

## **Freedom of Information Act 2000 (FOIA)**

### **Decision notice**

**Date:** 3 December 2018

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

### **Decision (including any steps ordered)**

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1. The complainant has requested a copy of the legal advice the Financial Conduct Authority (FCA) obtained which caused or contributed to some guidance that was published on 2 December 2016. The FCA refused to disclose this information, citing section 42 of the FOIA.
2. The Commissioner's decision is that the FCA has acted appropriately by refusing to disclose the withheld information under section 42 of the FOIA. She has however found the FCA in breach of section 10 of the FOIA, as it failed to respond to the complainant's request within 20 working days of receipt.
3. The Commissioner does not require any further action to be taken.

### **Request and response**

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4. On 19 February 2018, the complainant wrote to the FCA and requested information in the following terms:

"Please provide me with copies of information held by the Financial Conduct Authority that caused or contributed to the issue of its guidance first published on 2 December 2016 at <https://www.fca.org.uk/markets/mifid-ii/legal-entity-identifier-lei-update> in the following terms:

"If you are a client who is a legal entity or structure, including a company charity or trust, you will need to make arrangements to obtain an LEI code if you want the firm to continue to act on your instructions or make a decision to trade on your behalf from 3 January 2018 onwards."

Please also provide me with copies of information held by the Financial Conduct Authority pertaining to its decision to treat my correspondence relating to the eligibility of trusts for Legal Entity Identifiers as giving rise to a complaint."

5. As the FCA had failed to respond, the complainant contacted the Commissioner on 11 April 2018.
6. The Commissioner wrote to the FCA on 5 May 2018 and requested that the FCA respond to the complainant's request by 22 May 2018.
7. The FCA responded on 22 May 2018. It disclosed some information and applied sections 40 and 42 of the FOIA to the information it considered is exempt from disclosure in relation to question 1 of the request. In respect of question 2, the FCA confirmed that it does not hold this information.
8. The complainant replied on 27 May 2018. He stated that he was happy with the response to question 2 of his request but remained dissatisfied with the way in which the FCA had handled question 1. The complainant disagreed that section 42 of the FOIA is engaged.
9. The FCA carried out an internal review and notified the complainant of its findings on 2 July 2018. It upheld its application of section 42 of the FOIA.

### **Scope of the case**

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10. The complainant contacted the Commissioner again on 4 July 2018 to complain about the way his request for information had been handled. Specifically the complainant disagrees that the withheld information is subject to advice privilege. He therefore considers that section 42 of the FOIA cannot apply. He stated that if he is incorrect on this point and section 42 of the FOIA does apply, the public interest rests in favour of disclosure.
11. The complainant made no complaint about the following aspect of his request:

"Please also provide me with copies of information held by the Financial Conduct Authority pertaining to its decision to treat my correspondence relating to the eligibility of trusts for Legal Entity Identifiers as giving rise to a complaint."

He also made no complaint about the FCA's application of section 40 of the FOIA. The above element of the original request and the FCA's application of section 40 have not therefore formed part of the Commissioner's investigation.

12. The Commissioner will therefore now consider whether section 42 of the FOIA applies to the withheld information.

### **Reasons for decision**

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13. Section 42 of the FOIA states that information is exempt from disclosure if it is subject to legal professional privilege (LPP). This is a qualified exemption. So in addition to demonstrating that the withheld information is subject to LPP, the public authority must also consider the public interest test and demonstrate that the public interest in favour of disclosure is outweighed by the public interest in favour of maintaining the exemption.
14. There are two types of privilege within concept of LPP; litigation privilege and advice privilege. In this case the FCA has claimed that the withheld information is subject to advice privilege.
15. Advice privilege applies where no litigation is in progress or contemplated. It covers confidential communications between the client and lawyer, made for the dominant (main) purpose of seeking or giving legal advice. The legal adviser must have given advice in a legal context; for instance, it could be about legal rights, liabilities, obligations or remedies. The Commissioner is of the opinion that advice from a lawyer about financial matters or on an operational or strategic issue is unlikely to be privileged, unless it also covers legal concerns, such as advice on legal remedies to a problem.
16. The complainant disputes that the advice was given in a relevant legal context. He believes the guidance about Legal Entity Identifier (LEI) eligibility is directed to trustee clients for whom the FCA has no regulatory or supervisory responsibility and so the advice was not given in a 'legal context' and cannot therefore be covered by advice privilege.
17. The FCA explained that there are legal obligations arising under UK and EU law requiring the FCA to supervise the firms it authorises when it

comes to those firms' compliance with the Markets in Financial Instruments Regulation ("MiFIR"). Section 1L of the Financial Services and Markets Act 2000 ("FSMA") requires the FCA to 'maintain arrangements for supervising authorised persons'. It stated that when it issues a communication of the kind published on 2 December 2016 to help firms meet their legal obligations, the FCA is carrying out its supervisory function, in accordance with these duties. Accordingly, the legal advice the FCA received concerning the communication of 2 December 2016 related to its legal obligations as a regulator.

