

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 30 September 2022

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

Decision (including any steps ordered)

1. The complainant has requested correspondence between Lord Barker and the Financial Conduct Authority (FCA) relating to EN+ Group within a specified time period. The FCA refused to confirm or deny if any correspondence existed on the basis of the exemptions at section 44(2) and 40(5) of the FOIA.
2. The Commissioner's decision is that the FCA was not entitled to rely on either section 44(2) or section 40(5) of the FOIA to neither confirm nor deny holding relevant information. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation:
 - Either confirm or deny holding information within the scope of the request. If the FCA holds information it must either disclose it, or issue a refusal notice that complies with section 17 of the FOIA
3. The public authority must take these steps within 35 calendar days of the date of this decision notice. Failure to comply may result in the Commissioner making written certification of this fact to the High Court pursuant to section 54 of the Act and may be dealt with as a contempt of court.

Request and response

4. On 15 February 2022 the complainant made a request to the FCA for information in the following terms:

“Please provide a copy of all correspondence between (to and from) Lord Barker and members of the executive committee of the FCA relating to EN+ since 1st January 2019.”

5. The FCA responded on 4 April 2022 stating it could neither confirm nor deny whether it held information relevant to the request as to do so would reveal personal information.
6. The complainant requested an internal review of this decision on 6 April 2022. They argued that Lord Barker is a public figure and if it is his personal data the FCA is protecting then it could confirm or deny if information is held and provide it in a redacted format if necessary.
7. The FCA conducted an internal review and responded on 9 May 2022. The FCA concluded it had correctly refused to confirm or deny if the information was held by virtue of section 40(5)(b) of the FOIA and added that it considered section 44(2) also provided an exemption from the duty to confirm or deny if the information was held.

Scope of the case

8. The complainant contacted the Commissioner on 25 May 2022 to complain about the way their request for information had been handled.
9. The Commissioner considers the scope of his investigation to be to determine if the FCA has correctly refused to confirm or deny if the requested information is held by virtue of either section 40(5) or section 44(2) of the FOIA.

Background

10. The request refers to Lord Barker and EN+ and asks for any correspondence between Lord Barker and the FCA. EN+ is a public company listed on the London Stock Exchange. EN+ is a mining company, part-owned by the sanctioned Russian oligarch Oleg Deripaska. Lord Gregory Barker served, at the time of the request, as the executive chair of EN+¹.

¹ [Tory peer Greg Barker resigns as chair of Russian firm EN+ | Mining | The Guardian](#)

Reasons for decision

11. As section 44 is an absolute exemption, the Commissioner has looked at this exemption first. Only if it is not engaged will he look at section 40.

Section 44 – statutory prohibition on disclosure

12. Section 1(1) of the FOIA states that:

“Any person making a request for information to a public authority is entitled –

- (a) to be informed in writing by the public authority whether it holds information of the description specified in the request, and
 - (b) if that is the case, to have that information communicated to him.”
13. Section 44(1) of the FOIA provides an exemption from disclosure for any information whose disclosure would either be otherwise prohibited by another piece of legislation or which could constitute a contempt of court.
14. Section 44(2) of the FOIA provides an exemption from the duty to confirm or deny whether information is held if the mere act of confirming or denying alone would involve the disclosure of information which was otherwise prohibited.
15. Section 348(1) of the Financial Services and Markets Act 2000 (FSMA) prevents the FCA from disclosing “confidential information” without consent.

16. Section 348(2) of the FSMA states that:

“ “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 FCA, the PRA or the Secretary of State under any provision made by or under this Act; and
 - (c) is not prevented from being confidential information by subsection (4).”
17. Section 348(4) of the FSMA states that:

“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 collection of information so framed that it is not possible to ascertain from it information relating to any particular person.”

18. Section 349 provides some limited gateways to disclosure of confidential information, none of which relate to disclosure to the world at large. Section 352 of the FSMA makes it a criminal offence to disclose confidential information otherwise than in accordance with the FSMA.
19. The task for the Commissioner is to determine whether confirming if correspondence between Lord Barker and the FCA regarding EN+ exists would, in itself, be confidential information and therefore covered by the FSMA.

