

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 14 July 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 a Financial Services Authority (FSA) Board Meeting in 2011. The FSA has been superseded by the Financial Conduct Authority.
2. The Commissioner's decision is that section 36(2)(b)(i) is engaged with regard to the withheld information. Having considered the public interest arguments he has decided that for the majority of the information the public interest favours maintaining the exemption, but for some information it favours disclosure. For the information where the public interest favours disclosure the Commissioner has also decided that section 36(2)(c) is not engaged and that this information should be disclosed to the complainant.
3. The Commissioner requires the public authority to disclose the information listed in the annex at the end of this decision notice.
4. The public authority must take these steps 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 pursuant to section 54 of the Act and may be dealt with as a contempt of court.

Request and response

5. On 9 July 2013, the complainant wrote to the FCA and requested information in the following terms:

"I am writing to request information in relation to the Summary Board

Meeting minutes of the FSA dated 28 July 2011:

<http://www.fsa.gov.uk/static/FsaWeb/Shared/Documents/pubs/board-minutes/july11.pdf>

I am working on the basis that FCA is the same legal entity as FSA and so is responsible for such requests – Please let me know if this is incorrect.

The information I am looking for is in respect of the item in these minutes titled 'Unregulated Collective Investment Schemes'.

This item refers to a 'Report' that was considered by the Board. I would like to know the contents of that Report i.e. have a copy of it.

I am particularly interested in knowing more about the subject-matter of the 2nd bullet point: "there was some concern about the current selling practices and the descriptions of exemptions in the rules, and that this could be made clearer;"

6. The FCA responded on 1 August 2013. It confirmed that it held the information requested and provided a list of contents. The FCA also provided a response to the "2nd bullet point".
7. The complainant wrote to the FCA the same day stating:

"In terms of the first part of my request, when I asked about the contents of the Report, I meant the contents, not the Contents Page: for example, the heading "Executive Summary" is bereft of any specific information that might have informed debate or decision making.

Turning to the particulars, my request asked about the "concern about...the descriptions of exemptions in the rules". Whilst you have referred me to a subsequent paper on the "improvements" to the exemptions, that was not what I asked for. I am interested in the description of the [current] exemptions and the concerns these caused the Regulator.

Returning then to my request, to clarify should it have been unclear, the information I am looking for is the content of the Report (minus of course the Annex references to named firms). Specifically, the information I am looking for includes the precise form of words used, any references cited and the examples given. Whilst I appreciate that Freedom of Information applies to information rather than documents, you might find it easier to pass me a copy of the document in question rather than retyping its content verbatim.

Alternatively, if you are of the view that the information I am looking for is exempted, please consider this my request for an internal review of your decision."

8. The FCA treated this as a new request and responded on 9 September 2013. It refused to provide the requested information citing sections 21 and 36(2)(b)(i), (b)(ii) and (c) of the FOIA exemptions.

Following an internal review the FCA wrote to the complainant on 16 October 2013. It revised its position and provided a redacted copy of the information requested. However, the FCA maintained that section 36(2)(b)(i) and (c) still applied to the redacted information.

Scope of the case

9. The complainant contacted the Commissioner on 17 September 2013 to complain about the way his request for information had been handled. As stated above, an internal review response was not issued until 16 October 2013.
10. The Commissioner considers the scope of this case to be to determine if the FCA correctly applied section 36 of the FOIA to the withheld information.

Reasons for decision

The 'withheld information'

11. The withheld information is contained within a 'Paper to Board of Directors, The Financial Services Authority' Paper number FSA(11)82. The information specifically exempted by virtue of section 36 is contained in the following paragraphs:

Information withheld under section 36(2)(b)(i)

12. Paragraph 4, 7(a), 10(b)(v), 17(e), 31, 33, 34, 35, 38, 39, 41, 46, 47, 49, 50, 51, 54, 55 – 58, 59(b)(v) and 61. Section 36(2)(b)(i) has also been applied to part of paragraph 6 of the Annex and the references in the footers of page 1, 3 and 7.
13. Some of the above information has also been considered exempt by the FCA under section 36(2)(c).

