

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 11 June 2019

Public Authority: Financial Conduct Authority
Address: 12 Endeavour Square
London
E20 1JN

Decision (including any steps ordered)

1. The complainant has requested a 2010 review into a named company. The Financial Conduct Authority (FCA) has withheld the requested information under section 44(1)(a) of the FOIA (prohibitions on disclosure).
2. The Commissioner's decision is that the information is exempt from disclosure under section 44(1)(a).
3. The Commissioner does not require FCA to take any remedial steps.

Request and response

4. On 5 September 2018 the complainant wrote to FCA and requested information in the following terms:

"Please provide a copy of the FSA's 2010 "arrow" Review into [Redacted].

In particular, I am interested in any relevant information relating to the FSA's assessment of '[Redacted]' following the FSA report.

This information is pertinent to a public interest inquiry into billions of pounds worth of loans mis-sold to public sector organisations upon the advice of [Redacted]"

5. FCA responded on 3 October 2018. It neither confirmed nor denied it holds the requested information under section 44(2) of the FOIA.
6. Following an internal review FCA wrote to the complainant on 31 October 2018. It revised its position and confirmed that it holds the requested information and that it is exempt from disclosure under section 44(1)(a) of the FOIA.

Scope of the case

7. The complainant contacted the Commissioner on 28 November 2018 to complain about the way his request for information had been handled.
8. The Commissioner's investigation has focussed on whether FCA can rely on section 44(1)(a) to withhold the information the complainant has requested.

Reasons for decision

9. Section 44(1)(a) of the FOIA says that information is exempt information if its disclosure (otherwise than under this Act) by the public authority holding it is prohibited by or under any enactment.
10. In its submission to the Commissioner FCA has explained that it is relying on section 44(1)(a) because the requested information is information the Financial Services Authority (FSA) received when carrying out its regulatory functions under the Financial Services and Markets Act 2000 (FSMA) and is 'confidential' under section 348 FSMA¹. Section 348 FSMA restricts the FCA (which superseded the FSA) from disclosing 'confidential information' except in certain limited circumstances (none of which apply here).
11. FCA has gone on to provide a background. It has explained that ARROW (referred to in the request) stands for Advanced, Risk-Responsive, Operating framework. This is the name FSA gave to its risk-based approach to regulation. It was more commonly associated (outside the FSA) with the risk-assessment work carried out in firms. ARROW was

¹ <https://www.legislation.gov.uk/ukpga/2000/8/section/348>

used to determine the risks a firm posed to the FSA's four statutory objectives.

12. The reviews FSA conducted as part of the ARROW programme were one of the FSA Supervision's set piece tools in 2010 for larger firms. Its existence was well publicised by the FSA.
13. The fact that a firm had *had* a review has (or should have had) no negative implications. It is also quite clear from information on the website (from various financial sector articles based on guidance published by FSA in the past) that some 'high impact' firms might expect to have a visit from the FSA, the impact being the risk they posed to FSA achieving its objectives.
14. However, the *outcome* of the review was a report sent to the firm concerned, the information in which will fall within section 348 FSMA / section 44(1) FOIA, including the opinions etc of the FSA, as these are 'inextricably linked'. FCA notes that this is an argument which the Information Commissioner has accepted previously in other similar cases.
15. FCA has confirmed that the information to which it has applied section 44(1)(a) comprises information obtained by, and the actions that FSA took, in its engagement with the firm in question. FCA has provided this information to the Commissioner.
16. FCA has confirmed that the information falls within section 44(1)(a) as it was received by FCA (formerly FSA) for the purposes of, or in the discharge of, the FCA's functions under FSMA. Under section 348(5)(a) FSMA the FCA is identified as a primary recipient for the purposes of Part XXIII FSMA and therefore section 348(1).
17. Section 348 FSMA restricts the FCA from disclosing 'confidential information' it has received in carrying out its regulatory functions except in certain limited circumstances that do not apply here. Confidential information for these purposes is defined as non-public and non-anonymised information that relates to the business or other affairs of any person and which was received by the FCA for the purposes of, or in the discharge of, any of its functions under FSMA, where consent to disclosure has not been given to FCA. Disclosure of any such confidential information, without the consent of the provider of the information and, if different, the person to whom it relates, is in breach of section 348 of FSMA and is a criminal offence.
18. Section 348 FSMA, which triggers the exemption in section 44 FOIA, is a self-contained regime and does not depend for its operation on more

