

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 31 January 2020

Public Authority: Financial Conduct Authority

Address: 12 Endeavour Square
London
E20 1JN

Decision (including any steps ordered)

1. The complainant has requested information relating to how the Financial Conduct Authority (FCA) and the Financial Ombudsman Service (FOS) have interpreted and implemented the Alternative Dispute Resolution (ADR) regulations. The FCA provided some information captured by the request but withheld other information. The majority of the withheld information was withheld under section 44 – statutory prohibition on disclosure, but some information was also withheld under section 40(2) – personal information and section 31 – law enforcement. During the course of the Commissioner's investigation the FCA also applied section 42 – legal professional privilege to a small amount of the information that it had originally withheld under section 31. It also withdrew its application of exemptions from a very limited amount of information. The Commissioner also came to the conclusion that the FCA had interpreted one part of the request, part 8, too narrowly. The FCA therefore provided the Commissioner with further information in line with her, broader, interpretation. Although the FCA indicated that the majority of this information could be released, it also cited sections 44, 40 and 31 as a basis for withholding some of that information.
2. The Commissioner's decision is that the FCA is entitled to rely on the exemptions provided by section 44, 40(2) and 42. It is also entitled to rely on section 31 to withhold the majority of the information to which it has been applied. However section 31 does not apply to the remainder of that information.
3. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.

- To disclose that information which was withheld under section 31 but which the Commissioner has concluded does not engage section 31. This is set out in a confidential annex which has been provided exclusively to the FCA.
 - The FCA is also required to disclose the information from which it withdrew the application of any of the specified exemptions during the course of the Commissioner's investigation and the additional information that falls within the wider scope of part 8 of the request, apart from that which the Commissioner finds is exempt.
4. The public authority must take these steps within 35 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.

Background

5. The FCA has explained that in accordance with the European ADR Directive, alternative ways of resolving contractual disputes between consumers and businesses have to be widely available throughout the European Union. The request seeks information in relation to UK regulations which implement the ADR Directive.
6. The FCA and the FOS are separate legal entities. The FOS provides an alternative mechanism for resolving disputes between consumers and business in the financial services industry. Before operating as, what is known as, an ADR entity, the FOS needed the approval of the FCA. Approval was granted in July 2015 after the FCA had satisfied itself that the FOS met the requirements of the ADR Regulations.

Request and response

7. The complainant originally made a request on 31 August 2018. The Commissioner understands that this request was as follows:
- "My inquiry is to see the coordinating minutes to see if this variation was acceptable to the FCA, presumably it was/is."
8. The FCA interpreted this request as capturing the minutes of the meeting of its Oversight Committee of 21 May 2015. The FCA provided a copy of those minutes in full apart from the names of two junior officials which were redacted under section 40(2) on the basis that it was their personal data. The complainant was not satisfied

with this response and on 5 November 2018 he sought an internal review. When doing so he set out the sort of information he had expected his original request to capture in the following terms:

"This is the very least I request as apparent as relevant from what the FCA has so far been disclosed :-

1. The letter (in full) dated 1 May 2015 to you from Ms Wayman, I assume.
2. The reasoned statement accompanying it probably also 1 May
3. The committee papers and minutes of the meeting attended by Ms Vicary and Mr Gibson. I wish to read what assistance they gave you and your committee, (and whether it was imparted subsequent to their arrival to Ms Wayman) and FOS)) "for the Directive". If this does not refer to EU Dir 2013/11; then what? Ms. Vicary is a barrister and an experienced regulator.
4. The amendments (all) made as agreed in item 3 of the agenda by Ms Wayman-by June
5. The letter or whatever from Mr Woolard to the EU Commission also by June, it seems more likely to be July but you will know and let me have a copy, please.
6. The redress issues under item 5 by June may reflect upon states of mind and discussion of redress which was what Ms Vicary and Mr Gibson; as experts, were there for. I wish to read the full minute. All reference to considerations of "Fairness" in Sch. 3 seems to have been omitted from the FCA response and the omission merits re-visiting by FCA.
7. There will be documents between Sir Nicholas and no doubt others in FOS, including Ms Wayman; and both directors of policy, which will include the new Ms Lovell, on the subject of the content and policy around the application for certification under the alternative dispute resolution Directive. That may be a separate file and if you tell me to write requesting it from FOS, then of course I shall. I hope you as regulator can obtain it.
8. The entire minutes as taken by the name obliterated but company secretarial assistant of a meeting which closed at noon 21 May, Save that excluded from it as redacted, only parts not dealing with the application for approval and giving me an understanding of what occurred in order to enable Mr Woolard to inform the EU Commission of the position after the FCA had considered the application. His prior drafts of the minutes before

the one sent to me are relevant in my reading how Sch. 3 was dealt with by the FCA.

