

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 24 September 2024

Public Authority: Competition and Markets Authority
Address: The Cabot
25 Cabot Square
London
E14 4QZ

Decision (including any steps ordered)

1. The complainant has requested information about a merger investigation. The above public authority ("the public authority") relied on sections 44 (statutory prohibition) and 31 (law enforcement) of FOIA to withhold the information.
2. The Commissioner's decision is that the public authority was entitled to rely on sections 44 and 31 of FOIA to withhold the information.
3. The Commissioner does not require further steps to be taken.

Request and response

4. On 31 January 2024, the complainant wrote to the public authority and requested information in the following terms:

"Unless otherwise indicated or evident from a specific request, the time period applicable to each request is January 1, 2021 through December 31, 2023. The records requested are:

1. Written or recorded communications that the CMA prepared or received concerning any investigation of the proposed transaction and its potential effect on competition.

2. Written or recorded communications that the CMA prepared or received concerning Adobe's competitive position or competition facing Adobe's products, including Adobe's Express and XD applications.
3. Minutes and presentation materials concerning any meeting with representatives of Adobe or Figma regarding: (a) the proposed transaction or its potential effect, if consummated, on competition in any industry in which Adobe operates; or (b) Adobe's competitive position.
4. Nonpublic or otherwise internal documents produced by Adobe or Figma regarding: (a) the proposed transaction or its potential effect, if consummated, on competition in any industry in which Adobe operates; (b) Adobe's competitive position; or (c) competition facing Adobe or Figma products, including Adobe's Express and XD applications.
5. Drafts and final versions of any written submission, memorandum, complaint, case assessment or other document, including the provisional findings report, concerning: (a) potential or actual charges concerning the proposed transaction; or (b) Adobe's competitive position.
6. Information that the CMA considered: (a) from "interested parties" during the May 2023 invitation-to-comment process on the proposed transaction; (b) before launching the merger inquiry in May 2023; (c) in rendering its Phase 1 decision in June 2023, considering undertakings (if any) offered by Adobe/Figma to address "competition concerns," and referring the transaction for Phase 2 investigation; (d) in referring the transaction for in-depth investigation, and appointing an inquiry group, in July 2023; (e) in preparing provisional findings and the provisional findings report in November 2023; and (f) before cancelling the merger inquiry in December 2023.
7. Any written review, analysis, assessment, or submission by Adobe or Figma on the proposed transaction and its potential effect on competition.
8. Drafts and final versions of public statements by the CMA on the transaction.
9. Communications with any domestic or foreign regulatory or governmental agency, including the European Commission and the U.S. Department of Justice (Antitrust Division) or the U.S.

Federal Trade Commission, concerning the proposed transaction or its effect on competition.

10. Any other FOI request to the CMA and the CMA's responses thereto, including all materials that the CMA produced, concerning: (a) the proposed transaction or its potential effect on competition; (b) Adobe's competitive position; or (c) competition facing Adobe's products."
5. The public authority responded on 27 February 2024. It relied on section 44 of FOIA to withhold the requested information.
6. Following an internal review the public authority wrote to the complainant on 21 May 2024. It changed its position slightly. In respect of part 8 of the request it now relied on section 21 of FOIA (reasonably accessible) to withhold the final versions of public statements as these were in the public domain. It also denied holding any information within the scope of part 10. Finally, it relied additionally on section 31 of FOIA to withhold all remaining information that fell within the scope of the request.

Reasons for decision

7. The complainant has set out, at length, their grounds of complaint to the Commissioner. The Commissioner also considers that the public authority's arguments were clearly set out in its responses to the complainant. Given the nature of the exemptions being relied upon, the public authority's clearly explained position and his experience of similar cases, the Commissioner is satisfied that he can make a decision without seeking further submissions or the withheld information.

Section 44 – statutory prohibition

8. Section 44 of FOIA allows a public authority to withhold information that it would be prevented, by another piece of law, from publishing.
9. In this case, the public authority has pointed to the Enterprise Act 2002 and specifically [Part 9 of that Act](#), as preventing it from disclosing the requested information.
10. Part 9 of the Enterprise Act makes it a criminal offence for an employee of the public authority (or indeed any public authority) to disclose "specified information", unless there is a legal gateway allowing disclosure, or unless the information has lawfully entered the public domain already.

11. For the purposes of the Enterprise Act, any information which relates to the "affairs of an individual" or "any business of an undertaking" and has come to the public authority in connection with any of its functions will be "specified information."
12. The complainant argued that the public authority had used an "overbroad" interpretation of Part 9, that some of the information had already been made public and that either FOIA or the public interest (or both) required disclosure. These arguments are either misconceived or irrelevant.
13. Part 9 is very broad in its scope. It was intended to be very broad. In order to carry out its statutory functions, the public authority (and other organisations covered by the Enterprise Act) needs access to information that the owners would not normally share. The Act allows the public authority to demand (if necessary) that such information be provided. The corollary of that is that the public authority must then apply a high degree of protection to that information and must ensure that it is not further shared, except in limited circumstances.
14. Furthermore, the restriction applies to **information**, not to **documents**. Therefore even documents the public authority generates itself may be exempt in their entirety if the information they contain is specified information or if the public authority's own analysis relies so heavily on specified information that it is not practically possible to separate it out.
15. The complainant may be correct that some of the information is in the public domain – but that does not assist them. If and to the extent that any of the information is in the public domain, it would be exempt from disclosure under FOIA because it would already be accessible to the complainant. If it is not in the public domain, Part 9 will apply and the information will be exempt.
16. Section 44 of FOIA does not require (or even allow) for consideration of the public interest.
17. The complainant has pointed to section 244 of the Enterprise Act which lists considerations the public authority must take into account before disclosing information. This includes (among other things) a need to minimise the disclosure of information that is contrary to the public interest. By logical extension, the complainant argues, it should maximise disclosure of information that **is** in the public interest. This argument is, again, misconceived.
18. Section 244 only applies in circumstances where the public authority has already identified a legal gateway through which the information could be disclosed and is minded to disclose the information. In this case, the

public authority has not identified a gateway (and the Commissioner is doubtful that one exists) and is not minded to disclose the information. By law the Commissioner cannot challenge a public authority's decision not to rely on a legal gateway (see [Ofcom v Information Commissioner and Morrissey \[2012\] AACR 1](#)).

