

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 24 April 2024

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

Decision (including any steps ordered)

1. The complainant has requested correspondence relating to a Financial Conduct Authority ("FCA") investigation. The FCA disclosed some information, but it refused to disclose the remainder, citing sections 31(1)(g) (Law enforcement), 40 (Personal data) and 44(1)(a) (Prohibitions on disclosure) of FOIA.
2. The Commissioner's decision is that the FCA was entitled to rely on sections 31(1)(g) and 44(1)(a) to withhold the remaining information.
3. The Commissioner requires no steps as a result of this decision.

Request and response

4. On 5 July 2023, the complainant wrote to the FCA and requested information in the following terms:

"On July 3, 2023, Nikhil Rathi, chief executive of the Financial Conduct Authority, said in a letter to the Chair of the Treasury Select Committee the following:

"I can confirm that when we first opened our investigation, we received a letter before claim from lawyers acting for [individual's name] threatening judicial review. We responded robustly to this."

Please provide the following information:

- 1 / Any and all information contained within the 'letter before claim' referred to in Mr Rathi's letter. (In other words, a copy of the letter.)
- 2 / Any and all information contained within the FCA's "robust[...]" response to the letter. (In other words, a copy of the FCA's response.)
- 3 / Any and all information contained within any further reply [individual's name]'s lawyers to the FCA's response. (In other words, a copy of any further reply.)

In responding to this request, please give due consideration to the comments in Mr Rathi's letter that the "exceptional circumstances of this case" favoured transparency, and that the threatened judicial review proceedings "were not commenced".

5. The FCA responded on 3 August 2023. It confirmed that it held the information requested in points (1) and (2) of the request, saying:

"To the extent that the requested information is, or contains, 'confidential information' for the purposes of section 348 of the Financial Services and Markets Act 2000 (FSMA), which the FCA has received in the discharge of its public functions, we are exempted from the duty to disclose this information under section 44 of FOIA".
6. The FCA also cited sections 31 (Law enforcement) and 40 (Personal information) of FOIA to refuse to disclose this information.
7. It would neither confirm nor deny that it held the information requested in point (3), citing section 44 of FOIA.
8. On 18 August 2023, in a detailed request for an internal review, the complainant set out his reasons for disagreeing with the FCA's response to points (1) and (2) of the request.
9. Following the Commissioner's intervention, the FCA provided the outcome of the internal review on 31 January 2024. It maintained its position regarding points (1) and (2) of the request, confirming that it had applied section 44 to withhold both letters. It changed its position regarding point (3), disclosing the text of an email it had received.

Scope of the case

10. The complainant contacted the Commissioner prior to receiving the internal review, to complain about the way his request for information had been handled. Having received the internal review, he remained dissatisfied with the FCA's response to points (1) and (2) of the request.
11. The analysis below considers the FCA's application of the cited exemptions to points (1) and (2) of the request.
12. The Commissioner has commented on the delayed internal review in 'Other matters', at the end of this notice.

Reasons for decision

The withheld information

13. The withheld information in this case comprises two letters: a letter before claim sent to the FCA as part of the Pre-Action Protocol for Judicial Review, and the FCA's response. The letters set out each side's position regarding the FCA's regulatory investigation.
14. The Commissioner has viewed the withheld information.

Section 44 – Prohibitions on disclosure

15. Under section 44(1)(a) of FOIA, information is exempt from disclosure if its disclosure (otherwise than under FOIA), is prohibited by, or under, another piece of legislation. It is an absolute exemption, meaning that, if engaged, there is no requirement to consider whether the public interest nevertheless favours disclosure.

The complainant's position

16. Although he supplied detailed rebuttals in respect of the application of sections 31 and 40, the complainant did not provide particular arguments against the application of section 44, except to say, in his internal review request, that the FCA had been unclear about the extent to which it was relying on the exemption.

The FCA's position

17. Section 348(1) of the Financial Services and Markets Act 2000 ("FSMA") prohibits the disclosure of confidential information without the consent of the provider and the parties to which it relates. Confidential

information is defined at section 348(2) of the FSMA as 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; and
 - c) is not prevented from being confidential information by subsection (4) (broadly - information which has lawfully been made public or which has been genuinely anonymised).
18. The FCA explained that each of the letters contain information not in the public domain, which relates to the business or other affairs of the parties which were the subject of its investigation. It said the FCA received the information while carrying out its functions under the FSMA and that the information constitutes 'confidential information' for the purposes of section 348(2) of the FSMA.
19. The FCA said that if it were to disclose the requested information without consent, it would be in breach of section 348 of the FSMA. It confirmed that this would be a criminal offence.
20. It concluded that it was prohibited from disclosing this information under section 44(1)(a) of FOIA.