The complainant's position

20. The complainant argues that if Lord Barker engaged in lobbying the FCA for EN+, given its links to the sanctioned oligarch, then this information should be on the public record.
21. In terms of section 44, the complainant argues it is not clear that any lobbying activity completed by Lord Barker of the FCA would have been disclosed in a situation where a reasonable expectation of confidence existed, and therefore it is not clear section 44 applies. The complainant points to the Commissioner's guidance on expectations of confidence² and the four limb test that needs to be met.
22. The complainant also referenced the First-Tier Tribunal decision in *Corderoy v Information Commissioner & Department for Exiting the European Union (EA/2019/0109 & 0111)* in which the Tribunal commented that:

“Organisations which seek to influence policy formation can, under normal circumstances, expect to see their contributions summarised and publicly disclosed or disclosed by the organisations themselves as part of their own direct engagement with the public or their own widespread stakeholders from which it readily moves into the public domain.”

² [information-provided-in-confidence-section-41.pdf \(ico.org.uk\)](https://ico.org.uk/information-provided-in-confidence-section-41.pdf)

23. The complainant argues that this makes it clear that the Tribunal views any lobbying of government by third parties who seek to influence the policy process cannot be done in the expectation that this information will be withheld and thus there cannot be an assumption of confidence in relation to lobbying correspondence.

The FCAs position

24. The FCAs position is that if the information were held it would have been received by the FCA as part of its arrangements it has in place for carrying out primary market functions under Part VI of the FSMA and the Official Listing of Securities (Change of Competent Authority) Regulations 2000. It therefore would relate to confidential information the FCA would have received from a third party (Lord Barker) relating to its or another party's (EN+) business or affairs.
25. The FCA argues that the confidentiality regime in the FSMA is a self-contained regime and does not depend for its operation on more general legal or lay concepts of confidentiality. If the tests in section 348 of the FSMA are met then the restriction on disclosure applies. The FCA emphasised that section 348 of the FSMA restricts it from disclosing "confidential information" it has received in carrying out its regulatory functions except in limited circumstances. "Confidential information" for the purposes of section 348 is information which relates to the business or affair or any person, that was received by the FCA the purposes of, or in the discharge of, any of its functions under the FSMA, and where consent to disclosure has not been given to the FCA. Disclosure without consent is a breach of section 348 and is a criminal offence.
26. Further to this, the FCA also considers section 348 applies to information that is internally created by the FCA where the "created" information incorporates embedded confidential material received by the FCA from an external party. The FCA points to previous decision by the Commissioner, specifically decision notice FS50468587, in which this principle has been accepted and upheld by the Information Tribunal. The FCA also referenced the Information Tribunal appeal EA/2013/0098 in which the Tribunal accepted that section 348 information could be 'embedded' and that it could be difficult to 'disentangle' this information from other information.
27. Following on from this, the FCA argues that if it were to confirm or deny if it held the information falling within the scope of the request it would in itself be disclosing confidential information because of the way in which the request is phrased. In this case, confirming or denying if the FCA had been in contact with Lord Barker would disclose whether the FCA had received information prompting the need to communicate with Lord Barker in a regulatory capacity regarding the operation of EN+.

28. It is pointed out by the FCA that section 348(4) of the FSMA states that information is not confidential if
 - (a) It has already been made legitimately available to the public; or
 - (b) It can be summarised or so framed that it is not possible to ascertain from it information relating to any particular person.
29. The FCA argues that subsection (4) is not a relevant consideration in this case because the information is not publicly known i.e. whether any such correspondence exists and the FCA engaged with Lord Barker during the specified time period. The FCA could also not make information anonymous as the request specifically refers to a person and a firm.
30. In terms of consent, FSMA also allows that information may be disclosed (or to confirm or deny if it is held) if consent has been obtained from the person that would have provided the FCA with the information (if that was to be the case); and, if different, the person to whom it relates. In considering this request, the FCA took into account that the Commissioner and the Information Tribunal have previously accepted (EA/2005/0019) that if the FCA does not have consent the FOIA does not compel the FCA to seek consent.

The Commissioner's position

31. The Commissioner recognises the FCA's desire to protect its regulatory abilities. However, this exemption does not exist to protect regulatory functions, it exists to protect public authorities from violating other pieces of legislation which override the FOIA. If a public authority is unable to demonstrate that the identified statutory bar would prohibit the issuing of a confirmation or a denial, section 44 is not engaged – no matter how damaging issuing a confirmation or a denial might be.
32. Many regulators (including the Commissioner himself) are subject to special legislation to help them go about their work. This legislation allows the regulator to receive information that the organisations they regulate would not normally wish to share with third parties (usually because of commercial considerations) and may give the regulator the power to compel an organisation to hand over information.
33. The consequence of this privileged access to information is that the regulator is required to keep the information it collects confidential. Its staff are not permitted to disclose the information except through prescribed "gateways" to disclosure (usually related to criminal or civil judicial proceedings) and any unauthorised disclosure is a criminal offence.

