes for which, disclosure is not precluded by this section; or

(b) it is in the form of a summary or collection of information so framed that it is not possible to ascertain from it information relating to any particular person.

(5) Each of the following is a primary recipient for the purposes of this Part -

(a) the FCA;

54. A breach of section 348 of the FSMA is a criminal offence.
55. The statutory prohibition applies to disclosures of information received by a primary recipient. The Commissioner accepts that under section 348(5) of the FSMA, the FCA is a primary recipient of information.
56. The Commissioner has therefore gone on to consider whether the information is 'confidential information' in accordance with section 348(2) of the FSMA. Having viewed the withheld information the Commissioner is satisfied that it clearly relates to that investigation and therefore the business affairs of those firms. The condition set out in section 348(2)(a) is therefore satisfied.
57. The Commissioner has also considered whether the information was received by the FCA. Again, having viewed the withheld information the Commissioner is satisfied that the majority of the information was directly received from the firms involved. Some of the information however was actually created by the FCA, but is inextricably linked to information received from those firms, for example, a document recording one firm's plan to address the issues which the FCA had identified. The Commissioner is satisfied that such information constitutes information which was 'received' for the purpose of section 348(2)(b) and is therefore still capable of being considered confidential information.
58. As already discussed the request relates to the FCA's investigation in to the way that certain funds were marketed following concerns that some funds were, what are referred to as closet tracker funds, and the steps that the FCA required the firms managing those funds to put in place to remedy any problems that were identified. As such the FCA says the information relates to the discharge of its supervisory function of monitoring how firms comply with our rules and guidance. The Commissioner therefore accepts that the FCA holds the information for one of its regulatory functions.
59. In light of the above it would appear that the requested information is 'confidential information' in accordance with section 348(2). However the Commissioner has gone onto to consider whether any of the provisions set out in section 348(4) are relevant. The complainant has informed the Commissioner that a limited number of firms have been named in a press article which claims the firms have acknowledged they had to make changes to their marketing materials. However those firms have not revealed any details of FCA's findings, or identified the particular funds in question. The FCA has advised the Commissioner that apart from that, very limited information, the requested information is not in the public domain. The Commissioner accepts that the detailed

information captured by the request is different from that which a very small number of firms have already disclosed. Therefore the conditions provided by section 348(4)(a) is not satisfied and the information can still be considered 'confidential'. Nor is the information in the form of a summary or collection of information which is anonymised. Therefore the FCA could not rely on section 348(4)(b) to dis-apply the statutory prohibition.

60. In light of the above the Commissioner is satisfied that the rest of the information capture by question 5 of the request constitutes 'confidential information', it was received by a primary recipient, the FCA, and therefore its disclosure would breach the statutory prohibition created by section 348(1) unless the person from whom the information was obtained, or the person to whom it relates, has consented. The FCA has confirmed that none of the parties concerned have consented to the disclosure of the information.
61. Under section 349 of the FSMA, the FCA can still disclose confidential information if that disclosure was made for the purpose of facilitating the carrying out of a public function and if the disclosure also satisfies one of the conditions prescribed in the Financial Services and Markets Act 2000 (Disclosure of Confidential Information) Regulations 2001 (SI 2001 No.2188). However the Commissioner finds that this section is not relevant in respect of a disclosures made under the FOIA. This is because disclosing information in response to a freedom of information request is not a statutory function of the FCA. Furthermore, section 44 states explicitly that when considering the application of any statutory prohibition, the fact that the disclosure would be in response to a request under the FOIA should be ignored, i.e. section 44 states that:  
  
"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,"
62. Therefore the Commissioner is satisfied that section 349 of the FSMA does not dis-apply the statutory prohibition.
63. As a consequence, the Commissioner finds that section 348 of the FSMA prohibits the disclosure of the information requested in question 5. The information is therefore exempt information under section 44(1)(a) of the FOIA. This exemption is not subject to the public interest test. The FCA is entitled to withhold the residual information.

## **Right of appeal**

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64. 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: 0870 739 5836

Email: [grc@justice.gov.uk](mailto:grc@justice.gov.uk)

Website: [www.justice.gov.uk/tribunals/general-regulatory-chamber](http://www.justice.gov.uk/tribunals/general-regulatory-chamber)

65. 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.
66. 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**

**Rob Mechan**  
**Senior Case Officer**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
**Cheshire**  
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