

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 29 January 2014

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

Decision (including any steps ordered)

1. The complainant has requested information relating to any investigation that the Financial Conduct Authority (FCA) conducted into the marketing of a particular investment product by a named company. The FCA refused to confirm whether or not any information was held. It relied on section 43(3) to do so. This was on the basis that confirming or denying the information was held, and therefore whether there had been any investigation, would be likely to prejudice the commercial interests of the company now managing that fund.
2. The Commissioner's decision is that the FCA has dealt with the request correctly and therefore he does not require the public authority to take any further action in relation to the request.

Request and response

3. On 5 December 2012 the complainant made the following request to the FCA's predecessor, the Financial Services Authority (FSA), for information under the FOIA:

"We understand the FSA has investigated [the named company] and its handling and marketing (statements [the named company] made within its literature regarding the risks of the fund, which later turned out to be false) literature for [a specified fund]. We would like to request a copy of that investigation."

4. The FCA responded on 3 January 2013 and refused to confirm or deny that the requested information was held, citing section 44(2) FOIA to do so. This was on the basis that to reveal whether the information was held would breach the statutory prohibition created by section 348 of the Financial Services and Markets Act 2000.
5. The complainant then submitted a second request on 5 June 2013 as follows:

“I would like to make a Freedom of Information request for a copy of your recorded information on your investigations into the [same specified fund of the named company], their literature, pricing of the fund and any other recorded information you may have in connection with the closure of the [specified fund] in December 2008”
6. The FCA refused this second request on 11 June 2013 on the basis that it was a repeat of the 5 December request. This prompted the complainant to seek an internal review.
7. The FCA conducted an internal review of its handling of both the 5 December 2012 and the 5 June 2013 request. On 15 July 2013 the FCA advised the complainant that following the internal review it had revised its position and now relied on section 43(3) to refuse to confirm whether the requested information was held. Section 43(3) provides that a public authority may refuse to say whether it holds information, if to do so would prejudice the commercial interests of any person.

Relationship between the FCA and the FSA

8. When the complainant made his original request it was to the Financial Service Authority (FSA). At that time the FSA was responsible for regulating financial services and so would have held the information sought by the complainant **if** there had been an investigation. The FSA was succeeded by the FCA in April 2013 and at that stage the FCA took on responsibility for dealing with the complainant's request. The second request was made directly to the FCA. For convenience any reference in this notice to the FCA are also to its predecessor, the FSA, where appropriate.

Scope of the case

9. The complainant contacted the Commissioner on 16 July 2013 to complain about the way his request for information had been handled. The complainant explained that he was very confident that the FCA, or its predecessor the FSA, had investigated the named company's

marketing of the specified fund. He also argued that the fund in question had closed 5 years prior to his request in 2008 and that the named company no longer operates in the UK. He therefore found it hard to accept that the commercial interests of the named company could be damaged by disclosing whether or not it had been investigated in respect of a particular fund at some time in the past. Even if confirming or denying whether the information was held would prejudice commercial interests, the complainant argued the public interest favoured disclosing any report.

10. The Commissioner focussed his investigation on the second request. The issue to be decided is whether confirming the FCA holds information relating to any investigation it may have conducted into the marketing of the specified fund or the closure of that fund by the named company would prejudice the commercial interests of any person. If confirmation or denial would be prejudicial, and therefore section 43(3) is engaged, the Commissioner will go onto consider whether the public interest in maintaining the exemption outweighs the public interest in revealing whether the information is held.

Reasons for decision

Section 43(3)

11. When a public authority receives a request for information it is required under section 1(1)(a) to confirm whether or not it holds that information. However section 43(3) of FOIA states that a public authority is not obliged to provide this confirmation or denial if to do so would, or would be likely to, prejudice the commercial interests of any person.
12. For the exemption to apply disclosing whether the information is held, and therefore whether any investigation was carried out, must be harmful to someone's commercial interests. In other words there must be a causal link between revealing whether the information is held and the alleged prejudice.
13. That prejudice must be real, actual and of substance. If the harm was trivial or insignificant the Commissioner would not accept the exemption was engaged.
14. The exemption can be engaged on the basis that either the prejudice "would" occur, or that it "would be likely" to occur. "Would" is interpreted as meaning that it is a more probable than not that confirmation or denial will be prejudicial to someone's commercial interests. "Would be likely" is a lower test. It is taken to mean that there

must be more than a hypothetical or remote possibility of the prejudice occurring; there must be a real and significant risk of prejudice, even though the probability of prejudice occurring is less than 50%. In this particular case the FCA has engaged the exemption on the basis that confirmation or denial "would be likely" to cause the prejudice.

