

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 19 November 2019

Public Authority: Payment Systems Regulator
Address: 12 Endeavour Square
London
E20 1JN

Decision (including any steps ordered)

1. The complainant has requested information from the Payment Systems Regulator (the PSR) about the banks lobbying over push payment scams. The PSR refused to provide the requested information, relying on section 44(1)(a) of FOIA (prohibitions on disclosure) in order to do so. In particular the PSR cited the statutory prohibition on disclosure created by the Financial Services (Banking Reform) Act 2013 (FSBRA).
2. The Commissioner's decision is that the PSR has correctly applied section 44(1)(a) and the Commissioner does not require the public authority to take any steps.

Request and response

3. On 3 April 2019 the complainant made a request for information under the FOIA:
'Since and including September 2016, what lobbying was done by banks over whether they would be obliged to reimburse customers in cases of authorised push payment scams?'
4. On 3 May 2019 the PSR explained that it had taken the request for lobbying done by banks to mean their comments provided to the PSR on whether they should be obliged to reimburse customers in cases of authorised push payment (APP) scams during the time since, and including, September 2016.

5. The PSR responded that it had liaised extensively with the banking industry and others on this topic when carrying out its regulatory functions. It provided links to published information that is not confidential under the Financial Services (Banking Reform) Act 2013 (FSBRA). It also provided links to published information on other websites.
6. It stated that, some of the information received from banks in this regard is "confidential information" for the purposes of section 91(2) of FSBRA. As a result, PSR is prohibited from disclosing this information. It is information which is subject to statutory prohibition and is exempt from disclosure by virtue of section 44(1)(a) of the FOIA.
7. On 3 May 2019 the complainant requested a review and on 27 June 2019 the PSR provided the outcome of its internal review. It upheld the decision to cite section 44(1)(a) of the FOIA.

Scope of the case

8. On 27 June 2019 the complainant contacted the Commissioner to complain about the way his request for information had been handled.
9. The Commissioner considers the focus of the investigation is to determine whether the PSR handled the request in accordance with the FOIA. Specifically, whether the PSR is entitled to rely on the exemption 44(1)(a) of FOIA as a basis for refusing to provide the withheld information.

Background

10. The PSR provided the following as a background.
11. The PSR is responsible for the regulation of payment systems designated by HM Treasury. Its objectives are to promote competition in and development of payment systems and services; and to ensure payment systems are developed in the interests of the people and businesses that use them.
12. Authorised push payment (APP) scams - where people are tricked into sending money to a fraudster - are the second biggest type of payment fraud.
13. In November 2017 the PSR published a report on the work that the PSR and industry were doing to develop ways to help prevent APP scams. It was believed that more could be done by payment service providers in the area of reimbursement. An ongoing programme of work to tackle

the impact of such scams was initiated including consultation on a proposed 'contingent reimbursement model' (CRM). All information received by the PSR in respect of APP scams was for the purposes of its functions.

14. The consultation closed in January 2018. The PSR received 21 responses. (See <https://www.psr.org.uk/responses-our-consultation-development-contingent-reimbursement-model> and <https://www.psr.org.uk/outcome-consultation-development-contingent-reimbursement-model>.) Consumer groups and many of the industry players were supportive or conditionally supportive of the introduction of a CRM code for victims of APP scams.
15. The PSR established a dedicated steering group with a balance of representatives from consumer groups and payment service providers to develop the CRM code. The PSR was an observer on the steering group and acted as a mailbox for confidential and non-confidential responses. (See <https://www.lendingstandardsboard.org.uk/resources/app-scams-steering-group-feedback-on-responses-to-consultation-paper/>)

Reasons for decision

Section 44

16. Section 44 of the FOIA states that:
 - (1) Information is exempt information if its disclosure (otherwise than under this Act) by the public authority holding it –
 - (a) is prohibited by or under any enactment,
 - (b) is incompatible with any Community obligation, or
 - (c) would constitute or be punishable as a contempt of court.
17. The PSR provided the Commissioner with a sample of the withheld information i.e. the confidential information that the PSR received from banks about their views on the reimbursement of APP scam victims.
18. Having carefully viewed the sample of the withheld information the Commissioner accepts that it can be categorised as
 - unsolicited letters/emails from banks' trade bodies and individual banks sent to (or copied to) the PSR
 - The Steering Group (which developed the CRM code) meeting papers and minutes