general or lay concepts of confidentiality. If the tests in section 348 are met, the restriction on disclosure applies.

19. FCA considers that section 348 FSMA (and thereby section 44 FOIA) also extends to the FCA's considerations, views, advice and other internally-created information, where the 'created' information incorporates information received by FCA from an external party, such as the company in this case. In other words, disclosing the 'created' information would disclose the content or nature of the confidential information which FCA has received, given the 'inextricable link' between these types of information. This principle has also been accepted by the Information Commissioner in other cases – such as FS50468587² – and the First Tier Tribunal (Information Rights) (FTT) decision in the Landau appeal – EA/2013/0098.
20. FCA has noted that section 348(4) FSMA states that information is not confidential if (a) it has already been made legitimately available to the public; or (b) it can be summarised or so framed that it is not possible to ascertain from it information relating to any particular person. FCA considers that subsection (4) is not a relevant consideration in this case, other than in relation to any information that might already be in the public domain, because (a) the information falling within this exemption is not publicly available and (b) it would be impossible for FCA to make the information anonymous, as it is clearly identifiable as relating to the firm named in the request or to other associated persons.
21. In terms of consent, FCA has confirmed that, in this case, it does not have consent to disclose the information. In the absence of consent the information could only be disclosed if there is a 'gateway'. FCA says that in this case there is no gateway to provide the information to a third party, such as the complainant. The information therefore remains covered by section 348 FSMA and section 44(1)(a) FOIA is engaged.
22. Finally, in its submission FCA has made the following observation. In other cases before the Court of Appeal and the FTT, the significance of section 348 FSMA within the regulatory regime has been recognised. In summary, the objects are to assist in the exercise by the FCA of its regulatory functions, by encouraging the free-flow of information to the regulator, and to ensure that communications between those with

² https://ico.org.uk/media/action-weve-taken/decision-notice/2013/826338/fs_50468587.pdf

responsibility for policy and enforcement could communicate confidentially; and to protect the privacy of persons providing information to FCA.

23. Therefore, provided the criteria for information being 'confidential' set out in section 348 FSMA are met, which in this case FCA considers they are, there is a statutory bar from the FCA disclosing confidential information it has received from a third party and where this relates to its or another party's business or other affairs. As such FCA says it is satisfied that it has correctly applied section 44(1)(a) FOIA to protect from disclosure the information requested, as this is covered by section 348 FSMA.
24. FCA has noted that section 44 of the FOIA is an absolute exemption and there is no need for it to consider whether, if the exemption is engaged, there might nonetheless be public interest arguments for its release.
25. The Commissioner acknowledges that the complainant presented her with some public interest arguments for the information's release but, as FCA has said, section 44 is an absolute exemption and is not subject to the public interest test. The complainant has also said that the exemptions to section 348 under section 349 FSMA "*make clear the requested information can be released as there is a right to disclosure of the information as it is compatible with European Union obligations to release it.*" Section 349 FSMA does not make this clear, in the Commissioner's view, and she is not persuaded by this line of argument.
26. From FCA's submission, which is detailed and clear, the Commissioner is satisfied that it has correctly applied section 44(1)(a) to the requested information. FCA received the information in the course of carrying out its regulatory functions under FSMA and section 348 FSMA prohibits it from releasing it under FOIA, because it is confidential information.

Right of appeal

27. 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@justice.gov.uk
Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

28. 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.
29. 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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