

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 18 November 2024

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

Decision (including any steps ordered)

1. The complainant has requested information associated with a BBC 'Panorama' programme about the Blackmore Bonds collapse. The Financial Conduct Authority (FCA) has disclosed some of the information and withheld the remainder under sections 31, 36, 40, 42, 43 and 44 of FOIA. These exemptions concern law enforcement, effective conduct of public affairs, personal data, legal privilege, commercial interests and prohibitions on disclosure respectively.
2. As a result of the Commissioner's investigation, FCA identified further information it considered could be disclosed but it is continuing to withhold the remainder.
3. The Commissioner's decision is that FCA is entitled to rely on section 36(2)(b)(ii) to withhold some of the information within scope of the complainant's request.
4. FCA hasn't complied with section 1(1) and section 10(1) of FOIA as it hasn't communicated all the non-exempt information it holds within the required timescale.
5. The Commissioner requires FCA to take the following step to ensure compliance with the legislation:
 - If FCA hasn't already done so, disclose the further information that it has identified can be disclosed which is detailed in its submission to the Commissioner, with any personal data redacted appropriately.

6. FCA must take this step within 30 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

7. In August 2022, the BBC had broadcast a 'Panorama' programme about the Blackmore Bond collapse¹, 'The Billion-Pound Savings Scandal.'

8. The complainant made the following information request to FCA on 13 September 2022:

"Please provide me with all internal and external communications sent or received by the FCA and meeting agendas, collateral and minutes generated in connection with the above programme, between 1 March 2022 and 18 August 2022.

The disclosed information should include, but not be limited to:

- discussion about how to respond to the production team
- dialogue with the production team
- discussion of how to position the matter internally and with external stakeholders such as politicians and other media"

9. The Commissioner found that the request was vexatious under section 14(1) of FOIA in IC-210377-V8J6²; a decision the complainant appealed. The appeal was subsequently withdrawn by consent order.
10. FCA provided a fresh response to the request on 28 June 2024. It disclosed some information and withheld the remainder under sections 31, 36, 40, 42, 43 and 44 of FOIA.
11. The complainant submitted a complaint to both FCA and the ICO on 4 July 2024. This focussed on FCA's reliance on section 36, but they also had queries about sections 42 and 44 and the attachments FCA had

¹ <https://www.bbc.co.uk/news/business-62504445>

² <https://ico.org.uk/media/action-weve-taken/decision-notice/2023/4024749/ic-210377-v8j6.pdf>

provided. This correspondence can be categorised as a request for FCA to carry out an internal review.

12. FCA provided an internal review on 29 July 2024. It addressed the complainant's queries about sections 42 and 44 and confirmed that, to the best of its knowledge, it had identified all the relevant information it holds and had provided this if it wasn't exempt.

Reasons for decision

13. The Commissioner confirmed the scope of their complaint with the complainant. This investigation is focussed on FCA's reliance on section 36 of FOIA to withhold some of the information the complainant has requested. It has applied section 36 only to this information.

Section 36 – prejudice to the effective conduct of public affairs

14. FCA has applied section 36 to some information spread over more than 400 pages of communications.
15. In the referral form that FCA provided to its qualified person, both section 36(2)(b)(ii) and 36(2)(c) are discussed. Section 36(2)(c) concerns other prejudice that might be caused if the information were to be disclosed. But the QP states that 36(2)(c) isn't engaged and FCA only discusses section 36(2)(b)(ii) in its submission to the Commissioner. As such, he hasn't considered section 36(2)(c).
16. Under section 36(2)(b)(ii) information is exempt from disclosure if, in the reasonable opinion of a qualified person, its disclosure would otherwise inhibit or would be likely to otherwise inhibit the free and frank exchange of views.
17. This exemption can only be engaged on the basis of the reasonable opinion of a qualified person (QP).
18. To determine, first, whether FCA correctly applied this exemption, the Commissioner must consider the QP's opinion as well as the reasoning that informed the opinion.
19. In this case, the QP was FCA's Chair, Ashley Alder. The Commissioner is satisfied that, under sub-section 36(5) of FOIA, Ashley Alder is the appropriate QP. The QP's signature on the referral form is dated '24/2/24', which is before the date the request was submitted. However internal, covering emails associated with the FCA's QP referral form indicate that the QP's opinion was given on 24 June 2024 and that the reference to February was in error. The Commissioner accepts that the

QP gave their opinion at the appropriate time; after the request was submitted and before FCA provided a response to it.

