

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 9 December 2021

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

Decision (including any steps ordered)

1. The complainant has requested information about the investigation of a complaint. The Financial Conduct Authority (FCA) relied on section 31(3)(law enforcement) and 43(3)(commercial interests) to neither confirm nor deny it holds any relevant information.
2. The Commissioner's decision is as follows:
 - The FCA is entitled to neither confirm nor deny it holds the requested information under section 31(3) of the FOIA as to do so would be likely to prejudice the exercise of its functions. The public interest favours maintaining this exemption.
3. The Commissioner does not require the FCA to take any remedial steps.

Background and context

4. In its submission to the Commissioner, the FCA has provided the following background and context. The Financial Services and Markets Act 2000 (FSMA) is concerned with the regulation of financial services and markets in the UK. Under FSMA, the FCA has the functions (among others) of monitoring a firm's and key individuals' compliance with "the FCA's" requirements [the FCA may have meant "the FSMA's requirements" here] and is provided with powers to investigate matters

in relation to the exercise of its functions and, if appropriate, taking regulatory action.

5. Collective investment schemes (CIS) are defined at section 235 of FSMA and, very broadly, are funds to which several people have contributed whereby the fund manager will invest investors' money into one or more type of asset. The FCA regulates some collective investment schemes, both through authorisation of some UK collective investment schemes and recognition of some schemes from other countries. If a firm is neither authorised by the FCA nor recognised by the FCA, it is referred to as an unregulated collective investment scheme (UCIS). While the FCA does not regulate how UCIS are run, the FCA does regulate the promotion of these schemes in the UK and how UK firms can advise on or sell them, unless an exemption is available.
6. The establishment, operation or winding up of a CIS is a regulated activity, such that no person may carry on such activities unless they are an authorised person or an exempt person: section 19 FSMA. The contravention of section 19 is a criminal offence by virtue of section 23 FSMA. If the FCA receives information that suggests a CIS has been established, or is being operated, without authorisation, it may commence an investigation to determine whether or not there has been a breach of the FCA's rules.
7. If the FCA commences an investigation, this means that the FCA considers that there are circumstances that suggest that a breach of its rules or principles may have occurred. The circumstances may come to the FCA's attention from several sources, including without limitation the FCA's own inquiries, whistle-blowers, information provided by competitors, complaints, evidence of consumer harm, and self-reporting by a firm or individual themselves.
8. Given the threshold for commencing an investigation is a low one, it is evident the commencement of an investigation does not mean that the FCA will take regulatory action or that misconduct has occurred. If that was the case, the investigation would be a redundant exercise. At the same time, publicity about the fact of an investigation or other regulatory action inevitably causes prejudice to the investigation – evidence can go missing, witnesses may become uncooperative because of the public glare, the basis of the investigation may cause unhelpful speculation or even public searching of whistle-blowers, which in turn may create a disincentive for whistle-blowers to come forward, etc – and prejudice to the subject of the investigation.
9. The public, or perhaps more pointedly, the media are likely to unfairly infer culpability on the part of the subject, irrespective of the outcome of the investigation. In this case, the prejudice can be impossible to address, especially when the FCA decides there is insufficient evidence

to bring action or there is no basis for further action at all. These concerns are not ones held only by the FCA but are common to all regulators and law enforcement agencies.

10. For these reasons, it is the FCA's published policy not to publish the fact of an investigation or other regulatory action except in exceptional circumstances. Exceptional circumstances largely relate to issues that are already in the public domain where it would be expected that the FCA would initiate an investigation.

Request and response

11. On 9 November 2020 the complainant requested information of the following description:

"I would now like to formally make a Freedom of Information (FOI) request so I can understand whether our complaint has been investigated and no action has been taken against [redacted], or whether it is simply because your investigations are not yet complete. The information I would like is as follows:

- Written records of the investigations you made at the time of the initial complaint by [redacted] in 2017
 - Written records of the investigations you made at the time [redacted] provided [redacted]'s report in 2018
 - Written records of the investigations (if any) you have made since I requested an update on 14th October 2020."
12. On 7 December 2020 FCA responded. It refused to confirm or deny it holds the requested information under section 31 and section 43 of the FOIA and advised it considered the public interest favoured maintaining these exemptions.
 13. FCA provided an internal review on 11 January 2021. It confirmed that it was relying on section 31(3) and section 43(3) to neither confirm nor deny it holds the requested information.

Scope of the case

14. The complainant contacted the Commissioner on 11 May 2021 to complain about the way her request for information had been handled.
15. The Commissioner's investigation has focussed on whether FCA can rely on section 31(3) and/or section 43(3) to neither confirm nor deny it holds the requested information, and the balance of the public interest.