The Commissioner's decision

21. The Commissioner's guidance on section 44 of FOIA¹ discusses the statutory bar provided by section 348 of the FSMA. He has also considered other, similar complaints in which requesters have asked for information that the FCA says is confidential under the FSMA. Several decision notices explain the operation of section 44 and its interaction with the FSMA².
22. Looking at the relevant provisions in FOIA and the FSMA and applying them to the facts of this case, the Commissioner is satisfied that the FCA

¹ <https://ico.org.uk/media/for-organisations/documents/2021/2619033/s44-prohibitions-on-disclosure.pdf>

² For example, <https://ico.org.uk/media/action-weve-taken/decision-notices/2022/4023193/ic-200721-f8l4.pdf> and <https://ico.org.uk/media/action-weve-taken/decision-notices/2022/4022411/ic-189831-j8g7.pdf>

is the "primary recipient" of the requested information (the definition at section 348(5) of FSMA includes the FCA).

23. The Commissioner is also satisfied that the withheld information is 'confidential', as it clearly relates to the business of the person named in the request, was received by FCA for the purposes of/in the discharge of its functions (a regulatory investigation) and it has not been made publicly available or anonymised.
24. The FCA has told the Commissioner that 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".
25. As regards the criminal offence of disclosing confidential information without the required consent, the Commissioner considers that the FCA is unlikely to have consent to disclose the withheld information in this case – in general, third parties are unlikely to consent to the FCA disclosing information it has obtained from them or about them in response to information requests under FOIA. Noting the subject matter of the correspondence here, he finds it very unlikely that consent would be obtained.
26. Taking all the above into account, the Commissioner is satisfied that the withheld information is "confidential information" as defined by the FSMA, and its disclosure is prohibited. The Commissioner therefore considers that the FCA was entitled to rely on section 44(1)(a) of FOIA to withhold it.
27. However, to the extent that any information in the two letters is not covered by section 44 (by virtue of it not meeting the definition at section 348(2) of the FSMA), the Commissioner has considered the FCA's claim that the exemption at section 31 also provides grounds for withholding them.

Section 31 – Law enforcement

28. The FCA cited section 31(1)(g) to withhold the letters. This states that information will be exempt if its disclosure would, or would be likely to, prejudice the exercise by a public authority of its functions for any of the purposes specified in section 31(2) of FOIA.
29. The FCA said that the following functions listed in section 31(2) would be likely to be prejudiced by the disclosure of the withheld information:

- (a) the purpose of ascertaining whether any person has failed to comply with the law; and
- (c) the purpose of ascertaining whether circumstances which would justify regulatory action in pursuance of any enactment exist or may arise.
30. The FCA regulates financial services firms and financial markets in the UK. It gets its regulatory powers from the FSMA. Part XI of the FSMA outlines the FCA's powers to gather information, with a view to conducting investigations and ascertaining whether the FSMA has been complied with. The FCA's enforcement handbook³ outlines its approach to exercising the main enforcement powers given to it by the FSMA.
31. The FCA confirmed that the withheld information relates to a regulatory investigation that it was conducting at the time of the request. It explained that disclosing the withheld information would reveal detailed information about particular regulatory activity at a time when it was underway, and prior to any outcome being determined. It said that if this information was disclosed, the resultant damage to trust in the FCA, and to the flow of information to it, would be likely to undermine the investigation and also its investigative and regulatory functions in general. If the organisations and people it regulates perceive that information obtained or created in the course of its regulatory functions may be disclosed under FOIA, there is a real possibility this will inhibit their exchanges with the FCA. This would affect the flow and quality of the information the FCA receives as part of its role as the UK's financial regulator. It is of vital importance that the FCA be allowed a safe space in which to carry out its regulation of the financial services sector in a largely confidential manner.
32. The Commissioner is satisfied that the harm the FCA envisages relates to the law enforcement interests protected by sections 31(2)(a) and (c). He is also satisfied that the envisaged harm – damage to its ability to gather information and to investigate the areas it regulates, thoroughly and effectively - is not trivial.
33. The Commissioner is also satisfied that there is a clear causal link between disclosure and the envisaged harm. Noting that at the time of the request the FCA's investigation was live, the FCA said that it considers that the alleged conduct of those it regulates should remain

³ <https://www.handbook.fca.org.uk/handbook/EG/1/?view=chapter>

confidential unless and until a final decision to take formal enforcement action is reached:

“Disclosure of the withheld information could affect the flow of information the FCA receives as part of its role as the UK’s financial regulator. The Information Commissioner understands that a regulatory body depends on its communications to and from the bodies it regulates, other third parties and the public generally, being full and frank in nature so that it can effectively provide advice, investigate and consider any abuses of its regulatory requirements. The Commissioner has previously recognised and allowed the argument that disclosure could have a prejudicial effect where it could slow down a public authority’s regulatory process and may lead to less timely regulatory action.

