

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 9 September 2019

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 relating to communications about Bradford & Bingley.
2. The Commissioner's decision is that the Financial Conduct Authority has correctly cited section 14(1) of the FOIA in response to the request.
3. The Commissioner does not require the public authority to take any steps as a result of this decision notice.

Background

4. The bank was formed in December 2000 by demutualisation of the Bradford & Bingley Building Society following a vote of the building society's members, who swapped their nominal share of the building society for at least 250 shares of the newly formed bank. Former members of the Society each received a minimum of 250 shares worth £567.50 at the time, and savers with more savings receiving more shares worth up to £5,000 each.
5. In 2008, partly due to the 'credit crunch' the bank was nationalised and in effect split into two parts; the mortgage book and investment portfolios remained with the now publicly owned Bradford & Bingley plc, and the deposits and branch network (and a licence to use the B&B name for those aspects) was sold to Abbey National, itself owned by the Spanish Santander Group. The branch network was rebranded Santander on 11 January 2010 and the Bradford & Bingley name now solely relates to the nationalised section of the bank.

6. Shortly afterwards the decision was made to suspend the bank and there was then a statutory compensation scheme which resulted, effectively, in no compensation being given to the shareholders.

Request and response

7. On 3 December 2018, the complainant wrote to the public authority and requested information in the following terms:

"details of all communications, electronic or otherwise, from or to the Treasury regarding B&B on the 29.09.08"

8. The public authority responded on 3 January 2019 refusing to provide the information and cited section 14(1) of the FOIA.
9. Following an internal review the public authority wrote to the complainant on 12 February 2019 and upheld its refusal, however it cited section 14(2) of the FOIA as its basis for doing so.

Scope of the case

10. The complainant contacted the Commissioner on 7 March 2019 to complain about the way his request for information had been handled.
11. In her correspondence with FCA, the Commissioner asked it to confirm which limb of section 14 it was claiming reliance on. It confirmed that it was relying on section 14(1) of the FOIA. The Commissioner therefore considers the scope of this case to be to determine if the public authority has correctly applied section 14(1) to the request.

Reasons for decision

12. Section 14(1) of the FOIA states that a public authority is not obliged to comply with a request for information if the request is vexatious. There is no public interest test.
13. The term 'vexatious' is not defined in the FOIA. The Upper Tribunal (Information Rights) considered in some detail the issue of vexatious requests in the case of the Information Commissioner v Devon CC & Dransfield (GIA/3037/2011). The Tribunal commented that vexatious could be defined as the "manifestly unjustified, inappropriate or improper use of a formal procedure". The Tribunal's definition clearly

establishes that the concepts of proportionality and justification are relevant to any consideration of whether a request is vexatious.

14. In the Dransfield case, the Upper Tribunal also found it instructive to assess the question of whether a request is truly vexatious by considering four broad issues: (1) the burden imposed by the request (on the public authority and its staff); (2) the motive of the requester; (3) the value or serious purpose of the request and (4) harassment or distress of and to staff.
15. The Upper Tribunal did however also caution that these considerations were not meant to be exhaustive. Rather, it stressed the: *"importance of adopting a holistic and broad approach to the determination of whether a request is vexatious or not, emphasising the attributes of manifest unreasonableness, irresponsibility and especially where there is a previous course of dealings, the lack of proportionality that typically characterise vexatious requests"* (paragraph 45).
16. The Commissioner has identified a number of "indicators" which may be useful in identifying vexatious requests. These are set out in her published guidance on vexatious requests¹. In brief these consist of, in no particular order: abusive or aggressive language; burden on the authority; personal grudges; unreasonable persistence; unfounded accusations; intransigence; frequent or overlapping requests; deliberate intention to cause annoyance; scattergun approach; disproportionate effort; no obvious intent to obtain information; futile requests; frivolous requests.
17. The fact that a request contains one or more of these indicators will not necessarily mean that it must be vexatious. All the circumstances of a case will need to be considered in reaching a judgement as to whether a request is vexatious.
18. The Commissioner's guidance suggests that if a request is not patently vexatious the key question the public authority must ask itself is whether the request is likely to cause a disproportionate or unjustified level of disruption, irritation or distress. In doing this the Commissioner considers that a public authority should weigh the impact of the request on it and balance this against the purpose and value of the request.
19. Where relevant, public authorities need to take into account wider factors such as the background and history of the request.

¹ <https://ico.org.uk/media/for-organisations/documents/1198/dealingwith-vexatious-requests.pdf>

The complainant's position

20. The complainant has submitted detailed arguments in support of his request and subsequent complaint to the Commissioner. However, for brevity the Commissioner has not repeated them all here.
- The complainant stated that the FCA/FSA served notice to B&B at midday on 27 September 2008 under the Financial Services & Markets Act 2000 (FSMA) imposing a requirement with effect from 07:00 hrs 29 September 2008, subsequently altered to 09:00 hrs, that it must not accept deposits from new customers (the notice would not take effect if it was taken into public ownership).
 - Prior to the time extension of the removal of B&B's banking licence its nationalisation at 0800 hrs 29.09.08 would have been illegal as it was no longer a bank, which is defined as an institution holding a banking licence under the FSMA.
 - Several FOI requests have been made to the FCA and HMT asking specifically for relevant communications between them and the time of the licence extension.
 - HMT stated it had no record of inter-department communication with the FCA but that the latter extended the licence at 06:27 hrs 29 September 2008 whilst the FCA failed to confirm this or, more importantly, the time the amendment was issued to B&B.
 - Following legal advice the complainant believes evidence of the time the amended extension notice was issue to B&B is crucial to the legality, or otherwise, of B&B's nationalisation.
 - The FSA were still reassuring the public on 18 September 2008, and the complainant believes they were still doing so until 26 September 2008.
 - He argued that this is now a key issue in proving whether the destruction of B&B by the European Commission and the Treasury was or was not illegal and which is of particular interest to nearly one million B&B share/bond holders and employees.

