

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 15 April 2024

Public Authority: Financial Reporting Council Ltd
Address: 8th Floor
125 London Wall
London
EC2Y 5AS

Decision (including any steps ordered)

1. The complainant has requested from the Financial Reporting Council Ltd (FRC) the identity of a company and related information concerning an audit quality review that had been carried out into an audit conducted by Mazars LLP. At first the FRC refused to confirm or deny (NCND) whether it held the requested information citing sections 44, 41 and 40 of FOIA. It later withdrew its NCND response and the citing of section 44. It maintained its citing of sections 41 (information provided in confidence) and 40 (personal information), additionally relying on section 27 (international relations) of FOIA.
2. The Commissioner's decision is that the FRC cited section 27 correctly and that the public interest in favour of maintaining the exemption outweighs the public interest in disclosing the requested information. He has also decided that the FRC correctly cited section 41(1) of FOIA.
3. The Commissioner does not require further steps.

Background

4. The Commissioner has obtained the following background from the FRC's website:

"Pursuant to the Crown Dependencies Recognised Auditor Sanctions Procedure, the FRC's Enforcement Committee (the Committee) has determined that Mazars LLP (Mazars) failed to comply with the Regulatory Framework for Auditing in its audit of a Market Traded Company's financial statements ('the audit')."

More detail can be found at the link in the footnote¹.

Request and response

5. On 21 August 2023, the complainant wrote to the FRC and requested information in the following terms:

"With reference to this news article:

<https://www.frc.org.uk/news/august2023/sanctions-against-mazars>

Please provide me with:

The identity of: - the Market Traded Company. - the Recognised Supervisory Body. - the relevant Registrar. - the relevant Crown Dependency. The specific Regulatory Framework for Auditing that Mazars failed to comply with.

A copy of the Undertakings. A copy of any report provided to the Committee from the AQR and any further information the Committee received (refer paragraph 6.4(a) of the procedure document), including any representations provided to the Committee that relates to that report or information.

If you refuse to provide any part of my request, please still provide the rest of my request."

6. The FRC responded on 19 September 2023, stating that the identity of the Recognised Supervisory Body was already in the public domain. It refused to either confirm or deny (NCND) whether it held the requested
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¹ [Sanctions against Mazars \(frc.org.uk\)](https://www.frc.org.uk/news/august2023/sanctions-against-mazars)

information, citing sections 44 (prohibitions on disclosure), 41 (information provided in confidence) and 40 (personal information) of the FOIA.

7. The complainant made an internal review request on 21 September 2023. They pointed out that it was “strange” for the FRC neither to confirm or deny whether the information was held in view of the “published news article” and suggested that some of the information was not provided by an external party. The complainant did not require any personal data as part of their request and suggested that it would be “trivial” to redact it.
8. Following an internal review, the FRC wrote to the complainant on 19 October 2023. The review withdrew its reliance on section 44 but maintained the citing of sections 41 and 40(2) of FOIA whilst additionally relying on section 27 (international relations). The FRC confirmed that it held the information, withdrawing its previous NCND response.

Scope of the case

9. The complainant contacted the Commissioner on 30 October 2023 to complain about the way their request for information had been handled.
10. The Commissioner considers that the scope of his investigation is to consider the FRC’s citing of sections 27 and 41 of FOIA.

Reasons for decision

Section 27 international relations

11. Section 27(1) of FOIA states that:

“Information is exempt information if its disclosure under this Act would, or would be likely to, prejudice—

(a) relations between the United Kingdom and any other State,

[...]”

12. Section 27(5) explains that “State” includes the government of any State and any organ of its government, and references to a State other than the United Kingdom include references to any territory outside the United Kingdom.

13. The Commissioner's guidance² on section 27 acknowledges that there is some overlap between the different provisions set out in the exemption.
14. In order for a prejudice based exemption like section 27 to be engaged, the Commissioner considers that three criteria must be met:
 - First, the actual harm which the public authority alleges would, or would be likely, to occur if the withheld information was disclosed has to relate to the applicable interests within the relevant exemption.
 - Secondly, the public authority must be able to demonstrate that some causal relationship exists between the potential disclosure of the information being withheld and the prejudice which the exemption is designed to protect. Furthermore, the resultant prejudice which is alleged must be real, actual or of substance.
 - Thirdly, it is necessary to establish whether the level of likelihood of prejudice being relied upon by the public authority is met – i.e., disclosure would be likely to result in prejudice or disclosure would result in prejudice. If the likelihood of prejudice occurring is one that is only hypothetical or remote the exemption will not be engaged.
15. Furthermore, the Commissioner has been guided by the comments of the Information Tribunal which suggested that, in the context of section 27(1), prejudice can be real and of substance "if it makes relations more difficult or calls for a particular damage limitation response to contain or limit damage which would not have otherwise have been necessary"³.

