

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 3 November 2014

Public Authority: Financial Conduct Authority
Address: 25 The North Colonnade
Canary Wharf
London E14 5HS

Decision (including any steps ordered)

1. The complainant has requested information relating to information obtained from five banks by Martin Wheatley (Chief Executive Officer of the Financial Conduct Authority).
2. The Commissioner's decision is that the Financial Conduct Authority (FCA) has correctly applied section 44(1)(a) to the withheld information.
3. The Commissioner does not require the public authority to take any steps as a result of this decision notice.

Request and response

4. On 6 January 2014, the complainant wrote to the FCA and requested information in the following terms:

"I request the release of all information obtained from the banks by Martin Wheatley in connection with the two letters he wrote to HM Treasury on 25th February 2013 and on 9th May 2013 via a Freedom of Information request on behalf of the 90 members of our group. I attach copies of the letters."
5. The FCA responded on 31 January 2014. It confirmed it held the information requested but refused to provide it citing section 44 of the FOIA as its basis for doing so.

6. The complainant requested an internal review and highlighted that the information would not be confidential if it could be provided in the form of a summary or collection of information framed in a way that it would not be possible to ascertain from it any information relating to a particular person. The complainant requested the FCA provide a summary or collection of information for example by referring to each bank by a letter.
7. Following an internal review the FCA wrote to the complainant on 31 March 2014. The FCA explained it would now be disclosing information regarding loans with mark-to-market break costs in an anonymised form by aggregating information. The FCA still maintained the underlying information, including the identity of the banks, could not be provided by virtue of section 44 of the FOIA.

Background

8. The issues which form the background to this request relate to a piece of work that was carried out in April 2013, whereby HM Treasury (HMT) asked FCA to provide information on the number of fixed rate commercial/business loans with 'mark to market' break costs issued since December 2001. The request for data from HMT came about following two letters written by Martin Wheatley to HMT last year, on the subject of tailored business loans. The various banks were asked to provide the FCA with this information on a voluntary basis, and were invited to add some commentary on any changes in the number of such loans issued over that period, if they felt it was relevant.

Scope of the case

9. The complainant contacted the Commissioner on 10 June 2014 to complain about the way his request for information had been handled.
10. The Commissioner considers the scope of this case to be to determine if the FCA has correctly applied section 44(1)(a) of the FOIA to the withheld information.

Reasons for decision

Section 44(1)(a)

11. 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 –

(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."

12. The FCA has explained that the information in this case falls within section 44(1)(a) as it is information received by the FCA for the purposes of or in discharge of its functions under section 348 of the Financial Services and Markets Act 2000 (FSMA). That is, for the purpose of carrying out its supervision of firms and individuals.

13. 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."

14. 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 or whether this could be obtained.

Is the FCA a primary recipient?

15. 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"?

16. 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)."

17. 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.
18. The FCA stated the information relates to the business affairs of five banks and was received from them by the FCA or by employees of the FCA for the purposes of or in the discharge of the FCA's functions under FSMA. Those functions were for the monitoring of compliance with its regulatory requirements (supervision of the various firms is part of the FCA's regulatory role). The information therefore falls within section 348 of FSMA. Section 348 FSMA is a statutory prohibition on disclosure for the purpose of section 44 of the FOIA.
19. The Commissioner has first considered if the information relates to the business or affairs of another person. A person is not defined in FOIA, thus the Commissioner has adopted the usual legal interpretation of a person, namely any entity that is recognised as having legal personality to enter into legal relations.
20. The Commissioner is satisfied that the information does relate to the business or affairs of another person, in this case the five banks. 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.
21. 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. The FCA consider that in discharging its duties under the FSMA it is required to supervise firms, in this case the five banks, and their compliance with their obligations under the FSMA.
22. The Commissioner noted that the FCA's response of 10 April 2014 stated:

"Regarding questions (1), (4), and (5), it is worth mentioning that commercial lending is outside the FCA's regulatory remit. As such it is perhaps unsurprising that you find the data that we gathered to be

relatively limited and high level. In the context of why we gathered this information, it was not necessary for it to be a comprehensive survey of all banks, nor was it necessary for us to obtain particularly detailed data.