9. The "up-dates", un-redacted, from Ms Wayman, or whoever, on progress towards meeting the requirements.
 10. Each and all of the documents or other material to enable the Oversight Committee to agree it would recommend as early as 21 May that (the ombudsman's) application would be approved, subject to the reasoned statement being amended, "as above". My underlining. There is no mention anywhere of what to Ms Vicary and Mr Gibson may have advised what must have seemed to be a collision between Articles 3 and 9 of the Directive and Sch 3 paragraph 7 Fairness; which became page 13 of Ms Wayman's letter of 7 July to you.
 11. A true, full, copy of Mr Woolard's letter from the FCA to the European Commission as well as his drafts, and the email traffic or letters from/to the two experts, redress, prior to it, in the UK of the departure from Article 9. The attachments or some such sent to the EC is relevant'
 12. Any correspondence back from the EC. It is obvious that it must have inquired what you intended by substitution of FCA/DISP and the FOS use of the word "responsibly"."
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9. Although the complainant's main objective in writing to the FCA was to seek an internal review of how his original request was handled, he also stated that if the FCA wished to treat his letter of 5 November as a better formulated request, he would have no objection. As the FCA took the view that the information sought in the twelve part request above was substantially broader than the original request, it decided it was appropriate to treat the correspondence as a fresh request and informed the complainant of this on 27 November 2018 at which time it also sought further clarification as to what information was being sought at point 9.
 10. The complainant provided some clarification on the following day, 28 November 2018. Then on 20 December 2018 the FCA advised the complainant that it considered some of the information captured by the request was exempt under section 27 – prejudice to international relations and section 43 – prejudice to commercial interests, but that, as allowed under section 10(3) of the FOIA, it needed additional time to consider the public interest test in respect of those exemptions.

11. On 1 February 2019 the FCA provided its response to the request. It stated that it did not hold the information requested in points 5, 7, 11 and 12. It also advised the complainant that the information requested in parts 6 and 8 had already been provided in response to his earlier request and for completeness provided another copy of the minutes of the 21 May 2015 Oversight Committee meeting. Finally in respect of the information requested at parts 1 to 4 and 9 and 10 it provided a limited amount of information. This comprised of the minutes of the Oversight Committee for 24 February 2015, the agenda for the Oversight Committee meeting of 21 May 2015 and Oversight Committee Paper for 21 May 2015 and a Board Paper for a meeting of 4 June 2015. Some information had been redacted from these documents, in part this was on the basis that some of the issues discussed in the meetings did not relate to the alternative dispute resolution service offered by FOS and therefore was outside the scope of the request. In respect of other information captured by parts 1 to 4 and 9 and 10 of the request, the FCA stated that it was being withheld under the exemptions provided by section 44 – statutory prohibition, section 40(2) – personal information and section 31 – law enforcement.
12. The complainant asked for an internal review on 2 March 2019 and the FCA provided the outcome of that review on 3 May 2019. The review upheld the FCA's original decision of 1 February 2019.
13. During the course of the Commissioner's investigation the FCA also applied section 42 – legal professional privilege to a small amount of information which it had originally withheld under section 31 and withdrew the application of any exemptions to a very limited of the information.

Scope of the case

14. The complainant originally contacted the Commissioner on 10 December 2018 to complain about the way his request for information had been handled. At this stage the complainant may have considered that his letter to the FCA of 5 November 2018 was being treated as a request for internal review of his earlier and narrower request, rather than a fresh request. In any event it was not until the FCA had responded to the complainant's request of 5 November 2018 and then completed an internal review of that response on the 3 May 2019 that the request was eligible for investigation and it was not until 1 July 2019 that the Commissioner was provided with all the relevant paper work.
15. The Commissioner considers that the matter to be decided is firstly whether the FCA holds the information requested in parts 5, 7, 11

and 12. Secondly, the Commissioner will consider whether, by providing a copy of the minutes of the 21 May 2015 Oversight Committee, the FCA had fully responded to parts 6 and 8 of the request. Finally the Commissioner will look at whether any of the exemptions provided by sections 44, 31, 40, or 42 are engaged in respect of the information which the FCA wishes to withhold.

Reasons for decision

Section 1 – information held

16. Section 1(1)(a) of the FOIA provides that upon receipt of a request the public authority must inform the applicant whether it holds information of the description requested. In this case the FCA informed the complainant that it did not hold the information sought at parts 5, 7, 11 and 12 of the request.
17. Where there is some dispute over the amount of information located by a public authority and the amount of information that a complainant believes may be held, the ICO, following the lead of a number of Information Tribunal decisions, applies the civil standard of the balance of probabilities. In other words, in order to determine such complaints the ICO must decide whether on the balance of probabilities a public authority holds any information which falls within the scope of the request.
18. In respect of the information requested in of parts 5, 11 and 12 the FCA has stated that it has conducted thorough searches for the information in question, but that these searches have not identified any relevant information. It has therefore concluded that the information is not held.
19. In broad terms the information captured by parts 5, 11 and 12 relates to correspondence between the FCA, primarily its Director of Strategy and Competition, and counterparts at the EU regarding the alternative dispute resolution procedures.
20. The FCA has explained that any such letters or communications would have been sent from or received by the Director or the email accounts managed by his private office. The private office was contacted and the director's private secretary confirmed that all items sent and received from these email accounts had been searched, as had the Note for Records and archive folders, but that no relevant information was held.
21. The FCA has also advised the Commissioner that its Redress, Reporting and Oversight Policy (RROP) team, which has

responsibility for liaison with the FOS also holds what it describes as a significant volume of information stretching back to 2015 when the ADR Regulations were first under consideration. All the staff involved in the ADR Regulation issues have searched their email accounts, the accounts of former employees were also searched, but no information has been found.