The FRC's view

16. The FRC has relied on section 27(1)(a) of FOIA as set out in paragraph 11 above. The FRC has provided the Commissioner with the withheld information which cannot be detailed for obvious reasons. It refers to the ICO's guidance on section 27 which "clarifies that this includes the Crown Dependencies"⁴.
17. The FRC contends that "disclosure of the information requested would be likely to prejudice the working relationship between the FRC and the relevant Crown Dependency authority".

² [Section 27 - International relations | ICO](#)

³ [Microsoft Word - caat_1_2008.openfinal web dec .doc \(tribunals.gov.uk\)](#)

⁴ "The term "state" covers the government of any state. This will include states with a government structure, the overseas territories of the UK, the overseas territories of other countries and Crown Dependencies such as the Channel Islands."

18. The FRC has provided further detail to the Commissioner to support its view that section 27 applies that also cannot be included in this decision notice.
19. The FRC has set out the actual harm it alleges would be likely to occur to its applicable interests, noting that -

“the effective conduct of some of the FRC’s statutory and non-statutory functions depends, amongst other things, on maintaining trust and confidence between the FRC and authorities in other states, such as the Crown Dependencies”.

The relationship with the Crown dependencies -

“is important because most Crown Dependency auditors who are recognized to conduct the audit of Market Traded Companies (essentially, companies listed in the UK or the EU) are also statutory auditors in the UK and because of the close political, trade, financial and commercial ties between the UK and the Crown Dependencies – there are a considerable number of incorporated in one of the Crown Dependencies that are listed on a UK regulated market”

20. Additionally, “the FRC carries out inspections of Crown Dependency audits of Market Traded Companies pursuant to functions set out in the legislation of the relevant Crown Dependency”.
21. The FRC points to the Memorandum of Understanding (MoU) that is “in place between the Crown Dependency authorities, the ICAEW⁵ and the FRC”. The MoU -

“provides a framework for the working relationship between these bodies in the context of the implementation of inspections and enforcement by the FRC of Crown Dependency audits of Market Traded Companies”.

The FRC considers that,

“Providing some of the information requested to the requester would constitute non-compliance with a statutory restriction on disclosure, as set out above and would therefore involve the commission of a criminal offence”.

⁵ The Institute of Chartered Accountants in England and Wales

22. Moving on to the second and third criteria of the test for section 27 to be engaged, the FRC argues that “non-compliance would undermine the arrangements set out in the MoU”. It quotes from paragraph three as follows: “The terms of this MoU are subject to the Law in each relevant jurisdiction”. The FRC contends that disclosure -

“could strain relations between the UK, the relevant Crown Dependency and possibly the other Crown Dependencies, which are also parties to the MoU and in respect of which the FRC exercises the same regulatory role”.

It concludes that, “This could make relations more difficult and/or may require a particular response from the FRC to limit the damage”. To disclose this information “would be likely to prejudice relations between the United Kingdom and the relevant Crown Dependency”.

23. The Commissioner accepts that the actual harm described by the FRC relates to the applicable interests in the exemption and that a causal relationship exists between the disclosure of this information and the applicable interests the exemption is designed to protect at the lower level of prejudice.

Public interest test

24. The Commissioner will now go on to consider the public interest in releasing or continuing to withhold the information.

Public interest factors in favour of disclosing the information

25. The complainant states the following -

“The MOU the FRC refers to is a private agreement. I think it is in the interests of the UK as a whole for the outcome to be transparent, and to provide transparency over the use of UK public funds to conduct enforcement activity abroad.”

26. The FRC stated that disclosure:

“particularly the identity of the audited entity and the nature of the undertakings, would provide the public with further information about this enforcement matter enabling them to better contextualise the FRC findings”.

27. It adds the following -

“There is a public interest in transparency and open justice in relation to the FRC’s enforcement findings under the CDRASP [Crown

Dependencies Recognised Auditor Sanctions Procedure] which include undertakings accepted under the CDRASP which are in some respects similar to Sanctions.”

