

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

### **Decision notice**

**Date:** 6 October 2022

**Public Authority:** Financial Conduct Authority

**Address:** 12 Endeavour Square

London

E20 1JN

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

---

1. The complainant has requested information relating to a "lessons-learned exercise" conducted by the Financial Conduct Authority's (FCA) Risk and Compliance Oversight Division.
2. The FCA provided the complainant with a redacted copy of the requested information. The FCA relied on sections 31(1)(g), 40(2), 42 and 44(1)(a) of FOIA to withhold the redacted information. The complainant has not challenged the FCA's reliance on section 40 of FOIA.
3. The Commissioner's decision is that the FCA was entitled to rely on sections 31(1)(g), 42 and 44(1)(a) to withhold the redacted information.
4. However, the Commissioner has recorded a procedural breach of section 17(3) of FOIA, as the FCA failed to complete its deliberations on the balance of the public interest within a reasonable time.
5. The Commissioner does not require the public authority to take any steps as a result of this decision notice.

### **Request and response**

---

6. On 29 December 2020, the complainant made the following request for information to the FCA:

*"Paragraph 2.2 of the 26 November 2020 FCA board minutes reference 'an earlier lessons learned exercise conducted by the Risk and Compliance Oversight Division.'*

*1. When was that document (i) commissioned and (ii) completed?*

*2. Please provide me with a copy of that document, redacted where disclosure is not legally permissible (for instance, personal data, legal and professional privilege and s348 where the information has not already been made public and the relevant counterparties have refused permission to disclose)"*

7. The FCA wrote to the complainant on 27 January 2021 and stated that it was extending the time to respond to the request in order to complete its public interest test, in line with section 10(3) of FOIA. It stated that it was considering the public interest test in relation to section 31 (law enforcement) and section 36 (prejudice to the effective conduct of public affairs) of FOIA. The FCA stated that it hoped to respond to the complainant by 24 February 2021.
8. The FCA wrote to the complainant on 24 February 2021, advising that it had not been able to complete the work on the request. The FCA apologised for this delay and stated that it anticipated being able to complete the work and send a response by 12 March 2021.
9. Having not received a substantive response on 13 March 2021, the complainant wrote to the FCA for an update on the status of the request.
10. The FCA responded to the complainant on 19 March 2021, stating that it was not yet in a position to provide a full response to the request as the public interest was still being considered. It stated that it would endeavour to respond to the complainant by 31 March 2021.
11. On 1 April 2021, as the complainant had not received a substantive response, they wrote to the FCA stating that if they did not receive a response by close of play on 9 April 2021, they would raise the matter as a formal complaint with the Commissioner.
12. The FCA responded to the complainant on 9 April 2021, stating that it was still not yet in a position to provide a full response to the request, as the public interest was still being considered. It stated that it would endeavour to respond by 23 April 2021.
13. On 24 April 2021, as the complainant had still not received a substantive response, they wrote to the FCA stating that if they did not receive a response by close of play on 29 April 2021, they would refer the matter as a formal complaint to the Commissioner.
14. The FCA responded to the complainant's request on 14 July 2021. It provided the complainant with the information requested in part one of

the request. The FCA refused to provide the information requested in part two of the request, relying on sections 31 and 36 of FOIA.

15. The complainant requested an internal review on 18 July 2021.
16. The FCA responded to the complainant on 16 August 2021 and stated that it had still not reached a decision regarding their request for internal review. It stated that it was still considering the matter and hoped to be able to respond by 13 September 2021.
17. The FCA sent the complainant the outcome of its internal review on 8 October 2021, providing them with a redacted version of a presentation document "Risk and Compliance Oversight Division Review of the FSA/FCA's involvement in the Connaught Income Series 1 Fund".
18. The FCA stated that it had withdrawn its reliance on section 36 of FOIA. However, it maintained that section 31 still applied to a few lines in the report. The FCA also considered that section 40 (third party personal data) and section 44 (prohibitions on disclosure in other legislation) applied to a small amount of the redacted information.

