Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 20 October 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 a copy of the Requirement Notice that the Financial Conduct Authority issued to the Skilled Persons it appointed to review the activities of Royal Bank of Scotland's Global Restructuring Group. The Financial Conduct Authority has withheld this information on the basis that it intends to publish it in the future – an exemption under section 22 of the FOIA.

2. The Commissioner's decision is that the Financial Conduct Authority has correctly applied this exemption and he does not require it to take any further steps.

Background

3. In November 2013, two separate reports into the lending practices of Royal Bank of Scotland (RBS) and into banks' treatment of customers in financial difficulties were published. In response the FCA, in accordance with its power under section 166 of the Financial Services and Markets Act (FSMA) 2000, agreed with RBS to appoint independent Skilled Persons to review the allegations in the reports against RBS' practices.

4. In January 2014, the FCA announced on its website that it had appointed Promontory and Mazars to conduct this review.

Request and response

5. On 12 May 2014, the complainant wrote to the Financial Conduct Authority (FCA) and requested information in the following terms:

   "I am now making a Freedom of Information request for the FCA brief to Mazaars and Promontory.

   For the avoidance of doubt will you please send me a contemporaneous copy of the instruction or brief to the skilled persons made under Section 166 of the relevant Act?"

6. The FCA responded on 10 June. It said it intended to include the requested information, ie the Requirement Notice (RN), as part of Promontory and Mazars' final published report. It therefore withheld the information and cited the exemption under section 22 (information intended for future publication) as its basis for doing so.

7. Following an internal review, the FCA wrote to the complainant on 7 August. Having outlined arguments in favour of disclosing and not disclosing the information, it concluded by maintaining its original position.

Scope of the case

8. The complainant contacted the Commissioner on 8 August to complain about the way their request for information had been handled.

9. The Commissioner has investigated whether the Board has correctly applied section 22 to the requested information.

Reasons for decision

10. Section 22 of the FOIA says that information is exempt information if, at the time of the request, it is held with a view to its publication at some future date, and if it is reasonable in all the circumstances to withhold it until it is published.

11. The FCA has provided the Commissioner with evidence that, at the time of the complainant's request, it held the requested information with the intention of publishing it. The evidence is a copy of a page from the FCA's website, which was live in May 2014 (when the complainant made their request) having been updated in January 2014.

The archived page contains a reference to the final report being published in Quarter 3, 2014.

12. In its submission, the FCA has told the Commissioner that it now expects Promontory and Mazars to complete its review in early 2015, and anticipates that a final report will be published soon afterwards.

13. The FCA has confirmed to the Commissioner that it expects the RN to be included in the final report. It has explained that the report's publication has now been moved to early 2015 because of the complex nature of the review, which involves a large number and range of businesses.

14. The Commissioner accepts that, at the time the request was made, the FCA held the requested information with a view to its future publication as part of Promontory and Mazars' final report. He is also prepared to accept that it is not unreasonable that the review and final report should take longer than anticipated to complete, given their complexity and the severity of the allegations contained in the two reports mentioned at paragraph 3.

15. The Commissioner has gone on to consider whether it is reasonable in all the circumstances to withhold the information until it is published; taking account of whether this is sensible, fair to everyone concerned and in line with accepted practices. He also considered whether the FCA is right to manage the information's availability by planning and controlling its publication.

16. However, section 22 can only be applied where the public interest in maintaining the exemption outweighs the public interest in disclosure. The Commissioner therefore finally considered these arguments, mindful of his guidance on section 22 which explains that there is some overlap between the factors public authorities should take into account in deciding what is reasonable, and those which are relevant in balancing the public interest test.

17. The FCA maintains that the review should be able to proceed on the basis set out in the RN as fully, quickly and efficiently as possible, with maximum customer participation. The RN will form part of the final report that the Skilled Persons will publish when they have completed their review. FCA considers that this is the best time to consider the RN, when it can be seen in the context of the work the Skilled Persons have carried out.

18. Large banks, including RBS, have been subject to allegations of poor practice in connection to their lending practices and their treatment of business customers in financial difficulty. The FCA has acknowledged that, if proven, these allegations may also indicate wider governance problems within RBS, and other banks, that may, in turn, impact on large numbers of customers.

19. The FCA recognises that there are consequently sound public interest arguments in favour of disclosing the requested information. Doing so could:

    - increase public awareness and understanding of how the FCA utilises its powers under the FSMA
    - increase public understanding about the ongoing review
    - inform public debate on the matter, and
    - provide the opportunity for all those who believe they have been affected to feedback on the scope of the review.

20. Given its significance, the FCA has published information about the review on its website; advising the public of the action that is being taken and what steps they can take if they have concerns about how RBS has treated them.

21. The FCA has provided the complainant and the Commissioner with arguments in favour of not disclosing the requested information. The complainant has told the Commissioner that one of these arguments is not clear; namely that some people who may want to talk to the Skilled Persons (ie Promontory and Mazars) may not do so if the content of the RN became public.

22. When questioned about this, the FCA told the Commissioner that, as part of its internal review, it sought RBS' view on whether it could release the RN ahead of the publication of the final report. RBS firmly believes that the confidentiality of the information in the RN – which will be contained in the final report – needs to be preserved whilst the investigation is still ongoing. RBS also mentioned that premature disclosure might impact on the level to which customers participate in the review.

23. The FCA explained that the confidence of RBS customers is fundamental to the whole review – confidence that they can provide the Skilled Persons with their recollection of events on a private and confidential basis. Making the RN public would, FCA believes, risk undermining customers' confidence in the confidentiality of other aspects of the review. It could, therefore, deter customers from fully cooperating in the review process.

24. Another argument for withholding the requested information that the FCA has provided is the risk that disclosing it may result in challenges to the scope of the review, the matters under review or to the review's methodology. It could also lead to media coverage and public criticism. This could, again, undermine customer confidence in the review and deter people from participating in it.

25. The FCA also argues that any debate about the review at this stage would be a time consuming distraction for the both the FCA and the Skilled Persons, in the middle of what is a busy and complex project.

26. The Commissioner has considered both parties' representations carefully. He accepts that, at the time of the request, the FCA held the requested information with the intention of publishing it. He has also considered the argument at paragraph 17 and is of the view that it is reasonable in the circumstances for the FCA to withhold the information until it is published in early 2015.

27. The Commissioner acknowledges the concerns the complainant has about some of RBS' practices, which have been the subject of media and Parliamentary Select Committee interest. The complainant therefore considers it is in the public interest for the Requirement Notice to be disclosed ahead of its planned publication.

28. The Commissioner notes, however, that this argument and those that the FCA provided in favour of disclosure – although valid – do not provide substantial weight as to why it essential for the information to be released now rather than at the future intended publication date.

29. He does not consider that the public interest arguments in favour of disclosure outweigh those in favour of non-disclosure; namely

    - to preserve confidence in the overall review and encourage customers to participate in it
    - to prevent late challenges to the review's scope and methodology; and
    - to avoid diverting time and resources away from completing the final report.

30. The Commissioner considers that, on balance, it remains reasonable to withhold the information in the circumstances and that the public interest is best served by the FCA adhering to its plan to publish the requested information as part of Promontory and Mazars' final report.

Right of appeal

31. 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: 0870 739 5836
    Email: GRC@hmcts.gsi.gov.uk
    Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

32. 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.

33. 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