Regarding question (2), the difference in figures quoted in the table provided to you, compared to the figures in Mr Wheatley's letter of 9 May 2013, is explained by Mr Wheatley's reference to "more than" 60,000 loans.

Finally, to address your questions (3) and (4), some of the individual banks you identified are parts of a group; their figures were included in the information we obtained from the group. Clydesdale and Yorkshire Banks are a part of the National Australia group, HBOS is part of the Lloyds group and National Westminster is part of the RBS group."

23. This appeared to be contradictory and so the Commissioner sought further clarification from the FCA relating to its regulatory duties under the FSMA.
24. The FCA provided additional background to the Commissioner which is contained in an annex at the end of this decision notice. Based on the additional information provided the Commissioner is satisfied that the FCA was fulfilling a regulatory function by receiving the information which is the subject of this request.
25. 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.
26. 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.
27. 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. In this case the FCA provided anonymised aggregated information in response to the request.
28. For the reasons outlined above, the Commissioner has therefore concluded that 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?

29. 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 five banks.
30. The FCA has explained that the various banks provided the information on a voluntary basis and were of the understanding that information would be shared with HMT and also used internally within the FCA to help it understand the size of the market for commercial lending which used interest rate hedging. They had no expectation that the information provided would be disseminated any further. If they had been made aware of this possibility then they may have been reluctant to provide the information voluntarily which would in turn impact on the FCA's ability to engage effectively with those firms on a full range of issues.
31. Having considered the submissions presented by the FCA the Commissioner considers the information remains confidential information for the purposes of the statutory bar provided by section 348 of the FSMA.
32. Consequently the FCA was correct to rely on section 44(1)(a) of FOIA to withhold the requested information.

Right of appeal

33. 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

Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

34. 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.
35. 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

Pamela Clements
Group Manager
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF

Annex

36. It explained that the FCA has general functions of rule-making, preparing and issuing codes under FSMA, giving general guidance or determining general policy and principles. In discharging these functions the FCA must, so far as is reasonably possible, act in a way which is compatible with its strategic objective of ensuring that the relevant markets function well.
37. The FCA went on to explain that a letter of 9 May 2013 provided an update on the progress of a review of the sale of standalone interest hedging products (IRHPs), which come within the FCA's regulatory remit. It also discussed commercial loans which have similar features to complex IRHPs and the FCA has termed these tailored business loans (TBLs) which the FCA concluded were outside of its regulatory remit and that the Rules and Principles in the FCA Handbook therefore did not apply to their sale.
38. The FCA further explained that, in terms of the information requested, the FCA was carrying out a number of functions under FSMA. Firstly, it needed to consider whether products which have similar features to complex IRHPs fall within its regulatory remit, to determine whether or not detailed rules governing the sale of regulated products applied to them.
39. Secondly, the FCA explained that regulated firms are required to handle complaints for their customers in accordance with standards set out in the DISP section of its Handbook¹. DISP applies these standards to complaints about products which are unregulated as well as regulated. The requested information was received as part of the FCA's function of monitoring whether the rules in DISP were being complied with by the banks concerned.
40. Third, regulated firms must satisfy the 'threshold conditions' (see section 55B and schedule 6 FSMA); the behaviour of firms in respect of unregulated activities can be relevant to the threshold conditions. The requested information was received by the FCA as part of its function of monitoring whether firms are satisfying the threshold conditions.

¹ <http://fshandbook.info/FS/html/FCA/DISP>

41. Fourth, related to the above, under section 139A FSMA the FCA has a wide power to give guidance to all regulated firms or a section of them on various matters including the operation the FCA's rules. The requested information was received by the FCA as part of its function of considering whether to give guidance to banks which sold TBLs, for example concerning their handling of complaints in respect of those products.
42. Finally, the FCA's regulatory perimeter is set by the Treasury by way of secondary legislation. The Treasury needs to be kept informed by the FCA as to emerging issues in the financial services sector, so that the Treasury can decide whether to change the perimeter. The requested information was received by the FCA as part of the FCA's function of keeping under review whether it should notify the Treasury of emerging issues in the financial services sector.