22. Searches of all relevant databases were also conducted for documents created from May 2015 onwards.
23. Both email accounts and databases were searched using the search term 'ADR'. The FCA considers that this term was certain to be found in any records that were relevant to the request.
24. The FCA has said that it has no record of any information relevant to the request having been destroyed and that had such information ever been held it would have been retained for 25 years in accordance with the FCA's records management policy. From this the Commissioner understands that the FCA's position is that it has never held information of the type requested in parts 5, 11 and 12 of the request.
25. FCA has also provided the Commissioner with a copy the minutes of the meeting of the Oversight Committee of 11 November 2015. Those minutes confirm that there had been some contact with the EU Commission over the ADR, but refer to such contact as only being 'informal'. The FCA explained that the reference to the contact being 'informal' supported its position that there would not have been any record made of the contact.
26. In light of the above the Commissioner considers that the FCA has conducted thorough searches of the appropriate electronic files, using a search term most likely to retrieve any relevant information captured by parts 5, 11 and 12 of the request. Having carried out those searches, the FCA has not located the requested information. Furthermore the FCA has explained that any contact it had with the EU regarding the ADR issues was informal and would not have resulted in recorded information being held. Therefore the Commissioner has concluded that on the balance of probabilities the FCA does not hold the information sought by parts 5, 11 and 12 of the request.
27. The FCA has also argued that it does not hold the information sought in part 7 of the request. The information sought in part 7 of the request is comprised of correspondence between officers of the FOS, i.e. the FOS's internal correspondence. The FCA has explained that this is not correspondence to which the FCA would have been party to. As a consequence the FCA maintains that it has never held this

information. Furthermore the FCA considers that had it for any reason it ever had been provided with copies of that correspondence, the searches it conducted in respect of the other elements of the request would have unearthed it. The fact that the information was not discovered during these searches confirms the FCA's contention that it has never had access to the FOS's internal communications requested in part 7 of the request. The Commissioner is satisfied that on the balance of probabilities the FCA does not hold this information.

Information provided in response to the complainant's earlier request

28. The FCA considers that the information requested in parts 6 and 8 of the request had already been provided in response to the complainant's earlier request of 31 August 2018. As explained earlier, the FCA interpreted this request as capturing the minutes of the meeting of its Oversight Committee of 21 May 2015. The FCA provided a copy of those minutes in full apart from the names of two junior officials which were redacted under section 40(2) on the basis that it was their personal data.
29. Part 6 of the request relates to a minute from the Oversight Committee's meeting of 21 May 2015 which had previously been disclosed and is made in the following terms:

"The redress issues under item 5 by June may reflect upon states of mind and discussion of redress which was what Ms Vicary and Mr Gibson; as experts, were there for. I wish to read the full minute. All reference to considerations of "Fairness" in Sch. 3 seems to have been omitted from the FCA response and the omission merits re-visiting by FCA."
30. The minute for Item 5 of the 21 May 2015 meeting states:

"Mr McAteer suggested the FCA should consider holding a round table discussion on redress issues."
31. The Commissioner has looked at how this part of the request should be interpreted. She considered whether it could be interpreted as seeking the minutes of any round table discussion on redress issues that may have taken place, but decided it could not. The Commissioner concluded that the only objective interpretation that can be placed on the request is that it seeks a fuller minute of the potential need to hold round table discussions as contained in the minutes for the meeting of 21 May 2015. The FCA has provided the Commissioner with a full and unredacted copy of the minutes for the entire meeting of 21 May 2015. Having compared it with the version that was sent to the complainant, the Commissioner is satisfied that

the complainant has been provided with a full copy of the minute for Item 5 and that the only information that was redacted from the minutes as a whole was the names of junior FCA officials.

32. Therefore the Commissioner accepts that the FCA had already provided the complainant with the full minute for Item 5 of the meeting of 21 May 2015 in response to his original request of 31 August 2018. The FCA also sent the complainant another copy of those minutes in response to the 5 November 2018 request. The Commissioner is satisfied that the FCA has complied with this element of the request.
33. The FCA also considers that part 8 of the request had also been complied with by the provision of the minutes of the 21 May 2015 meeting in response to the earlier request.
34. Part 8 of the request is as follows:

"The entire minutes as taken by the name obliterated but company secretarial assistant of a meeting which closed at noon 21 May, Save that excluded from it as redacted, only parts not dealing with the application for approval and giving me an understanding of what occurred in order to enable Mr Woolard to inform the EU Commission of the position after the FCA had considered the application. His prior drafts of the minutes before the one sent to me are relevant in my reading how Sch. 3 was dealt with by the FCA."
35. The first sentence appears to seek a full version of the minutes of the meeting of 21 May 2015. The complainant then comments that as he is only interested in information relating the FCA's approval of FOS's alternative dispute resolution process, any other information could be withheld.
36. The Commissioner accepts that, to the extent part 8 of the request is seeking the full minutes of the meeting of 21 May 2015, the FCA had already provided the information in response to the complainant's earlier request and that this information was provided again in response to his request of 5 November 2018, apart from the name of junior officers.
37. However the Commissioner interprets the final sentence of part 8 of the request as seeking any draft versions of these minutes that might exist. The Commissioner therefore asked the FCA to clarify whether any such drafts existed. The FCA confirmed that its Board Secretariat does hold previous versions of these minutes and went on to provide the Commissioner with copies of those drafts. Some of the amendments made to the minutes could be described as stylistic and the Commissioner understands that the FCA is prepared to disclose the majority of the information contained in those draft

minutes. The FCA is therefore required to provide that information to the complainant.

38. The FCA has applied exemptions to other information contained in the draft minutes, for example, where drafting amendments relate to the level of detail in which discussions were recorded. The exemptions in question are those provided by section 40 - personal information, section 44 - statutory prohibition and section 31 - law enforcement. All these exemptions have also been claimed in respect of other information captured by the request. The Commissioner will therefore consider their application to the draft minutes at the same time as she considers their application to the rest of the information.