34. When determining whether or not section 44 is engaged in respect of a confirmation or a denial, the Commissioner must perform a three-step test:
 - a) identify the relevant legislation introducing the statutory bar;
 - b) determine whether issuing a confirmation or a denial would disclose information which would be subject to the statutory bar; and
 - c) consider whether there is a gateway that would allow a confirmation or denial to be issued.
35. The Commissioner accepts that the FSMA is relevant in this case as it is the FCA's governing the legislation and does prohibit the disclosure of "confidential information."
36. When determining whether a statutory bar requires a neither confirm nor deny response, the Commissioner is not required to consider what the hypothetical contents of any information that existed might be (if in fact the information existed). His role is to determine whether the mere act of issuing a confirmation or a denial that information is held would in itself result in the disclosure of information that would engage the statutory bar.
37. It is this information that the FCA is being asked to confirm or deny that it holds. Therefore in issuing a confirmation or a denial, the FCA is in effect being asked to say either that it engaged in correspondence with Lord Barker relating to EN+ within the specified time period or it did not engage in correspondence.
38. In issuing a confirmation or a denial, the FCA is not being asked to disclose any correspondence, if it exists. It is being asked to confirm if such information exists.
39. The Commissioner does not accept that by merely confirming that it held information (if indeed that is the FCA's true position) the FCA would be disclosing any "embedded" confidential information as a confirmation would not in itself reveal the correspondence, if any exists, or the reasons for the communications taking place.
40. The FCA has argued that confirming or denying if the information exists is essentially confirming whether the FCA had received information requiring communications with Lord Barker and EN+ in a regulatory capacity.
41. The Commissioner considers this to be speculative – confirming or denying if correspondence exists would not necessarily confirm that the FCA had received information that prompted contact with Lord Barker.

The request is quite open in its wording and correspondence could take many forms and may not always be prompted by regulatory concerns. Issuing a confirmation or a denial would not confirm that the FCA had or had not received information from a third party.

42. In terms of the Tribunal cases referenced by the FCA; the Commissioner does not consider these to be relevant in this case. In EA/2013/0098 the FCA had already confirmed it held an item of correspondence and the Tribunal found that the confidential information (what the FCA had received) was so intertwined with the other correspondence that it was not possible to separate the two and therefore the entire correspondence was confidential. This case is different. The FCA has not confirmed that it holds any information so speculation as to what the information (if it existed) might contain is irrelevant.
43. If the FCA were to issue a confirmation that it had engaged in correspondence as listed in the request or that it had no correspondence, that might have an impact on the FCA's regulatory effectiveness but it would not reveal any information the FCA has received. Issuing a confirmation or denial would not disclose any information the FCA has received and any such confirmation or denial would therefore not disclose 'confidential information' and the FSMA would not prevent a confirmation or denial from being issued.
44. As the statutory bar is not engaged, it follows that the FCA is not entitled to rely on section 44(2) of the FOIA.
45. The Commissioner will next go on to consider if section 40(5) of the FOIA provides an exemption from the duty to confirm or deny if the information is held.

Section 40 – personal information

46. Section 40(5B)(a)(i) of FOIA provides that the duty to confirm or deny whether information is held does not arise if it would contravene any of the principles relating to the processing of personal data set out in Article 5 of the UK General Data Protection Regulation ('UK GDPR') to provide that confirmation or denial.
47. Therefore, for the FCA to be entitled to rely on section 40(5B) of FOIA to refuse to confirm or deny whether it holds information falling within the scope of the request the following two criteria must be met:
 - Confirming or denying whether the requested information is held would constitute the disclosure of a third party's personal data; and

- Providing this confirmation or denial would contravene one of the data protection principles.

Would the confirmation or denial that the requested information is held constitute the disclosure of a third party's personal data?

48. Section 3(2) of the DPA 2018 defines personal data as:- "any information relating to an identified or identifiable living individual".
49. The two main elements of personal data are that the information must relate to a living person and that the person must be identifiable.
50. Information will relate to a person if it is about them, linked to them, has biographical significance for them, is used to inform decisions affecting them or has them as its main focus.
51. In this case the FCA has argued that the information if held, relates to a living person (Lord Barker). Confirming or denying whether the requested information was held would disclose whether or not Lord Barker had corresponded with the FCA on behalf of EN+.
52. The Commissioner is satisfied that if the FCA confirmed whether or not it held the requested information this would result in the disclosure of a third party's personal data. The first criterion set out above is therefore met.
53. The fact that confirming or denying whether the requested information is held would reveal the personal data of a third party does not automatically prevent the FCA from refusing to confirm whether or not it holds this information. The second element of the test is to determine whether such a confirmation or denial would contravene any of the data protection principles.
54. The Commissioner agrees that the most relevant data protection principle is principal (a).

