

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 18 April 2016

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 on software licences purchased by the Financial Conduct Authority (FCA). The FCA provided information for parts of the request but considered that the discount on the normal list price for the licence agreement was exempt on the basis of section 43(2).
2. The Commissioner's decision is that the FCA has correctly applied the provisions of section 43(2) and the balance of the public interest lies in maintaining the exemption. He requires no steps to be taken.

Request and response

3. On 2 July 2015, the complainant wrote to the Financial Conduct Authority (FCA) and requested information in the following terms:

"In your annual report you make reference to a loss of £3.2m relating to software licences.

In relation to this could you please answer the following questions:

- 1) *How many licences was it that you purchased and please give then name of the software, the company that they were bought from, and a description of what it could be used to do?*
- 2) *What was the discount on the normal list price?*

3) Why have these software licences not used?

4) Please provide me with any internal FCA documents that relate to why it is that these licences were not used after they were bought and why it was not possible to get your money back?"

4. The FCA responded on 7 August 2015. It answered question 1; confirming that the licence agreement was with Oracle and describing the nature of the licences. For question 2 the FCA cited section 43 of the FOIA as a basis for refusing to provide the information. The FCA provided an explanation as requested in question 3 and stated it could not provide the information at question 4 as to do so would exceed the cost limit and therefore engaged section 12 of the FOIA.
5. The complainant requested an internal review of the decision to refuse to provide information in response to question 2 on the basis of section 43.
6. Following an internal review the FCA wrote to the complainant on 1 October 2015. It stated that it had focused only on its response to question 2 as this was the subject of the internal review request. The FCA maintained its position and further explained how it had concluded that information relevant to question 2 should be withheld on the basis of section 43.

Scope of the case

7. The complainant contacted the Commissioner on 26 November 2015 to complain about the way his request for information had been handled.
8. The Commissioner considers the scope of his investigation to be to determine if the FCA has correctly applied the provisions of section 43 of the FOIA to withhold information within the scope of question 2 of the request.

Reasons for decision

9. Section 43(2) of the FOIA provides an exemption from disclosure of information which would or would be likely to prejudice the commercial interests of any person (including the public authority holding it). This is a qualified exemption and is, therefore, subject to the public interest test.

10. The term 'commercial interests' is not defined in the FOIA; however, the Commissioner has considered his awareness guidance¹ on the application of section 43. This comments that:

"...a commercial interest relates to a person's ability to participate competitively in a commercial activity, i.e. the purchase and sale of goods or services."

11. The withheld information in this case is the discount price on the normal list price. The FCA has explained that the software licence agreement referred to in the 2014/15 financial statements was with Oracle. The agreement gave the FCA the right to purchase various licences covering databases and other products under a "Pool of Funds" agreement. The Commissioner understands a Pool of Funds agreements is a type of unlimited licence agreement which allows customers to deploy a mix of pre-defined software and products for a limited time in exchange for paying a lump sum upfront for licences and support.
12. The Commissioner considers that the discount on the normal price for the software licence agreement would clearly be commercial information as it relates to participation in a commercial activity between the FCA and a third party (Oracle). The information does therefore fall within the scope of the exemption.
13. Having concluded that the withheld information falls within the scope of the exemption the Commissioner has gone onto consider the prejudice disclosure would cause and the relevant party or parties who would be affected.
14. Section 43(2) consists of 2 limbs which clarify the probability of the prejudice arising from disclosure occurring. The Commissioner considers that "likely to prejudice" means that the possibility of prejudice should be real and significant, and certainly more than hypothetical or remote. "Would prejudice" places a much stronger evidential burden on the public authority and must be at least more probable than not.
15. The FCA has stated that disclosure of the information would be likely to prejudice the commercial interests of the FCA and Oracle.
16. Where a public authority is arguing that disclosing the information may harm the commercial interests of a third party, in this case Oracle, the Commissioner will expect those arguments to be based on a proper understanding of their concerns. The Commissioner will not accept mere speculation about whether there would be any prejudice or how that

¹ https://ico.org.uk/media/for-organisations/documents/1178/awareness_guidance_5_v3_07_03_08.pdf

prejudice may occur. Therefore he would generally expect the public authority to be able to demonstrate that it had discussed the matter with the relevant third party. In this case the FCA has provided a copy of the correspondence it has had with Oracle and that letter supports the arguments presented by the FCA.

