

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 6 August 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 regarding the Arch Cru Investment Fund including information on complaints about this. The Financial Conduct Authority (FCA) confirmed information was held but was prohibited from disclosure by virtue of section 348 of the Financial Services and Markets Act 2000. The FCA therefore considered the section 44 FOIA exemption to be engaged.
2. The Commissioner's decision is that the FCA has correctly applied the exemption to withhold the requested information.

Request and response

3. On 22 January 2014, the complainant wrote to the Financial Conduct Authority (FCA) and requested information in the following terms:
 1. *"I would like to know how many people complained or reported the Arch Cru funds to the FSA prior to the funds' suspension in 2009?"*
 2. *I would like to know what the main complaints about Arch Cru concerned?*
 3. *When did the FSA first become aware that there were problems with Arch Cru funds?*

4. *What was found in the FSA's Arrow visit to Capita regarding Arch Cru in October 2008 which the FSA was concerned about?"*

4. The FCA responded on 19 February 2014. It stated that information within the scope of the request was held. For parts 1 and 2 of the request any information held was considered exempt from disclosure under section 44 of the FOIA by virtue of section 348 of the Financial Services and Markets Act 2000 (FSMA). The FCA also answered the question asked in part 3 of the request and summarised the findings as requested in part 4.
5. The complainant requested an internal review on 24 February 2014. In this the complainant asked the FCA to reconsider whether the information requested in parts 1 and 2 fell within section 348(4)(a) and (b) of the FSMA and to provide the specific information requested in part 4.
6. Following an internal review a response was sent to the complainant on 2 May 2014. It upheld its decision to withhold the information in parts 1 and 2 of the request under section 44 of the FOIA. With regard to part 4; the FCA explained that any information it had received from Capita during the course of an Arrow visit had been received for the purpose of carrying out the FCA's supervision of those firms and would therefore be exempt under section 44 of the FOIA. The FCA considered this would also extend to any information compromising of the views of the FCA and other internally-created information where disclosure of this information would disclose the content or nature of the confidential information.

Relationship between the FSA and FCA

7. The request refers to the "FSA" (Financial Services Authority). The FSA were responsible for regulating financial services prior to April 2013. The FSA was then succeeded by the FCA and the request was submitted to the FCA but referred to the FSA as the body in charge of regulation during the time Arch Cru was active. Any reference to the FCA in this notice is also to its predecessor, the FSA, where appropriate.

Scope of the case

8. The complainant contacted the Commissioner on 20 May 2014 to complain about the way her request for information had been handled.

9. The Commissioner considers the scope of his investigation to be to determine if the FCA has correctly withheld information within the scope of the parts 1, 2 and 4 of the request on the basis of section 44 of the FOIA.

Background

10. CF Arch cru Investment and Diversified funds were two UK open-ended investment companies authorised and regulated by the FCA. These funds invested in a series of Guernsey-domiciled investments listed on the Channel Islands Stock Exchange, and were run by an investment manager, Arch Financial Products LLP. Capita Financial Managers Limited (Capita) was the Authorised Corporate Director.
11. The funds were suspended by Capita on 13 March 2009 and are being wound up. A payment scheme and consumer redress scheme have been arranged for investors in the fund.

Reasons for decision

Section 44(1)(a)

12. Section 44 of the FOIA provides 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 Community obligation, or

(c) would constitute or be punishable as a contempt of court."

13. The FCA has explained that the information in this case falls within section 44(1)(a) as it is information received by the FCA for the purposes of or in discharge of its functions under section 348 of the FSMA. That is, for the purpose of carrying out its supervision of firms and individuals.
14. The FCA has taken the position that any information on the number of complaints about Arch Cru and the subject of these complaints is confidential information. As is any information produced following the Arrow visit and any views of the FCA or internally-created information which discusses or discloses any of the confidential information.

15. Section 348(1) of the FSMA states that:

"Confidential information must not be disclosed by a primary recipient, or by any person obtaining the information directly or indirectly from a primary recipient, without the consent of –

(a) the person from whom the primary recipient obtained the information; and

(b) if different, the person to whom it relates."