## **Background of the complaint**

---

19. The complainant initially contacted the Commissioner on 30 April 2021 to complain about the delay in the FCA's consideration of the public interest test. The Commissioner wrote to the FCA on 25 May 2021 asking it to provide a substantive response to the complainant within 10 working days. Following two extensions to the deadline, the FCA responded to the request on 15 July 2021.
20. The complainant contacted the Commissioner on 13 September 2021 to complain about the FCA's failure to respond to their internal review request. The Commissioner wrote to the FCA on 15 September 2021 asking it to provide an internal review decision to the complainant within 10 working days. Following an extension to the deadline, the FCA provided the complainant with the outcome of its internal review on 8 October 2021.
21. The complainant contacted the Commissioner on the 20 October 2021, stating that the document the FCA sent with its internal review response was not the one they had requested but a presentation based on the Risk and Compliance Oversight Report, and not the Report itself.
22. The Commissioner contacted the FCA about the complainant's concerns on 27 October 2021 and requested further clarification about the information the FCA held.

23. The FCA provided the Commissioner and the complainant with its clarification of the information held on 10 November 2021. In its submission to the Commissioner, the FCA explained that the term "earlier lessons-learned exercise" in paragraph 2.2 of the 26 November 2020 FCA board minutes referred to the following documents submitted to the FCA's Executive Committee/Board in 2016:
  - Annex A – an attachment to Board Papers setting out brief details of the matters being covered
  - Annex B – the lessons learned slides (i.e. the "Risk and Compliance Oversight Division Review of the FSA/FCA's involvement in the Connaught Income Series 1 Fund" presentation provided to the complainant on 8 October 2021)
  - Annex C – the Fact Find Report
24. The complainant contacted the Commissioner on 11 November 2021 to express their dissatisfaction with the FCA's response, specifically the fact that the FCA had stated that the "Fact Find Report" did not fall within the scope of the request.
25. The Commissioner therefore accepted the complaint for investigation on 19 November 2021.
26. On the 24 February 2022, the Commissioner wrote to the FCA with his initial view that the FCA had incorrectly narrowed the scope of the request to the wording "lessons learned" rather than "lessons learned exercise". As the FCA had confirmed that all three annexes were produced as part of the "lessons learned exercise", it was the Commissioner's view that all three annexes fell within the scope of the complainant's request for information. The Commissioner advised the FCA that it should therefore either provide Annexes A and C or issue a refusal notice in accordance with the requirements of section 17 of FOIA (Annex B having been provided to the complainant, with redactions, on 8 October 2021).
27. The FCA provided the complainant with a redacted copy of Annexes A and C on 24 March 2022. The FCA relied on section 31, section 40(2), section 42 (legal professional privilege) and section 44 of FOIA to withhold the redacted information.
28. The Commissioner wrote to the complainant on 29 March 2022 asking if they were satisfied with the FCA's revised response to their request.
29. The complainant responded on 29 March 2022 advising that they believed the FCA had made a number of unjustified redactions, specifically the information redacted under sections 31, 42 and 44.

30. On 26 May 2022, the complainant wrote to the FCA explaining that some of the information redacted in Annex C was information about them (i.e. their personal data) and should therefore be disclosed.
31. The FCA provided the complainant with a small amount of personal data from page 4 of Annex C on the 01 June 2022.

### **Scope of the case**

---

32. The complainant has not challenged the FCA's reliance on section 40 of FOIA (personal data) to redact some information from its response.
33. The FCA has confirmed that all the redacted information in Annex A consists entirely of personal data.
34. The Commissioner therefore considers the scope of his investigation is to determine whether the FCA is entitled to rely on sections 31 (law enforcement), 42 (legal professional privilege) and 44 (prohibitions on disclosure in other legislation) of FOIA to withhold the redacted information from Annex C – the "Fact Find Report".

### **Reasons for decision**

---

35. The FCA has provided the Commissioner with full unredacted copies of the documents, detailing where each exemption has been applied. The Commissioner has reviewed this information and will outline his position on each exemption in turn.

### **Section 31 – law enforcement**

36. Section 31(1)(g) of FOIA states that information is exempt if its disclosure would, or would be likely to, prejudice the exercise by any public authority of its functions for any of the purposes specified in subsection (2).
37. The FCA has cited the following purposes listed under section 31(2) when relying on this exemption:
  - a) The purpose of ascertaining whether any person has failed to comply with the law; and
  - c) The purpose of ascertaining whether circumstances which would justify regulatory action in pursuance of any enactment exist or may arise.