Section 44 – statutory prohibition

39. Having concluded her consideration of how the FCA dealt with parts 5, 6, 7, 11 and 12 of the request the Commissioner will now look at how it has dealt with the remaining parts. The FCA has confirmed that it holds information of the type described in parts 1 to 4 and 9 and 10. It released some of the information captured by part 3 of the request, but it has withheld the rest of the information under a variety of exemptions. The main one being that provided by section 44(1)(a) of the FOIA. This has been applied to at least some of the information captured by all these remaining elements of the request. It has been applied to all the information caught by parts 1, 2 and 9 of the request. It has also been applied to some of the information that has been withheld in response to part 3 of the request. In addition some of the information withheld from the draft minutes captured by part 8 of the request is also being withheld under section 44.
40. Part 4 of the request seeks information on the amendments that were made to FOS's application for certification of its alternative dispute resolution process and the statement of reasons that accompanied it. The FCA has explained that the only information it holds in respect of these amendments is that which can be gleaned by comparing the application and statement of reasons submitted by FOS on 1 May 2015 and the version dated 7 July 2015 that was ultimately approved and published on the FCA's website. The 1 May 2015 letter and accompanying statement of reasons is the subject of parts 1 and 2 of the request and are being withheld under section 44, therefore the information requested at part 4 of the request is, in effect, also being withheld under section 44.
41. Regarding part 10 of the request, the FCA's position is that the requests overlaps with the information requested in parts 1, 2, 3 and

9, i.e. that the information captured by part 10 is a combination of that which has already been requested in parts 1, 2, 3 and 9. Having considered the scope of these requests the Commissioner considers the FCA's approach is correct. As set out above, the majority of this information has been withheld under section 44.

42. The Commissioner will now go onto to consider the application of section 44(1)(a) to all this information. Section 44(1)(a) of the FOIA provides that information is exempt if its disclosure by the public authority holding it is prohibited by or under any enactment.
43. The FCA has identified section 348 of the Financial Services and Markets Act 2000 (FSMA) as creating a statutory prohibition, making it a criminal offence for the FCA (or its officers) to disclose, what is referred to as, 'confidential information' except in very limited circumstances. The Commissioner will now look at section 384 of the FSMA in more detail.
44. Section 348(1) of the FSMA states 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.
45. So far as is relevant, section 348(2) defines confidential information as:
 - (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 FCA, ... 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).
46. The Commissioner accepts that section 348 of the FSMA is clearly a statutory prohibition on disclosure and where it applies the information will be exempt under section 44 of the FOIA. The question is whether section 348 does apply to the information in question.

47. The prohibition prevents, what is referred to in section 358(1) as, a 'primary recipient' from disclosing confidential information. The FCA is one of the bodies defined as primary recipients in section 348(5).
48. Therefore the next issue to be decided is whether the information being withheld is confidential information which the FCA received from another person. Having viewed the withheld information the Commissioner is satisfied that much of it comprises of documents which the FCA received directly from the FOS. Other information is in the form of notes produced by the FCA, but which record, or discuss information it received from the FOS during meetings, or in submissions from the FOS. The Commissioner is satisfied that such information constitutes information received by the FCA from the FOS. There is also a limited amount of information which includes the FCA's assessment of the FOS's submissions. The Commissioner has carefully considered whether it can really be said that such information was received from the FOS. The assessments in question are based directly on the information that was received from the FOS, it essentially summarises the FCA's interpretation of that information and considers whether any clarification is necessary. In so doing it provides an outline of the information provided by the FOS and the issues it raised. It is therefore impractical to disentangle it from the actual information that was directly provided by the FOS. On this basis the Commissioner is satisfied that this information can be regarded as information received from the FOS.
49. For the purposes of section 348(2) of the FSMA, the term 'person' includes any entity that is recognised as having a legal personality to enter legal relations. It should also be remembered that the FOS is a separate legal entity to the FCA. Having viewed the withheld information the Commissioner is satisfied that it relates to the FOS's application for the certification of its alternative dispute resolution process. She is also satisfied that the provision of this alternative dispute resolution process can be considered a business affair of the FOS. The test provided by section 348(2)(a) is therefore met.
50. In respect of section 348(2)(b) the FCA has explained the information was held by it for one of its functions under Schedule 17 of the FSMA. In particular paragraph 2 of Schedule 17 provides that:
- (1) The FCA must take such steps as are necessary to ensure that the body corporate established by the Financial Services Authority under this Schedule as originally enacted is, at all times, capable of exercising the functions conferred on the scheme operator by or under this Act.
- (2) The FCA must exercise any function falling within sub-paragraph (3) in a way which is consistent with enabling the scheme operator,

at all times, to qualify as an ADR entity and meet the quality requirements in Chapter II of the ADR Directive.

