

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 18 January 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 eIDAS – that is, electronic identification and trust services. The Financial Conduct Authority ('the FCA') has said it does not hold the requested information.
2. The Commissioner's decision is as follows:
 - On the balance of probabilities, the FCA does not hold the specific information requested and has complied with section 1(1)(a) of the FOIA.
 - The FCA breached section 10(1) as it did not comply with section 1(1)(a) within 20 working days following the date of receipt of the request.
3. The Commissioner does not require the FCA to take any remedial steps.

Request and response

4. On 9 September 2019 the complainant wrote to the FCA and requested information in the following terms:

"In the FCA's guide to the adjustment period for secure customer authentication

(<https://www.fca.org.uk/firms/strong-cust...>) the FCA includes an item on eIDAS certificates for TPPs using open banking access.

Please provide:

1. Documentation and communications showing what the FCA have assessed as 'Being 'equivalent' to eIDAS, e.g. which criteria are used to judge 'equivalentness'.
2. Documentation and communications relating to how the Open Banking Implementation Entity's privately issued certificates were judged to be equivalent to eIDAS - i.e. how they were judged against the criteria mentioned above."
5. The FCA wrote to the complainant on 7 October 2019. It indicated that it considered the exemption under section 43 of the FOIA would apply to information it held and considered relevant to the request, and that it needed more time to consider the associated public interest test.
6. The FCA responded to the request on 4 November 2019. It said it held information within the scope of the request and that it was exempt information under section 43(2) (commercial interests) of the FOIA with the public interest favouring withholding the information. The FCA advised that it considered that section 44 of the FOIA (prohibitions on disclosure) was also engaged.
7. The complainant requested an internal review on 4 November 2019 and the FCA provided one on 28 February 2020. The FCA revised its position and confirmed that, in fact, it does not hold information falling within the scope of the first part of the request. The FCA confirmed that it therefore does not hold information within the scope of the second part.

Scope of the case

8. The complainant contacted the Commissioner on 21 February 2020 to complain about the way his request for information had been handed.
9. The Commissioner's investigation has focussed on whether, on the balance of probabilities, the FCA holds the information the complainant has requested and has complied with section 1(1) of the FOIA. She has also considered whether the FCA has complied with section 10(1), which concerns the time for complying with section 1(1).

Reasons for decision

10. Under section 1(1) of the FOIA anyone who requests information from a public authority is entitled under subsection (a) to be told if the authority holds the information and, under subsection (b), to have the information communicated to him or her if it is held and is not exempt information.
11. Under section 10(1) of the FOIA a public authority must comply with section 1(1) promptly and within 20 working days following the date of receipt of the request.
12. eIDAS refers to a range of services that include verifying the identity of individuals and businesses online and verifying the authenticity of electronic documents. In its submission to the Commissioner the FCA has provided additional background to the subject matter of the request. It says that on 5 February 2020, it published an update on Strong Customer Authentication. Referencing the first part of the complainant's request, the FCA has then noted the situation of there being no documents or communications showing what the FCA has assessed as being 'equivalent' to eIDAS ie what criteria are used to judge 'equivalentness'.
13. The FCA has explained that from 14 September 2019 new rules began to apply that affect the way banks and other payment services providers check that the person requesting access to an account or trying to make a payment is permitted to do so. The FCA agreed to give firms extra time to implement these rules in some circumstances (with a temporary adjustment period until 14 March 2020). It says that it was aware of a risk that a number of Third Party Providers (TPPs) would not be able to obtain an eIDAS certificate by 14 September 2019 when the new rules in the Regulatory Technical Standards for strong customer authentication and common and secure standards of communication (SCA-RTS) began to apply. It was also aware that a number of TPPs were using certificates issued by the Open Banking Implementation Entity (OBIE), as this was the identification method used by a number of Account Information Service Providers.
14. For the reasons stated in its website publication (ie to minimise disrupting services to customers) the FCA encouraged firms to continue to use existing methods of identification for a short period. The FCA refers to this period as the 'temporary adjustment period'. But the FCA says that as it was aware that there may be providers of secure identification certificates other than OBIE, it considered it appropriate to refer to "equivalent" certificates, and only refer to OBIE certificates as an example. By equivalent, the FCA says it simply meant equivalent

purpose, namely secure identification. Whether or not a certificate was already being used for this purpose was a matter of fact. The FCA says it did not make any assessment of equivalence or develop any criteria as it did not anticipate that it would be making such an assessment.

