

## **Freedom of Information Act 2000 (FOIA)**

### **Decision notice**

**Date:** **18 December 2014**

**Public Authority:** **Financial Conduct Authority**

**Address:** **25 The North Colonnade  
Canary Wharf  
London  
E14 5HS**

### **Decision (including any steps ordered)**

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1. The complainant has requested information on the approval process for Paul Flowers position as chairman of the Co-operative Bank. The FCA identified information within the scope of the request and considered this exempt on the basis of section 21, 22, 31, 44 and 40 of the FOIA.
2. The complainant agreed to withdraw his complaint about the application of the section 21 and 22 exemptions.
3. Commissioner concluded that the section 44(1)(a) exemption, by virtue of section 348 of the Financial Services and Markets Act 2000, provided a basis for the withholding the majority of the information within the scope of the request.
4. For the information not covered by the section 44(1)(a) exemption, the Commissioner has concluded that the section 31(2) exemption is not engaged and he now requires the FCA to disclose this information, as set out in the confidential annex, with appropriate redactions under section 40(2).
5. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
  - Disclose the information as set out in the confidential annex which is not subject to the section 44 or 31 exemptions.
6. 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

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7. On 18 November 2013, the complainant wrote to the Financial Conduct Authority ("FCA") and requested information in the following terms:

*"Please would you let me know in writing if you hold information of the following description:*

*Information concerning:*

*The approval process for Paul Flowers to become chairman of the Co-operative Bank including records of interviews with the FSA."*

8. The FCA responded on 12 December 2013 explaining that interviews were conducted in 2009 for a Significant Influence Function (SIF) role and a link to the FCA website with information on the SIF interview process was provided. The FCA explained that Paul Flowers was also interviewed in 2010 for a Non-Executive Chairman position but no formal SIF interview was conducted on that occasion. The FCA then explained that the remaining information within the scope of the request was being withheld under sections 44, 40(2) and 31(1)(g) of the FOIA.
9. Following an internal review the FCA wrote to the complainant on 4 February 2014. It stated that a transcript of evidence given to the Treasury Select Committee by Clive Adamson was available online and therefore any information in this that fell within the scope of the request was exempt on the basis of section 21 of the FOIA. The FCA also explained that as the Select Committee intended to publish further information about Paul Flowers approval process this information was exempt on the basis of section 22 of the FOIA.
10. It upheld its use of section 44 and 31 and reiterated that it considered section 40(2) applied to any of Paul Flowers' personal data that was not already in the public domain.

## Scope of the case

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11. The complainant contacted the Commissioner on 25 February 2014 to complain about the way his request for information had been handled.

12. During the course of the Commissioner's investigation the FCA provided details of the information it had initially withheld under section 22 which had since been made available. This information was a transcript of oral evidence given by Clive Adamson to the Treasury Select Committee<sup>1</sup> and written evidence provided to the Committee which consisted of a note for record of the SIF interview with Paul Flowers and a note for record of the FCA introductory meeting with Paul Flowers<sup>2</sup>. At this same link a copy of Paul Flowers CV submitted to the Committee is also accessible and had previously been withheld on the basis of section 22.
13. As a result of these additional disclosures, the complainant agreed to withdraw the parts of his complaint relating to the use of the section 21 and 22 exemptions by the FCA. Consequently the Commissioner considers the scope of his investigation to be to determine whether the remaining information has been correctly withheld under sections 40, 31 and 44 and, if applicable, where the balance of the public interest lies.

## Background

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14. Under the Financial Services and Markets Act 2000 (FSMA) the FCA has powers to regulate two types of individual – those who have 'significant influence' on the conduct of a firm's affairs and those who deal with customers or the property of customers. The "Approved Person – Significant Influence Controlled Functions" regime was created to capture the former of these types of individuals.

## Reasons for decision

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### Section 44(1)(a)

15. Section 44 of the FOIA provides that:

*"(1) Information is exempt information if its disclosure (otherwise than under this Act) by the public authority holding it –*

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<sup>1</sup>

<http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/treasury-committee/project-verde/oral/6540.html>

<sup>2</sup>

<http://www.publications.parliament.uk/pa/cm201314/cmselect/cmtreasy/writev/verde/contents.htm>

- (a) *is prohibited by or under any enactment,*
- (b) *is incompatible with any Community obligation, or*
- (c) *would constitute or be punishable as a contempt of court."*