Information withheld under section 36(2)(c)

14. Paragraph 4, 41, 47, 50, 51, 56b), 56c), 57, 59v), 61, part of paragraph 6 of the Annex the footers on pages 1, 3, page 7

Section 36

15. The relevant parts of section 36(2) state that,

"Information to which this section applies is exempt information if, in the reasonable opinion of a qualified person, disclosure of the information under this Act-

[...]

(b) would, or would be likely to, inhibit-

(i) the free and frank provision of advice,

(c) would otherwise prejudice, or would be likely otherwise to prejudice, the effective conduct of public affairs."

16. These are qualified exemptions, and are therefore subject to the public interest test.
17. For a public authority to cite section 36 of the FOIA the qualified person must give their reasonable opinion that the exemption is engaged. For the Commissioner to determine that the exemption is engaged it must be demonstrated that the designated qualified person has given their opinion, and that the opinion is reasonable.
18. In order to establish that the exemptions have been correctly applied the Commissioner must:
- Ascertain who was the qualified person or persons;
 - Establish that an opinion was given by that person;
 - Ascertain when the opinion was given; and
 - Consider whether the opinion was reasonable.
19. The FCA has informed the Commissioner that the qualified person in this case was one of the FCA's Non-Executive Directors, Professor Amelia Fletcher. The Commissioner is satisfied that Professor Fletcher was a qualified person for the FCA.

20. The FCA has also provided the Commissioner with a copy of the submission provided to Professor Fletcher in order to seek her opinion as to whether this exemption was engaged.
21. After examining this submission the Commissioner notes that it is dated 30 September 2013 at the internal review stage and signed by Professor Fletcher on 15 October 2013. However, it also indicates that the qualified person's opinion was originally sought on 29 August 2013, prior to the FCA's response of 9 September 2013. The Commissioner is therefore satisfied that the opinion was sought at the appropriate time. He is also satisfied that the qualified person gave her opinion in relation to both section 36(2)(b)(i) and section 36(2)(c).
22. In this case the FCA has relied upon sections 36(2)(b)(i) and 36(2)(c) to withhold some of the requested information. As it has applied section 36(2)(b)(i) to all the withheld information, the Commissioner has considered this exemption first.

Section 36(2)(b)(i)

Was the opinion reasonable?

23. The qualified persons opinion in relation to section 36(2)(b)(i) was that if this information were to be disclosed there was a reasonably high risk of inhibiting the views and advice given to the Board.
24. In this instance the qualified person considered that in order for its Board to be able to decide on policies so that it may direct the FCA for the effective achievement of its regulatory objectives, there has to be open and uninhibited discussions between Board members and those who make presentations to them (both orally and in writing).
25. Presenters have to be able to express themselves openly, honestly and completely, so that the disadvantages as well as the advantages of any proposed course of action, or the risks to the FCA's objectives or the legal risks involved in adopting a proposed policy, can be properly debated or less conventional options explored before the Board.
26. Given the FCA's profile, public disclosure in this case of all the considerations presented to the Board would be likely to have an inhibiting effect on the free and frank advice provided, because it could expose individual presenters and their proposals, or individual Board members, to unjustified public criticism. This may inhibit or lower the quality or range of the views in the future, which would prejudice the effectiveness of the Board's rule-making powers and hence the conduct of the FCA's "public affairs".

27. The Board needs a protected space in which to consider and refine options, whether in relation to its regulatory functions or in relation to managing the FCA's business, so that the decisions it makes are sound, well considered and likely to achieve its objectives. This protected space is important in that it allows all options to be considered including radical options and potential disadvantages with particular proposals which, if disclosed might prevent or at least inhibit Board members or presenters from putting forward their views in the future.
28. The Commissioner has reviewed the withheld information and considers that they are records of candid discussions. Based upon this and the submissions above which the FCA has confirmed were put to the qualified person, the Commissioner is of the view that the opinion of the qualified person is a reasonable one. He therefore finds that section 36(2)(b)(i) was correctly engaged.
29. The Commissioner has next gone on to consider whether the public interest in maintaining the exemption outweighs the public interest in disclosing the information.