18. The FCA explained that the communication/guidance of 2 December 2016 is directed at firms which the FCA does authorise. It is not directed at trustee clients although it does affect them. It stated that the communication itself said "Read this page if you are a firm subject to MiFID II transaction reporting obligations." It explained further that firms subject to the MiFID II transaction reporting obligations include investment firms that the FCA authorises and in the case of recognised investment exchanges, investment exchanges to whom it has granted recognition. The withheld information is a series of communications between FCA employees and FCA's legal advisers containing legal advice relating to the content of the communication/guidance issued on 2 December 2016 and other legal issues.
19. The Commissioner has reviewed the withheld information and she is satisfied that these are confidential communications between FCA employees and FCA legal advisers for the main purpose of requesting and obtaining legal advice relating to the content of the communication/guidance of 2 December 2016. The Commissioner is satisfied that the legal advice was provided in a relevant legal context. The FCA has explained that the communication/guidance was directed at firms it authorises; not at trustee clients (although it does affect them). It has explained how it has legal obligations to supervise the firms it authorises and that communications/guidance of this nature are issued to help such firms meet their legal obligations. In doing so it is carrying out its supervisory function in accordance with its duties under the relevant legislation.
20. For the above reasons the Commissioner is satisfied that the withheld information is subject to advice privilege and therefore that section 42 is engaged. She will now go on to consider the public interest test.

#### *Public interest test*

21. The FCA stated that it acknowledges there is a public interest in promoting openness, transparency and accountability in a public authority's decision-making process. It noted in this particular case that disclosure of the legal advice and its communications with its Markets

business area would provide a greater degree of transparency in relation to the communication the FCA first published on 2 December 2016. The FCA also recognised that trustees may have a particular interest in the disclosure of the material the subject of this exemption.

22. However, it argued that it is important that the FCA can seek legal advice in relation to its supervisory functions so it can make its decisions in the correct legal context. It stated that it is important that the FCA be allowed to conduct a free exchange of views as to its rights and obligations with those advising them without the fear of intrusion, save in the clearest case, of which it states this case is not one.
23. The FCA explained that whilst there may be a legitimate public interest in disclosing legal advice provided by the FCA's legal advisers, it is strongly in the public interest for the FCA to be able to have open and candid communications with its lawyers to ensure the FCA seeks and receives the best possible legal advice, expressed in clear and forthright terms, to enable it to carry out its statutory functions lawfully as well as effectively. It stated that disclosure of the legal advice would prejudice the FCA's ability to defend its legal interests both directly by unfairly exposing its legal position to challenge and indirectly by diminishing the reliance it can place on the legal advice having been fully considered and presented without fear or favour.
24. In addition, it mentioned that Tribunal decisions have established that there is an inbuilt interest in the maintenance of LPP and will, in general, rarely favour the disclosure of material covered by LPP. It stated that at least equally strong countervailing considerations would need to be addressed to override that inbuilt public interest, of which it states is not the case here.
25. The complainant believes there are equally compelling public interest arguments in favour of disclosure. He referred to the interests of the trustees affected by the guidance which stems from the advice being withheld. He stated that a large number of people are affected (and quoted 500,000) and he does not consider the FCA has given sufficient weight to this when considering the public interest test. The complainant advised that all trustees wishing to engage in MiFID reportable transactions are affected by the guidance on which the requested legal advice is based. He believes the advice was sought for the benefits of the trustees not the FCA and so they should be able to see information which directly affects them. He commented that the aggregated expense to all trustees affected having to obtain LEIs amounts to many millions of pounds and the FCA has failed to take this into account or indeed comment on it.