16. The FCA has explained that the majority of the information in this case falls within section 44(1)(a) as it is information received by the FCA's predecessor the FSA for the purposes of or in discharge of its functions under section 348 of the FSMA, or it is information created by the FCA that is intrinsically linked to information it has received in discharge of its functions. That is, for the purpose of carrying out its supervision of firms and individuals.
17. The FSA were responsible for regulating financial services prior to April 2013. The FSA was then succeeded by the FCA and the request was submitted to the FCA but the information in question was either received by or created by the FSA. Any reference to the FCA in this notice is also a reference to its predecessor, the FSA, where appropriate.
18. The FCA considers that any information it has received for the purpose of carrying out its functions under the FSMA, particularly for the purpose of carrying out the supervision of firms and individuals, falls within section 348 of the FSMA.
19. Section 348(1) of the FSMA states that:

*"Confidential information must not be disclosed by a primary recipient, or by any person obtaining the information directly or indirectly from a primary recipient, without the consent of –*

- (a) *the person from whom the primary recipient obtained the information; and*
  - (b) *if different, the person to whom it relates."*
20. The operation of the statutory bar is dependent on the consideration of the following issues; firstly, whether the FCA can be classified as a primary recipient, secondly, whether the request is for 'confidential information' and if so, thirdly, whether there is consent to the release of the information.

*Is the FCA a primary recipient?*

21. Primary recipients are defined at section 348(5) of the FSMA and include the FCA. The Commissioner therefore accepts that the FCA is a primary recipient for the purposes of the FSMA.

*Is the information "confidential"?*

22. Section 348(2) of the FSMA defines confidential information for the purposes of the legislation. It is defined 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 Authority ... ; and*
  - (c) *is not prevented from being confidential information by subsection (4)."*
23. Subsection (4) states that the information cannot be confidential information if it has already been disclosed to the public or it can be anonymised in such a way that it is not possible to ascertain from it information relating to a particular person.
24. The FCA has stated the information which is subject to the section 44(1)(a) exemption and meets the criteria of section 348(2) of the FSMA is information which has been provided to it by external parties, including Mr Flowers under its regulatory functions of monitoring compliance.
25. The Commissioner has first considered if the information relates to the business or affairs of another person. The information was obtained in interviews with Paul Flowers and from other parties involved in the process of approving his nomination to the Co-operative Bank Board. The Commissioner is therefore satisfied that the information does relate to the business or affairs of another person, in this case Mr Flowers and the Co-operative Bank. He has therefore gone on to consider whether the information was received by the FCA for the purposes of, or in the discharge of, any of its functions.
26. The FSMA is concerned with the regulation of financial services and markets in the UK. The FCA is the body designated under the FSMA with functions and regulatory objectives to ensure market confidence, financial stability and the protection of consumers.
27. Under the FSMA the FCA has powers to regulate two types of individual – those who have 'significant influence' on the conduct of a firm's affairs and those who deal with customers or the property of customers. The "Approved Person – Significant Influence Controlled Functions" regime was created to capture the former of these types of individuals. The FCA therefore argues that any information it received in the course of carrying out the Approved Person – Significant Influence Controlled Functions Regime ("SIF") is information received in the course of the FCA discharging its functions under the FSMA of regulating individuals

with significant influence on customers. The Commissioner is therefore content that the FCA was fulfilling a regulatory function by receiving the information which it has identified as subject to this exemption.

28. The Commissioner notes that some of the information is information which has been internally created (such as documents containing the views of the FCA on the information it received) and cannot be as obviously said to have been 'received by' the FCA. Previous decisions of the Commissioner<sup>3</sup> and the Information Tribunal<sup>4</sup> have accepted that the prohibition on disclosure can extend to the views of the public authority, considerations and other internally-created information where the 'created' information incorporates information received by the public authority from another party.
29. The Commissioner has reviewed the withheld information that the FCA has identified as being subject to this statutory prohibition on disclosure and notes that some of this is information created by the FCA but embedded in these documents is its views on meetings, questions for future meetings which are based on previous meetings and follow-up points. Guided by previous decisions, the Commissioner is minded to accept that disclosure of this created information would disclose the content or nature of information which has been received by the FCA given the inextricable link between these types of information, and therefore this would also be confidential information as defined by section 348(2) of the FSMA.
30. Section 348(4) of the FSMA also states that information may not be deemed confidential information if it has legitimately been made available to the public or it can be anonymised.
31. The Commissioner considers that information will only have been legitimately made available where it has been placed in the public domain without breaching the FSMA and there is no indication that this has occurred.
32. If the information can be summarised or framed so that it is not possible to ascertain from it information relating to another person then section 348(4) will apply. The Commissioner does not consider this to be a relevant consideration in this case. This is because the focus of the

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<sup>3</sup> ICO Decision Notice FS50468587

<sup>4</sup> EA/2013/0098 and EA/2009/0033

request itself, which makes Paul Flowers and the Co-operative Bank its subject, removes the possibility of making the information anonymous.

33. For the reasons outlined above, the Commissioner has therefore concluded that the majority of the withheld information is confidential information pursuant to section 348(2) of the FSMA.