51. Based on the FCA's submissions the Commissioner is satisfied that essentially these provisions require the FCA to perform its regulatory role in a way that would enable the FOS to qualify as an ADR entity. Therefore, during the FCA's consideration of the FOS's application for certification as an ADR entity and when discussing any issues raised by that application, the FCA was performing its statutory functions under Schedule 17 of the FSMA.
52. The last test that has to be met before the information can be considered 'confidential information' is that created by section 348(2)(c). This in turn refers section 348(4) which sets out a number of circumstances in which information cannot be regarded as 'confidential information' regardless of the fact that the preceding elements of section 348(2) have been satisfied. The relevant circumstances are firstly, section 348(4)(a), that the information has already been publicly disclosed. The second circumstance, section 348(2)(b), is that the information is in the form of a summary or collection of data from which it is not possible to ascertain information relating a particular person. The FCA has advised the Commissioner that the information is not already in the public domain and, having viewed the information, the Commissioner is satisfied that it is not in the form of a summary or collection of data and that it does reveal information about an identifiable person, i.e. the FOS.
53. In light of the above the Commissioner is satisfied that the information being withheld under section 44 is 'confidential information'. However, there are still grounds under which confidential information can be disclosed. Under section 348(1) such information can be disclosed with the consent of the person who provided it and, if different, the person to whom it relates. The FCA has confirmed that no consent was obtained from the FOS.
54. Finally, under section 349 of the FSMA, confidential information can be disclosed if the disclosure is made for the purpose of facilitating the performance of a public function and is permitted under certain regulations. Those regulations being The Financial Services and Markets Act 2000 (Disclosure of Confidential Information) Regulations 2001 (S.I. 2001 No.2188). The Commissioner does not consider that the disclosure of the information would be for the purpose of carrying out a public function, nor is it obvious that any of the provisions of the Regulations referred to are met. The Commissioner is satisfied that regulation 349 does not allow the disclosure of the confidential information.

55. In conclusion the Commissioner is satisfied that the statutory prohibition created by section 348 of the FSMA does apply to the information being withheld under section 44 of the FOIA. The Commissioner finds section 44 is engaged. This provides an absolute exemption; it is not subject to the public interest test. The FCA is entitled to withhold the information.

Section 31 – law enforcement

56. Two of the exemptions provided by section 31 have been applied to some of the information captured by part 3 of the request together with a very limited amount of the information which had been withheld from the draft minutes captured by part 8 of the request.
57. So far as is relevant section 31(1)(g) provides that information is exempt if disclosure would or would be likely to prejudice the exercise by any public authority of its functions for either:
- (a) the purpose of ascertaining whether any person has failed to comply with the law, or
 - (c) the purpose of ascertaining whether circumstances which would justify regulatory action law in pursuance of any action exist or may arise.
58. The FCA has explained that under the regulatory regime of the FSMA, the roles of the FCA and the FOS are broadly complimentary in that the objective of both is to promote and maintain confidence in financial services on the UK. The FCA is a competent authority under the ADR Regulations and the FOS is an ADR entity under those Regulations. As a consequence it is a function of the FCA to certify FOS as an ADR entity and to determine whether the FOS is meeting the relevant quality requirements of the ADR Regulations. To facilitate this determination the FOS is required to report certain information to the FCA on an annual and bi-annual basis. If the FCA considers that the FOS is not meeting those quality requirements there is a procedure under the ADR Regulations for the FCA to require FOS to remedy the failings. If the FCA considers the failings serious enough it could withdraw the FOS's certification as an ADR entity.
59. The FCA argues that in determining whether the FOS is meeting the relevant quality requirements it is both ascertaining whether the FOS has failed to comply with its legal obligations under the ADR Regulations and at the same time is ascertaining whether circumstances exist, that would justify the FCA taking regulatory action requiring the FOS to remedy any failings, or even withdrawing

the FOS's certification as an ADR entity. Therefore the Commissioner will consider the application of the two exemptions together.

60. When considering the application of the exemptions cited by the FCA, the Commissioner interprets the term 'ascertaining' to mean that the body claiming to have the relevant statutory function must be responsible for not only investigating whether the law has been complied with, or whether regulatory action is justified, it must also have the power to determine the matter with some certainty. From the FCA's submissions the Commissioner is satisfied that the FCA's statutory functions do extend to making formal decisions as to whether the FOS has complied with the law or whether any regulatory action is required to remedy any failings by the FOS in its role as an ADR entity.
61. The Commissioner also accepts that the information which is the subject of the request was very clearly generated as a consequence of the FCA performing those statutory functions. Therefore the Commissioner will go on to look at whether disclosing the information being withheld under section 31 would or would be likely to prejudice those functions.
62. Both the exemptions can be applied on the basis that the prejudice claimed either 'would' occur, or that it is only 'likely' that the prejudice would occur. In this case the FCA is confident that the prejudice would occur. Clearly it is not possible to predict with absolute certainty what will occur in the future and so the term 'would' is taken to mean that it is more probable than not that the prejudice would occur. In other words the chance of the prejudice occurring has to be greater than 50%.
63. The FCA has also argued that not only is there a greater than 50% risk of the prejudice occurring, the resulting prejudice would not be trivial or insignificant. It considers as a regulator it is dependent on the communications with and about the persons and functions that it regulates. The FCA believes it is important that such communications are full and frank in nature. This allows it to gather all the information it needs in order to consider the relevant regulatory requirements. The Commissioner recognises the logic of this argument and accepts that it is possible that if a regulator disclosed either the information it had obtained from one of the bodies it regulated, or initial views based on such information, the regulated body may be reluctant to cooperate in the future. This is in part because of concern that the initial views could be interpreted negatively by external commentators.
64. Often a regulator such as the FCA will have powers to compel regulated bodies to provide it with the information it requires.

However the existence of such powers would not overcome the problem completely. Any reluctance to supply information on behalf of the regulated body could hinder the ability of the FCA to respond swiftly to issues. Furthermore the quality and candour of the information ultimately obtained from the regulatory body may be reduced.