16. The operation of the statutory bar is dependent on the consideration of the following issues; firstly, whether the FCA can be classified as a primary recipient, secondly, whether the request is for 'confidential information' and if so, thirdly, whether there is consent to the release of the information or whether this could be obtained.

Is the FCA a primary recipient?

17. Primary recipients are defined at section 348(5) of the FSMA and include the FCA. The Commissioner therefore accepts that the FCA is a primary recipient for the purposes of the FSMA.

Is the information "confidential"?

18. Section 348(2) of the FSMA defines confidential information for the purposes of the legislation. It is defined as information which –

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

(b) was received by the primary recipient for the purposes of, or in the discharge of, any functions of the Authority ... ; and

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

19. Subsection (4) states that the information cannot be confidential information if it has already been disclosed to the public or it can be anonymised in such a way that it is not possible to ascertain from it information relating to a particular person.

20. The FCA stated the information meets the criteria of section 348(2) of the FSMA in that the information relates to the business of Capita (section 348(2)(a)) and it was received by the FCA under its regulatory functions for the purposes of supervising Capita's compliance with its obligations (348(2)(b)).

21. The Commissioner has first considered if the information relates to the business or affairs of another person. A person is not defined in FOIA,

thus the Commissioner has adopted the usual legal interpretation of a person, namely any entity that is recognised as having legal personality to enter into legal relations.

22. The Commissioner is satisfied that the information does relate to the business or affairs of another person, in this case Capita. He has therefore gone on to consider whether the information was received by the FCA for the purposes of, or in the discharge of, any of its functions.
23. The FSMA is concerned with the regulation of financial services and markets in the UK. The FCA is the body designated under the FSMA with functions and regulatory objectives to ensure market confidence, financial stability and the protection of consumers. The FCA consider that in discharging its duties under the FSMA it is required to supervise firms, in this case Capita, and their compliance with their obligations under the FSMA. The Commissioner is therefore content that the FCA was fulfilling a regulatory function by receiving the information which is the subject of this request.
24. The Commissioner notes that some of the information is information which has been internally created (such as documents containing the views of the FCA on the information it received) and cannot be as obviously said to have been 'received by' the FCA. Previous decisions of the Commissioner¹ and the Information Tribunal² have accepted that the prohibition on disclosure can extend to the views of the public authority, considerations and other internally-created information where the 'created' information incorporates information received by the public authority from another party.
25. The Commissioner has reviewed the withheld information and notes that some of this is information created by the FCA but embedded in these documents is its views on information received by the public authority in the course of discharging its supervisory functions under the FSMA. Guided by previous decisions, the Commissioner is minded to accept that disclosure of this created information would disclose the content or nature of the information which has been received by the FCA given the inextricable link between these types of information and this information would also be confidential information as defined by section 348(2).

¹ ICO Decision Notice FS50468587

² EA/2013/0098 and EA/2009/0033

26. Section 348(4) of the FSMA also states that information may not be deemed confidential information if it has legitimately been made available to the public or it can be anonymised.
27. The Commissioner considers that information will only have been legitimately made available where it has been placed in the public domain without breaching the FSMA and there is no indication that this has occurred.
28. If the information can be summarised or framed so that it is not possible to ascertain from it information relating to another person then section 348(4) will apply. The Commissioner does not consider this to be a relevant consideration in this case. This is because the focus of the request itself, which makes the Arch Cru fund and Capita its subject, removes the possibility of making the information anonymous.
29. For the reasons outlined above, the Commissioner has therefore concluded that the withheld information is confidential information pursuant to section 348(2) of the FSMA.

If it is confidential information is there consent to its release or can this be obtained?

30. The FSMA allows that information may be disclosed if consent has been received from the person that provided the FCA with the information, in this case Capita.
31. The FCA has explained that when dealing with a previous request for information on the same subject, it consulted with Capita who refused to provide consent for disclosure. As such the FCA has not sought consent again as it understands Capita's position has not changed. As consent has not been provided the Commissioner considers the information remains confidential information for the purposes of the statutory bar provided by section 348 of the FSMA.
32. The FCA was therefore correct to rely on section 44(1)(a) of FOIA to withhold the requested information.

Right of appeal

33. 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

34. 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.
35. 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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