

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 20 January 2022

Public Authority: Financial Conduct Authority (FCA)

Address: 12 Endeavour Square
London
E20 1JN

Decision (including any steps ordered)

1. The complainant has requested information relating to guidelines for strong customer authorisation (SCA). The FCA provided some information but refused to disclose some of the requested information under 40(2), 43(2) and 44(1)(a) FOIA. It refused to comply with part 2 of the request under section 12 FOIA.
2. The Commissioner's decision is that section 40(2) and 44(1)(a) FOIA were applied correctly to the withheld information (section 43(2) FOIA was applied to the same information that the Commissioner found section 44(1)(a) FOIA to apply to and so section 43(2) was not considered any further). The FCA was also correct to refuse to comply with part of the request under section 12 FOIA.
3. The Commissioner requires no steps to be taken.

Request and response

4. On 3 October 2020 the complainant made the following request for information under the FOIA for:

"I require copies of all correspondence between yourselves and [named firm] from your original information with the guidelines for strong customer authorisation up to and including your decision not to take any action despite them having committed probably 2 million cases of

- Age Discrimination and Fraud and any internal communications during your investigation.”
5. On 30 October 2020, he contacted FCA again to tell it that he had received information that his request should have been made under the Data Protection Act 1998 (DPA) and was therefore asking for the following:

“Therefore under that Act I require you to provide me with all copies of communication you sent to [named firm] since the first about Strong Customer Authorisation including the guidelines. Copies of all communication to and from [named firm] [.....]. Copies of all internal communications that happened during that investigation including the decision/instruction not take action despite the fact that they had committed around 2 million Age Discriminations and 2 million fraud/attempted frauds.”
 6. Further clarification was received by the FCA on 2 November 2020:

“I require copies of your communication with [named organisation] starting in 2017 when you first informed them of The guidelines for Strong Customer Authentication including the guidelines themselves and any other communications between yourselves up to the implementation on 18th Sept 2019. I also require copies of any correspondence between yourselves and them and any internal e-mails notes or instruction since my complaint was made in Sept/Oct 2019 to include the reason/directive that no action should be taken against [named organisation] despite you having been informed that they had committed around 2 million Age Discriminations and despite you having told them that they must provide an alternative to mobile phones/tablets.”
 7. On 12 January 2021 the FCA responded. It provided the complainant with some information but refused to provide some information held under section 43(2) and section 44(1)(a) FOIA.
 8. The complainant requested an internal review on 14 January 2021. The FCA sent the outcome of its internal review on 25 March 2021. It revised its position. In relation to part 1 of the request it provided the complainant with some of the information originally withheld. In relation to the remaining withheld information it upheld its application of the original exemptions cited and additionally applied section 40(2) FOIA. In relation to part 2 of the request it confirmed that it would exceed the cost limit under section 12 FOIA to comply.

Scope of the case

9. The complainant contacted the Commissioner to complain about the way his request for information had been handled.
10. During the course of the Commissioner's investigation the FCA disclosed some further information to the complainant.
11. The Commissioner has considered whether the FCA was correct to withhold the requested information under section 40(2) and section 43(2) or 44(1)(a) FOIA. He has also considered whether it was correct to refuse to comply with part 2 of the request under section 12 FOIA.

Reasons for decision

Section 40(2)

12. Section 40(2) of the FOIA provides that information is exempt from disclosure if it is the personal data of an individual other than the requester and where one of the conditions listed in section 40(3A)(3B) or 40(4A) is satisfied.
13. In this case the relevant condition is contained in section 40(3A)(a)¹. This applies where the disclosure of the information to any member of the public would contravene any of the principles relating to the processing of personal data ('the DP principles'), as set out in Article 5 of the General Data Protection Regulation ('GDPR').
14. The first step for the Commissioner is to determine whether the withheld information constitutes personal data as defined by the Data Protection Act 2018 ('DPA'). If it is not personal data then section 40 of the FOIA cannot apply.

¹ As amended by Schedule 19 Paragraph 58(3) DPA.

15. Secondly, and only if the Commissioner is satisfied that the requested information is personal data, he must establish whether disclosure of that data would breach any of the DP principles.

Is the information personal data?