The public interest arguments in favour of maintaining the exemption at section 36(2)(b)(i)

30. The Commissioner accepts that there is a public interest in maintaining the exemption at section 36(2)(b)(i) as, were there to be a lack of open and uninhibited information provided to the Board for its members to consider and debate, this would be likely to harm the quality of the Board's decisions which, as the Board is the FCA's senior decision-maker, would harm the FCA's overall effectiveness.
31. The Commissioner considers that there is a public interest in allowing senior decision making bodies within a regulator (in this case the FCA Board) to make decisions on difficult and sensitive matters. He considers that in order for a fully informed decision to be made, relevant personnel at a public authority should be able to discuss matters in a free and frank manner, exchanging views and exploring the various options.
32. The Commissioner also recognises that it is in the public interest in allowing these senior decision making bodies to be fully briefed, in order to enable them to make fully informed decisions. This is especially the case in relation to the formulation of complex and potentially controversial policy decisions. As its senior decision making body the FCA Board needs a protected space in which to have open and uninhibited discussions on sensitive regulatory issues.

33. For the FCA to function effectively staff presenting to the Board need to set out a range of policy options and candid analysis of the strengths and weaknesses of those options. The Commissioner accepts that it is in the public interest to ensure that discussions are free and frank and that all options are presented, as ultimately this leads to better decision making.
34. It is in the public interest for presenters to the Board to be open and candid in their briefing papers, so that the Board has a rounded picture of what is proposed. Presenters understand the wider context in which the FCA operates and the consequences for consumers, firms and markets if the communication of difficult and sensitive matters is mishandled and it is in the public interest for this understanding to be fully communicated to the Board in order to aid its decision making.

The public interest arguments in favour of disclosing the requested information

35. The Commissioner accepts that there are a number of factors in favour of disclosure of the Board report, stemming from the fact that the Board is the senior decision-making body of the FCA.
36. In relation to its regulatory agenda, there is an interest in allowing regulated firms and individuals in particular, but also other stakeholders, access to information which will help them to understand the reasoning of the Board which has led to decisions affecting them. The withheld information relates to the development of a policy which would potentially change the FCA's rules governing a large number of firms and stakeholders operating in the financial sector.
37. Disclosure would promote openness and transparency and thereby accountability, in that, if the public can see the basis on which decisions were made, they will be able to comment. Informed comment should lead to better quality decisions by the Board and so the FCA, as well as increasing stakeholders' sense of engagement in the regulatory regime.
38. On a more general level, the Commissioner considers that the regulation of the financial sector is an issue that has attracted a large amount of public and political debate, especially during the current economic downturn. He considers that there is a public interest in increasing public understanding of the regulation of firms operating in this sector, and in allowing the public to build up an informed view as to whether that regulation is effective and proportionate. In this instance the withheld information relates to proposed changes to the way in which firms operating in this part of the financial sector are regulated. As such, he considers that the publication of this information would be in the public interest.

The balance of the public interest

39. In finding that this exemption is engaged, the Commissioner has already accepted that the disclosure of this information is likely to result in some inhibition to the free and frank provision of advice. However, in considering the balance of the public interest, the Commissioner takes into account the severity, frequency, or extent of any inhibition that would be likely to occur.
40. In order to determine this, the Commissioner has considered both the nature of the withheld information and the timing of the request.
41. The request was made on 9 July 2013. The FCA stated that, following the consultation, the final rules on the restrictions on the retail distribution of unregulated collective investments schemes and close substitutes were published in PS13/3 on 3 June 2013 and were due to come into force on 1 January 2014. It is quite clear in this case that the complainant's request was made after the decision had been made by FCA and at a time when the policy had been approved. FCA was not therefore deliberating or formulating its decision on this policy at the time of the request – this had already taken place and been concluded.
42. The Commissioner has therefore taken into account that there was no obvious or overwhelming need for safe space to deliberate and reach a decision at the time of the request.
43. In relation to the nature of the withheld information, he notes that it relates directly to a meeting of the FCA Board where the development of this policy was discussed, or to papers that were presented in this process. He also notes that the information is detailed, and appears to represent the free and frank exchange of views, and the provision of advice.
44. Having reviewed the information in this particular case the Commissioner accepts that, for the majority of the withheld information, there remained sensitivities around the content of the information, even though the key decision had been taken. He concludes that, given these sensitivities, there would have been a relatively severe and widespread inhibition to the provision of future advice to the Board if this information were to have been disclosed at the date of the request. However, for the minority of more factual information the information does not have the same sensitivity and he considers that the extent and severity of any inhibition would be minimal.
45. In considering where the balance of the public interest lies the Commissioner has also considered the FCA's arguments about the

extent to which the public interest in disclosure has already been met by the publication of other information

46. Prior to publication of the consultation paper FSA(11)82, the FSA published a wide range of consumer-facing materials. These include but were not limited to consumer alerts, guidance to firms and consumers, consultation papers, and board minutes. The FCA has provided the Commissioner with links to a number of public messages which are available on its website.