*If it is confidential information is there consent to its release or can this be obtained?*

34. The FSMA allows that information may be disclosed if consent has been received from the person that provided the FCA with the information. In this case the information was provided by a number of sources, mainly Paul Flowers and the Co-operative Bank.
35. In view of the circumstances surrounding this issue the FCA has stated it did not seek consent from these parties and does not consider it is obliged to. The Commissioner accepts that the situation would make obtaining consent difficult and acknowledges that section 348 of the FSMA does not compel the FCA to seek consent. As such, as consent has not been provided the information remains confidential information for the purposes of the statutory bar.
36. The FCA was therefore correct to rely on section 44(1)(a) of FOIA to withhold the majority of information it has identified as subject to this prohibition on disclosure. There is a small amount of information that is not subject to section 44(1)(a) as it is not confidential information obtained from a third party and is not intrinsically linked to confidential information.
37. However, there is some further information the FCA has withheld which is not subject to section 44 of the FOIA. This information has been withheld on the basis of section 31 of the FOIA and consists of information created by the FCA which is not intrinsically linked to information received by the FCA which is confidential. The Commissioner has therefore gone on to consider the application of section 31 by the FCA to this information.

## **Section 31**

38. Section 31(1)(g) of the FOIA provides that information is exempt if its disclosure would or would be likely to prejudice the exercise by any public authority of its functions for any of the purposes specified in subsection (2). The FCA has identified subsection (2)(c); the purpose specified is that of ascertaining whether circumstances which would justify regulatory action in pursuance of any enactment exist or may arise.

39. For section 31(1)(g) to be engaged via section 31(2)(c) a public authority has to have a specific function in respect of ascertaining whether regulatory action is required. There would then have to be a risk of that function being harmed if the information was disclosed. The Commissioner is satisfied that the FCA does have a statutory function under the FSMA to investigate individuals or institutions providing financial services with a view to taking enforcement action where necessary.
40. The FCA considers that 'ascertaining' in this context will include the public authority's decision making process at the end of which a person's misconduct or breach of the law is established. For the FCA this would therefore include information from the point at which a person is served a Decision Notice under Part XXVI of the FSMA<sup>5</sup>.
41. The exemption can be applied on the basis that the alleged prejudice would, or would be likely to occur, if the information was disclosed. The Commissioner understands the FCA has applied the exemption on the basis of the lower threshold that it would be likely to prejudice the FCA's function of monitoring compliance with regulatory requirements and determining if enforcement action is required.
42. At the time of the request the FCA was still considering whether to investigate the issue separately from the HM Treasury inquiry which had been announced. By 6 January 2014 the FCA had announced it would be undertaking enforcement investigations into events at the Co-operative Bank. The FCA has argued that disclosure of the information which is subject to section 31 would have been likely to have prejudiced its ability to undertake enforcement investigations as it would have disclosed information which would be of relevance to any future investigation.
43. This information was obtained and created by the FCA's predecessor, the FSA, in the course of fulfilling its obligations under the FSMA to regulate persons involved in providing financial services. The Commissioner recognises that information of this nature would be likely to be of relevance in an investigation to determine if enforcement action may be necessary as it documents the process of assessing a person's conduct and will help to build up a picture of how Mr Flowers was deemed fit for his role at the Co-operative Bank. However, when looking at the specific content of the information that has been withheld, the Commissioner notes that this information does not discuss any of the

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<sup>5</sup> <http://www.legislation.gov.uk/ukpga/2000/8/part/XXVI>

matters surrounding Mr Flowers' appointment and largely consists of more administrative information.

44. The FCA has argued that disclosure of the information would be likely to harm its function of monitoring compliance. This is because it may lead to a loss of flexibility and judgement in the use of the information it holds that is used to consider whether an individual is fit and proper to perform functions relating to financial services.
45. The FCA has expanded on this by stating there may be a change in the conduct of individuals and firms if they consider they can predict what may or may not be asked by the FCA. The FCA considers the purpose of the SIF-holder appointments is to emphasise the accountability of individual members of firm's senior management. Therefore the effectiveness of the SIF process is likely to be undermined over time if information which forms part of the decision-making process is disclosed.
46. Having viewed the remaining withheld information which is being solely withheld under this exemption, the Commissioner does not consider the FCA has demonstrated that prejudice would be likely to occur. The FCA's arguments have been based on the premise that disclosure of this information would be likely to prejudice the enforcement inquiry which was not in progress at the time of the request. The Commissioner accepts that an inquiry into possible enforcement action was a possibility and he has considered whether the disclosure of this limited information may have had a prejudicial effect on ascertaining whether circumstances which would justify regulatory action in pursuance of any enactment may arise.
47. The Commissioner does accept that this limited information forms part of the SIF process in that it relates to meetings and discussions regarding Mr Flowers' appointment but it is not information which reveals anything about the decision that was made and the basis for this. For this reason the Commissioner does not consider that the prejudice set out in section 31(2)(c) is likely to occur. This limited information is listed in a confidential annex which has been provided solely to the FCA and should now be disclosed.
48. However, some of this information does contain personal data so before disclosing this information the Commissioner has considered whether the FCA has correctly applied the section 40(2) to redact the personal information within the documents listed in the confidential annex.