16. Section 3(2) of the DPA defines personal data as:

"any information relating to an identified or identifiable living individual".

17. The two main elements of personal data are that the information must relate to a living person and that the person must be identifiable.
18. An identifiable living individual is one who can be identified, directly or indirectly, in particular by reference to an identifier such as a name, an identification number, location data, an online identifier or to one or more factors specific to the physical, physiological, genetic, mental, economic, cultural or social identity of the individual.
19. 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.
20. The FCA confirmed that the information withheld under section 40(2) FOIA is the names of current or former FCA staff as well as representatives of Santander UK PLC.
21. In the circumstances of this case, having considered the information withheld under this exemption, the Commissioner is satisfied that this information both relates to and identifies the individual named in the request. This information therefore falls within the definition of 'personal data' in section 3(2) of the DPA.
22. The fact that information constitutes the personal data of identifiable living individuals does not automatically exclude it from disclosure under the FOIA. The second element of the test is to determine whether disclosure would contravene any of the DP principles. The most relevant DP principle in this case is principle (a).

Would disclosure contravene principle (a)?

23. Article 5(1)(a) of the GDPR states that:

"Personal data shall be processed lawfully, fairly and in a transparent manner in relation to the data subject".

24. In the case of an 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 if to do so would be lawful, fair and transparent.
25. In order to be lawful, one of the lawful bases listed in Article 6(1) of the GDPR must apply to the processing. It must also be generally lawful.

Lawful processing: Article 6(1)(f) of the GDPR

26. Article 6(1) of the 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"* lawful bases for processing listed in the Article applies.
27. The Commissioner considers that the lawful basis most applicable is basis 6(1)(f) which states:

*"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"*².
28. In considering the application of Article 6(1)(f) of the GDPR in the context of a request for information under the FOIA, it is necessary to consider the following three-part test:-
 - i) **Legitimate interest test:** Whether a legitimate interest is being pursued in the request for information;
 - ii) **Necessity test:** Whether disclosure of the information is necessary to meet the legitimate interest in question;

² 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) provides that:-

"In determining for the purposes of this section whether the lawfulness principle in Article 5(1)(a) of the GDPR would be contravened by the disclosure of information, Article 6(1) of the 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".

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

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

Legitimate interests

- 30. 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.
- 31. The FCA explained that there is a legitimate interest in having knowledge of the background to the requirements around SCA being implemented.
- 32. The Commissioner accepts that there is some legitimate interest in understanding the background as to who was party to decisions surrounding SCA being implemented.

Is disclosure necessary?

- 33. 'Necessary' means more than desirable but less than indispensable or absolute necessity. Accordingly, the test is one of reasonable necessity and involves consideration of alternative measures which may make disclosure of the requested information unnecessary. Disclosure under the FOIA must therefore be the least intrusive means of achieving the legitimate aim in question.
- 34. The Commissioner considers that disclosure is necessary to provide knowledge of the background to the requirements around SCA being implemented, specifically who was party to the inquiries/decisions in this specific case.

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

35. It is necessary to balance the legitimate interests in disclosure against the data subject's interests or fundamental rights and freedoms. In doing so, it is necessary to consider the impact of disclosure. For example, if the data subject would not reasonably expect that the information would be disclosed to the public under the FOIA in response to the request, or if such disclosure would cause unjustified harm, their interests or rights are likely to override legitimate interests in disclosure.
36. In considering this balancing test, the Commissioner has taken into account the following factors:
 - the potential harm or distress that disclosure may cause;
 - whether the information is already in the public domain;
 - whether the information is already known to some individuals;
 - whether the individual expressed concern to the disclosure; and
 - the reasonable expectations of the individual.
37. In the Commissioner's view, a key issue is whether the individuals concerned have a reasonable expectation that their information will not be disclosed. These expectations can be shaped by factors such as an individual's general expectation of privacy, whether the information relates to an employee in their professional role or to them as individuals, and the purpose for which they provided their personal data.
38. It is also important to consider whether disclosure would be likely to result in unwarranted damage or distress to that individual.
39. On balance, the FCA's view is that the names and contact details of current or former FCA staff below management level whose roles do not require a significant level of personal judgement and responsibility would not expect their role to be subject to public scrutiny. The relevant staff of the third-party firm also have a reasonable expectation that the personal information relating to their employment should be protected. The individuals concerned did not give their consent for their personal details to be made available to the public at large and did not have any expectation that it would be disclosed. Furthermore, given the passage of time since the discussions about SCA took place, FCA considers that any legitimate public interest is outweighed by the rights and freedoms of the data subjects.
40. Based upon FCA's submissions in this case, the Commissioner considers that the rights and freedoms of the data subjects, due to their level of seniority and reasonable expectations, must outweigh the legitimate interest in disclosure.

