

The Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 27 October 2022

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

Decision

1. The complainant is acting on behalf of a client, who has requested some "detailed" information about two groups of law firms/files from the Financial Conduct Authority (FCA). The Commissioner's decision is that FCA was correct to rely on section 44(1)(a) of FOIA (the 'prohibitions on disclosure' exemption).
2. The Commissioner does not require FCA to take any steps as a result of this decision notice.

Request and response

3. The complainant's client made the following information request to FCA on 5 May 2022:

"Please can you provide us a detailed breakdown of the make up of Group 1 & Group 2".
4. The final position of FCA, as expressed in the internal review response it provided to the complainant's client on 21 July 2022, was that:

"... the information we hold, in response to your request, is confidential information under section 348 of the Financial Services and Markets Act 2000 ... and therefore exempt under section 44(1)(a) of [FOIA]".

Scope of the case

5. On 25 August 2022 the complainant submitted an application to the Commissioner for a decision regarding FCA's reliance on two exemptions, and the present decision addresses only part of that application – namely FCA's reliance on section 44(1)(a) of FOIA in respect of the 5 May 2022 request (the rest of the application will be dealt with under a separate case reference number/decision notice).
6. In all the circumstances of this case, the Commissioner felt it was not necessary/proportionate to approach FCA for submissions before issuing his decision, and the Commissioner has not asked to see a copy of the information that is being withheld. The Commissioner considers that the responses that FCA provided to the complainant's client already address the [key questions](#) that the Commissioner generally asks public authorities when handling complaints relating to section 44(1)(a); and he considers there would be no value in seeing the withheld information itself because doing so is unlikely to change the present decision, bearing in mind the type of information and level of detail that has been requested.

Reasons for decision

7. Section 44(1)(a) of FOIA allows a public authority to withhold information whose disclosure, otherwise than under FOIA, is prohibited by or under another piece of legislation.

FCA's position

8. FCA told the complainant's client that FCA is prohibited from disclosing the information it holds within scope of the request "as it constitutes 'confidential information' for the purposes of section 348 of the Financial Services and Markets Act 2000" (FSMA) which FCA received in discharging its public functions. In its initial response (18 May 2022), FCA explained the operation of section 44(1)(a) of FOIA and its interaction with section 348 of FSMA; explained what "confidential information" means under FSMA; and explained that it would be a criminal offence to disclose such information without the consent of the relevant person(s).

9. FCA also noted that FSMA provides some exceptions, commonly known as 'gateways to disclosure', however FCA stated "none of these apply".

Complainant's position

10. The complainant disagrees with FCA's refusal to disclose the requested information. The complainant has said to the Commissioner "we do not believe [FSMA] actually covers the information requested" and FSMA "does not apply to the information requested as that information is not confidential".
11. The internal review request (24 May 2022) argued that FCA did not explain why the information within scope of the request is confidential; and that "a public interest test ... should be implied" in respect of section 348(2) of FSMA as it would be in respect of section 41 of FOIA (in response FCA disagreed with those assertions, provided further explanation and maintained that disclosure is prohibited).
12. Based on the above evidence, the Commissioner's understanding is that the complainant believes that disclosure of the requested information would be in the public interest and therefore it is not 'confidential' under FSMA.
13. The complainant is seeking a "**detailed** breakdown" (emphasis added) of the two groups of firms/files. More detailed, presumably, than the [data set](#) that FCA published apparently on 16 June 2022 (around a month after initially responding to the information request) and that (FCA's [website](#) says) was "anonymised to remove direct reference to the individual firms ... as well as other information which might indirectly identify an individual firm" – the publication of that data set was highlighted in FCA's internal review response of 21 July 2022, yet the complainant still pursued the matter and went on to submit the present complaint to the Commissioner.

The Commissioner's position

14. The Commissioner draws the complainant's attention to his [guidance](#) on section 44 of FOIA and previous decision notices published on his website in which the Commissioner has explained the operation of section 44 and its interaction with FSMA, and has upheld FCA's reliance on section 44(1)(a) – with section 348 of FSMA – in similar circumstances where requesters have sought information that FCA claims to be confidential (a fairly recent example is [IC-125437-J5C2](#)).
15. Looking at the relevant provisions in FOIA and FSMA and applying them to the facts of this case, FCA will be a "primary recipient" of the requested information (the definition at section 348(5) of FSMA includes FCA).

16. The information will be 'confidential' as it relates to the business/affairs of the firms in the two groups referenced in the request; it was clearly received by FCA for the purposes of/in the discharge of FCA's functions; and it has not been made publicly available or framed as an anonymous summary/collection of information. While FCA did later publish some anonymous data and highlighted it to the complainant's client at internal review, it is clear that the present complaint is about a "detailed breakdown" and the complainant is not satisfied with anonymous data.
17. FCA has said no gateways to disclosure apply, and the Commissioner's [guidance](#) (following the Upper Tribunal) explains that if a public authority has decided that information should not be disclosed under a gateway "the Commissioner will only verify that the authority has made that decision, and not consider whether its decision was reasonable".
18. There is nothing in the Commissioner's published guidance on section 44 to support the complainant's client's argument that "a public interest test ... should be implied" in respect of section 348(2) of FSMA when deciding whether information is confidential. In addition, the Commissioner's [guidance](#) acknowledges that "deciding whether section 44(1)(a) is engaged inevitably leads to a consideration of the other legislation that may provide a statutory bar", and the Commissioner sees nothing in FSMA itself to suggest the need to imply a public interest test in respect of section 348(2). Indeed, at section 348(2) FSMA sets out very specifically what "confidential information" means under FSMA.
19. Section 348(1) of FSMA provides that confidential information must not be disclosed by FCA without the consent of the person from whom FCA obtained the information and, if different, the person to whom the information relates. FCA referred to the issue of consent, stating that it would be a criminal offence to disclose the requested information without the required consent. The Commissioner considers that FCA is unlikely to have consent to disclose the information – in general third parties are unlikely to consent to FCA disclosing information it has obtained from them or about them in response to information requests under FOIA.
20. The Commissioner also directs the complainant to the comments made by FCA in [IC-125437-J5C2](#) at paragraphs 32 – 34 around the confidentiality regime in FSMA and consent, because they are likely to be relevant to the present case too (and the Commissioner upheld FCA's position in IC-125437-J5C2).
21. In summary, the Commissioner disagrees with the complainant's view that the requested information – a "detailed breakdown" of the two groups of firms – is not confidential under FSMA. FCA published an anonymised data set so that individual firms are not directly/indirectly

identified; the Commissioner did not ask for a copy of the withheld information, but on the balance of probabilities a “detailed breakdown” containing information that identifies (directly or indirectly) individual firms (which FCA removed from the anonymous data set it published) will be “confidential information” under FSMA, whose disclosure is prohibited. The Commissioner therefore considers that FCA was correct to cite section 44(1)(a) of FOIA.

Right of appeal

22. 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

23. 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.
24. 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

Daniel Kennedy
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