Would confirming whether or not the requested information is held contravene one of the data protection principles?

55. Article 5(1)(a) UK GDPR states that:- "Personal data shall be processed lawfully, fairly and in a transparent manner in relation to the data subject"
56. In the case of a FOIA request, the personal data is processed when it is disclosed in response to the request. This means that the information can only be disclosed – or as in this case the public authority can only confirm whether or not it holds the requested information - if to do so

would be lawful (i.e. it would meet one of the conditions of lawful processing listed in Article 6(1) UK GDPR), be fair, and be transparent.

Lawful processing: Article 6(1)(f) UK GDPR

57. Article 6(1) of the UK GDPR specifies the requirements for lawful processing by providing that "processing shall be lawful only if and to the extent that at least one of the" conditions listed in the Article applies. One of the conditions in Article 6(1) must therefore be met before disclosure of the information in response to the request would be considered lawful.
58. Article 6(1) of the UK GDPR specifies the requirements for lawful processing by providing that "processing shall be lawful only if and to the extent that at least one of the" conditions listed in the Article applies. One of the conditions in Article 6(1) must therefore be met before disclosure of the information in response to the request would be considered lawful.
59. The Commissioner considers that the condition most applicable on the facts of this case would be that contained in Article 6(1)(f) UK GDPR which provides as follows:- "processing is necessary for the purposes of the legitimate interests pursued by the controller or by a third party except where such interests are overridden by the interests or fundamental rights and freedoms of the data subject which require protection of personal data, in particular where the data subject is a child"³
60. In considering the application of Article 6(1)(f) UK GDPR in the context of a request for information under FOIA it is necessary to consider the following three-part test:-

³ 1 Article 6(1) goes on to state that:-

"Point (f) of the first subparagraph shall not apply to processing carried out by public authorities in the performance of their tasks".

However, section 40(8) FOIA (as amended by Schedule 19 Paragraph 58(8) DPA 2018) and by Schedule 3, Part 2, paragraph 20 the Data Protection, Privacy and Electronic Communications (Amendments etc) (EU Exit) Regulations 2019) provides that:-

"In determining for the purposes of this section whether the lawfulness principle in Article 5(1)(a) of the UK GDPR would be contravened by the disclosure of information, Article 6(1) of the UK GDPR (lawfulness) is to be read as if the second sub-paragraph (dis-applying the legitimate interests gateway in relation to public authorities) were omitted".

(i) Legitimate interest test: Whether a legitimate interest is being pursued in the request for information;

(ii) Necessity test: Whether confirmation as to whether the requested information is held (or not) is necessary to meet the legitimate interest in question;

(iii) Balancing test: Whether the above interests override the legitimate interest(s) or fundamental rights and freedoms of the data subject.

61. The Commissioner considers that the test of “necessity” under stage (ii) must be met before the balancing test under stage (iii) is applied.

(i) Legitimate interests

62. In considering any legitimate interest(s) in the disclosure of the requested information under FOIA, the Commissioner recognises that a wide range of interests may be legitimate interests. They can be the requester’s own interests or the interests of third parties, and commercial interests as well as wider societal benefits. These interest(s) can include broad general principles of accountability and transparency for their own sakes, as well as case-specific interests. However, if the requester is pursuing a purely private concern unrelated to any broader public interest, unrestricted disclosure to the general public is unlikely to be proportionate. They may be compelling or trivial, but trivial interests may be more easily overridden in the balancing test.

63. The complainant considers that if Lord Barker engaged in lobbying the FCA for EN+, given its close links to a sanctioned oligarch, then this information should be on the public record. They argue there is a clear legitimate interest in disclosure, or confirmation or denial.

64. The FCA stated it had “taken into account” the points raised by the complainant that there is a legitimate interest in confirming whether or not information, either to or from Lord Barker, concerning any ‘lobbying’ activities on behalf of EN+. The Commissioner has taken this to mean that the FCA accepts there is some legitimate interest in confirming whether the information is held in this case.

65. The Commissioner considers that there is a legitimate interest in the public being aware of any such correspondence exists in light of the links between EN+ and the sanctioned oligarch.

(ii) Is confirming whether or not the requested information is held necessary?