15. When considering the exemption from the duty to confirm or deny a public authority is not restricted to considering the consequences of the actual response that it would be required to provide under section 1(1)(a). For example even if the public authority does not hold the information, it can consider what would happen if it was in a position where it did have to confirm that the information was held. That is, the public authority only needs to demonstrate that either a hypothetical confirmation, or a hypothetical denial would engage the exemption.
16. In light of this, the FCA has explained that if, hypothetically, it had to confirm that it held information relating to an investigation into a named company and a particular financial product that company offered, this would reveal whether it had investigated that company and that fund. Disclosing that a company had been investigated would, it is argued, damage the reputation of the company and its product. The Commissioner accepts there is a logical connection between revealing that a company, or its product, has been the subject of an investigation by the FCA and damage to that company's reputation.
17. However before accepting the exemption is engaged it is necessary to consider a number of other factors. Firstly there is the issue of whose commercial interests would be likely to be prejudiced as a result of the confirmation. The Commissioner will not identify the particular companies, the trading names they use, or the actual financial product that is the subject of this request. This is to protect the commercial interests of the parties concerned. These details are however included in a confidential annex which had been provided to the FCA only.
18. It is understood that the fund to which the request relates was originally provided by a subsidiary of the company named in the request. However the FCA has not argued that there would be any prejudice to the commercial interests of that named company.
19. The FCA has explained that another company now manages the fund and is responsible for its liabilities. This company will be referred to as the 'new fund manager'. It is this company's commercial interests which the FCA believes would be prejudiced. The new fund manager also offers other financial products under the subsidiary's trading name and benefits from the goodwill associated with that trading name. Therefore the FCA argues that if it had to confirm a product offered under the trading name had been the subject of an investigation this would lead to

speculation and adverse comments that would be damaging to all products offered under that trading name.

20. The Commissioner accepts that confirming the existence of an investigation could generate speculation that would damage the reputation of products offered under the trading name and therefore has the potential to prejudice commercial interests in those products.
21. The FCA has argued that the prejudice would not be confined just to products offered under that trading name. Since those within the financial services industry can easily associate the new fund manager with the trading name, confirming one of the products offered under that trading name had been the subject of an investigation is capable of tainting the new fund manager's reputation generally.
22. The FCA has a thorough understanding of how the financial services market operates and is therefore well placed to explain how confirming that a firm had been investigated would prejudice that firm's commercial interests. In this case the FCA has also sought the views of a new fund manager. Its representatives have argued that in their experience the public will frequently infer misconduct from the mere fact that the FCA has conducted enquiries regardless of whether or not it goes on to take formal enforcement action. The representatives argue that if, hypothetically, the FCA confirmed that the information was held, it would be likely to damage the reputation of the new fund manager generally and the products offered under the trading name in particular. This would have an adverse affect on the firm's ability to attract further investment in a competitive market.
23. When the complainant contacted the Commissioner he was under the impression that section 43(3) had been applied on the basis that it was the original provider of the fund, as named in his request, whose commercial interests would be prejudiced if the FCA confirmed it had investigated the fund. He argued that as this company no longer operated in the UK its commercial interests would not be prejudiced. As it is now apparent that it is not the original provider's interests which are of concern to the FCA there is no need for the Commissioner to address this point.
24. The complainant believes that the events which would have been the subject of any investigation occurred back in 2008. The Commissioner recognises that the sensitivity of information, or, in this case, confirming the existence of information, does wane over time. However even if an investigation had taken place in the past, the speculation and adverse criticism that would be generated by revealing its existence would occur at the time that revelation was made, ie at the time the request was responded to. Even if some commentators would appreciate that the

events in question had occurred some time ago, there would still be some prejudice.