15. Based on the above, the FCA says that its internal review concluded that its response to the original request had mistakenly informed the complainant that the FCA held relevant documentation, for which it apologised. The FCA has told the Commissioner that before making this decision, it spent considerable time trying, in the interests of transparency and in the spirit of the Act, to adopt a wider interpretation of the complainant's request. This was so that documents could be disclosed if they could reasonably be considered to fall within the scope of request. In the FCA's view all attempts at doing so have faced the problem of knowing where to draw the line, with the consequent risk that an arbitrary approach would be taken to what was and what was not relevant. This brings with it a related risk that documents that might be considered relevant on one wider interpretation were excluded under a different wider interpretation. However, the FCA has confirmed that it did not consider the initial request to require clarification: it was sufficiently precise to have led it to the conclusion in the internal review that no documents fell within scope. The FCA has confirmed that it remains of that view.
16. The FCA's submission to the Commissioner then details the searches it has carried out for relevant information. It has confirmed that it has carried out extensive searches of the relevant business areas' records (the FCA Payments Policy and General Counsels Division (GCD)) and these revealed no information falling within scope of either the first or second part of the request.
17. The FCA says that email searches were carried out by members of Payments Policy and GCD, searching for terms such as 'eIDAS' and 'OBIE'. The FCA is satisfied that the searches were adequate because:
 - a) The relevant members of Payments Policy and GCD had either worked on:
 - FCA's guidance on the adjustment period given in its website, or
 - making a post-Brexit version of the SCA-RTS.
 - b) These searches would have been likely to retrieve any relevant information because:
 - they included emails relating to the FCA's website guidance which referred to 'an equivalent certificate', or

- they included emails relating to the FCA's consultation on making the on shored SCA-RTS, and consultation responses advocating the continued use of certificates issued by the OBIE.
18. The FCA confirmed that, if held: relevant information would be held as electronic records; searches included searches of information held on electronic databases; and that MS Outlook and that FCA staff are not permitted to hold FCA information on personal computers.
 19. In its submission the FCA has provided the Commissioner with further background and context to the request. It has also provided more detail on the information it had originally considered fell within the scope of the request, and why it had then concluded at internal review that it did not. The Commissioner has considered that further detail, which the FCA considers is sensitive. As such, she does not intend to reproduce it in this notice, suffice to say that the FCA has explained why the information in question does not address the specifics of the request; that is, information on how the FCA has assessed any other secure identification method as being 'equivalent' to eIDAS. The Commissioner accepts the FCA's position.
 20. The Commissioner has considered the specifics of the complainant's request, the FCA's explanation and the associated circumstances and context. She is satisfied, on the balance of probabilities and for the reasons the FCA has given, that the FCA did not hold the information requested in part 1 of the request, at the time of the request. It follows that the FCA therefore does not hold the information requested in part 2 of the request.
 21. In the first part of his request, which the Commissioner agrees is clear, the complainant has requested information on what the FCA has assessed as being equivalent to eIDAS, such as any criteria used to judge that one secure identification method is equivalent to another. The FCA has confirmed that it did not make any assessment of equivalence including developing any criteria. This was because it had not anticipated that it would be making such an assessment.
 22. The Commissioner has decided that the FCA complied with section 1(1)(a) of the FOIA when it confirmed that the information was not held. The Commissioner finds that the FCA breached section 10(1) of the FOIA on this occasion. This is because the complainant submitted his request on 9 September 2019 and the FCA did not comply with section 1(1)(a) until 28 February 2020.

Right of appeal

23. 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

24. 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.
25. 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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