20. The Commissioner has considered whether the QP's opinion about section 36(2)(b)(ii) is reasonable. It's important to note that 'reasonableness' isn't determined by whether the Commissioner agrees with the opinion provided but whether the opinion is in accordance with reason. In other words, is it an opinion that a reasonable person could hold? This only requires that it's a reasonable opinion, and not necessarily the most reasonable opinion.
21. The test of reasonableness isn't meant to be a high hurdle and if the Commissioner accepts that the opinion is one that a reasonable person could hold, he must find that the exemption is engaged.
22. In order for the QP's opinion to be reasonable, it must be clear precisely how the inhibition may arise. In his published guidance on section 36 the Commissioner notes that it's in the public authority's interests to provide him with all the evidence and arguments that led to the opinion, in order to show that it was reasonable. If this isn't done, then there's a greater risk that the Commissioner may find that the opinion isn't reasonable.
23. The QP was provided with a copy of the request with the information intended to be redacted under section 36(2)(b)(ii) highlighted, an explanation of the exemption, a description of the inhibition envisioned by disclosure, and public interest considerations. The QP was advised that disclosing the information in question would hinder candid discussion between FCA staff, including senior management, on a sensitive and high-profile topic, and may limit the frankness of any such discussions in the future. It was noted that the topic (Blackmore Bond plc) was, and still is, highly controversial as the public's general view was that FCA should have intervened sooner to prevent the financial losses experienced by many investors.
24. The degree of likelihood (of the inhibition occurring) that the QP anticipates isn't clear from the QP referral form. The referral form discusses degrees of likelihood and asks the QP to confirm "at the end of the document" whether they consider the envisioned inhibition would happen or would be likely to happen. But no such confirmation is given there.
25. In its submission to the Commissioner however, FCA says that it was subsequently confirmed to it that the QP's opinion was that the envisioned inhibition would happen, as opposed to would be likely to happen. FCA has provided the Commissioner with the internal email exchange confirming this, dated 24 June 2024. 'Would inhibit' means

that it is more likely than not (ie a more than 50% chance) that inhibition would occur.

26. Officials are expected to be aware that information could be disclosed under FOIA, but it's also expected that this shouldn't deter officials from expressing their views freely. However, in this case the Commissioner has taken account of the fact that the Blackmore Bonds matter was live at the time of the request, that the matter was sensitive and high profile, that future communications about the matter were likely to occur, internally and externally, for example with the producers of the Panorama programme, and that FCA is very likely to be involved in discussions about other, similarly sensitive matters in the future. On that basis, the Commissioner will accept that the prejudice FCA envisions – a chilling effect on FCA's discussions - would occur, as defined above, if the information were to be disclosed.
27. In their request for an internal review, the complainant said that they considered that while FCA's performance of its functions by statute could be categorised as 'the conduct of public affairs', its work responding to concern and interest from stakeholders could not.
28. 'Public affairs' can be defined as matters associated with social, economic, political or business activities that affect ordinary people in general. The Commissioner is satisfied that FCA's communications, internally and with the BBC, about the documentary about the Blackmore Bond collapse can be categorised as 'public affairs.'
29. The Commissioner is also satisfied that the QP had sufficient appropriate information about the context, request and the section 36(2)(b)(ii) exemption to form an opinion on the matter of whether reliance on that exemption was appropriate with regard to the information in scope.
30. Since he's satisfied that the relevant considerations have been addressed, he must accept that the QP's opinion about withholding the information is one a reasonable person might hold. He therefore finds that FCA is entitled to rely on section 36(2)(b)(ii) to withhold information within scope of the complainant's request. He's gone on to consider the associated public interest test. Although FCA correctly applied the exemption under section 36(2)(b)(ii) to the request, the information might still be disclosed if there's sufficient public interest in its disclosure.

Public interest test

31. In their request for an internal review, the complainant acknowledged that there will be certain circumstances when it could be harmful for the scope or nature of debate within a public body to be constrained by parties' fear that their views might subsequently be made public.

32. But they also considered that:

“there are other topics for which the effective functioning of the organisation and the maintenance of public confidence in it require protagonists to act in good faith at all times, which is best ensured by them having reasonable grounds for believing that their discussions may subsequently be published.”

33. In the circumstances of this case, the complainant said, it was vital that employees believe there is no 'safe space' for debate, that the only acceptable course of action is full, honest and transparent disclosure. This would show how well FCA is carrying out its functions.

34. In its submission to the Commissioner, FCA says it considered the following factors for disclosure:

- “It is generally in the public interest that information on how the FCA operates is made available to the public as it would show the FCA to be an open and transparent organisation. In this instance, disclosure of the in-scope information would provide the public with useful context on the way the FCA makes its own representations to the media on sensitive regulatory matters, and it would allow a better understanding of the FCA’s inner workings as a regulator and of its own decision-making processes.
- Disclosure would help the public to understand the full picture and understand the factors which influence important decisions taken by the FCA. This will promote accountability and help the public determine whether decisions of importance to consumers, the financial industry and the wider UK economy are made in a way that promotes the public benefit.”

35. FCA says it considered the following factors against disclosure:

- “There is a strong public interest in a public authority such as the FCA being able to take a sound and considered approach to important topical issues. Disclosure of the requested information could act as a deterrent to the free expression and constructive deliberation of FCA staff, including senior management, on similar issues.