25. There is one additional factor that the Commissioner has taken into account when considering whether the exemption is engaged. This is included in the confidential annex provided to the FCA.
26. In light of the above the Commissioner is satisfied that the exemption provided by section 43(3) is engaged.

Public interest test

27. The public interest test as set out in section 2(1) requires a public authority to consider whether in all the circumstances of the case, the public interest in maintaining the exclusion from the duty to confirm or deny outweighs the public interest in disclosing whether the public authority holds the information.
28. The FCA acknowledges that there is a public interest in transparency and in the public being aware of the actions and considerations that the FCA has taken in respect of the firms and individuals it regulates in the financial services industry.
29. The complainant has concerns over the marketing literature produced by the named company that originally provided the fund. If these concerns were wide spread and supported by authoritative sources, the Commissioner would certainly find that there was an increased public interest in revealing whether the FCA had investigated those concerns. However the Commissioner is not aware of these concerns being widespread.
30. Although it is apparent that some investors in the fund suffered financially as a result of the financial crisis in 2008 neither the FCA nor the complainant has suggested that particularly large numbers of people were affected. If large numbers had been involved the public interest in confirming or denying would have increased.
31. There is clearly a public interest in making information available that would inform the public about problems in a financial product or poor practice by companies or individuals operating in the financial services market. However the FCA has explained that where a company or an individual is investigated and it concludes there are problems which require regulatory action, the FCA does publish the findings of those investigations in the form of final notices. Therefore the public interest in protecting consumers is already satisfied to a large degree.
32. The Commissioner is satisfied that there is some public interest in confirming whether or not the FCA investigated the fund, but that this is

limited to the general public interest in the FCA being transparent in the way in performs its regulatory functions. This limited public interest now has to be balanced against the public interest in refusing to say whether the information is held and preventing a possible prejudice to the commercial interests of the new fund manager.

33. It is not possible to quantify with precision the severity of the prejudice that is likely to occur to the commercial interests of new fund manager if, hypothetically, the FCA had to confirm the information was held. However the Commissioner accepts that the financial services industry is very competitive and recognises the importance of investors having confidence in the products on offer and the companies managing those funds. He therefore finds that the prejudice would not be insignificant.
34. The financial services industry is an important component of the UK economy. There is a public interest in private sector companies being able to operate effectively in that market. It would work against the public interest to disturb that market by unfairly prejudicing the commercial interests of any of the companies operating in it.
35. It is understood that where a company is investigated and any complaints are upheld the FCA does publish its findings. However the final decision is only published once the company or individual concerned has had the opportunity to formally comment on the FCA's preliminary findings. This process means that the FCA only makes its findings public where the actions of the party under investigation warrant doing so and after a fair process has been followed.
36. To reveal the existence of an investigation, and so prompt damaging adverse comments, in other circumstances would be unfair. The Commissioner considers it is important to the companies concerned that they are able to deal with the FCA without worrying that they will be unfairly penalised as a result.
37. The Commissioner recognises that the FCA also benefits from the companies it regulates having confidence that their business affairs will remain private except where the FCA takes formal action. This enables the FCA to carry out its regulatory duties efficiently and effectively. However when considering the public interest in respect to section 43 it is only appropriate to take account of the public interest inherent in the exemption. That is the public interest in preventing a prejudice to the commercial interests of the relevant party, in this case the new fund manager, and the public interest in not interfering in the operation of financial services market.
38. The Commissioner is satisfied that there is some public interest in the FCA confirming or denying whether it had investigated the fund.

However this has to be weighed against the public interest in preventing a prejudice to the commercial interests of the new fund manager together with the interference that any unfair disclosure could have on the financial services market. On balance the Commissioner finds that the public interest favours maintaining the exclusion from the duty to confirm or deny whether the information is held.

39. The Commissioner does not require the FCA to take any further action in this matter.

Right of appeal

40. 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

41. 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.
42. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

Signed

Pamela Clements
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