65. The Commissioner has gone on to look at the actual information which is being withheld under section 31 to determine whether its disclosure would effect the behaviour of the FOS in the way the FCA fears. The Commissioner has also considered whether the disclosure would signal to other bodies regulated by the FCA that information about their interactions with the FCA could be made public too.
66. Some of the information to which section 31 has been applied can be characterised as the FCA's assessment of the information that has been provided to it by the FOS. The Commissioner acknowledges that she has previously described some of the information withheld under section 44 as being an assessments of the FOS's application. The distinction between that information and the information being withheld under section 31 is that the latter does not in itself reveal the actual information provided by the FOS. Therefore it would not satisfy the requirement of the relevant statutory prohibition (section 348 of the FSMA) for the information to have been received from a third party
67. In considering the impact of disclosing the information withheld under section 31 the Commissioner has taken account of the timing of the request. The information relates to the FCA's approval of the FOS's application for certification as an ADR entity back in early 2015, the approval was granted in July 2015 and the request was made over three years later in August 2018; the actual substantive issue of whether to grant approval had been completed by the time of the request. Therefore disclosing the information at the time of the request could not hinder the approval process. Furthermore the passage of time may have reduced the sensitivity of the FOS to the disclosure and therefore limited any negative reaction that disclosure would cause. The Commissioner has also had regard for the status of the FOS. It is an independent public body established by Parliament to sort out complaints between customers and businesses providing financial services. It would be difficult for such a body to be seen as hindering the regulatory oversight of the FCA.
68. Nevertheless the Commissioner notes that the FCA did contact the FOS when dealing with the request and although the FCA has not provided any details of the response it received, The FCA has advised the Commissioner that it did not obtain the consent of the FOS to the disclosure of this information. Therefore the

Commissioner accepts that the FCA has grounds for believing the FOS would not welcome the disclosure of the information. That is not to say that the information in question is particularly critical of the FOS's application, it may simply be that the FOS has an expectation that certain elements of the regulatory process would remain confidential.

69. In light of this and having viewed the withheld information relating to the FCA's assessment of the FOS application, the Commissioner is satisfied that its disclosure would make the FOS more reticent to provide the FCA with information in the future. To a lesser extent, disclosure would signal to other regulated bodies that information about their interactions with the FCA may also be released.
70. The other information that has been withheld under section 31 reveals the FCA's approach to its regulation of the FOS and the process for approving the FOS's application to be certified an ADR entity. The Commissioner is less convinced that the disclosure of this information would result in the FOS, or any other regulated body, becoming more reluctant to volunteer information to the FCA. However the FCA argues that to be an effective regulator its internal communications regarding the bodies and functions it regulates must be full and frank in nature. Although the Commissioner recognises that there is some merit in the argument that in order to carry out its public functions a public authority must be able to discuss issues and a free and frank manner, the Commissioner is cautious of accepting the argument is relevant to the application of section 31. There is an specific exemption that relates to preventing the candour of discussion and advice being inhibited due to the concern of potential disclosure. That exemption is provided by section 36(2)(b)(i) and (ii) of the FOIA. Importantly, the application of this, potentially very wide, exemption is dependent on the public authority's designated qualified person (usually the most senior officer within the organisation) being of the opinion that either full frank exchange of views or provision of advice would be hindered by the disclosure. This is an important safeguard against information being withheld on such grounds too frequently and without proper consideration.
71. Nevertheless the Commissioner has considered whether the disclosure of this information would undermine the ability of the FCA to properly carry out its regulatory functions. Some of the information is very anodyne, simply identifying points of clarification from the FOS. Other information simply records what appears to be an uncontentious suggestion on how to approach one aspect of the approval process. The Commissioner does not accept that the disclosure of such information would have would have any

meaningful impact on the ability of the FCA to perform its regulatory duties.

72. The remaining information may have had greater significance at the time it was created in 2015. However given the time that had elapsed between then and the time of the request the Commissioner considers it most likely that the sensitivity of the information would have waned or the issues discussed within the information would have become apparent during the intervening period. Therefore the Commissioner is not satisfied that disclosing this information would prejudice the FCA's regulatory or law enforcement functions.
73. In conclusion the Commissioner has found that much of the information that has been withheld under section 31 does engage the exemptions provided by sections 31(2)(a) and (c). However a limited amount of the information does not engage those exemptions. The Commissioner requires the FCA to disclose this information. The information will be identified in a confidential annex which will be made available exclusively to the FCA.

Public interest test

74. In respect of the information that does engage the exemption the Commissioner will now consider the public interest test as set out in section 2 of the FOIA. This provides that even though information may engage an exemption it can only be withheld if, in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosure.
75. In its submission to the Commissioner the FCA has acknowledged that there is a public interest in accountability and transparency. It recognises that there is a particular public interest in disclosing information which reveals the FCA's approach to complaint handling as this affects consumers directly.
76. In its refusal notice to the complainant dated 1 February 2019 the FCA also stated that there was a strong public interest in the public being reassured about the effectiveness of the regulatory approach taken by the FCA and it considered the disclosure of the information would demonstrate how the FCA responds to matters arising within the sector it regulates. It also considered disclosure would provide information to consumers to assist them making decisions about their dealings, or potential dealing with firms and individuals that are, or may be operating in the financial services industry. Finally it considered disclosure would increase public awareness and understanding of decisions taken by the FCA.
77. At the internal review stage the FCA added that disclosure would enable regulated firms, their senior management and legal advisers,

together with the public more generally, to better understand why, where and how it makes decisions on regulatory matters and on the use of the FCA's statutory powers. It considered that this in turn will facilitate comments and debate about the effectiveness and efficiency of the FCA's regulatory approach.