Public interest factors in favour of maintaining the exemption

28. The FRC stated that set against the argument for disclosure of the audited entity’s name and the nature of the undertakings is that it “would constitute non-compliance with a statutory prohibition and with the arrangements set out in the MoU”. Its view is that disclosure “may adversely affect some of the FRC’s statutory and non-statutory functions”.
29. Furthermore it believes that, “It is in the public interest that the FRC has open and candid exchanges of information with the relevant Crown Dependency and the other Crown Dependencies”.
30. It concluded that the balance of public interest lay in favour of maintaining the exemption as “the enforcement findings were sufficiently intelligible to the reader without the information requested”. The public interest in transparency had been “substantially met” by the information that the FRC had publicly announced.

Balance of the public interest

31. The Commissioner is satisfied that the balance of the public interest favours maintaining the section 27(1)(a) exemption. Although he understands the complainant’s view that this information should be disclosed, his view is that the public interest in transparency has been met by what the FRC has published on its website and that the public interest in the withheld information does not justify prejudicing relations with a Crown Dependency and the effect this might have on the FRC’s statutory and non-statutory functions.

Section 41 – information provided in confidence

32. Section 41(1) of FOIA provides that –

“(a) Information is exempt information if it was obtained by the public authority from any other person (including another public authority); and, (b) the disclosure of the information to the public (otherwise than under this Act) by the public authority holding it would constitute a breach of confidence actionable by that or any other person”.

33. The Commissioner’s advice on section 41 states that –

“information will be covered by Section 41 if –

- it was obtained by the authority from any other person,
- its disclosure would constitute a breach of confidence.
- a legal person could bring a court action for that breach of confidence, and
- that court action would be likely to succeed.”⁶

Was the information obtained from any other person?

34. Section 41(1)(a) states that the information must have been obtained from “any other person”.
35. The complainant argues that “the internal review did not address that some information [they] requested was not provided to the FRC by an external party”.
36. The FRC explained that the requested information was obtained by its Enforcement Committee from the audit firm and from the FRC’s Audit Quality Review team (AQR). It acknowledges the requester’s point that “some or all of the information is therefore also held by AQR. AQR received the information from the audit firm”.
37. The Commissioner has seen the withheld information. He accepts that some of that information was originally provided from another person(s) or authority – “AQR received the information from the audit firm”.
38. The Commissioner must next consider whether or not its disclosure to the public (otherwise than under FOIA), would constitute a breach of confidence ‘actionable’ by that or any other person.

Would disclosure constitute an actionable claim for breach of confidence

39. The usual test for section 41 cases is set out in the case of *Coco v Clark* [1969] RPC 41 which sets out three elements which must be present in order that a claim can be made. According to the decision in this case a breach of confidence will be actionable if:
 - the information has the necessary quality of confidence;

⁶ [information-provided-in-confidence-section-41.pdf \(ico.org.uk\)](https://ico.org.uk/information-provided-in-confidence-section-41.pdf)

- the information was imparted in circumstances importing an obligation of confidence; and
 - there was an unauthorised use of the information to the detriment of the confider.
40. However, for that claim to be 'actionable' within the meaning of section 41(1)(b) of FOIA, a public authority must establish that an action for breach of confidence would, on the balance of probabilities, succeed.

Does the information have the necessary quality of confidence?

41. In order for information to have the necessary quality of confidence, it must be more than trivial and not otherwise accessible.

42. The FRC states that the information:

'obtained by the Enforcement Committee is confidential under paragraph 21.1 of the CDRASP which says "All information and evidence obtained under this Procedure by the Enforcement Committee... will be confidential". Information obtained by AQR is also confidential.'

43. The FRC explained that "AQR carries out inspections of Crown Dependency Audits of Market Traded Companies pursuant to arrangements provided for in the legislation of the relevant Crown Dependency..." It further explains that its 'request for information to the audit firm contained a section entitled "Confidentiality" in which it is stated *"We will only disclose private individual or company information obtained under this statutory notice where this is permitted by law and not in contravention of any other legal duty."*

Was the information imparted in circumstances importing an obligation of confidence?