Reasons for decision

Section 31 – law enforcement

16. Under subsection 1(1) of the FOIA anyone who requests information from a public authority is entitled under subsection (a) to be told whether or not the authority holds the information – the 'duty to confirm or deny'.
17. Subsection 31(3) of the FOIA says that the duty to confirm or deny does not arise if, or to the extent that, compliance with section 1(1)(a) would, or would be likely to, prejudice any of the matters mentioned in subsection 31(1).
18. In its submission to the Commissioner, FCA has referred to subsection 31(1)(g) and confirmed that it considers confirming or denying the information is held would be likely to prejudice the exercise of its functions, specifically those functions under subsection 31(2)(b) and 31(2)(c) - the purpose of ascertaining whether any person is responsible for any conduct which is improper and the purpose of ascertaining whether circumstances which would justify regulatory action in pursuance of any enactment exist or may arise, respectively.
19. In the Commissioner's experience, section 31(2)(b) is not a widely used exemption. Improper conduct relates to how people conduct themselves professionally. For conduct to be improper it must be more serious than simply poor performance. It implies behaviour that is unethical.
20. Subsection 31(2)(c) is one of the more frequently claimed in section 31. This reflects the fact that many activities and sectors of the economy are subject to statutory regulation. Regulators include such bodies as the Food Standards Agency, the Health and Safety Executive, the Information Commissioner and the FCA.
21. Regulators use a range of measures to ensure compliance with the legislation they are responsible for. These can include compelling someone to remedy a breach of the legislation through serving enforcement notices, imposing sanctions such as fines, the

administration of a licensing regime (including the revoking of licenses where necessary) or publicly censuring someone. All such measures constitute "regulatory action".

22. For the exemption to apply the disclosure would have to, or be likely to, prejudice the ability of the regulator to determine whether any of these measures should be taken in the circumstances.
23. FCA has noted its explanation in its internal review response. In that response FCA advised the complainant that to the extent that it did investigate the entity named in the request or take any action (which FCA said may or may not be the case in this instance), confirming the existence of such an investigation or action may tip off the markets or firms or individuals in similar positions, to FCA's regulatory interest in a particular issue. It said that this may lead those parties to take steps designed to frustrate the regulatory process. Likewise, FCA said, denying that it investigated or took action might lead markets, firms or individuals to conclude that the FCA's regulatory priorities lay elsewhere. This may lead those parties to take steps that, even inadvertently, may frustrate the regulatory process.
24. In its submission to the Commissioner, FCA expands on this to say that the harm to its function of "ascertaining" or monitoring compliance with its regulatory requirements would be likely to occur over time, not just the period identified in the request. This is because confirming or denying that relevant information is held would be likely to lead to FCA losing flexibility and judgement in the use of its processes and resources for the following reasons. First, because it may result in firms or individuals changing their conduct, in the hope of increasing their prospects of avoiding the FCA detecting non-compliance with its regulatory requirements. Second, it may result in a loss of flexibility and judgment in the types of conduct which the FCA considers significant in firms and individuals generally, or by type, by relying on the issues on which the FCA focusses its priorities. The FCA says it has a variety of regulatory powers available to achieve outcomes that protect consumers and ensure markets work well. It considers it is therefore crucial that this flexibility and judgement is not harmed or inhibited in any way.
25. FCA says that another way of considering the risk it wishes to avoid is firms or individuals thinking they may be able to reduce the possibility of any non-compliance being detected by the FCA, because they consider they have a detailed understanding of the matters and priorities the FCA has (or has not) decided to direct its resources towards. As such, they are able to deploy their own resources accordingly or phrase responses in order to avoid further investigation. The FCA considers it is more likely to raise overall standards in the financial services industry if firms and individuals are not able to second-guess or predict what specific

matters, or types of matters, will be subject to a more detailed consultation or investigation, and the resources (both human and monetary) that will be devoted to it.

26. If firms or individuals cannot be certain what areas of their business will be the subject of more detailed reviews or monitoring by the FCA, this will help ensure they are not tempted to do the minimum necessary or tailor responses to its regulatory enquiries and investigations in order to disguise the true position. If they are unable to anticipate what matters will, or will not, be the focus of review or monitoring by the FCA, firms and individuals are likely to strive for a higher standard of compliance in the first place. This further supports FCA's view that confirming or denying the information is held would prejudice the effectiveness of the FCA's way of regulating.
27. The FCA concludes its section 31 submission by confirming that, as explained previously, its published policy is not to publish the fact of an investigation or other regulatory action except in exceptional circumstances, none of which apply in this case. The FCA considers it would be likely to cause material harm to its functions if it confirmed or denied it held requested information, or disclosed information, in response to ad hoc requests under the FOIA, instead of in accordance with the FCA's published policy for the following reasons:
 - a) There is a significant risk that firms or individuals would be less likely to make proactive disclosures of rule breaches or potential breaches to the FCA, which would seriously jeopardise the FCA's ability to regulate.
 - b) The FCA may face increased legal challenge prior to the appointment of investigators, which would reduce the FCA's flexibility and judgment in relation to investigations and cause delays.
 - c) Intensive speculation may ensue, yet it would be extremely difficult for the FCA to provide further explanation or context given the restrictions of section 348 of the FSMA (the bullet below provides further information on this).
 - d) Section 348 of FSMA restricts the FCA from disclosing "confidential information" it has received in carrying out its regulatory functions except in certain limited circumstances (none of which applies here). Confidential information for these purposes is defined as non-public and non-anonymised information which 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 the 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.