78. The Commissioner considers that some of the public interest arguments presented would be more relevant had the request related to the FCA's regulation of the actual businesses that operate within the financial services industry, rather than the FOS. However the Commissioner acknowledges the logic of the argument that, if disclosed, the requested information would help both the public and the industry understand the decision making of the FCA and its approach to one of its regulatory roles.
79. The complainant has focussed directly on the issues to which the requested information relates, i.e. the FCA's approval of the FOS as an ADR entity. It is clear that the complainant has concerns that the FOS's ADR process is not in compliance with the EU Directive from which the ADR Regulations are derived. As a consequence he considers that consumers are not provided with a fair opportunity to present their case when accessing the ADR scheme. The Commissioner has not been presented with any evidence which suggests this is a concern of a wider number of consumers. Nevertheless the Commissioner recognises that the approach taken by the FCA when approving the FOS's certification as an ADR entity is an important issue. Disclosure could provide some insight into the FCA's relationship with, and its regulation of, the FOS. Potentially disclosure would also allow consumers to reach a more informed view of the FCA's assessment of the FOS's application, which in turn may inform the public's understanding of the ADR scheme operated by the FOS.
80. In respect of the arguments in favour of maintaining the exemptions the FCA has argued that there is a strong public interest in it being able to carry out its functions in the most effective manner possible, and that disclosure of the information has the potential to prejudice any work it is currently doing as well as its ability to investigate concerns in the future. This is because it believes disclosure would make the bodies it regulates less willing to volunteer information to the FCA.
81. The FCA also considers that some of the withheld information would reveal strategies and tactics used in the supervision of the firms it regulates and that this could affect the way it interacts with firms, so prejudicing ongoing and future investigations. Although the Commissioner recognises that some of the information which has been withheld under section 31 could be characterised as being more

about its strategies and tactics, it is that information which the Commissioner has found does not engage the exemptions. The Commissioner does not consider that the actual information which she has found does engage the exemptions, would arm firms within the financial services industry with intelligence that they could use to their advantage during any form of regulatory investigations and so hamper the effectiveness of such investigations.

82. The final public interest argument which the FCA presented in its submission to the Commissioner is that the information could lead to widespread speculation which could hinder and prejudice the progress of the FCA's current and future regulatory activities. It has not however developed this argument and having viewed the information, it is not clear that disclosure would lead to such speculation.
83. Therefore when balancing the public interest arguments for and against the disclosure of the information, the Commissioner has taken account of the FCA's argument that disclosure would undermine the willingness of regulated bodies to volunteer information to it and the importance of preserving this free flow of information. Against this the Commissioner has weighed both the general public interest in transparency and accountability, and the particular public interest in disclosing information on the FCA's regulation of the FOS and the ADR scheme it offers consumers.
84. When balancing the arguments for and against disclosure, the Commissioner has had regard for the extent to which the information actually being withheld under section 31 would meet the public interest factors cited in favour of disclosure. The information would demonstrate the rigour to which the FCA undertook its supervision of the FOS to only a limited extent. On the other side of the scale the Commissioner does place weight on the importance of ensuring that the FCA is able to obtain information from the bodies it regulates on a voluntary basis and that those bodies engage properly with the FCA. Without the ability to obtain such information the FCA would not be able to take action in a timely manner. Ultimately this would increase the risks faced by consumers. The Commissioner therefore finds that where the information which she has found does engage the exemptions provided by both section 31(2)(a) and (c), the public interest in favour of maintaining the exemption outweighs the public interest in disclosure. The FCA is entitled to withhold this information.

Section 42 – legal professional privilege

85. The FCA has withheld a limited amount of information captured by part 3 of the request under section 42 of the FOIA. The information

is contained in one short paragraph contained in one document which is then repeated in another.

86. So far as is relevant section 42(1) of the FOIA provides that information in respect of which a claim for legal professional privilege could be maintained in legal proceedings is exempt information.
87. Legal professional privilege is a concept which has evolved to protect communications between a lawyer and their client. It allows an individual to access legal advice confident in the knowledge that they can present their legal adviser with the full facts of the issue in question and that the legal adviser can provide full and frank advice including the strengths and weaknesses of their position, without fear that the communications will be made available to other parties. It is an important concept which allows individuals to obtain the best legal advice they can to protect their interests.
88. There are two types of legal professional privilege. 'Litigation privilege' protects communications between a legal adviser and their client in situations where litigation is ongoing or anticipated. The second type of legal professional privilege is 'advice privilege'. In this case the FCA argues that the information in question attracts advice privilege.
89. For information to attract advice privilege it has to be contained in a confidential communication between a legal adviser and their client which has been made for the dominant purpose of seeking legal advice and the legal adviser has to have been acting in their professional capacity. Where legal advice is received directly by one officer within an organisation and then the substance of the advice is conveyed to others within the organisation, privilege extends to the onward communication of the advice. This is important in this case as the information in question is contained in documents which report the contents of the advice rather than being directly received from a legal adviser.
90. The FCA has explained that the advice conveyed in the information was received by officers by the relevant business area (the RROP team) from the FCA's legal advisers in the General Counsel's Division. The FCA has also assured the Commissioner that the advice has not been placed in the public domain and therefore remains confidential.
91. The Commissioner has viewed the information being withheld under section 42 and is satisfied that it relates to a particular legal issue which is relevant to the FCA's approval of the FOS as an ADR entity. In light of this and submission provided by the FCA, the Commissioner is satisfied that the information is capable of

attracting advice privilege. The exemption provided by section 42(1) is engaged.