38. In order for a prejudice based exemption, such as section 31, to be engaged, there must be at least a likelihood that disclosure would cause prejudice to the interest that the exemption protects. In the Commissioner's view, three criteria must be met in order to engage a prejudice-based exemption:
- i. Firstly, the actual harm which the public authority alleges would, or would be likely to, occur if the withheld information was disclosed has to relate to the applicable interests protected by the exemption.
  - ii. Secondly, the public authority must be able to demonstrate that some causal relationship exists between the potential disclosure of the information being withheld and the prejudice which the exemption is designed to protect. Furthermore, the resultant prejudice which is alleged must be real, actual or of substance.
  - iii. Thirdly, it is necessary to establish whether the level of likelihood of prejudice being relied upon by the public authority is met – i.e. whether disclosure "would be likely" to result in prejudice, or whether disclosure "would" result in prejudice.
39. Section 31 is also subject to a public interest test. Therefore, even if the above criteria are met and the exemption is engaged, the information should still be disclosed unless the public interest in maintaining the exemption outweighs the public interest in disclosure.
40. The Commissioner will focus on whether disclosing the information redacted from the Fact Find Report would, or would be likely to, prejudice these functions of the FCA in this case.
41. The Commissioner has first considered whether the FCA is formally tasked with functions for the purposes set out in section 31(2).
42. In its submission to the Commissioner, the FCA provided some information on its statutory objectives and functions as set out in the Financial Services and Markets Act 2000 (FSMA).
43. The FCA stated that under Part XI of the FSMA, it has the function of monitoring firms' compliance with the FCA's requirements and of inquiring into, investigating and, if appropriate, taking action (including disciplinary measures under Part XIV) in relation to the firms it regulates.
44. The FCA stated that under section 1C of Part 1A of the FSMA (section 5(1) of the FSMA in 2011), the FCA has a consumer protection objective in securing an appropriate degree of protection for consumers. The FCA stated that it was exercising these functions when considering what

action it should take, if any, against various individuals and firms which it regulated in relation to the Connaught Income Fund. The FCA stated that it is these functions that it considers would be likely to be prejudiced if the information which has been redacted under section 31 was disclosed.

45. The Commissioner accepts that the FCA is formally tasked with functions set out in section 31(2)(a) and (c) of FOIA. He will now go on to consider the likeliness of prejudice occurring to the exercise of these functions if the withheld information were to be disclosed and whether there is a causal link between disclosure and the occurrence of such prejudice.
46. The FCA has argued any prejudicial effect to its ability to carry out these functions would not just occur during an ongoing investigation but also over time, as disclosure would lead to a loss of flexibility and judgement in its use of processes and resources, which could lead to firms and individuals acting in a way that might harm the conduct of the regulatory functions.
47. The FCA has concerns that disclosure of the requested information may lead firms or individuals to think they can reduce the possibility of any non-compliance being detected by the FCA because they understand the matter and priorities the FCA has (or has not) decided to direct its resources towards. The FCA believes that this may result in firms or individuals knowing how to phrase responses to avoid further investigation. The FCA considers that non-disclosure is more likely to raise overall standards in the financial services industry if firms and individuals are not able to second guess or predict what specific matters will be subject to a more detailed consultation or investigation, the resources that will be devoted to it and the methodology the FCA will use.
48. The FCA has argued that if firms or individuals cannot be certain what areas of their business will be the subject of more detailed reviews or monitoring by the FCA, this will help to ensure they are not tempted to do the minimum necessary or tailor responses to regulatory enquiries and investigations to disguise their true position. The FCA states that to the extent that they are, or have been, investigating (or considering investigating) the firms or individuals in this case, disclosing the requested information may tip off the markets or firms or individuals in similar positions, of the FCA's regulatory interest in a particular issue or activity and how the FCA invests its time and resources into investigating this.