Therefore, disclosing the withheld information requested in question 1 and 2 would be likely to undermine the FCA’s effectiveness in carrying out its review and monitoring functions and therefore, the exemption provided by section 31 of the Act is engaged”.

34. The FCA said that disclosure “would be likely to” prejudice the functions which sections 31(2)(a) and (c) protect. The term “would be likely to prejudice” means that the degree of risk must be such that there ‘may very well’ be prejudice to those interests, even if the risk falls short of being more probable than not.
35. The withheld information discusses regulatory activity in a particular case and it contains detailed information about the position of both sides. The Commissioner has no difficulty in accepting that this is sensitive, confidential information and that prejudice would be likely to arise to the FCA’s regulatory functions from premature disclosure. As a regulatory body, it is dependent on its communications with those operating in the financial services sector, and the public generally, being full and frank in nature so that it can effectively provide advice, investigate and consider any regulatory action necessary. The premature disclosure of information about an investigation could undermine that investigation, and also the effectiveness of future investigations in general. It could impact on the flow of full and frank information to the FCA if there is a perception that information provided in confidence may be prematurely disclosed, under FOIA.
36. Mindful that disclosure under FOIA is to the world at large, the Commissioner is satisfied that disclosure in this case would be likely to prejudice the FCA’s functions at section 31(2)(a) and (c) and therefore that the exemption at section 31(1)(g) provides grounds for withholding the information in its entirety.

Public interest test

37. Section 31 is subject to a public interest test. Although the exemption is engaged, the information must be disclosed unless the public interest in maintaining the exemption outweighs the public interest in disclosure.

Public interest arguments favouring disclosure

38. The complainant said:

“The FCA’s own chief executive has said in his evidence to Parliament that this case involves “serious public allegations” and that “the exceptional circumstances of this case” necessitate greater transparency than would be typical. In relation to the specific information requested here, Mr Rathi acknowledged in his evidence the importance of these issues: “You ask whether the threat of litigation affects our approach”. There is no acknowledgement of that in the FCA’s response. Instead it refers only to generic public interest factors in favour of disclosure.

The arguments the FCA makes against disclosure are weak, unclear and display at best an indifference for public discussion and debate about the FCA’s exercise of its powers.”

39. The FCA acknowledged the general public interest in openness and transparency regarding how it carries out its regulatory duties. It recognised there is also a public interest in the public being informed and reassured about the effectiveness of its regulation of the financial services industry. This is particularly so where matters affect consumers directly. Disclosure would improve the FCA’s accountability and facilitate informed comment on its regulatory and supervisory approach.
40. The FCA acknowledged that disclosure would also assist regulated firms, their senior management, legal advisers, and the general public, to better understand why, where and how the FCA makes decisions on regulatory matters and on its use of its statutory powers. This may lead to increased stakeholder engagement in the regulatory regime and create greater public confidence in the markets and firms that are operating in the financial services sector.

Public interest arguments favouring maintaining the exemption

41. The FCA said there is a strong public interest in it being able to carry out its functions in the most effective and efficient manner possible, so as to maintain public confidence in the financial services sector.
42. It argued that disclosure of information relating to the FCA’s live investigations could lead to inaccurate and unhelpful speculation about

how and when it will exercise its formal powers, as opposed to other regulatory tools. This has the potential to prejudice the FCA's ability to determine whether circumstances which would justify formal regulatory action exist or may arise.

43. The FCA argued that it needed a safe space in which to receive and consider information about regulatory matters. If it was unable to guarantee confidentiality to those providing it with information, this would affect the flow and quality of the information they were willing to share with it. To do anything that undermines the confidentiality of its dealings with those it regulates, and therefore to dilute the effectiveness of the FCA, may ultimately lead to a decline in the FCA's ability to deliver its statutory objectives, and in public confidence in the sector.
44. The FCA said that the public interest in transparency and informing the public is already met by the substantial information it makes available to enable firms, consumers, and its key stakeholders to understand how the FCA operates and the standards of conduct they are expected to meet, through its published handbook of rules and guidance. Where any formal regulatory action is taken against a firm or an individual, the public is informed of the final outcome of the proceedings. For example, Final Notices are published on the FCA's website and may be widely reported in the press. This serves to balance the public interest in transparency regarding regulatory action, with due legal process.