- Responses to the Steering Group's September 2018 consultation on the draft CRM code
 - Responses to the PSR's November 2017 consultation on introducing a CRM code
 - Responses to the PSR's Call for inputs on role of operator, including question about a model for reimbursing victims (March 2017)
 - Information gathered through meetings/calls on reimbursement of victims.
19. The PSR stated that the confidential information is exempt from disclosure under FOIA as it was information received from the banks for the purposes of section 91(2) of the Financial Services (Banking Reform) Act 2013. (FSBRA) The relevant FSBRA sections state:

'91 Restrictions on disclosure of confidential information

(1) Confidential information must not be disclosed by a primary recipient, or by any person obtaining the information directly or indirectly from a primary recipient, without the consent of—

- (a) the person from whom the primary recipient obtained the information, and*
- (b) if different, the person to whom it relates.*

(2) In this section "confidential information" means information which—

- (a) relates to the business or other affairs of any person,*
- (b) was received by the primary recipient for the purposes of, or in the discharge of, any functions of the Payment Systems Regulator under this Part, and*
- (c) is not prevented from being confidential information by subsection (4).*

(3) It is immaterial for the purposes of subsection 2 whether or not the information was received—

- (a) as a result of a requirement to provide it imposed by or under any enactment;*
- (b) for other purposes as well as purposes mentioned in that subsection*

(4) Information is not confidential information if—

- (a) it has been made available to the public by virtue of being disclosed in any circumstances in which, or for any purposes for which, disclosure is not precluded by this section, or*
(b) it is in the form of a summary or a collection of information that is framed in such a way that it is not possible to ascertain from it information relating to any particular person.

(5) Each of the following is a primary recipient for the purposes of this section—

- (a) the Payment Systems Regulator;*
(b) the FCA...'

'92 Exemptions from section 91

(1) Section 91 does not prevent a disclosure of confidential information which—

- (a) is made for the purpose of facilitating the carrying out of a public function, and*
(b) is permitted by regulations made by the Treasury under this section....'

20. The PSR stated that information received by the PSR on APP scams that is not confidential under FSBRA, or has been summarised or anonymised for publication (with consent) was provided to the complainant as links to the PSR and other websites.
21. PSR stated that the withheld information *'is confidential information within the meaning of subsection 91(2) as it relates to the business or other affairs of any person, was received by a primary recipient for the purposes of or in the discharge of any functions of the PSR under Part 5 of FSBRA and is not prevented from being confidential information by subsection 91(4) of FSBRA'*.
22. PSR explained that it is also possible for the 'received' information to be embedded within information created or held by the PSR and such information would also be confidential information under FSBRA. For example, the Steering Group meeting papers and minutes. Disclosure of the 'created' information would disclose the content or nature of the confidential information received by the PSR while performing its regulatory duties. Therefore, it is prohibited from disclosing such 'created' information which was received by the PSR and which is not in the public domain or where the relevant consents have not been obtained.
23. This principle of 'received' information being embedded in 'created' information has been accepted in previous tribunal decisions. (See

[http://informationrights.decisions.tribunals.gov.uk/DBFiles/Decision/i1236/Landau,%20Jonny%20EA.2013.0098%20\(14.04.14\).pdf](http://informationrights.decisions.tribunals.gov.uk/DBFiles/Decision/i1236/Landau,%20Jonny%20EA.2013.0098%20(14.04.14).pdf)

24. Section 92 of FSBRA provides for 'information gateways' with other authorities to share and receive confidential information where this advances the objectives and functions of the PSR or of the other authority. Following her guidance (<https://ico.org.uk/media/for-organisations/documents/1186/section-44-prohibitions-on-disclosure.pdf> paragraph 30) the Commissioner is satisfied that this gateway allows disclosure to other authorities for the purpose of carrying out public functions and does not allow disclosure of the confidential information under FOIA.
25. The Commissioner accepts that where agreement and consent from the banks (and others) was provided, the information or a summary of the information was published by the PSR or published on other websites and is not confidential information under section 91(4) of FSBRA. Where consent is not provided then section 91(1) of FSBRA applies.
26. In view of the above, the Commissioner is satisfied that the withheld information provided to the PSR by the banks about their views on the reimbursement of APP scam victims is confidential information for the purposes of section 91(2) of FSBRA. The tests in section 91 of FSBRA are met and therefore the restriction on disclosure applies.
27. In conclusion, the Commissioner's decision is that the PSR has correctly applied section 44(1)(a) to withhold all the requested information in this case, through the provisions of section 91 of FSBRA. As section 44 is an absolute exemption there is no need to consider the public interest test.

Right of appeal

28. 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

29. 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.

30. 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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