49. The FCA pointed out that in a previous decision notice, IC-40642-L0K8<sup>1</sup>, the Commissioner accepted that financial markets are very sensitive to the actions of the regulator and that the FCA is closely watched for clues about where regulatory action might take place. Revealing details of the types of companies or individuals that have been or are subject to investigation or other regulatory action might risk other firms or individuals altering their activities towards ones which are potentially harmful, but which are less likely to attract regulator attention. This could distract the FCA from its work, as it has to have the flexibility to reallocate resources as necessary to counter new issues which might arise. In IC-40642-L0K8, the Commissioner was therefore satisfied that the chance of prejudice to the appropriate function occurring was more than hypothetical and the harms identified were of actual substance. The FCA believes this case to be similar to IC-40642-L0K8 in this regard.
50. The complainant has provided the Commissioner with evidence that the FCA stated that its investigations in connection with Connaught ended in December 2020. The complainant has therefore argued that, as the FCA has ruled out any law enforcement activities, there can be no legitimate basis for redacting any part of the report under section 31 of FOIA. The FCA has noted these comments. However, it has argued that this does not mean that it is not open to the FCA to consider regulatory or enforcement action against third parties connected to the various entities detailed in the redacted information.
51. The FCA stated that it is satisfied that the prejudice being claimed is not trivial or insignificant and that disclosure would lead to the harmful consequences that section 31 of FOIA is there to protect.
52. The FCA argued that prejudice would be likely to arise to its regulatory functions from disclosure of the requested information, as this could impact on the flow of information it receives as part of its role as the UK's financial regulator. The FCA argues that a regulatory body will be dependent on its communications to and from (and about) persons that operate in the financial services sector, and the public generally, being full and frank in nature so that it can effectively provide advice, investigate and consider any abuses of its regulatory requirements.
53. The FCA recognises that there is a public interest in accountability and transparency. This is particularly so where this contributes to increasing

---

<sup>1</sup> <https://ico.org.uk/media/action-weve-taken/decision-notices/2020/2619069/ic-40642-l0k8.pdf>



awareness and understanding of the FCA's approach to handling high profile issues, which affect consumers directly.

54. The FCA has stated that it has a number of policies and structures in place to ensure that it and the firms and individuals that it regulates are compliant with the legislation under which it operates, in particular FSMA.
55. The FCA has stated that it is its published policy not to publish the fact of an investigation or other regulatory action, except in exceptional circumstances. The FCA does not consider any such circumstances apply in this case.
56. Taking into account all of these arguments and accepting that the FCA has the functions it has described that are relevant to the exemption, the Commissioner accepts that disclosing the requested information would be likely to prejudice the FCA's ability to ascertain if a person has failed to comply with the law or whether regulatory action may be required.
57. The Commissioner recognises that most of the FCA's arguments relate to the chilling effect that may occur as a result of disclosure on its interactions with the sector it regulates in various different ways.
58. The Commissioner accepts there will be occasions where a regulator needs to create a degree of uncertainty amongst those it regulates as to where its resources may be focused at any given time and how it conducts its investigations. The more information about how a regulator allocates its resources and the activities it is concerned with, along with information on how it goes about investigating matters, the better able an unscrupulous entity will be to make an accurate assessment of the likelihood of a particular activity coming to the attention of that regulator and therefore to determine the risk of carrying out that activity.
59. The Commissioner accepts the FCA's arguments that its ability to regulate effectively depends on a free flow of information to and from the companies it regulates. Whilst companies which are found to have broken the law should expect to be punished (and have that punishment made public), those that are genuinely unsure must be able to approach the regulator for guidance, without that fact being disclosed to the world at large. The FCA has demonstrated that it has a strategy for publication of action.
60. The Commissioner is therefore satisfied that the chance of prejudice to the appropriate functions occurring is more than hypothetical and the harms identified are actual and of substance. Given that there is a clear

link between disclosure of the requested information and the potential harms, the Commissioner is satisfied the section 31(1)(g) exemption, in conjunction with subsections 31(2)(a) and (c) is engaged.

61. As the exemption at section 31 is a qualified exemption, the Commissioner has gone on to consider the public interest arguments both in favour of disclosure and of maintaining the exemption.