19. The information that the public authority holds is likely to comprise a large number (the complainant themselves estimates three million) of documents provided by either Adobe Inc or Figma Inc; witness statements made by employees of either company; third party representations; and documents recording the public authority's own internal deliberations.
20. The first three categories of document will clearly be specified information. The information each one contains has been come to the public authority (either directly or indirectly) and relates to either Figma Inc or Adobe Inc (or both). The only reason the public authority would have received this information would be in connection with its statutory function of overseeing mergers. That is sufficient to make the information subject to Part 9 of the Enterprise Act and therefore section 44 of FOIA would apply.
21. In respect of internally-generated documents that record the public authority's deliberations, to the extent that these exist, any analysis is also highly likely to be specified information. This is because it will be impossible in practice to separate out the information that has "come to" the public authority without rendering the remaining information meaningless or incomprehensible. Where these documents do contain specified information, they will be covered by Part 9 and therefore section 44 of FOIA.

Section 31 – law enforcement

22. To the extent that any of the internally-generated documents can be redacted to remove any specified information whilst retaining some meaning, the Commissioner has gone on to consider whether section 31 would be engaged.
23. It is possible that some of the early correspondence in the investigation may fall into this category – for example letters the public authority wrote before having seen any of the specified information either company provided. Parts of drafts of the public authority's published reports may also fall into this category where they contain information that has "come to" the public authority, but where that information was subsequently published in the final version. To the extent that earlier drafts contain changes that were not published and don't reflect specified information, section 44 may not be engaged.

24. Section 31 of FOIA will apply to any information whose disclosure might harm a regulator's ability to regulate effectively.
25. The public authority has regulatory functions, specifically the overseeing of mergers.
26. The public authority has argued that disclosing information about the conduct of its investigation would harm its ability to regulate effectively because it would reveal, to the world at large, the precise methods it uses to investigate.
27. The Commissioner recognises that, to operate effectively, regulators need a safe space in which to consider evidence and deliberate options before settling on a final outcome.
28. He also recognises that, in order to regulate effectively, regulators need to preserve a certain degree of ambiguity about the precise tactics that they use. If organisations know in advance precisely what questions they will be asked or what other methods the public authority is likely to employ, they can prepare their own counter-methods to avoid or minimise scrutiny.
29. Whilst the Commissioner accepts that, in practice, organisations are unlikely to be able to avoid scrutiny entirely, the potential still exists for them to frustrate investigations.
30. The Commissioner therefore accepts that the exemption is engaged and has gone on to consider the balance of the public interest.

Public interest test

31. The complainant has argued that there is a strong public interest in disclosure. Adobe's announcement that it intended to pursue a merger was followed by a sharp fall in the company's share price. The complainant claims that this has caused significant losses to some shareholders. They also informed the Commissioner of a lawsuit, currently within the US Federal Court system, alleging that senior Adobe executives misled investors about their plans to merge. It is not clear whether the complainant has any direct involvement in that lawsuit – though it would make them no more (or less) entitled to receive the information via FOIA.
32. The public authority argues that there is a stronger public interest in trying to protect its ability to regulate effectively.

The Commissioner's view

33. The Commissioner considers that the public interest should favour maintaining the exemption.
34. It is not clear how many of Adobe's investors are based in the UK and the Commissioner can only assign limited weight to the interests of those overseas. Equally it is not clear how much of the shareholder class comprises of institutional investors or wealthy individuals capable of defending their own interests. The Commissioner is sceptical that this is an issue of great importance to most ordinary people in the United Kingdom.
35. To the extent that information is required to pursue a lawsuit, the Commissioner notes that information can be obtained via the US courts for use in litigation rather than disclosed to the world at large.
36. The Commissioner notes that such public interest as there is in disclosure is weakened significantly by the extent of the information that would be exempt under section 44 of FOIA. Once that information is removed, what remains is likely to be peripheral, shorn of its proper context and will add limited value in understanding how the public authority came to the decision that it did.
37. Further weakening the public interest in disclosure is that neither the complainant nor anyone else now appears to be criticising the public authority's investigative process or the preliminary decision that it reached. Adobe and Figma did issue a joint statement at the time contesting the public authority's preliminary findings, but they subsequently dropped their proposal. The public interest in disclosure is likely to be strongest where there are credible allegations that the process the public authority followed was flawed or led to an irrational conclusion.
38. In summary the Commissioner considers that there is a strong public interest in protecting the ability of regulators to regulate effectively. The public interest in the information is not exceptionally strong and is weakened by the amount of information that would actually be disclosed.
39. The Commissioner is therefore satisfied that the balance of the public interest favours maintaining the exemption.

Right of appeal

40. 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

41. 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.
42. 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

Roger Cawthorne
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