Freedom of Information Act 2000 (FOIA)

Decision notice

Date: **26 September 2017**

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 the draft version of the Financial Conduct Authority's (FCA's) news release of 2 August 2016 along with e-mails discussing this draft up to and including the final version. The complainant also requested the FCA to release the e-mails which discuss the thinking behind and motivation for the news release.

2. The Commissioner's decision is that the FCA has correctly applied section 12(1) of the FOIA to the complainant's request on the grounds that to comply would exceed the appropriate limit. The Commissioner has also decided the FCA failed to provide the complainant with advice and assistance in respect of the remaining parts of his request and therefore it has breached section 16 of the FOIA.

3. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.

    - Provide the complainant with relevant advice and assistance as to what information can be provided within the appropriate limit.

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 13 November 2016, the complainant wrote to the FCA and requested information in the following terms:

   "Please release all correspondence, minutes of meetings/phone calls etc relating to the publication of the news release on 2nd August 2016: Investment advisers' and authorized firms' responsibilities when accepting business from unauthorised introducers or lead generators".

6. The FCA responded on 23 December 2016. It stated that it was unable to provide an answer as it held a large amount of information that would need to be reviewed and, by extracting the information the complainant had requested, the FCA would exceed the 'appropriate limit' of £450, or 18 hours at £25 per hour set out in section 12 of the FOIA.

7. On 29 December 2016, the complainant then refined his request in the following terms:

   "*Please release the draft version of this news release along with e-mails discussing this draft up to and including the final version. At the same time please release the e-mails which discuss the thinking behind and motivation for the news release".*

8. The FCA responded to the complainant's refined request on 17 January 2017. It stated that it had attempted to provide the complainant with a suggestion of how he might be able to narrow his request to come within the cost limit, but were unable to identify a way.

9. The complainant requested an internal review on the same day.

10. Following an internal review the FCA wrote to the complainant on 3 March 2017. It stated that the refined request would engage section 12.

Scope of the case

11. The complainant contacted the Commissioner on 7 March 2017 to complain about the way his refined request of 29 December 2016 had been handled. He stated that the basis of his concern was that, in his opinion, there seemed to be an unwillingness to ask whoever drafted the release for the relevant documents.

12. The Commissioner asked the FCA to provide its final position. The FCA reiterated to the Commissioner that it believed the complainant's request would vastly exceed the appropriate time limit set out in section 12 of the FOIA.

13. In view of this complaint, the Commissioner's investigation was focussed on the FCA's application of section 12 of the FOIA in order to refuse to comply with the complainant's request. This notice sets out the Commissioner's decision.

Reasons for decision

Section 12- The cost of compliance

14. Section 12 of FOIA states:

"*Section 1(1) does not oblige a public authority to comply with a request for information if the authority estimates that the cost of complying with the request would exceed the appropriate limit.*"

15. The Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2004 ("the Regulations") sets the appropriate limit at £450 for the public authority in question. Under the Regulations, a public authority may charge a maximum of £25 per hour for work undertaken to comply with a request. This equates to 18 hours work in accordance with the appropriate limit set out above.

16. A public authority is only required to provide a reasonable estimate or a breakdown of costs and in putting together its estimate it can take the following processes into consideration:

- determining whether it holds the information;
- locating the information, or a document which may contain the information;
- retrieving the information, or a document which may contain the information; and
- extracting the information from a document containing it.

Is section 12(1) engaged?

The FCA's position

17. To support its reliance on section 12 of the FOIA, the FCA has explained how it holds the information requested by the complainant.

18. At the FCA, information is not held within one central area for records management purposes. Instead, each individual involved in the alert production store their records using varying naming conventions and in different file locations.

19. The FCA contacted their Enforcement, Event Supervision and Strategic Communications areas to ask them to identify the requested information. This was on the basis that these three areas were most heavily involved in the production of the alert and would therefore be likely to hold the most comprehensive records.