17. The actual information requested is the discount received by the FCA on the normal list price. The total value of the Pool of Funds ("POF") agreement is already publicly known as is the amount written off by the FCA. The withheld information is then the amount of discount given by Oracle which may be in the form of a figure or percentage discount on the list price.
18. The FCA argues that the value of the discount is a fundamental component of the contract and that disclosure of this information would be likely to prejudice the bargaining positions of both the FCA and Oracle in negotiating future contracts. After consulting with Oracle on this issue, the FCA remains of the view that disclosure of the withheld information would be likely to hamper the ability of each party to participate in commercial activity, to negotiate effectively in relation to similar future contracts, and to successfully enter into comparable transactions with other commercial entities.
19. The FCA has stated that at the time of the internal review there were discussions on how to recover best value from the unused licences.
20. The FCA has argued that it would undermine its relationship with Oracle to release the amount of discount and it could jeopardise its ability to purchase future software and support from Oracle or receive advantageous pricing. Similarly, disclosure would be likely to impact on Oracle's commercial interests by making public its general negotiating position to future clients.
21. The Commissioner has considered these points and has first looked at the claimed prejudice to Oracle's commercial interests. Oracle, when consulted, stated that it objected to disclosure as the POF agreement contained line item pricing details reflecting the preferential discounts that were agreed in confidence with the FCA.
22. The Commissioner understands the argument from Oracle to therefore be that disclosure of the discount may lead to future potential clients expecting to be offered the same terms or similar to those offered to the FCA. That being said, neither Oracle nor the FCA has identified any particular negotiations or prospective negotiations that are being conducted by Oracle which may be affected by this disclosure, weakening this argument.

23. In addition to this, Oracle's arguments are based on the premise that the information that has been requested and would be disclosed would include the line item pricing details which the Commissioner accepts may be more likely to engage the exemption. However, in this case the information which has been requested is the overall amount of discount and not any further breakdown.
24. The Commissioner's understanding is that the amount of preferential discount offered will be dependent on the specific nature of the POF agreement and will vary based on overall value and the number of licences involved in the agreements. For this reason it is difficult to see how disclosure of an overall discount would be prejudicial to future negotiations. The Commissioner therefore does not accept the exemption is engaged in relation to Oracle's commercial interests.
25. In respect of the FCAs commercial interest the Commissioner would again find it difficult to accept the general argument that disclosing the discount amount would be likely to prejudice future negotiations with Oracle or other suppliers. There is no evidence that any negotiations are in prospect with any other licence providers or that the FCA is intending to purchase any further licence agreements from Oracle.
26. However, the FCAs argument that at the time of the request and the internal review it was in the process of discussions around the selling of unused licences purchased under the POF agreement does have some validity. The Commissioner can accept that disclosure of the discount value may have impacted on these negotiations as it would have allowed the potential buyers an insight into the reduction on the overall value of the licences that was agreed with Oracle, weakening the FCAs negotiating position as any buyer would not be prepared to pay full price if the full amount of the discount was made known.
27. For this reason, the Commissioner would accept that there is a causal link between disclosure of the discount amount and the potential prejudice to the FCAs commercial interests. He therefore accepts the exemption is engaged.

Public interest arguments in favour of disclosure

28. In favour of disclosing the information the FCA acknowledged there is a public interest in transparency and in furthering the public understanding of the FCAs actions. Disclosure would help the public become more informed about the FCAs decision making and assist the public debate on the FCAs use of public funds.

Public interest arguments in favour of maintaining the exemption

29. The Commissioner notes that the exemption has been engaged on the basis that the prejudice envisaged by the FCA is only likely to occur. This reduces the weight that can be given to their arguments about the impact that disclosing the information would have.
30. The FCA considers the public interest in protecting commercially sensitive information is particularly strong where it relates to private companies' participation in public authority tenders and contracts. The FCA argues that potential tenderers and providers of contracted services should not be discouraged from bidding for public contracts by a fear of disclosure of commercial confidential information.
31. In addition to this, disclosure of details of the licence agreement could be detrimental to future negotiations as third parties would be more aware of the financial position of the FCA and the discount offered by Oracle, leading to the adjustment of payment demands accordingly.

Balance of the public interest test

32. The Commissioner considers there is a strong public interest in disclosure of financial information where it relates to the spending of public money. To an extent the information in question here does relate to the spending of public funds. However, the Commissioner cannot ignore the fact that the amount of money spent by the FCA on the licence agreement has already been disclosed as has the amount that has been written off. The information that remains is the discount that the FCA received on the overall list price and the arguments for suggesting this disclosure of this would be in the public interest are much weaker. Although disclosure would show that the FCA negotiated a better value for money agreement and this would show how it is using public funds.
33. Much stronger than this is the argument that disclosure of the discount may affect the FCAs negotiating position in the event that it chose to sell any unused licences to another company. It is a likely outcome that disclosing the discounted amount would influence the cost the FCA could hope to seek from potential buyers as knowing the discount would make it harder for the FCA to ask for cost value for the licences, therefore impacting the public purse.
34. Having considered all the factors discussed above the Commissioner finds that the public interest in maintaining the exemption and withholding the information, outweighs the public interest in its disclosure. Therefore the information can be withheld under section 43(2).

Right of appeal

35. 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

36. 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.
37. 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

Jill Hulley
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