26. On these specific points the FCA stated that it considers the number of persons indirectly affected by its communication dated 2 December 2016 makes it even more desirable that the FCA, as a responsible public body, should seek and obtain legal advice before imposing a legal requirement on such persons. It commented, putting it the other way around, because of its (claimed) impact, to have issued the communication without taking legal advice may well have attracted criticism.
27. On the matter of cost, the FCA confirmed that in weighing up the public interest argument it did not specifically consider the interests of trustees constrained to incur the expense of obtaining a LEI. It said that it did not consider any expense incurred to be directly relevant in weighing the public interest in disclosure. If the withheld information were to be disclosed the expense would still need to be incurred.
28. The Commissioner has considered the public interest arguments for and against disclosure and reached the decision that the public interest rests in maintaining the exemption. She will now explain why.
29. The Commissioner acknowledges the public interest in openness, transparency and accountability. She considers there is a public interest in allowing members of the public access to information which will enable them to understand more clearly why particular decisions have been made. The FCA has said that the guidance was not directed at trustees themselves but at the firms it regulates. However, it has acknowledged that although it is not directed at trustees it does affect them. The Commissioner considers those affected by such guidance will have legitimate reasons for requiring access to information which may assist them in understanding more concisely why that guidance is in place and how it was produced. She also notes that the complainant has stated that the guidance does affect a large number of people and the guidance has had a monetary effect of them (i.e. the expense of having to obtain an LEI).
30. However, in this case there are strong and compelling public interest arguments in favour of maintaining the exemption, which in the Commissioner's opinion, outweigh the public interest arguments in favour of disclosure.
31. There is a strong public interest in maintaining the important principle behind LPP: safeguarding openness in all communications between client and lawyer to ensure access to full and frank legal advice, which in turn is fundamental to the administration of justice. A client's ability to speak freely and frankly with his or her legal adviser to obtain appropriate legal advice is a fundamental requirement of the English legal system. The concept of LPP protects the confidentiality of communications

between a lawyer and client to ensure there is complete fairness in legal proceedings. Disclosure of legal advice would be likely to prejudice the FCA's ability in future to speak so freely and frankly with its legal adviser(s) and this may in turn result in less candid or less appropriate legal advice being received. There would then be a negative knock on effect on the FCA's decision making and potentially place it at an unfair disadvantage where the legal advice is relied upon or is relevant to legal proceedings. It is in the public interest to maintain the FCA's ability to obtain free, frank, candid and appropriate legal advice to ensure that it is making the most appropriate decisions and meeting its statutory functions as best it can.

32. The Commissioner notes that disclosure would enable those affected by the guidance to understand more clearly how this was produced. She also notes that the complainant considers many people are affected by this guidance and if they require an LEI it is at their expense. However, she does not consider such public interest arguments are compelling enough in this case to override the importance principle of LPP. In the First-tier Tribunal hearing of *Bellamy v Information Commissioner & the Secretary of State for Trade and Industry (EA/2005/0023, 4 April 2006)* the tribunal said:

"there is a strong element of public interest inbuilt into the privilege itself. At least equally strong countervailing considerations would need to be adduced to override that inbuilt public interest."

33. In this case the Commissioner is not persuaded that the public interest arguments in favour of disclosure equal or outweigh the public interest in maintaining the important principle behind LPP or FCA's application of section 42 of the FOIA.

### **Procedural matters**

34. Section 10 of the FOIA requires a public authority to respond to an information request promptly and in any event no later than 20 working days from receipt.
35. The Commissioner notes that the information request was made to the FCA on 19 February 2018. Yet it was not responded to until 22 May 2018 and after the Commissioner's intervention. As the FCA failed to respond to the complainant's request within 20 working days of receipt the Commissioner has found the FCA in breach of section 10 of the FOIA.



## **Other matters**

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36. The Commissioner would also like to take this opportunity to remind the FCA of the requirements of the section 45 code of practice and in particular what this advises in terms of internal reviews. The code says that internal reviews should be carried out within 20 working days of receipt. This can be extended to 40 working days but the Commissioner considers the additional time should only be required and therefore used if the request is particularly complex or voluminous. The Commissioner does not consider this request was particularly complex or voluminous so 20 working days should have been sufficient to carry out this exercise and notify the complainant of the outcome.



## Right of appeal

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37. 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](mailto:GRC@hmcts.gsi.gov.uk)

Website: [www.justice.gov.uk/tribunals/general-regulatory-chamber](http://www.justice.gov.uk/tribunals/general-regulatory-chamber)

38. 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.
39. 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

**Samantha Coward**  
**Senior Case Officer**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
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