

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 7 January 2014

Public Authority: The Financial Conduct Authority¹

Address: 25 The North Colonnade
Canary Wharf
London
E14 5HS

Decision (including any steps ordered)

1. The complainant has requested information relating to the Financial Conduct Authority (FCA)'s review of Keydata Investment Services Ltd (Keydata)'s traded life policy investments and the distribution of them by independent financial advisers. The FCA responded by claiming that it was not obliged to comply with the information requests by virtue of section 12(1) (appropriate limit) of FOIA.
2. The Commissioner's decision is that the FCA failed to act on the complainant's intended alternative reading of the requests, referred to as (B) in the body of the notice at paragraph 18. He has therefore found that the FCA breached section 1(1) (rights of access) of FOIA and requires the FCA to process the alternative reading under the legislation and issue an appropriate response.
3. The public authority must take this step within 35 calendar days of the date of this decision notice. Failure to comply may result in the Commissioner making written certification of this fact to the High Court

¹At the date of the information request the responsible public authority was the Financial Services Authority (FSA). However, from 1 April 2013 the FSA was succeeded by the Financial Conduct Authority (FCA). For the sake of consistency, though, the Commissioner refers to the FCA as the relevant public authority throughout the body of the decision notice.

pursuant to section 54 of the Act and may be dealt with as a contempt of court.

Request and response

4. The complainant originally contacted the FCA on 14 December 2012 and requested information relating to its investigation into Keydata. The FCA responded on 10 January 2013. In terms of a number of points raised by the complainant, the FCA stated that they would be considered outside of FOIA because they did not represent requests for recorded information but instead asked for explanations of actions and decisions that had been taken. For the remaining points, FCA advised it was having difficulty processing the application for information because it was unclear what specific items of information were being sought. Consequently, the FCA provided further clarification that it considered would assist the complainant in drafting an appropriate request.
5. The complainant subsequently contacted the FCA on 22 January 2013 and provided a revised application for information alongside an explanation of the information he wanted to be provided. The wording of the revised requests is reproduced in the annex attached to this notice.
6. On 21 February 2013 the FCA provided its response to the revised requests. The FCA stated that it was not under a duty to comply with the requests because the cost of doing so would exceed the appropriate limit for the purposes of section 12 of FOIA. As required by section 16 of FOIA, however, the FCA offered the complainant further advice and assistance by stating that he may wish to limit his requests to the points set out at 3.1(4) and 3.2(1-5) on the basis that they could potentially be dealt with under the cost limit.
7. The complainant wrote to the FCA on 7 March 2013 challenging the completeness and adequacy of its response. Among other issues raised concerning the FCA's approach to the requests, he questioned its reliance on section 12 of FOIA.
8. The FCA subsequently carried out an internal review, the outcome of which was provided to the complainant on 11 April 2013. This upheld the decision that section 12 applied to the set of revised requests. The FCA also found that it had provided an appropriate level of advice and assistance for the purposes of section 16 of FOIA. Nevertheless, having revisited this matter, the FCA concluded that it may also be able to process point 3.1(3) of the request within the appropriate limit.

Scope of the case

9. The complainant contacted the Commissioner on 8 May 2013 to complain about the way the FCA had handled his requests. The complaint itself was split into two parts; the procedural issues relating to the FCA's handling of the original and revised sets of requests and, the FCA's refusal to comply with the revised set of requests submitted on 22 January 2013.
10. The first part of the complaint has been dealt with elsewhere and so the Commissioner's decision in this notice only extends to the second item, namely the FCA's processing of the requests of 22 January 2013.

Reasons for decision

Background

11. The FCA's website² contains the following information on Keydata:

Q1. What was Keydata?

Answer

Keydata was a product provider that designed and distributed structured investment products. These were distributed both directly and via a network of independent financial advisers (IFAs).

In addition to other activities, Keydata invested customers' money in bonds issued by one of two Luxembourg-based companies, SLS Capital SA and Lifemark SA, which used the money raised to buy portfolios of US senior life settlement policies.

During the course of a wider investigation we discovered that several Keydata products may not have been eligible for ISA (Individual Savings Account) status and could create an unexpected tax liability cost for Keydata and investors. Keydata

² <http://www.fca.org.uk/consumers/financial-services-products/investments/news-and-investigations/keydata-faqs>

could not pay this and we moved to place the firm into administration. We also considered that Keydata would have a legal liability to investors to whom it had mis-sold its products as ISAs. Keydata's management did not oppose the administration.

PWC [PricewaterhouseCoopers] discovered that the assets underlying the SLS Bonds purchased with £103m of Keydata investors' money may have been misappropriated.

As of January 2010, investors in bonds issued by Lifemark [...] have not received any income. Lifemark is now in liquidation and it is unlikely that investors will have their investment returned in full.