#### Public interest arguments in favour of disclosure

62. The FCA accepts that there can be positive advantages from publishing the fact of an investigation or other regulatory action. For example, where the matters under consideration have become the subject of public concern, speculation or rumour and publication would allay concern, or contain the speculation or rumour. The FCA has explained that the exceptional circumstances in which such publication might be made are where the following advantages would arise:

- to maintain public confidence in the financial system or market;
- to protect consumers or investors;
- to prevent widespread malpractice;
- to help the investigation or regulatory action itself, for example, by bringing forward witnesses;
- or to maintain the smooth operation of the market.

63. The FCA has argued that there can also be advantages from publishing the FCA's considerations of a particular issue or sector, which would have a deterrent effect and encourage other firms or individuals to improve their conduct, without naming or identifying any particular firm or individual.

#### Public interest arguments in favour of maintaining the exemption

64. When conducting the public interest test in respect of a prejudice-based exemption, the Commissioner generally acknowledges that by accepting the exemption is engaged, he also accepts that there is a public interest in preventing that prejudice occurring. How much weight is given to this will depend on the severity of the prejudice and the likelihood of it occurring.
65. The FCA has argued that it publishes a considerable amount of information on its website that makes it clear what its expectations of firms and individuals are, what its regulatory priorities are in the current period and what are the key risks it sees to the financial services sector.

These publications include, amongst other things, the Independent Report about the Connaught Income Fund Series 1.

66. However, the FCA does not consider that publishing the fact of an investigation or regulatory action into a particular firm or individual would cause them to make permanent changes for the benefit of consumers. The FCA considers that disclosure could have the opposite effect to raising standards. Instead, it argues that disclosure could create the following risks:

- it will discourage firms or individuals from self reporting breaches or potential breaches;
- it will encourage firms or individuals to take steps to avoid detection rather than improve standards;
- it will tailor firms or individuals' compliance to the matters the FCA is investigating, and has investigated, rather than compliance across the range of their regulatory obligations; and
- it will hinder the FCA's proper performance of its regulatory functions in the monitoring and investigation of firms and individuals.

67. The FCA argued that it has a strategic objective to ensure that the relevant market functions well. It stated that it would be contrary to the public interest to publish the fact of an investigatory or regulatory action outside the circumstances set out in FSMA and chapter 6 of the Enforcement Guide, as this could trigger market movements and speculation that could be detrimental to consumers. The FCA considers that it has a robust statutory regime that sets out when such action is published and therefore protects against these risks.

68. The FCA has referred the Commissioner to his own guidance on section 31<sup>2</sup>, which states that investigators need private thinking space (safe space) to explore all aspects of a case without interference from the press or public. The FCA also points to the parts of the guidance which state that even if a provider of information to an investigating authority is not a confidential source, there is still a public interest in not

---

<sup>2</sup> <https://ico.org.uk/media/for-organisations/documents/1207/law-enforcement-foi-section-31.pdf>

discouraging others from cooperating with public authorities and supplying them with information they need on a voluntary basis.

69. Again, the FCA has also referred the Commissioner to the previous Decision Notice IC-40642-L0K8. The FCA has pointed out that, in that decision notice, the Commissioner recognised that there will be occasions where a regulator needs to create a degree of uncertainty, amongst those they regulate, as to where its resources may be focused at any given time. Regulators have finite resources which they must prioritise according to where they perceive the most serious concerns are (or are likely to occur). The more information about the regulator's allocation of resources it has, the better able an unscrupulous entity will be to make an accurate assessment of the likelihood of a particular activity coming to the attention of that regulator and, hence, the risk of carrying out that activity.
70. Following on from this, the FCA argues it is important that a regulator can determine whether any wrongdoing or undesirable practices have taken place and form a balanced assessment before making that assessment available to the world at large.
71. The FCA has also argued that section 348 of the FSMA prevents it from disclosing "confidential information" that it has received without consent or other lawful basis. This means that if it were to release information about the fact of an investigation, intensive speculation may ensue, but it would be restricted from publishing further helpful information to guide firms or individuals on taking any specific remedial action. Contrary to the public interest, it would create an opportunity for rumour and speculation to fill the information vacuum and would be inherently unlikely to raise standards.
72. Furthermore, the FCA argues that it considered it to be highly significant, in terms of the public interest, that the FSMA itself provides for a statutory process to be followed should a firm or individual breach any regulatory requirements. That process is there to ensure fairness to the firms/individuals concerned and the protection of their legal rights. Where the FCA has internally considered taking action but ultimately determined that it was not appropriate to do so (e.g. because of lack of evidence), it considers it would be unfair to those individuals and/or firms – and very strongly not in the public interest – to disclose the internal thinking of regulator staff, which proved to be unfounded.
73. The FCA therefore considers that it is strongly in the public interest that it be allowed space in which to carry out its regulation of the financial services sector unhindered and without disclosing information which could be unfair to any individuals/firms identified (which would harm the FCA's ability to regulate the firms it is responsible for).