For consumers:

http://www.fsa.gov.uk/pages/consumerinformation/product_news/saving_investments/ucis/index.shtml

For firms:

http://www.fsa.gov.uk/smallfirms/your_firm_type/financial/investment/ucis.shtml

47. The FCA advised its discussion papers and feedback statements are public documents available on its website.

DP11/1 is available here:

http://www.fca.org.uk/static/pubs/discussion/dp11_01.pdf

FS11/3 is available here:

http://www.fca.org.uk/static/pubs/discussion/fs11_03.pdf

48. The Commissioner accepts that the firms and stakeholders potentially affected by these proposed changes may feel that the published information is inadequate and that there remains a public interest in disclosure of the withheld information to provide a full picture. However, he considers that the published information, together with the consultation process, does go some way to satisfying the public interest in disclosure. He has also taken into account that the majority of the report has been released in response to this request.
49. In considering the balance of the public interest the Commissioner recognises that the public interest factors in favour of disclosure are strong in this case. He concludes that for the majority of the withheld information they are outweighed in this case by the public interest in maintaining the exemption. For the minority of information he concludes that the public interest in maintaining the exemption does not outweigh the public interest in disclosure.

Section 36(2)(c)

Was the opinion reasonable?

50. The Commissioner has found that there is some information to which section 36(2)(c) has been applied that is not considered exempt by virtue of section 36(2)(b)(i). He has therefore gone on to consider this information (the Footer on pages 1 and 7 and paragraph 41) separately.

51. Following the ruling of the Tribunal, the Commissioner takes the view that section 36(2)(c) is intended to apply to cases not covered by another specific exemption. Furthermore, the fact that section 36(2)(c) uses the phrase "otherwise prejudice" means that it relates to prejudice not covered by section 36(2)(a) or (b).

52. Section 36(2)(c) states:

"Information to which this section applies is exempt information if, in the reasonable opinion of a qualified person, disclosure of the information under this Act-

(c) would otherwise prejudice, or would be likely otherwise to prejudice, the effective conduct of public affairs."

53. The qualified persons opinion in relation to section 36(2)(c) was that the inhibition to the free and frank provision of advice already considered by the Commissioner under section 36(2)(b)(i) would result in less sound decision making which would in turn harm the effectiveness with which the FCA conducts its public affairs.

54. The Commissioner considers that this stated prejudice clearly relates to the prejudice covered by section 36(2)(b)(i) and cannot therefore be covered by the 'otherwise prejudice' limb of section 36(2)(c). He therefore considers that the qualified person's opinion in this respect is not a reasonable opinion.

55. The Commissioner notes that in later correspondence from the FCA to the Commissioner its Information Access Team identified an additional prejudice argument that would be relevant to section 36(2)(c). However, this argument appears to have been provided by the Information Access Team to bolster its arguments at a later date. There is no evidence that it formed part of the opinion given by the qualified person. It is not mentioned in the submission on which the qualified person based her opinion, the original refusal notice, or the letter setting out the results of her internal review. For this reason the Commissioner has disregarded this argument as not forming part of the qualified person's opinion.

56. In light of the above the Commissioner finds that the qualified person's opinion in relation to section 36(2)(c) was not a reasonable opinion and that therefore this exemption is not engaged.
57. Bearing all the above in mind, the Commissioner has listed the information he considers should be disclosed in an annex at the end of this decision notice. The remaining information should remain withheld.

Right of appeal

58. 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

59. 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.

60. 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

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

Annex

Information to be disclosed to complainant:

- Page 1 – footer ref 1 – in entirety save for the last sentence
- Page 3 – footer ref 4 – in entirety
- Page 7 – footer ref 9 – in entirety
- Page 8 - paragraph 39 – from “we suggest..” onwards
- Page 8 – paragraph 41 – first sentence only