

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 21 August 2023

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

Decision (including any steps ordered)

1. The complainant has requested information about investigations carried out into a particular bank. The above public authority ("the public authority") relied on sections 44 (prohibitions on disclosure) and 31 (law enforcement) of FOIA to refuse to confirm or deny that the information was held.
2. The Commissioner's decision is that the public authority was entitled to rely on section 44 of FOIA to refuse to confirm or deny whether it held information within the scope of the request.
3. The Commissioner does not require further steps to be taken.

Request and response

4. On 31 January 2023, the complainant wrote to the public authority and, referring to a complaint he'd previously made to the public authority about a particular bank, requested information in the following terms:
 - "[1] Did the FCA investigate any complaints against [the bank] in 2022?
 - "[2] Did any such investigation result in a Final Notice being issued to [the bank]?"

"[3] Did the FCA investigate the report I presented to them in regard to breaches of the FCA Rules by [the bank]?"

"[4] If so, what was the outcome of that investigation?"

"[5] If the FCA did not investigate my report, what was the reason for not undertaking such an investigation?"

5. The public authority responded on 28 February 2023. It refused to confirm or deny that it held any information and relied on section 44 of FOIA in order to do so.
6. The complainant sought an internal review on 5 March 2023, but asked the public authority to focus only on elements [3], [4] and [5]. Following an internal review the public authority wrote to the complainant on 2 June 2023. It upheld its original position that it was entitled to rely on section 44 of FOIA to refuse to confirm or deny that it held information and it noted that it would also be entitled to rely on section 31 of FOIA to refuse to confirm or deny.

Scope of the case

7. The complainant contacted the Commissioner on 4 July 2023 to complain about the way his request for information had been handled.
8. The Commissioner wrote to the complainant on 14 August 2023 to set out why, in his view, he considered that the public authority had correctly relied upon section 44. The complainant described the reasoning as "fatuous" and asked for a formal decision notice.
9. The Commissioner considers that the scope of his investigation is to determine whether the public authority was entitled to rely on section 44 to refuse to confirm or deny that the information was held. If it wasn't, he will go on to consider whether it could have relied on section 31 of FOIA instead.

Reasons for decision

10. Section 44 of FOIA allows a public authority to withhold information if another law would have prevented the information from being published. It also allows a public authority to refuse to confirm or deny holding information if the mere act of confirming that information was (or was not) held would, in itself, reveal information whose disclosure is prohibited by law.

11. In this case, the law in question is the Financial Services and Markets Act 2000 (FSMA 2000), specifically section 348, which prevents the FCA from disclosing "confidential information" that it has obtained either directly or indirectly from another person.
12. Section 352 of FSMA 2000 makes it a criminal offence for a person to disclose confidential information.
13. The term "confidential information" is defined in FSMA 2000 as being information that meets three criteria:
 - It has been obtained by the FCA for the purposes of its functions; and
 - It relates to the business or other affairs of any person (which can include a "legal person" such as a business); and
 - It is not already in the public domain or is framed in such a way that it can be linked to an individual person (or business).
14. There are a small number of exceptions, but they largely relate to the sharing of information with law enforcement bodies or with the courts.
15. If the public authority confirmed or denied that it held information within the scope of element 3 of the request, it would be confirming that it had (or had not) received a report that a particular bank had breached its rules.
16. The public authority has various functions under FSMA 2000 to ensure that banks are complying with the appropriate laws and regulations. If it had received a report that a particular bank was not complying with the rules, that would be information that it had received for the purposes of carrying out its functions – so the first criteria is satisfied.
17. The information also relates to the business or other affairs of the bank in question because it relates to how the bank goes about its day to day business and how it complies with the law. Therefore the second criteria is satisfied.
18. The original wording of the request named the bank in question, therefore, the only information the public authority could confirm that it held would be information relating specifically to that bank – which could be identified from the wording of the request. Thus the information is not framed in such a general way as to avoid identifying the bank. Nor is the information in the public domain.
19. Therefore it would appear that all three criteria are satisfied and so the information would be "confidential information" – which the public authority is forbidden from publishing.

20. The complainant argued that the information was too trivial to qualify as “confidential information” as no harm was likely to result from disclosure. The Commissioner is bound by the wording of the legislation. Section 348 of FSMA 2000 does not provide for any test of harm. Information is either confidential information (because it meets the three criteria) or it is not. If it is, section 348 prohibits the public authority from divulging it and section 44 of FOIA is engaged.
21. The complainant also attempted to argue that, as parts of his request related to investigations the public authority had carried out, such information (if it were held) would be information the public authority had generated itself, rather than information it had received – therefore it would not meet the definition of confidential information.
22. The Commissioner accepts that, had the request only sought details of any investigations carried out into the particular bank, confirming or denying that such information were held would probably not disclose confidential information.
23. However, the request in this case did not ask about investigations generally, but about investigations that had resulted from a complaint that the complainant says he submitted to the public authority. Consequently, the public authority could not confirm or deny that it held information without simultaneously confirming that it had received a complaint from the complainant, the nature of the complaint he had submitted and the institution about whom he had complained.
24. The complainant obviously knows whether or not he submitted a complaint and of what nature, but this is not information that is known to the world at large. FOIA requires disclosure to the world at large, not just the individual requester – therefore the FCA would be divulging confidential information if it confirmed or denied that it held any information within the scope of the request.
25. The Commissioner is thus satisfied that section 44 of FOIA is engaged. There is no requirement for him to consider the balance of the public interest.

Other matters

26. Whilst it does not affect the conclusion's outlined above, the Commissioner wishes to draw the public authority's attention to a particular paragraph from its internal review:

"I would also add that it is likely that the requested information, if held, would also contain "received" information embedded within it in the form of FCA's own analysis and views on the information received."

27. This statement is incorrect for two reasons.
28. Firstly, when a public authority is relying on section 44 of FOIA to refuse to confirm or deny that information is held, it must only consider the effect of disclosure and not the nature of the information that has been requested. Section 44 will only apply if the mere act of confirming or denying that information is held would, in itself, reveal information whose disclosure is prohibited by law. The fact that the information itself (if it were held) may be subject to a statutory prohibition does not automatically mean that the public authority can rely on section 44 to refuse to confirm or deny.
29. Secondly, only information the public authority has **received** in the course of carrying out its functions would be "confidential information". This implies that such information must have originated with another party before being passed to the public authority. If the public authority has generated its own internal analysis, that information is not information it has "received." The information will only fall within the statutory definition of confidential information to the extent that it reveals information that the public authority has received from other parties in carrying out its functions. It does not follow automatically that internally-generated information will be subject to the statutory prohibition – although it may still be subject to other FOIA exemptions.
30. Finally, the Commissioner notes that the public authority took three months to complete its internal review. The Commissioner's guidance and the section 45 FOIA Code of Practice require that internal reviews should normally be completed within 40 working days.

Right of appeal

31. 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

32. 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.
33. 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
Senior Case Officer
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
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SK9 5AF