## Section 40(2) – personal data

49. The FCA has redacted names and contact information from the information which the Commissioner has determined should be disclosed as it does not engage the section 31 or 44 exemptions.
50. Section 40(2) provides an exemption from disclosure for information that is the personal data of an individual other than the requester and whether the disclosure of that personal data would be in breach of any of the data protection principles.
51. The Commissioner has first considered whether this information constitutes personal data. Personal data is defined in section 1(1) of the Data Protection Act 1998 (DPA) as:

*"personal data' means data which relate to a living individual who can be identified –*

- (a) *from those data, or*
- (b) *from those data and other information which is in the possession of, or is likely to come into possession of, the data controller."*

52. The Commissioner has considered the information identified as personal data in these documents and accepts that an individual is identifiable in relation to each of these proposed redactions, either as they are the sender or recipient of the correspondence, an author of the document or due to what is stated in the correspondence. The Commissioner accepts therefore that the information is personal data in accordance with the definition in the DPA.
53. Turning to whether disclosure of this information would be in breach of any of the data protection principles, the Commissioner has focussed here on the first principle, which requires that personal data be processed fairly and lawfully, and particularly whether disclosure would in general be fair. In forming a view on whether disclosure would be fair, the Commissioner has taken into account the reasonable expectations of the data subject, the consequences of disclosure on the data subject and whether there is a legitimate public interest in the disclosure of this information.

54. The Commissioner has considered his own guidance on the disclosure of personal data of public sector employees<sup>6</sup> which suggests that it is likely that the information of more junior members of staff would be more likely to be withheld but it is necessary to consider the nature of the information and the responsibilities of the employees in question. In this case the information in the emails and documents is at times administrative and is not discussing major decisions or the approval process. The individuals would therefore have had little expectation their personal data would be disclosed as they were not involved with high level discussions or involved in major decisions on the issue.
55. In terms of any consequences of disclosure on the data subjects; the Commissioner considers that disclosure counter to the expectation of privacy may be distressing to the individuals but this is not a strong possibility. However, as the data subjects would have little reasonable expectation their information would be disclosed the Commissioner must consider the possibility of distress, no matter how remote.
56. As well as this the Commissioner has considered the legitimate public interest in the public knowing this information. The Commissioner does not consider there is any public interest in the release of this information as it is not directly relevant to the issue and would not provide any insight into the situation or contribute towards any debate on the matter. The Commissioner acknowledges that usually disclosure of information will increase transparency and accountability.
57. In making his decision the Commissioner has considered whether the infringement of the individual's right to privacy is outweighed by the legitimate interest in disclosure. The Commissioner has not been convinced there is a significant legitimate public interest in disclosure of the names and contact information of individuals in this case beyond simply increasing transparency about the public authority. Balanced against this, the Commissioner does consider the individuals had no reasonable expectations about disclosure and may consider it to be disproportionately intrusive to have their information disclosed.
58. The Commissioner therefore considers that disclosure of this information would be unfair and in breach of the first data protection principle. As

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[http://ico.org.uk/for\\_organisms/guidance\\_index/~/media/documents/library/Environmental\\_info\\_reg/Practical\\_application/section\\_40\\_requests\\_for\\_personal\\_data\\_about\\_employees.ashx](http://ico.org.uk/for_organisations/guidance_index/~/media/documents/library/Environmental_info_reg/Practical_application/section_40_requests_for_personal_data_about_employees.ashx)

such, the section 40(2) exemption is engaged and the information is therefore exempt from disclosure.

## **Conclusion**

59. The Commissioner has found the section 44(1)(a) exemption to be engaged in relation to the majority of the information identified as within the scope of the request. For the information which is not covered by the section 44(1)(a) exemption, the Commissioner has concluded that the section 31(2) exemption is not engaged and he now requires the FCA to disclose this information, as set out in the confidential annex, with appropriate redactions under section 40(2).

## **Right of appeal**

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60. 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@hmcts.gsi.gov.uk](mailto:GRC@hmcts.gsi.gov.uk)

Website: [www.justice.gov.uk/tribunals/general-regulatory-chamber](http://www.justice.gov.uk/tribunals/general-regulatory-chamber)

61. 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.
62. 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 .....**

**Steve Wood**  
**Head of Policy Delivery**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
**Cheshire**  
**SK9 5AF**