74. For the above reasons, the FCA considers that disclosure of the information redacted under section 31 would be inconsistent with the public interest.

Balance of the public interest

75. The Commissioner recognises there will almost always be a public interest in transparency within public authorities. As a public authority, the FCA should be accountable for the way it operates.

76. In this case, the Commissioner recognises that this issue relates to the collapse of a fund involving large sums of money, which has had a serious financial, personal and professional impact on a significant number of people. It is therefore not unreasonable to argue that disclosing information which highlights how the regulator has looked into this, and the communications it has had with other financial institutions, would be of some public interest in showing that this is being thoroughly and appropriately investigated from every angle.

77. The Commissioner notes that the FCA has referred to exceptional circumstances in which publication can be made outside of its usual processes. These circumstances are set out in Enforcement Guide 6.1.2 and are where the following advantages would arise:

- to maintain public confidence in the financial system or market;
- to protect consumers or investors;
- to prevent widespread malpractice;
- to help the investigation or regulatory action itself, for example, by bringing forward witnesses; or
- to maintain the smooth operation of the market.

78. The Commissioner considers the first bullet point to be relevant, and if there is sufficient public interest in disclosure this "exceptional circumstance" would be applicable and would not prevent disclosure.

79. That being said, the Commissioner considers the arguments for maintaining the exemption are compelling.

80. There is a considerable public interest in having a strong and effective regulator, able to take decisive action where necessary and with a variety of tools at its disposal. The FCA has clearly, and in detail, explained why disclosing the information withheld under section 31 would reduce its ability to carry out its regulatory functions effectively. In particular the Commissioner attributes significant weight to both the

chilling effect and safe space arguments as it is clear that a regulator should be afforded the time and space to investigate matters appropriately and with full cooperation from all parties. Transparency is important but must be balanced against the need for regulators to effectively perform their functions when this requires confidentiality. The FCA has demonstrated that it is aware of this and has a clear process that does allow for publication of information of this nature in exceptional circumstances.

81. In this case the Commissioner does not consider that there is a strong enough public interest in the disclosure of this information to outweigh the public interest in withholding the information.
82. The Commissioner is therefore satisfied that disclosing the information in question would be likely to have the prejudicial effects identified by the FCA. Section 31(1)(g) with sections 31(2)(a) and (c) are therefore engaged and the public interest favours maintaining the exemption.

#### **Section 42 – legal professional privilege**

83. Section 42(1) of the FOIA provides that information is exempt from disclosure if the information is protected by legal professional privilege (LPP) and this claim to privilege could be maintained in legal proceedings.
84. There are two categories of LPP – litigation privilege and legal advice privilege. Litigation privilege applies to confidential communications made for the purpose of providing or obtaining legal advice in relation to proposed or contemplated litigation. Legal advice privilege may apply whether or not there is any prospective litigation, but legal advice is needed. In both cases, the communications must be confidential, made between a client and professional legal adviser acting in their professional capacity and made for the sole or dominant purpose of obtaining legal advice.
85. The client's ability to speak freely and frankly with their legal adviser in order to obtain appropriate legal advice is a fundamental requirement of the English legal system. The concept of LPP protects the confidentiality of communications between a lawyer and client.
86. In this case, the withheld information consists of one sentence which the FCA explained is advice from lawyers to the FCA. The FCA stated that the withheld sentence is not in the public domain. The FCA is satisfied that the legal privilege attached to the withheld information has not been waived.
87. The Commissioner has viewed the information withheld under section 42 FOIA and considers that the exemption is engaged.

88. Section 42 is not an absolute exemption, and it is also necessary to consider whether the public interest favours withholding or disclosing the information.