- The FCA needs a safe space in which to hold free and frank discussions about sensitive matters. In conducting such discussions, the organisation needs to feel confident that, where appropriate, sensitive information will not be disclosed. Disclosure of this information would seriously undermine this trust.
 - Disclosure of the information covered by the exemption in s.36(2)(b)(ii) FOIA would inhibit such discussions and this, in turn, would impact on the effectiveness of such exercises in the future, as well as on the FCA's ability to identify where it has not handled matters appropriately and action should be taken to improve.
 - Disclosure would lead to unwarranted speculation. The FCA needs space away from live public scrutiny, so that the decisions it makes are sound and well considered. Without a protected space for open and honest discussion of the important and complex issues involved, decision-makers and external stakeholders could be discouraged from frank exchanges."
36. When it weighed the public interest balance, FCA says it took account of the following factors:
- "...the chilling effect the disclosure of the exchanges of views in the withheld material would have on future internal discussions of a similar nature. The consequence of which would be that the FCA would be less likely to engage with external bodies, such as the Panorama production company, in the future.
 - The importance of the FCA having a safe space to have free and frank discussions on how to respond to such queries rather than respond 'no comment'.
 - That the FCA's general approach to openness and transparency in the future could be impacted. Any negative impact on the FCA's effective conduct of public affairs would not be in the interests of the wider public."
37. The FCA concluded that the balance of the public interest favoured exempting the information under section 36. It considered that the public interest factors in favour of disclosure had also been addressed to a large extent by FCA's engagement with formal accountability mechanisms including the Treasury Select Committee.
38. The Commissioner has found that the QP's opinion that disclosing the information being withheld under section 36(2)(b)(ii) would inhibit the free and frank exchange of views is a reasonable opinion.

39. When he considers the balance of the public interest, the Commissioner takes account of the weight of the QP's opinion, the timing of the request, and the severity, extent and frequency of the envisioned prejudice or inhibition.
40. The QP in this case was FCA's Chair; as such they had the requisite knowledge of Blackmore Bonds, FCA's role in the matter and the consequences of any disclosure. Their opinion that the envisioned inhibition would happen therefore carries a good deal of weight.
41. Chilling effect arguments are likely to be strongest if the issue in question is still live. FCA has noted that the Blackmore Bond matter was live at the time of the request – the BBC documentary had only been broadcast three weeks previously. It has noted that the matter remains live at the time of this notice, but the Commissioner is concerned with the period at the time of the request and up to the point when FOIA required a response from FCA. As noted, at that time the matter was 'live.'
42. Regarding severity, extent and frequency, the issue here is about the potential inhibition to the process of exchanging views, rather than what is in the information exchanged. FCA considers that disclosing the information would have a chilling effect on the willingness of the people involved to have frank discussions about the Blackmore Bonds collapse and the BBC's documentary about that matter.
43. FCA has described the Blackmore Bonds collapse and FCA's role in that matter as sensitive and high-profile. As such, the Commissioner considers that FCA would need to feel confident that it could discuss the situation completely openly – internally and with individuals involved in making the associated documentary for the BBC.
44. If people didn't feel able to offer their views about the Blackmore Bonds collapse openly – concerned that those views could be disclosed to the world at large under FOIA – this could lead to not all the relevant and pertinent facts emerging. In turn, this could create a misleading picture of that event and muddy ongoing and future discussions and decisions about it.
45. The Commissioner appreciates that the complainant has an interest in the collapse and considers that interest is entirely valid. However, he's noted the BBC had shown its documentary examining Blackmore Bonds before they submitted their request. The collapse, including FCA's involvement in it as regulator, had also been discussed in the public

domain prior to the request in other arenas³. FCA has also now released a great deal of the information covered by the request. The Commissioner considers these factors satisfy the public interest in transparency to a satisfactory degree.

46. In the circumstances of this case the Commissioner considers that there's greater public interest in FCA being willing to talk openly about situations like the Blackmore Bonds collapse – internally and with external parties such as those associated with the BBC documentary in this case. The Blackmore Bonds collapse was (and remains) live. Complete frankness is more likely to lead to any issues and concerns about that collapse being identified, understood and acted upon appropriately. This would maintain or strengthen FCA as a regulator, ensure its decision-making is robust and reduce the likelihood of similar issues and concerns emerging again in the future. There's a considerable public interest in that.
47. On balance therefore, the Commissioner finds that the public interest favours maintaining the exemption under section 36(2)(b)(ii) of FOIA.

Procedural matters

48. Under sections 1(1) and 10(1) of FOIA a public authority must communicate information it holds to an applicant, if it's not exempt information, as soon as possible and within 20 working days following the date of receipt of the request.
49. In its submission to the Commissioner, FCA has advised that it's identified that it can disclose some of the information which it had previously withheld. Because it's disclosing this information outside of the 20 working day requirement, FCA hasn't complied with sections 1(1) and 10(1) of FOIA.

³ <https://commonslibrary.parliament.uk/research-briefings/cbp-9272/#:~:text=FCA%20response,therefore%20a%20matter%20for%20Parliament.>

Right of appeal

50. 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

51. 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.
52. 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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