e) In this case, the requested information, if held, would have been received by the FCA as part of the arrangements it has in place for carrying out its supervisory function under section 1L of FSMA. If held, it therefore relates to confidential information it would have received from a third party and where this relates to its or another party's business or other affairs.

28. The FCA confirmed that it considers the above points to have a 'chilling effect' on its ability properly to perform its functions as a regulator. It considers this chilling effect applies equally to any disclosure now, in relation to actual or potential past investigations.

The Commissioner's conclusion

29. In her correspondence to the Commissioner, the complainant has said that the matter that she complained about to the FCA, and which is the focus of her request, is still being promoted, that the matter has been independently investigated by another body, but that there is no evidence whether or not the FCA has investigated her complaint. She disputes that indicating whether the FCA investigated the matter, by confirming or denying it holds relevant information, is a "privacy issue".

30. The Commissioner accepts that the FCA is responsible for regulating the FSMA and, as such, is tasked with the functions under subsections 31(2)(b) and 31(2)(c). With regard to 31(2)(b), the Commissioner considers it credible that some individuals and bodies working in the financial sector could be responsible for behaviour that is unethical and that the FCA would investigate such behaviours. With regard to 31(3)(c), the Commissioner is satisfied that, as a regulator, the FCA has a suite of regulatory measures at its disposal and is entitled to consider whether and how to use those measures against particular parties.

31. If the FCA was to confirm or deny that it holds information within scope of the complainant's request it would, in effect, be confirming whether or not it had investigated the matter that is the subject of the request. While she appreciates it is likely to be frustrating for the complainant, the Commissioner accepts the FCA's position that confirmation or denial would be likely to prejudice the purposes under subsections 31(2)(b) and (c).

32. It is not the FCA's policy to publish the fact or otherwise of an investigation. In addition to the effects discussed above, confirming or denying it had carried out an investigation in this case (in effect) would be likely to 'tip off' the markets, firms and individuals in similar positions to the body named in the request as to whether or not the FCA has an

interest in a particular issue. Those bodies could then take steps to frustrate FCA's regulatory functions.

33. The Commissioner therefore accepts that confirming or denying whether the requested information is held would be likely to result in the prejudicial effects to the FCA's purposes described at subsections 31(2)(b)-(c) of FOIA and that subsection 31(3) is therefore engaged. As section 31(3) is a qualified exemption, the Commissioner has next considered whether in all of the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosure.

Public interest test

Arguments in favour of disclosing the information

34. The complainant has not presented any public interest arguments, as such, to the Commissioner or in her correspondence to the FCA.
35. In its correspondence to the complainant, the FCA recognised the public interest in accountability and transparency, particularly where this contributes to increasing awareness and understanding of the FCA's use of its statutory powers in respect of the financial services sector.
36. The FCA also acknowledged that there can be positive advantages arising out of publishing the fact of an investigation, for example, where the matters under investigation have become the subject of public concern, speculation or rumour and publication would allay concern, or contain the speculation or rumour. The exceptional circumstances in which such publication might be made are set out in the FCA's Enforcement Guide.
37. Finally, the FCA acknowledged that there can also be advantages from publishing the FCA's investigations into a particular issue or sector. Publication would have a deterrent effect and encourage other firms to improve their conduct, without naming or identifying any particular firms. This would increase consumer confidence in the work that FCA does, and it could have a dissuasive effect on non-compliant conduct.

Arguments in favour of maintaining the exemption

38. The FCA has presented the following arguments:
- It publishes a considerable amount of information on its website that makes it clear what its expectations of firms and individuals are, what its regulatory priorities are in the current period and what are the key risks it sees to the financial services sector. The FCA's policy is not to publish the fact of an investigation or other regulatory action except in exceptional circumstances. It is

through the information it publishes, rather than publication of the fact of an investigation or other regulatory action, that it sets standards for the regulated community. There are no exceptional circumstances in this case.

