

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 17 May 2016

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

Decision (including any steps ordered)

1. The complainant made a freedom of information request to the Financial Conduct Authority (FCA) for information about Lloyds Banking Group and what he said was possible involvement or complicity in fraud committed by a named individual. In response the FCA refused to confirm or deny if the requested information was held under section 44(2) (prohibitions on disclosure) and section 43(3) (commercial interests).
2. The Commissioner's decision is that section 44(2) was correctly applied and the FCA was not obliged to confirm or deny if the requested information was held. The Commissioner requires no steps to be taken.

Request and response

3. On 13 September 2015 the complainant made a freedom of information request to the FCA which read as follows:

This email is a FOIA request for all information held by Financial Conduct Authority (FCA), and/or previously held by the Financial Services Authority (FSA), about Lloyds Banking Group and its possible involvement/complicity to the fraudulent crimes committed Benjamin Wilson (trading as SureInvestment).

4. The FCA responded to the request on 12 October 2015 when it referred the complainant to details of the prosecution of Benjamin Wilson by the

FCA which had been published on its website. However, it said that apart from these published details it could not comment further publicly on the investigation. Therefore it said that it could neither confirm nor deny whether the requested information was held. It applied section 44(2) of FOIA which provides that the duty to confirm or deny does not arise if to do so would be prohibited by or under any enactment. The FCA explained that the relevant statutory prohibition was section 348 of the Financial Services and Markets Act 2000 (FSMA). The FCA also applied section 40(5)(b) (personal information) and section 43(3) (commercial interests) to refuse to confirm or deny if the requested information was held.

5. The complainant subsequently asked the FCA to carry out an internal review of its handling of his request. In doing so he confirmed that he was not requesting any personal information about Mr Wilson or commercial information about Lloyds Banking Group.
6. The FCA presented the findings of internal review on 12 November 2015. The review upheld the application of section 44 and section 43 but said that it was no longer relying on section 40 since the complainant has made it clear he was not seeking personal information about Mr Wilson.

Scope of the case

7. On 23 November 2016 the complainant contacted the Commissioner to complain about the FCA's decision to refuse to confirm or deny if the information he requested was held.

Background

8. The complainant's request relates to the FCA's prosecution of Benjamin Wilson who was convicted of fraud after running an investment fund that defrauded investors of millions of pounds. The FCA has released a statement about its investigation and the prosecution of Mr Wilson on its website. The FCA referred to this statement in its response to the complainant.

<https://www.fca.org.uk/news/fraudster-benjamin-wilson-sentenced-to-seven-years-imprisonment>

Reasons for decision

Section 44 - Prohibitions on disclosure

9. Section 44 provides that:

(1) Information is exempt 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 obligation, or*
- (c) would constitute or be punishable as a contempt of court.*

(2) The duty to confirm or deny does not arise if the confirmation or denial that would have to be given to comply with section 1(1)(a) would (apart from this Act) fall within any of paragraphs (a) to (c) of subsection (1).

10. In this case the FCA has said that the relevant statutory prohibition is section 348 of the FSMA. This provides that:

(1) 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.*

(2) In this Part “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 Authority, the competent authority for the purposes of Part VI 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).*

11. The FCA explained that to confirm or deny if the requested information is held would result in the disclosure of information which relates to the business affairs of Lloyds Banking Group amounting to a disclosure of confidential information as defined in section 348 of the FSMA.

12. 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 disclosure or whether this could be obtained.
13. A primary recipient is defined at section 348(5) of the FSMA and includes the FCA. The Commissioner therefore accepts that the FCA is a primary recipient for the purposes of the FSMA.
14. The FSMA defines 'confidential information' at section 348(2). This describes it as information which relates to the business or other affairs of any person and was received by the primary recipient for the purposes of, or in the discharge of, its functions and is not prevented from being confidential.
15. The FCA said that this comprises any information which may have been received from a firm, individual or other regulatory body during the course of any discussions which the FCA may have had with a firm, individual or other regulatory body and which may have been received while performing its regulatory duties and which is not in the public domain.
16. The complainant has requested information about the possible involvement of Lloyds Banking Group (LBG) in the fraud committed by Benjamin Wilson. If the requested information was held then the FCA has said that it would have been received for the purposes of or in the discharge of certain of its functions under the FSMA, namely the purpose of carrying out its supervision of firms and individuals. It said that it would also have been received for the FCA's function of investigating whether a person is or has been carrying on regulated financial services activities without the necessary authorisation from the FCA. Having considered this explanation the Commissioner is satisfied that the FCA would be fulfilling a regulatory function if it received any such information. Were the information held it would also clearly relate to the business affairs of a person, in this case Lloyds Banking Group.
17. Section 348(4) of the FSMA states that information is not confidential if it has already been made legitimately available to the public; or (b) it can be summarised or so framed that it is not possible to ascertain from it information relating to any particular person. However, it is clear that section 438(4) does not apply in this case. The information is not publicly available and given that the request specifically names Lloyds Banking Group it would be impossible to anonymise any information as it would be known which authorised firm the information related to. The

Commissioner is satisfied that the requested information, if held, would amount to confidential information.

18. Finally, the FSMA allows information to be disclosed if consent has been obtained from the person that would have provided the FCA with the information (if that was to be the case) and, if different the person to whom it relates. The Commissioner has been informed that consent has not been obtained in this case.
19. Section 44(2) of the FOIA provides that the duty to confirm or deny that information is held does not apply if the confirmation or denial itself would be prohibited by that enactment. In this case the Commissioner is satisfied that confirming or denying whether the requested information is held would amount to the disclosure of confidential information where consent for this has not been obtained. It would reveal something to the public about the affairs of the business related to that information and would therefore fall within section 348 of the FSMA.
20. The Commissioner finds that the FCA is correct to refuse to confirm or deny whether it holds the requested information under section 44(2) of the FOIA.

Right of appeal

21. 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

22. 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.
23. 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

Paul Warbrick
Senior Case Officer
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
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SK9 5AF