44. The FRC has argued that the information "is more than trivial" and has "the necessary quality of confidence". The information concerns information about the FRC's enforcement findings in relation to a particular business". The FRC argues that -

"paragraph 21.1 of the CDRASP, the statutory prohibition on disclosure and the 'Confidentiality' section of the AQR's request for information demonstrate that there would have been an expectation of confidence (except to the extent that the Enforcement Committee decided to publish information under the CDRASP)".

45. In its internal review the FRC explained that -

"FRC decision-making bodies consider on a case by case basis what information should be published in relation to the outcome of an investigation, taking into account the public interest and the principle of transparency. The details published in each case will depend on the particular circumstances. As stated by the ICO in its guidance on section 41 of FOIA, the fact that similar material has been disclosed in the past should not be taken as definitive proof that the undisclosed requested information does not have the necessary quality of confidence."

Would disclosure be detrimental to the confider?

46. The FRC argued that the "disclosure of the withheld information would prejudice the operations of the CDRASP". It repeats that -

"paragraph 21.1 of the CDRASP requires that information obtained under the procedure by the Enforcement Committee is to be kept confidential (subject to the Enforcement Committee's decision to publish and the exception relating to regulatory etc bodies)."

To disclose the "withheld information would breach this requirement and in so doing would deter audit firms from co-operating as openly and fully as possible with both AQR and the Enforcement Committee". It considers that "this would prejudice the efficient operation of AQR's monitoring of Market Traded Companies and the CDRASP, which would not be in the public interest".

47. The complainant raises a point about the withholding of part of the information under this exemption. They do not accept that "releasing the identity of the Crown Dependency and the Relevant Registrar" would lead to identification of the company and that the argument put forward in the internal review "...is spurious. There are hundreds if not thousands of market traded companies in the crown dependencies and identifying which crown dependency is involved would not identify the company".

Is there a public interest defence for disclosure?

48. The complainant's view is that

"there is an overwhelming public interest in the information I requested being made public to maintain the reputation of the accounting profession and uphold proper standards within the accounting profession".

They underpin their argument by referring to The Commissioner's guidance -

"Paragraph 85 of the ICO's guidance states that if the information would reveal evidence of misconduct then this will carry significant public interest weight in favour of disclosure".

49. The complainant also argues the following:

"When the parties agreed that the issue should be handled by the FRC they agreed that would happen to UK standards and under UK jurisdiction. Paragraph (sic) 7.4 of CDAR allows the FRC to publish the outcome as it 'thinks fit' and it would be perverse to apply anything other than UK standards of transparency."

In the complainant's internal review request they provided links to where this type of information had been disclosed by the FTC.

50. Their view is that refusing to provide "the identity of the relevant Crown Dependency and relevant Registrar" is "strange". The complainant states that "They are public bodies and should not have any expectation that their identify (sic) would be held in confidence". Their contention is that,

"The outcome of your investigation alleges that the company prepared financial statements that were materially misstated, which would be misconduct and therefore you should publish the identity of the Market Traded Company so that it can be properly held to account".

51. The FRC has made it clear that disclosure "would be an actionable breach of confidence and that it was not in the public interest to breach this duty of confidence". In its internal review, the FRC referred to the complainant's citing of paragraph 85 of the ICO's guidance. However, the review stated that -

"the information requested would not 'reveal' evidence of misconduct. The Enforcement Committee has considered the evidence provided to it under the CDRASP. It has sanctioned the audit firm and has brought the misconduct to light in its announcement".

52. The complainant has pointed out to the Commissioner that, "The internal review did not consider the misconduct of the company in preparing incorrect information (they only considered misconduct of the auditor)."

53. The Commissioner understands the complainant's reasons for wanting the requested information about the company concerned to be disclosed. However the FRC's role was to determine whether the auditor had complied "with the Regulatory Framework for Auditing in its audit of

a Market Traded Company's financial statements". He does not accept that the complainant's reasons are sufficiently strong to outweigh the factors in favour of non-disclosure or provide a sufficient defence against a breach of confidence claim. The FRC provided some argument to the Commissioner that he cannot repeat here for reasons of confidentiality but these arguments have also informed his decision. He has decided that the FRC was entitled to rely on section 41 of FOIA to withhold the requested information.

54. The Commissioner has not gone on to look at the FRC's citing of personal data for the reasons given in paragraph seven and the Commissioner has decided that the requested information is exempt under sections 27 and 41 of FOIA.

Right of appeal

55. 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

56. 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.
57. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

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