The FCA's position

12. The FCA has claimed that section 12(1) of FOIA applies to the complainant's requests made on 22 January 2013.
13. Section 12(1) of FOIA provides that a public authority is not obliged to comply with a request for information if the authority estimates that the cost of doing so would exceed the appropriate limit. This limit is specified by the Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2004 (the "Fees Regulations").
14. The Fees Regulations state that an estimate can only take into account the costs a public authority reasonably expects to incur in: determining whether it holds the requested information; locating the information; retrieving the information; and, extracting the information. The Fees Regulations further clarify that the costs associated with these activities should be worked out at a standard rate of £25 per hour per person.
15. The appropriate limit has been set at £600 for central government departments, legislative bodies and the armed forces and £450 for all other public authorities, which includes the FCA.
16. The Commissioner understands that in response to the requests the FCA has already approached the departments it considered would have the greatest familiarity with Keydata. A preliminary search for information had by itself led to the discovery of over 1000 documents, across several different IT systems, which could be relevant to the requests. The FCA worked on the assumption that it would normally take an average of two to three minutes to analyse each document with a view to determining what information may be captured by a request. Even if an optimistic estimate of one or two minutes per document was allowed, however, the FCA has calculated that the average of 90 seconds per

document would still mean the time for compliance would reach 25 hours and therefore exceed the appropriate limit. This estimate, the Commissioner is led to believe, would not take account of all the information captured by the requests that may be held by other areas within the FCA.

17. When investigating the FCA's response to the information requests, the Commissioner has become aware of the possibility that the complainant and the FCA share different interpretations of the scope of the requests. This is indicated by the fact that the FCA has included as part of its cost-estimate the potential time required to analyse the documents it had located with a view to determining what information was relevant and should therefore be considered for disclosure. In contrast, the complainant informed the FCA as part of his request for it to carry out an internal review (paragraph 2.4, 7 March 2013) that the information should not need to be edited for irrelevant information. This is because the complainant prefaced his requests by stating at point 3.1 that he would "like **all** [the Commissioner's emphasis] of the information" contained in the various records asked for. This position is reinforced at point 4.1 of the request letter where, under the heading 'Practicalities', the complaint expresses his preference for the requested information to be provided in the form of copy documents.
18. From this point, the Commissioner refers to the interpretations of the FCA and the complainant as (A) and (B) respectively.
19. It is clear that the different ways in which the requests are read will have a significant effect on the cost-estimate under section 12(1) of FOIA. Specifically, if the complainant's view (B) is adopted, the cost-estimate would potentially be greatly reduced. This is owing to the fact that once it had been established that a document fell within the scope of the requests – as it represented, for example, correspondence between the review team and senior management within the Small Firms Division (point 3.1(1) of the request – the FCA would not need to take an additional step to check and extract any relevant information. Put simply, on this interpretation the complainant is not limiting his requests to certain types of information contained within a document.
20. Under FOIA, a public authority has a duty to read a request objectively. If a public authority considers that a request has more than one objective reading and further information is required to identify the information that is actually wanted then, under section 1(3) of FOIA, it should seek clarification from the applicant. The duty will not arise, however, where in the circumstances it is reasonable for a public authority to conclude that there is only one *objective* interpretation of the request. An important consideration is that generally speaking FOIA is applicant and motive blind, which means that a public authority

should not go behind the phrasing of a request. The question for the Commissioner is therefore whether the FCA acted reasonably by adopting the particular interpretation, (A), it did.

21. In effect, the FCA has argued that the correct approach to the requests is only possible if there is an acknowledgement of the way in which the requests are actually framed. In particular, the FCA has claimed that point 3.1 must be read in the context of point 1.1, where the complainant states that "I would like specific information relating to the FSA review in or around 2007 of Keydata's traded life policy investments and the distribution of them by independent advisers."
22. The FCA points out that the complainant goes on to provide further clarification at point 1.2 when he confirms his interest in "both strands of work within the review". Accordingly, in the FCA's view, any reading of point 3.1 must be seen in the light of the two strands of the review to which the complainant refers earlier in his correspondence containing the requests. If correct, this would mean that the FCA would still have a responsibility to decide what, if any, parts of the contents of a record related to the two strands of the review and were thus potentially eligible for disclosure under the requests.
23. The Commissioner considers that it was not unreasonable in the circumstances for the FCA to read the requests made under point 3 in conjunction with point 1. Ultimately, to the Commissioner's mind, it is fair to assume that the references made at point 1 are meant to contextualise the information sought by the complainant. On this basis, the Commissioner is prepared to accept that the FCA's reading (A) is an objective reading. However, the Commissioner has also found that this determination does not in itself prevent the finding that another objective reading of the requests exists.
24. Much as the FCA considers that point 3 should be read in the light of point 1, so it could be considered that an equally valid reference point for understanding the scope of the requests is made at point 4 by the complainant. Specifically, 4.1 advanced the complainant's preference for the requested information to be provided in the form of copy documents, with the complainant stating at 4.2 that the information he is asking for "comprises all of the content of the documents". Point 4.2 also specifies a number of features of the information that should be provided, such as dates and the names of senders and recipients, but makes clear that his requests are not limited to these features.
25. The consequence of this is that the Commissioner considers it was reasonable for the complainant to expect that his requests captured all, rather than just some selected elements, of the content of the documents falling within the scope of the requests. He has therefore

determined that the complainant's alternative reading (B) of the requests is objective and, furthermore, has not been acted on by the FCA.