- Publishing the fact of an investigation [or otherwise] would create the following risks: it will discourage firms or individuals from self-reporting breaches or potential breaches; it will encourage firms or individuals to take steps to avoid detection rather than improve standards; it will tailor firms' or individuals' compliance to the matters the FCA is investigating, and has investigated, rather than compliance across the range of their regulatory obligations; and it will hinder the FCA's proper performance of its regulatory functions in monitoring, assessing and investigating firms and individuals.
- The Commissioner's decision in IC-40642-10K8¹ from December 2020 has similarities to the current case. In that decision, the Commissioner recognised that there will be occasions when a regulator needs to create a degree of uncertainty as to where its resources may be focused at any given time. Regulators have finite resources which they must prioritise according to where they perceive the most serious concerns are (or are likely to occur). The more information about the regulator's allocation of resources it has, the better able an unscrupulous entity will be to make an accurate assessment of the likelihood of a particular activity coming to the attention of that regulator and, hence, the risk of carrying out that activity.
- In his previous decision, the Commissioner accepted that financial markets are very sensitive to the actions of the regulator and that the FCA is closely watched for clues about where regulatory action might take place. Revealing details of the types of companies or individuals that have been or are subject to investigation or other regulatory action might risk other firms or individuals altering their activities towards activities which are potentially harmful, but which are less likely to attract regulatory attention. This could distract the FCA from its work as it has to have the flexibility to reallocate resources as necessary to counter new issues which might arise. The Commissioner was satisfied in the earlier case that the chance of prejudice to the appropriate function occurring was more than hypothetical and the harms identified were actual

¹ <https://ico.org.uk/media/action-weve-taken/decision-notice/2020/2619069/ic-40642-10k8.pdf>

and of substance. The FCA believes there are similarities with the current request and that earlier decision.

- The FCA has noted that the Commissioner has previously recognised that some information when taken in isolation is not likely to be harmful on its own but may be harmful when combined with other information already in the public domain or known to a limited group of people; sometimes known as a “mosaic” or “jigsaw” effect. The FCA believes that public bodies, such as the FCA, are therefore entitled to look at the effect of the proposed confirmation or denial in the context of any existing information already in the public domain or known. For example, by allowing third parties to build up a bigger picture of its regulatory approach to issues such as the subject matter of the request in this case and allowing them, or others, to develop an understanding of how to manipulate the FCA’s existing processes and systems for their own ends.
- Finally, any disclosure of the fact of an investigation or regulatory action will be inherently limited by the constraints of section 348 of FSMA, highlighted above. Accordingly, if the FCA were to publish the fact of an investigation or any other regulatory action (or to confirm or deny whether such information was held), intensive speculation may ensue, yet it would be extremely difficult for the FCA to provide further explanation or context given section 348 restrictions. Consequently, to confirm or deny whether such information was held is inherently unlikely to raise standards.
- It has also been accepted more generally by the Courts that, as a matter of general principle and based on the authorities, a person or entity has a reasonable expectation of privacy in relation to any investigation, including the investigation of criminal allegations until charged: see for example *Sir Cliff Richard OBE v BBC* and another, [2018] EWHC 1837 (Ch). This is because the party concerned would not want others to know prematurely of such proceedings because of the stigma attached (and the potential personal or commercial prejudice they may incur) as a result of any such premature or unfair disclosure including through confirming or denying any relevant information is held.

Balance of the public interest

39. The Commissioner understands that the complainant has private interests in the information she has requested but this cannot be confused with the wider public interest.
40. In this case the Commissioner is satisfied that confirmation or denial would be likely to lead to individuals and other bodies taking steps to

frustrate the FCA's regulatory processes and/or give individuals or other bodies a prejudicial insight into what might or might not be the FCA's priorities. Both these outcomes would impede the FCA's ability to carry out its functions effectively.

41. The Commissioner appreciates the complainant's private interest, that there is a public interest in the FCA being open and accountable and the other possible positive outcomes of confirming, or otherwise, the fact of an investigation that the FCA has noted. However, as in IC-40642-10K8 and also FS50673940² from June 2017, the Commissioner considers that there is a stronger public interest in neither confirming nor denying whether the requested information in this case is held. This is because, for the reasons discussed in this and previous similar decisions, to do so would be likely to impede the FCA's ability to carry out its functions effectively and the FCA being an effective regulator outweighs the arguments for disclosure presented here.
42. Since section 31(3) of the FOIA has been correctly applied to the information and the public interest favours maintaining this exemption, it has not been necessary for the Commissioner to consider the FCA's application of section 43(3).

² <https://ico.org.uk/media/action-weve-taken/decision-notices/2017/2014403/fs50673940.pdf>

Right of appeal

43. 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: 0203 936 8963
Fax: 0870 739 5836
Email: grc@justice.gov.uk
Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

44. 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.
45. 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

Cressida Woodall
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