41. The Commissioner therefore considers that there is no Article 6 basis for processing and so the disclosure of the withheld information would not be lawful.
42. Given the above conclusion that disclosure would be unlawful, the Commissioner considers that he does not need to go on to separately consider whether disclosure would be fair or transparent.

The Commissioner's view

43. The Commissioner has therefore decided that the FCA was entitled to withhold the information under section 40(2), by way of section 40(3A)(a).

Section 44(1)(a)

44. Section 44 of the FOIA states that:

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

(a) is prohibited by or under any enactment,

(b) is incompatible with any retained EU obligation, or

(c) would constitute or be punishable as a contempt of court."

45. In this case the FCA has argued that disclosure is prohibited by the FSMA and has therefore applied section 44(1)(a) FOIA.

46. Section 348(1) of the FSMA prevents the FCA from disclosing "confidential information" without consent.

47. 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).

48. 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.

49. Section 349 provides some limited gateways to disclosure of confidential information, none of which relate to disclosure to the world at large.

50. Section 352 of the FSMA makes it a criminal offence to disclose confidential information otherwise than in accordance with the FSMA.

51. The FCA confirmed that some of the information requested would have been received by the FCA as part of the arrangements it has in place for carrying out its supervisory function under the FSMA. It therefore relates to confidential information it would have received from a third party and where this relates to its or another party's business or other affairs.

52. It went on that, for the purposes of section 348 FSMA it does not matter if the FCA requested information, for instance, from a firm, or whether the firm provided it pro-actively. Either way it will be information "received" under section 348.

53. The FCA also explained that section 348 FSMA 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. In other words, disclosure of the "created" information would disclose the content or nature of the confidential information in the form of FCA's own analysis and views on the information received, given the inextricable link between these types of information. Consequently, the FCA is prohibited from disclosing any information which it received while performing its regulatory duties and which is not in the public domain or where the relevant consents to disclosure have not been obtained.

54. It explained that its experience with third parties about the FCA disclosing information obtained from them or about them, in response to information requests under FOIA, is overwhelmingly that they are opposed to any disclosure. This is given the importance those operating in the financial services sector attach to the information they provide the FCA; and the wider consequences that any damaging disclosures might have on the financial markets more generally. There is no reason to consider that the providers of the underlying information, and, if different, the persons to whom it relates, would react differently to the present request. Therefore, in terms of consent, the FCA confirmed that it does not hold consent to the disclosure of the requested confidential information that is restricted from disclosure under section 348 of FSMA.
55. Upon viewing the information withheld under section 44(1)(a) the Commissioner's view is that the FCA has correctly applied section 44(1)(a) and the enactment prohibiting the FCA from disclosure in this instance is the FSMA.
56. Section 44(1)(a) is an absolute exemption and is not therefore subject to the public interest test.
57. As the FCA has applied section 43(2) FOIA to the same withheld information which the Commissioner has found section 44(1)(a) FOIA to apply, he has not gone on to consider the application of section 43(2) FOIA any further.

Part 2 of the request - Section 12

58. Section 12 of the FOIA allows a public authority to refuse to deal with a request where it estimates that it would exceed the appropriate cost limit to:
 - either comply with the request in its entirety, or
 - confirm or deny whether the requested information is held.
59. The estimate must be reasonable in the circumstances of the case. The appropriate limit is currently £600 for central government departments and £450 for all other public authorities. Public authorities can charge a maximum of £25 per hour to undertake work to comply with a request - 24 hours work for central government departments; 18 hours work for all other public authorities. If an authority estimates that complying with a request may cost more than the cost limit, it can consider the time taken to:

- (a) determine whether it holds the information
- (b) locate the information, or a document which may contain the information
- (c) retrieve the information, or a document which may contain the information, and
- (d) extract the information from a document containing it.