Public interest arguments in favour of disclosure the withheld information

89. The FCA has acknowledged that there may be a legitimate public interest in the public seeing the advice provided to FCA's employees by its legal advisers in relation to the potential options in respect of any breaches of its rules and to help promote openness, transparency and accountability in the FCA's decision-making processes.

Public interest arguments in favour of withholding the information

90. The FCA is of the view that it is more important that it be allowed to conduct an exchange of views, freely and frankly, as to its legal rights and obligations with those advising it without fear of intrusion. The FCA has argued that it is strongly in the public interest for the FCA to be able to have open and candid communications with its lawyers, without fear of disclosure, to ensure the FCA seeks and receives the best possible legal advice, expressed in clear and forthright terms, to enable it to carry out its statutory functions lawfully as well as effectively.
91. The FCA also argued that it is desirable for it, as a responsible public body, to seek and obtain legal advice before making any decisions on possible Enforcement action. Because of its impact, to have made any decision to take Enforcement action against a firm/individual without taking legal advice may well have attracted criticism.

Balance of the public interest

92. In considering the balance of the public interest the FCA has also considered that Tribunal decisions have established that there is an in built public interest in the maintenance of LPP and will, in general, rarely favour the disclosure of material covered by legal privilege. The FCA considers that, from previous Tribunal decisions, it is clear that some clear, compelling and specific justification for disclosure must be shown to outweigh the obvious interest in protecting communications between lawyer and client, which the client supposes to be confidential.

93. In supporting this argument the FCA has referred to paragraphs 68 and 69 of the Commissioner's Decision Notice FS50432367<sup>3</sup>. In the appeal of this Decision Notice (EA/2005/0023) the Tribunal concluded at paragraph 35 that:

"The Tribunal has come to the unanimous view that the Appellant has failed to adduce sufficient considerations which would demonstrate that the public interest in maintaining the exemption is, in the present case, outweighed by any public interest in justifying a disclosure. ... there is a strong element of public interest inbuilt into the privilege itself. At least equally strong counter-veiling considerations would need to be adduced to override that inbuilt public interest... it is important that public authorities be allowed to conduct a free exchange of views as to their legal rights and obligations with those advising them without fear of intrusion, save in the most clear cut cases"

94. The Commissioner considers that there is a strong public interest in protecting the doctrine of LPP. Whilst countervailing arguments need not be exceptional, they must be equally strong. In this case, given the extent of information already provided to the complainant on this subject matter, this goes a significant way to meeting the public interest in the openness and transparency of how the FCA complies with the laws it regulates.

95. On balance the Commissioner considers that the public interest in disclosure is outweighed by the public interest in maintaining the exemption in this case.

#### **Section 44 - prohibitions on disclosure**

96. Section 44 of FOIA states 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 retained EU obligation, or
  - (c) would constitute or be punishable as a contempt of court."

---

<sup>3</sup> [https://ico.org.uk/media/action-weve-taken/decision-notices/2012/743234/fs\\_50432367.pdf](https://ico.org.uk/media/action-weve-taken/decision-notices/2012/743234/fs_50432367.pdf)



97. The FCA has identified information in the Fact Find Report documents that it argues is subject to a statutory prohibition on disclosure. The FCA has argued that disclosure of this information is prohibited by the FSMA and is therefore exempt under section 44(1)(a) of FOIA.
98. Section 348 of FSMA restricts the FCA from disclosing "confidential information" it has received when carrying out its regulatory functions, except in certain limited circumstances.
99. Section 348(2) of the FSMA states that "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 discharge of, any functions of the FCA; and
  - c) is not prevented from being confidential information by subsection (4).
100. Section 348(4) of the FSMA states that 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.
101. Section 348 provides some limited gateways to disclosure of confidential information, none of which relate to disclosure to the world at large. Section 352 of the FSMA makes it a criminal offence to disclose confidential information otherwise than in accordance with the FSMA.
102. The FCA confirmed that parts of the information subject to the request constituted "confidential information" within section 348(2) of the FSMA as the information was received by the FCA from a third party as part of the arrangements the FCA has in place for carrying out supervisory functions under section 1L of the FSMA. The information was related to the business or affairs of the third party and was not otherwise publicly available.
103. The FCA explained that its experience with third parties about the FCA disclosing information obtained from them or about them, in response to information requests under FOIA, is overwhelmingly that they are opposed to any disclosure. This is given the importance those operating

in the financial services sector attach to the information they provide the FCA and the wider consequences that any damaging disclosures might have on the financial markets more generally. There is no reason to consider that the providers of the underlying information and, if different, the persons to whom it relates, would react differently to the present request. Therefore, in terms of consent, the FCA confirmed that it does not hold consent to the disclosure of the requested confidential information that is restricted from disclosure under section 348 of FSMA.