26. The Commissioner must therefore necessarily find the FCA in breach of section 1(1) of FOIA because it failed to give proper consideration to the complainant's intended reading of the requests. Therefore, to ensure compliance with FOIA, he requires that the FCA considers the alternative reading of the request, (B), in accordance with FOIA and issues an appropriate response.

Right of appeal

27. 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: GRC@hmcts.gsi.gov.uk

Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

28. 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.
29. 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

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

Annex – information request (22 January 2013)

1 Introduction and definitions

1.1 *I would like specific information relating to the FSA's review in or about 2007 of Keydata's traded life policy investments and the distribution of them by independent financial advisers.*

1.2 *Please note that I am interested in both strands of work within this review i.e:*

(1) *the consideration of the features and risks of the products and the review of Keydata's due diligence, arrangement and promotion of the products. As I understand it, this stand [sic] of work resulted in the team in FSA Small Firms Division referring Keydata to Enforcement, and subsequently to Enforcement's appointments of investigators on 7 December 2007.*

*(I will call this strand of work "**the 2007 Keydata Product Provider Review**", although I now believe it may have begun in 2006)*

(2) *the review of the marketing and distribution of the products by ten IFAs [sic] This strand of work resulted in the team visiting the ten firms and in FSA Small Firms Division sending a feedback letter to each of firms [sic].*

*I will use your definition of this strand of work and call it "**the 2007 Keydata Distributors Review**", although again I now believe it may have begun in 2006 and continued into 2008).*

2 Location of the information

2.1 *I believe the information will be held in the successors to the FSA's Small Firms Division and Retail Policy and Themes Division, and by your own team as a result of previous requests.*

2.2 *Information in relation to my specific request in paragraph 3(4) above may also be located in the FSA's Communications Division.*

3 Specific Requests

3.1 *The information I would like is all of the information contained in:*

- (1) *internal memoranda, reports, plans, briefings and email and other communications from the review team in 2006 to 2008 (i.e. on the 2007 Keydata Product Provider Review and 2007 Keydata Distributors Review) to:*
 - *senior management within Small Firms Division; and*
 - *other areas of the FSA, including Financial Promotions and Policy and any Risk Assessment Committee;*
- (2) *responses from senior management and other areas of the FSA to those communications, including any analyses or risk assessments of the Keydata products;*
- (3) *the FSA's feedback letter to Keydata on its review (i.e. the 2007 Keydata Product Provider Review);*
- (4) *internal memoranda, briefings, drafts and email and other communications to senior management or to the FSA's Communications Division relating to the decisions most likely in 2011:*
 - *to publish in 2011 the statement set out below on your webpage "Keydata Investments Services Ltd FAQs"; and*
 - *to use the particular wording in the sentences on the IFA review which I have underlined in that statement.*

3.2 *In relation to my request in paragraph 3.1(4), I am especially interested in information explaining the following points:*

- (1) *why the concurrent review of Keydata and the SIB and SIP products (i.e. 2007 Keydata Product Provider Review) was not mentioned in the statement;*
- (2) *why it was decided to use the words "To be precise" in the statement in relation to matters looked at in the IFA review (i.e. the 2007 Keydata Distributors Review) and not to refer to the matters looked at in the concurrent Keydata and SIB and SIP review (i.e. the 2007 Keydata Product Provider Review);*
- (3) *why the statement is unclear about:*

- *whether or not the FSA had considered, and had made a decision, not to publish the findings of the Keydata review (i.e. the 2007 Keydata Distributors Review) in 2007 and 2008; and*
 - *whether or not the reason for any decision not to publish the findings of the review was because the findings were similar to the findings of the larger project mentioned in the statement;*
- (4) *what information was put forward to support the implication that there was a link between the FSA's failure to publish the findings of the Keydata IFA review (i.e. the 2007 Keydata Distributors Review) and its publishing of the findings of the larger project (i.e what you define as the 2008 Quality of Advice Review);*
- (5) *what information was put forward to support the implication that the FSA was then taking action against those who sold Keydata products, other than N&P.*

[...]

4 Practicalities

4.1 I would prefer the information in the form of copy documents

4.2 *The information I am asking for comprises all of the content of the documents, including but not limited to:*

- (1) *dates (and times, where appropriate)*
- (2) *the name of each sender and recipient who was a senior manager at the time*
- (3) *the designation and organisation unit of each sender and recipient*
- (4) *titles and sub-titles*
- (5) *paragraph numbers*
- (6) *text*
- (7) *tables*

(8) *footnotes or endnotes*

(9) *annotations*