20. In their internal review, the FCA explained that their Enforcement division holds an extensive number of electronic records amounting to 492 e-mail exchanges which could be deemed as relevant to the complainant's request. The FCA estimates that extracting the relevant information from their Enforcement division would take 4 hours and 35 minutes.

21. In addition to this, the FCA's Event Supervision division holds 815 electronic records which could be deemed relevant to the complainant's request. Two individuals were contacted to undertake searches of the Event Supervision's records. The FCA estimates that it would therefore take the Event Supervision division more than 12 hours to locate, extract and retrieve information relevant to the request.

22. The Strategic Communications division identified a further 130 e-mails exchanges which potentially fell within the scope of the request. The FCA estimated it would take 4 minutes per email for the Strategic Communications division to read and review content and extract information relevant to the request. Therefore, it estimates that extracting the relevant information would take approximately 8 hours and 40 minutes.

23. The FCA acknowledges that information may be duplicated across the different business areas. However, it argues that in order to provide the information requested, it would still need to review all of these e-mails in order to determine which fell within the scope of the request.

24. The FCA also explained that an electronic search of the information held using key words would be possible, but, given the software programmes available to the FCA for the management of its electronic records, this would not reliably identify only those items which fell within the scope of the request. To ensure that all the information requested has been captured, the FCA stated it would need assistance from other individuals and departments that would hold any relevant information as well.

The Commissioner's decision

25. The Commissioner has considered the FCA's submissions which she considers to be both plausible and persuasive.

26. In order to compile the statistics required to answer the complainant's request, the Commissioner has decided that it would be necessary for the FCA to locate, retrieve and extract a total of 1,437 e-mails sent during the period specified by the complainant.

27. To undertake this activity would take the FCA comfortably in excess of the 18 hours work set out in the Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2004. It is of the opinion of the Commissioner therefore that the FCA is entitled to rely on section 12 of the FOIA to refuse to respond to the complainant's request.

Section 16- duty to provide advice and assistance

28. Section 16(1) of the FOIA provides that a public authority should give advice and assistance to any person making an information request as far as it would be reasonable to do so. Section 16(2) clarifies that, providing an authority conforms to the recommendations as to good practice contained within the Section 45 Code of Practice ("the Code") issued by the Secretary of State, it will have complied with section 16(1).

29. The Code advises that, where an authority is not obliged to comply with a request for information because, under section 12(1) and the Regulations made for that section, the cost of complying would exceed the appropriate limit, it should provide the complainant with reasonable advice and assistance.

30. The ICO guidance states that the minimum a public authority should do in order to satisfy section 16(1) is indicate if it is able to provide any information at all within the appropriate limit. Communicating this to a complainant may avoid further and futile attempts to refine the request to bring it under the appropriate limit.

31. During the investigation the Commissioner invited the FCA to access whether it could provide any advice and assistance in accordance with section 16(1). She suggested as an example that the FCA might consider whether it could potentially provide the information for the period immediately leading up to the publication of the statement.

32. In response, the FCA advised that it could not reasonably provide any advice and assistance because of the volume and breadth of the information relating to the statement. The FCA argues that to provide copies of emails for the month prior to the publication of its news release would not be helpful as it would not provide a complete picture of the thinking and motivation behind the press release.

33. The Commissioner does not accept this argument however. Using the FCA's calculations, she has found that the FCA may be able to locate and extract information for a specified window of time, such as a month. The Commissioner further considers that to provide such a snapshot, particularly when close to the publication date or at a significant juncture, may provide the complainant with an indication of the FCA's thought process and motivation behind the news release. Even if this was not the complete picture, it may still be of value to the complainant.

34. The Commissioner therefore considers that the FCA could have provided the complainant with guidance as to how he could refine his request so that compliance fell within the parameters of section 12. The FCA's failure to do this amounts to a breach of section 16 of the FOIA.

35. The Commissioner requires the FCA to provide the complainant with relevant advice and assistance as to what information can be provided within the appropriate limit.

Right of appeal

36. 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

37. 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.

38. 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 ……

Alun Johnson
Team Manager
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