104. Section 348(4) of the FSMA states the information is not confidential if it has been made available to the public or it can be summarised in a way that prevents it from being related to a particular person. The Commissioner does not consider either of these circumstances have been met so he accepts the information is confidential information.
105. Upon viewing the information withheld under section 44(1)(a), the Commissioner's view is that the FCA has correctly applied section 44(1)(a) as the information is "confidential" and was obtained directly from the third party in the course of the FCA carrying out its supervisory functions under the FSMA.
106. Section 44(1)(a) is an absolute exemption and is not subject to the public interest test. The Commissioner therefore finds that the information withheld under this exemption by the FCA has correctly been withheld.

### **Section 17 – refusal of request**

107. Section 1(1) of FOIA says that an individual who asks for information from a public authority is entitled to (a) be informed whether the authority holds the information and (b) if the information is held, to have that information communicated to them.
108. Section 10(1) of FOIA states that a public authority must respond to a request "promptly and in any event not later than the twentieth working day following the date of receipt."
109. Section 10(3) of FOIA states that, where a public authority is considering the balance of public interest, it can extend the 20 working day deadline "until such time as is reasonable in the circumstances."
110. Section 17(3) of FOIA states that where a public authority is relying on a qualified exemption, it can have a "reasonable" extension of time to consider the public interest in maintaining the exemption or disclosing the information.
111. Although FOIA does not define what constitutes a reasonable time, the Commissioner considers it reasonable to extend the time to provide a

full response, including public interest considerations, by up to a further 20 working days, which would allow a public authority 40 working days in total. The Commissioner considers that any extension beyond 40 working days should be exceptional and requires the public authority to justify the time taken fully.

112. In this case, the total time taken by the FCA to respond to this request was 138 working days, significantly exceeding the 40 working day time limit set out above. The Commissioner does not consider there to be any exceptional circumstances and finds that, by failing to complete its deliberations on the public interest test within a reasonable timeframe, the FCA has therefore not complied with section 17(3) of FOIA.

## **Other matters**

---

### Internal review request

113. The Commissioner notes that the time taken for the FCA to respond to the internal review request exceeded 40 working days. Although there is no statutory time set out in FOIA within which public authorities must complete a review, the Commissioner takes the view that a reasonable time for completing an internal review is 20 working days from the date of the request for review, and in no case should the total time taken exceed 40 working days. The Commissioner therefore recommends that the FCA review the Section 45 code of practice<sup>4</sup>.

### The requester's personal data

114. The Commissioner reminds the FCA that if it receives a request for information under FOIA, and some or all of the requested information is the requester's personal data, the FCA should exempt it under section 40(1) of FOIA and consider the request for that particular information under the subject access provisions of UK data protection law. The Commissioner recommends that the FCA review the section 40

---

4

[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/744071/CoP\\_FOI\\_Code\\_of\\_Practice\\_-\\_Minor\\_Amendments\\_20180926\\_.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/744071/CoP_FOI_Code_of_Practice_-_Minor_Amendments_20180926_.pdf)

guidance<sup>5</sup> as well as the UK GDPR guidance on the right of access to personal data<sup>6</sup>.

---

<sup>5</sup> <https://ico.org.uk/media/for-organisations/documents/2021/2619029/s40-personal-data-of-both-the-requester-and-others-foi-eir-final-version-21.pdf>

<sup>6</sup> <https://ico.org.uk/for-organisations/guide-to-data-protection/guide-to-the-general-data-protection-regulation-gdpr/individual-rights/right-of-access/>

## Right of appeal

---

115. 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: 0203 936 8963

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)

116. 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.

117. 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**  
**Group Manager**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
**Cheshire**  
**SK9 5AF**