66. 'Necessary' means more than desirable but less than indispensable or absolute necessity. Accordingly, the test is one of reasonable necessity which involves the consideration of alternative measures, and so confirming whether or not the requested information is held would not be necessary if the legitimate aim could be achieved by something less. Confirmation or denial under FOIA as to whether the requested information is held must therefore be the least intrusive means of achieving the legitimate aim in question.
67. The FCA argues confirmation or denial is not necessary to meet the legitimate interest. It considers openness and transparency about the FCAs activities should not take priority over personal privacy.
68. The Commissioner disagrees with the FCAs position and considers that confirmation or denial would be necessary to meet the legitimate interest in the public awareness of whether Lord Barker has been corresponding with the FCA on behalf of EN+.

(iii) Balance between legitimate interests and the data subject's interests or fundamental rights and freedoms

69. It is necessary to balance the legitimate interests in confirming whether or not the requested information is held against the data subject(s)' interests or fundamental rights and freedoms. In doing so, it is necessary to consider the impact of the confirmation or denial. For example, if the data subject would not reasonably expect the public authority to confirm whether or not it held the requested information in response to a FOI request, or if such a confirmation or denial would cause unjustified harm, their interests or rights are likely to override legitimate interests in confirming or denying whether information is held.
70. The FCA is concerned if it confirmed or denied if there had been communications in this case and then it received a further information request under the FOIA in relation to another matter involving the same parties, it would have to confirm or deny again as any refusal to do so could be contrasted with the response in this case and the public could infer whether or not the information was held.
71. The FCA also believes that confirmation or denial would constitute a breach of the data subject's privacy and confirmation or denial would attract a level of scrutiny and attention about the nature of Lord Barker's communications with the FCA, if they exist, which would be unfair to the individual involved. The FCA also points out that Lord Barker has recently resigned as chair of EN+ so any speculation caused by the confirmation or denial would be linked to activities relating to his former employment and not his current employment.

72. The Commissioner accepts there are many circumstances in which a data subject would not expect information to be disclosed into the public domain, even where it relates to their working life. However, the Commissioner considers that the more senior an individual is and the more senior the role in question, it is more likely the data subject would have a reasonable expectation that a public authority may confirm or deny if it has interacted with them in a professional capacity.
73. Given the seniority of the data subject's role, the Commissioner considers that the data subject in this specific case would have a reasonable expectation that the FCA may confirm or deny whether the requested information was held.
74. The FCAs argument regarding the recent resignation of the data subject cannot be afforded significance as, at the time the request was made, this was not the case. The Commissioner would argue that if this were a factor it could even be argued it would lessen the impact of any confirmation or denial as the data subject is no longer in the role so less likely to be impacted by information about his role coming to light.
75. Based on the above factors, the Commissioner has determined that there is sufficient legitimate interest to outweigh the data subjects' fundamental rights and freedoms, and that confirming whether or not the requested information is held would be lawful.

Fairness

76. Even if it has been demonstrated that confirming or denying whether the withheld information is held under FOIA would meet the condition for lawful processing under Article 6(1)(f) UK GDPR, it is still necessary to show that such a confirmation or denial would be fair and transparent under principle (a).
77. Under principle (a), the provision of confirmation or denial must be fair to the data subject, but assessing fairness involves balancing their rights and freedoms against the legitimate interest in the provision of confirmation or denial to the public.
78. In considering whether confirming whether or not the requested information is held is fair the Commissioner takes into account the following factors:
 - The data subject(s) reasonable expectations of what would happen to their information;
 - The consequences of providing confirmation or denial (if it would cause any unnecessary or unjustified damage or distress to the individual(s) concerned); and

- The balance between the rights and freedoms of the data subject(s) and the legitimate interests of the public.

79. The Commissioner considers that as confirmation or denial passes the legitimate interest test in this case, this will be fair for the same reasons.

Would confirming whether or not the information is held be transparent?

80. Under principle (a), confirming or denying whether the requested information is held must be transparent to the data subject.

81. In considering whether providing such a confirmation or denial would be transparent, the Commissioner takes into account what information the FCA has provided to the data subject concerning the request. In this case the FCA has sought the data subject's consent to confirm or deny the existence of any correspondence but has not been able to gain a response.

82. Given the seniority of the data subject and the high level of engagement (ie communications with FCA executives) that are suggested by the request, if such communications occurred it would be reasonable to assume that either the data subject would be aware of, or the FCA would make the data subject aware of, its duty to confirm or deny whether information is held in response to FOIA requests received.

83. Based on the above factors, the Commissioner has determined that confirming whether or not the requested information is held would be transparent.

84. In this instance, the Commissioner has decided that the FCA has failed to demonstrate that section 40(5B)(a)(i) is engaged.

Right of appeal

85. 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

86. 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.
87. 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

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