The FCA's position

21. The FCA stated that having reconsidered its internal review response and the Commissioner's guidance it had concluded that while the complainant has made a number of requests on the same or similar matter, it does not appear that all three of the criteria in paragraph 6 would be met. It therefore confirmed that it was relying on section 14(1) of the FOIA.

22. In reaching that conclusion, the FCA had taken into account all the relevant circumstances. These include, in particular in this case, whether the request:
- has any serious purpose or value
 - is an attempt to re-open a matter already substantially dealt with and therefore demonstrates an unreasonable persistence
 - how much correspondence there has already been on this issue
 - would impose a significant burden in terms of expense and distraction if complied with; and
 - can fairly be characterised as obsessive or manifestly unreasonable.
23. The FCA acknowledge the complainant is concerned with the events surrounding the nationalisation of B&B in 2008. It further acknowledges that there was a significant public interest in understanding the events that took place at the time and the reasons for nationalisation.
24. However, 10 years have elapsed since that event took place and quite apart from the FOIA requests the complainant has made to the FCA and its predecessor the FSA, the matter has been considered in different forums on different occasions. Given that is the case the FCA consider the public interest in answering this particular request now is low.
25. The FCA argued that the circumstances leading to the event were set out in full in the Upper Tribunal decision published on 19 July 2012. In addition, in December 2017 proceedings were issued against HM Treasury, the FCA and the Bank of England claiming damages for misfeasance in public office and under the Human Rights Act 1998 in connection with the nationalisation of B&B in 2008. The claim was struck out and an appeal refused on 8 November 2018.
26. It further explained that the FCA has gone to considerable lengths and devoted considerable resources to deal with the complainant's requests on this subject over the years.
27. The FCA stated that it has reviewed the correspondence it, and the FSA, has had with the complainant between 27 July 2011 and 3 December 2018. It went on to explain that during this time the complainant made a total of 16 requests for information held by the FCA in relation to the nationalisation of B&B. One of those, made on 6 June 2013, was refused by the FCA on 3 July 2013 and subsequently referred to the Commissioner who upheld the refusal.

28. With regard to this particular request, the complainant has made three previous requests for substantially similar information prior to December 2018, and on each occasion it has explained that to comply with those requests would exceed the appropriate cost limit set in section 12 of the FOIA.
29. The FCA went on to explain that it considered whether a further refinement of the request would make it possible to comply within the cost limit but concluded that it would not.
30. With this in mind, the FCA maintains its position that all of the complainant's previous requests have been considered carefully and responded to appropriately, and there is no reason to expect that there would be a different outcome if it were to undertake a new search of its records as a result of this request.
31. Having taken account of all these factors, the FCA are of the view that the time needed to review the large number of files (6000+) held for the period in question to locate and identify any relevant information would cause a significant burden on FCA resources and would serve no useful purpose.
32. The FCA also wished to clarify that it does not consider that there is any improper motive in the request, nor does it believe that there is any intention to cause harassment or distress to FCA staff. Nevertheless, it must give appropriate weight to the resource being devoted to the investigation of the request and whether the purpose and value of the request provide sufficient grounds to justify the distraction of staff from other duties (including dealing with other FOIA requests) that would be incurred in complying with it.
33. Further, given the time that has elapsed since B&B was nationalised, the FCA consider it has exhausted all avenues to bring a satisfactory closure to this case, and is of the view that this request can be fairly characterised as obsessive and unreasonable.

The Commissioner's view

34. The complainant's stated purpose is to 'prove' that the nationalisation of B&B was illegal. The complainant has already been advised, in a legal judgement that the time for any legal action has long since passed and that any such action or claim would have no prospect of success i.e. a claim for misfeasance in public office has to be made against a person rather than an organisation.
35. It is clear that the complainant does not accept either this conclusion or that the matter has been investigated thoroughly. Using the FOIA to pursue matters which have already been investigated and addressed is

an abuse of the process. It is clear that the complainant has a keen personal interest in the information that the FCA might hold. However, the Commissioner can see little wider public interest in the request.

36. The Commissioner acknowledges the strength of feeling the complainant has about this matter, and his dedication to establishing the facts. However, it is only the Commissioner's remit to consider if a public authority has correctly cited an exemption and, where applicable, considered the public interest. Continuing to submit requests is unlikely to serve a useful purpose and the FCA has expended extensive resources in dealing with the complainant's requests and correspondence over a number of years.
37. Given the number of files that would need to be reviewed, and the time spent dealing with previous requests, the Commissioner is satisfied that this would impose a significant burden on the FCA. She therefore concludes that the FCA was entitled to rely on section 14 of the FOIA to refuse the request.

Right of appeal

38. 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

39. 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.
40. 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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