The appropriate limit for the ICO is £450 or the equivalent of 18 hours work.

60. While FCA has been able to confirm that it may hold information within the scope of part two of his request, it is unable to comply with the request in full as to do so would exceed the appropriate limit under section 12 of the Act.
61. In terms of the information held by the FCA, it explained in its internal review response dated 25 March 2021 that information of possible relevance to this part of the request is held across a range of business areas and filing structures in the FCA, as it does not hold one, or even two, single files about Santander. There are a significant number of folders and within each there could be several hundred emails, letters or other documents. These records are not organised by key terms but are set up within each business area using the file structures and naming conventions they consider most appropriate. For example, the Santander UK Supervision Team confirmed that they hold 299 records within one single folder relating to Santander UK during the period 1 September 2019 to 2 November 2020.
62. The information identified is not recorded or held in a readily extractable format that would allow the FCA to identify, locate, retrieve and extract all but only information within the scope of the request within the appropriate limit. To do this would mean that each email would need to be opened and reviewed together with any attachments to each email. This would take a significant amount of time on the basis of 6 to 8 minutes to review each email and any attachments to ensure only relevant information is provided:
- $$299 \times 6 \text{ minutes} = 1794 \div 60 = 30 \text{ hours}$$
63. It also confirmed that an electronic search of the information held using key words such as 'SCA' would not be effective, as the naming conventions used would not necessarily have mentioned SCA.
64. Furthermore in order to provide the information requested, records for other business areas, such as the Supervision Hub and Enforcement,

would also need to be reviewed. This would be likely to add to the 299 records already identified.

65. The FCA explained the estimate to review each document was based upon its experience of dealing with the first part of the request. For that exercise it spent approximately 3 hours identifying information held on two electronic databases and then a further 6-8 minutes identifying whether each record related to SCA and fell within the scope of the first part of the request. The second part of the request is far more complex as in the absence of further clarification it would need to review all material received to and from Santander to ensure all relevant information is captured and an accurate answer is obtained. If the scope of the request were to include all "communications to and from Santander" on any subject rather than just SCA related information then this would be an immense undertaking (furthermore it is prohibited from disclosing information which it has received, except in limited circumstances, due to the confidentiality provisions of section 348 FSMA, which is discussed under section 44(1)(a) above). Therefore, to review the entire body of the correspondence held would likely take in excess of the time it took to comply with the first part of the request. This is because the same search methodology would be followed and additional business areas would need to be contacted.
66. Based upon the number of relevant emails located potentially relevant to part 2 of the request which would need to be reviewed the Commissioner is satisfied that it would exceed the cost limit under section 12 FOIA to comply. This is because the time of 6 minutes per email is based upon FCA's review of the smaller volume of emails relevant to part 1 of the request. In addition it is likely records for other business areas, such as the Supervision Hub and Enforcement, would also need to be reviewed which would add to the time and cost of compliance.

Section 16

67. In considering its use of section 12 FOIA, it has taken into account the ICO's guidance on section 16 FOIA. This states that where a public authority estimates that to comply with a request would exceed the appropriate limit it is expected to consider giving an indication of what, if any, information could be taken into account within the cost ceiling by advising how the request might be reformed or re-focused.
68. However, FCA explained that as the guidance notes state, this requirement is expressly qualified "only in so far as it would be

reasonable to expect the authority to do so". In this case, FCA has explained to the complainant that it could not offer any suggestions as to how the request might be brought within the appropriate limit without further clarification of the information the complainant is seeking. However, the requester did not take the opportunity to engage with the FCA by providing clarification to explore whether the request could be refined.

69. The Commissioner accepts that the FCA has considered its obligations under section 16 FOIA in this case and asked the complainant for clarification as to the scope of information required to enable the FCA to be able to provide appropriate advice and assistance. In the absence of the clarification requested, the Commissioner accepts that it would not have been possible for the FCA to provide advice and assistance as to how the request could be refined to fall within the cost limit. It therefore complied with its obligations under section 16 FOIA.

Right of appeal

70. 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

71. 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.
72. 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.....

Gemma Garvey
Senior Case Officer

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