Public interest balancing test

45. When balancing the opposing public interests in a case, the Commissioner will decide whether it serves the public interest better to disclose the requested information or to withhold it because of the interests protected by the relevant exemption. If the public interest in maintaining the exemption does not outweigh the public interest in disclosure, the information must be disclosed.
46. The Commissioner considers that there is a presumption running through FOIA that openness is, in itself, to be regarded as something which is in the public interest. He also recognises the need for transparency and accountability on the part of public authorities which are tasked with enforcing laws and regulations. He notes that the underlying matters in this case were sufficiently serious to require the FCA to confirm to a Parliamentary Select Committee that an investigation was underway.
47. The Commissioner also considers there is a public interest in the public being informed about how the FCA conducts investigations, and how it responds to challenges to its regulatory approach. He also accepts the

strong public interest in knowing whether regulatory activity is efficient, proportionate and robust.

48. However, in carrying out this exercise, appropriate weight must be afforded to the public interest inherent in the exemption - that is, the public interest in avoiding prejudice to law enforcement matters. Clearly, it is not in the public interest to disclose information that would compromise the FCA's ability to accomplish its core function of the protection of consumers, integrity of the market and promotion of competition in the interests of consumers.
49. The Commissioner considers that the information contains sensitive information about the investigation (including its grounds, and each party's position regarding them). The Commissioner considers it would be fundamentally unfair, and not in the interests of the course of justice, for such information to be made public at a time when the investigation was still live and no decision had been reached over the allegations under consideration. The Commissioner also considers that, given the investigation's high profile, disclosure at the time of the request would have been likely to have a disruptive effect on the FCA's work, because of the follow-up enquiries it would likely generate. Dealing with them would have distracted internal attention away from its core business and may even have impeded the investigation itself.
50. The Commissioner also has concerns about the chilling effect that disclosure in this case would be likely to have. It could create a perception among the people and bodies the FCA regulates that sensitive information obtained in the course of its regulatory duties will not be held in confidence and may be disclosed to the world at large, prior to any outcome being determined. He considers that there is a real chance this would deter people, and financial bodies, from coming forward and cooperating with the FCA, fully and frankly. There is a very significant public interest in avoiding damage to the regulation of financial services, and it is a factor of considerable weight in favour of maintaining the exemption in this case.
51. Furthermore, the Commissioner considers it to be in the interests of the fair and effective operation of the justice system that anyone subject to an ongoing regulatory investigation is able to communicate about the case in confidence, with the regulator.
52. The Commissioner notes the FCA's comments on the information it publishes about its regulatory activity. He considers that this information goes some way to satisfying the public interest in transparency.
53. On balance, the Commissioner considers that the disclosure of information that would be likely to undermine the FCA's ability to

conduct its regulatory functions effectively and efficiently, is not justified by the benefit which would flow from the disclosure of the information. For this reason, the Commissioner accepts that the public interest in maintaining the exemption is stronger than that in disclosing the withheld information.

54. His decision is therefore that the FCA was entitled to rely on section 31(1)(g) (by virtue of sections 31(2)(a) and (c)) to withhold the information requested at points (1) and (2) of the request.
55. In view of this decision, it has not been necessary to also consider the FCA's application of section 40(2) to the request.

Other matters

56. Although they do not form part of this notice, the Commissioner wishes to highlight the following matters of concern.

Internal review

57. The Commissioner cannot consider the amount of time it took a public authority to complete an internal review in a decision notice because such matters are not a formal requirement of FOIA. Rather, they are matters of good practice which are addressed in the Code of Practice issued under section 45 of FOIA.
58. The Code states that reviews should be conducted promptly and within reasonable timescales. The Commissioner has interpreted this to mean that internal reviews should take no longer than 20 working days in most cases, or 40 in exceptional circumstances.
59. In this case, the FCA took 114 working days to complete the internal review, which significantly exceeds the Commissioner's recommended 40 working day maximum.
60. The Commissioner has made a record of the FCA's late provision of the internal review, for monitoring purposes.

Right of appeal

61. 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

62. 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.
63. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

Samantha Bracegirdle
Senior Case Officer
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF