

**Freedom of Information Act 2000 (FOIA)
Environmental Information Regulations 2004
Decision notice**

Date: 20 October 2022

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

Decision (including any steps ordered)

1. The complainant has requested any communications between the Financial Conduct Authority (FCA) and the US Securities and Exchange Commission (SEC) relating to named organisations from 2017 to the date of the request. Although the Commissioner is not able to document the sequence of events that led up to this for reasons of confidence, the FCA's original response was amended at internal review where it neither confirmed nor denied that it held the requested information, citing sections 27, 44, 43 and 31 FOIA.
2. The Commissioner's decision is that the FCA was entitled to rely on neither confirming nor denying whether it held the requested information under section 27(4) FOIA and for that reason has not gone on to consider the other exemptions cited.
3. The Commissioner requires no steps to be taken.

Request and response

4. On 20 September 2021, the complainant wrote to the FCA and requested information in the following terms:

“Any and all communications with the US Securities exchange commission relating to Ripple and/or XRP from 2017- current date.”
5. The FCA responded on 18 October 2021. It stated that it was relying on sections 27 (international relations), 44 (prohibitions on disclosure), 43 (commercial interests) and 31 (law enforcement) FOIA.
6. The complainant made a request for an internal review on 24 October 2021.
7. The FCA wrote twice to the complainant (22 November 2021 and 20 December 2021) stating that it needed to extend the time it would require to respond.
8. Following an internal review, the FCA wrote to the complainant on 24 January 2022. It stated that it neither confirmed nor denied (NCND) whether the information was held, citing sections 27(4), 44(2), 31(3), 43(3).

Background

9. The FCA highlighted Article 7 of the International Organization of Securities Commissions (IOSCO) Enhanced Multilateral Memorandum of Understanding (EMMoU),

“to which both the FCA and United States Securities and Exchange Commission are signatories, states that each authority that is a signatory will keep confidential requests, responses, referrals, and related communications made to it under the EMMoU, the contents of such communications, and any matters arising in connection with such communications, including consultations between or among each authority, and unsolicited assistance”.
10. The FCA also explained that the SEC -

“...is a signatory to the EMMoU, the MMoU, and other bilateral agreements that promote information sharing among foreign nations. These agreements permit the SEC to request information from foreign securities regulators (which we neither confirm nor deny is the case here), and who may decline the Requests, or the foreign regulator may agree to facilitate the production of

documents from foreign entities under the foreign regulator's jurisdiction. This cross-border cooperation is seen by the SEC as critical to its mission of protecting the investing public and maintaining fair and transparent global markets".

Scope of the case

11. The complainant originally contacted the Commissioner on 20 December 2021 to complain about the length of time it was taking for the FCA to review their complaint. After the FCA had provided an internal review, the complainant was not content that the FCA had NCND the requested information, querying whether the exemptions applied and stating that "there is a public interest in the information as there is a suspicion of wrongdoing".
12. The Commissioner considers that the scope of this case is the FCA having NCND whether it holds this information under sections 27, 44, 43 and 31.

Reasons for decision

13. The right of access under FOIA is in two parts. Section 1(1)(a) provides a right to receive confirmation or denial from a public authority as to whether requested information is held. Section 1(1)(b) provides a right to be provided with that requested information where it is held. Both rights are subject to exemptions. Clearly, if a public authority is not obliged to comply with section 1(1)(a) because an exemption applies, it is not obliged to provide requested information where that is held. In this case, the FCA is arguing that it is exempt from its duty to comply with section 1(1)(a). This position is widely referred to as "NCND" – neither confirm nor deny.

Section 27 – international relations

14. Section 27(1)(a) FOIA states that:

"(1) Information is exempt information if its disclosure under this Act would, or would be likely to, prejudice— (a) relations between the United Kingdom and any other State".

15. Section 27(4) says that,

"The duty to confirm or deny does not arise if, or to the extent that, compliance with section 1(1)(a)—

(a) would, or would be likely to, prejudice any of the matters mentioned in subsection (1), or

(b) would involve the disclosure of any information (whether or not already recorded) which is confidential information obtained from a State other than the United Kingdom or from an international organisation or international court."

16. The FCA is confident that the SEC, though an independent federal agency, is part of the executive branch of the US government and falls within the meaning of 'state' for the purposes of sections 27(1), 27(2) and 27(4) of the FOIA.
17. The FCA's view is that the exemption does not necessarily focus on the scale or importance of the issue or on the subject or type of information, but on whether UK interests abroad, or the international relations of the UK would be prejudiced through the confirmation or denial that the requested information is held.
18. It also considers that the requested information would be exempt (under section 27(2)), if held, as it would be confidential information obtained from a State other than the UK or from an international organisation/court. Any such information is confidential while the terms on which it was obtained are required to be held in confidence or that it is reasonable for the State, organisation or international court to expect that it will.
19. The quoted sub-sections also apply to information that is internally created, if it were to exist, if the "created" information is embedded in documents or parts of documents generated from its record of information provided in confidence by another State, organisation or international court. The Commissioner's guidance acknowledges that many public authorities (including the FCA) carry out functions that relate directly to or have the potential to affect the international relations of the UK. The exemption is not limited to central government departments.

20. Most of the world's financial regulators, including the SEC and the FCA, are members of the IOSCO and a signatory to the MMOU Concerning Consultation and Cooperation on the Exchange of Information¹. This is to ensure compliance with, and enforcement of their securities and derivatives and regulations. Where information is shared under IOSCO the FCA would have agreed to keep it confidential except (a) for specified circumstances or (b) when it receives a legal demand. However, where (b) arises the FCA has agreed that it will apply all protections it can to prevent disclosure of the material. "Professional secrecy" provisions are similar to equivalent provisions contained within the vast majority of MOUs around the world and they support the framework for international cooperation and reflect statutory requirements governing cooperation.
21. The FCA also engages with foreign state criminal law enforcement and prosecutors in relation to dealing with serious economic and international crime. These may relate to a criminal investigation, though any FCA investigation is on a regulatory only basis. Regulation 4(a) and (b) of the Financial Services and Markets Act 2000 (FSMA) can be an applicable gateway but this is not a gateway to share confidential information to the public.
22. The FCA attaches great importance to open conversations and exchanges with fellow overseas regulators, financial institutions and law enforcement agencies without fear that it will be subject to harmful disclosure or prejudice the interests protected by section 27 FOIA. In relation to this request it is important for the UK to be able to have open and candid communications with the US financial regulatory authorities regarding the regulation of the financial services sector, though it is neither confirming or denying whether it did in this instance. If the information was held, disclosure would be likely to have an inhibiting effect on communications between the SEC and the FCA. This impact could cause a chilling effect on open, cooperative exchanges between the organisations concerned which are a key component supporting mutual cooperation. Relations between the UK and the USA would be prejudiced.

¹ <https://www.fca.org.uk/publication/mou/fsa-mou-iosco.pdf> (pp 7 and 8 covers the requirements of confidentiality)

23. The FCA is satisfied that, if it held such information falling within this exemption and it was disclosed, it would clearly impact on its relationships with overseas regulators and other overseas financial institutions and law enforcement agencies. This would not be confined to US government authorities. These authorities need to be able to have open conversations and exchanges with fellow authorities in the UK without fear that it is shared or the confirmation or denial of its existence is then subject to harmful disclosure.
24. The Commissioner notes that the complainant stated in their request for an internal review that they did not intend to pass on the information to any third party, publicly or privately, and that the risk was therefore "mitigated and nullifies the exemption". However, disclosure under the FOIA is to the world in general and cannot be confined to one requester.
25. The Commissioner has been provided with confidential information which cannot be outlined here to support the FCA's view why it is neither confirming or denying whether it holds this information. The FCA has provided argument that actual harm would ensue by confirmation or denial and that there is a causal relationship between doing so and the resultant harm. He accepts that the exemption is engaged at the lower level of prejudice as the risk of prejudice occurring is clearly more than a hypothetical one.

Public interest test

26. The Commissioner will now go on to consider whether it is in the public interest to neither confirm nor deny whether this information is held.

Public interest factors in favour of confirming or denying

27. The FCA accepts that there is a general public interest in promoting transparency, accountability and public understanding of the relationship between the FCA and financial regulators outside the UK.
28. There is a public interest in raising public awareness of the FCA's regulatory and supervisory processes and functions.
29. The FCA acknowledges that there is a public interest in the public finding out and being reassured by the FCA's responses to matters arising within the financial services sector within the UK and worldwide, particularly when they may involve communications with other states' financial regulators.

Public interest factors in favour of maintaining the exemption neither to confirm or deny

30. The FCA asserts that there is a strong public interest in it being able to carry out its functions under the FSMA 2000 in the most effective manner possible. Any ad hoc disclosure relating to the FCA's dealings with other states and their financial regulators such as SEC can undermine expectations or reciprocal cooperation and confidentiality, prejudicing the UK's relations with other states (such as the USA) who may become less willing to share information with the FCA.
31. The FCA stresses the importance of its relationships with other States to ensure the smooth and efficient operation of the UK and the worldwide regulatory, supervisory and consumer regimes in the financial services industry. It is not possible to confirm or deny whether the requested information exists because of the way in which the request is phrased. To do so would reveal whether there had or had not been communications between the FCA and SEC about the other third-party entities named in the complainant's request which could be prejudicial. The FCA does not believe this to be in the public interest.

Balance of the public interest

32. The Commissioner agrees with the FCA that confirming or denying whether it holds the requested information is not in the public interest. He accepts that to do so would reveal confidential information that regulatory authorities outside the UK would expect to be kept confidential. The very fact of confirmation or denial would reveal something in itself. To do so could seriously undermine the sharing of information of this kind which is likely to undermine the FCA's ability to be an effective regulator and is not in the public interest.
33. As the Commissioner has decided that the FCA has appropriately cited section 27(4) FOIA, he does not intend to go on to consider the FCA's citing of sections 44(2), 31(3) and 43(3) NCND.

Other matters

34. The section 45 code of practice recommends that public authorities complete the internal review process and notify the complainant of its findings within 20 working days, and certainly no later than 40 working days from the receipt.
35. The FCA did not complete its internal review for some three months, one month beyond the maximum timeframe that the Commissioner deems to be acceptable for a public authority to take.

Right of appeal

36. 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

37. 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.
38. 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

Janine Gregory
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