Public interest test

92. Section 42(1) is subject to the public interest test. The information can only be withheld if all the circumstances of the case the public interest in maintaining the exemption outweighs the public interest in disclosure.
93. The FCA has acknowledged that there is a legitimate public interest in the public seeing the advice provided to its officers as this would promote openness, transparency and accountability in the FCA's decision making process. The Commissioner accepts this is the case and that there is a public interest in disclosing information which would allow the public to satisfy itself that the FCA had proceeded appropriately, taking full account of its legal responsibilities, when conducting the assessment of the FOS's application as ADR entity.
94. Against those arguments it is necessary to weigh the public interest arguments in favour of maintaining the exemption. As recognised by the Tribunal in a series of cases, the Commissioner considers there will always be a strong public interest in maintaining the exemption due to the importance in preserving the principle behind legal professional privilege i.e. safeguarding the openness of communications between a client and lawyer to ensure access to full and frank legal advice. This is fundamental to the administration of justice.
95. In *Bellamy v Information Commissioner and the Secretary of State for Trade and Industry* (EA/2005/0023) the Tribunal found,

"... that at least equally strong counter-veiling considerations would need to be adduced to override that inbuilt public interest ..."
96. Having considered the public interest arguments for and against disclosure, and having viewed the withheld information itself, the Commissioner finds that although there is some public interest in releasing the information, it is not sufficient to outweigh the public interest preserving the principle that individuals should be free to enter into a full and frank dialogue with their legal adviser in order to protect their interests. The Commissioner finds that the public interest in maintaining the exemption outweighs the public interest in disclosure. The FCA is entitled to withhold the information under section 42(1).

Section 40(2) – personal information

97. The FCA has withheld a very small amount of information under section 40(2) of the FOIA from the minutes and papers that have been disclosed. This is limited to the of junior officers and the direct contact details of more senior colleagues. The junior officials are named in the papers simply because they are carrying out secretarial/administrative duties in relation to approval process.
98. Section 40(2) of the FOIA provides that information is exempt from disclosure if it is the personal data of an individual other than the requester and where one of the conditions listed in section 40(3A)(3B) or 40(4A) is satisfied.
99. In this case the relevant condition is contained in section 40(3A)(a)¹. This applies where the disclosure of the information to any member of the public would contravene any of the principles relating to the processing of personal data ('the DP principles'), as set out in Article 5 of the General Data Protection Regulation ('GDPR').
100. The first step for the Commissioner is to determine whether the withheld information constitutes personal data as defined by the Data Protection Act 2018 ('DPA'). If it is not personal data then section 40 of the FOIA cannot apply.
101. Secondly, and only if the Commissioner is satisfied that the requested information is personal data, she must establish whether disclosure of that data would breach any of the DP principles.

Is the information personal data?

102. Section 3(2) of the DPA defines personal data as:

"any information relating to an identified or identifiable living individual".

103. The two main elements of personal data are that the information must relate to a living person and that the person must be identifiable.
104. An identifiable living individual is one who can be identified, directly or indirectly, in particular by reference to an identifier such as a name, an identification number, location data, an online identifier or to one or more factors specific to the physical, physiological, genetic, mental, economic, cultural or social identity of the individual.

¹ As amended by Schedule 19 Paragraph 58(3) DPA.

105. Information will relate to a person if it is about them, linked to them, has biographical significance for them, is used to inform decisions affecting them or has them as its main focus.
106. As stated previously the information in questions is the junior officers within the FCA and the contact details of other officers named in the minutes. The Commissioner is satisfied that this information both relates to identifiable individuals. This information therefore falls within the definition of 'personal data' in section 3(2) of the DPA.
107. The fact that information constitutes the personal data of an identifiable living individual does not automatically exclude it from disclosure under the FOIA. The second element of the test is to determine whether disclosure would contravene any of the DP principles.
108. The most relevant DP principle in this case is principle (a).

Would disclosure contravene principle (a)?

109. Article 5(1)(a) of the GDPR states that:

"Personal data shall be processed lawfully, fairly and in a transparent manner in relation to the data subject".

110. In the case of an FOIA request, the personal data is processed when it is disclosed in response to the request. This means that the information can only be disclosed if to do so would be lawful, fair and transparent.
111. In order to be lawful, one of the lawful bases listed in Article 6(1) of the GDPR must apply to the processing. It must also be generally lawful.

Lawful processing: Article 6(1)(f) of the GDPR

112. Article 6(1) of the GDPR specifies the requirements for lawful processing by providing that "processing shall be lawful only if and to the extent that at least one of the" lawful bases for processing listed in the Article applies.
113. The Commissioner considers that the lawful basis most applicable is basis 6(1)(f) which states:
- "processing is necessary for the purposes of the legitimate interests pursued by the controller or by a third party except where such interests are overridden by the interests or fundamental rights and

freedoms of the data subject which require protection of personal data, in particular where the data subject is a child"².

114. In considering the application of Article 6(1)(f) of the GDPR in the context of a request for information under the FOIA, it is necessary to consider the following three-part test:-

- i) **Legitimate interest test:** Whether a legitimate interest is being pursued in the request for information;
- ii) **Necessity test:** Whether disclosure of the information is necessary to meet the legitimate interest in question;
- iii) **Balancing test:** Whether the above interests override the legitimate interest(s) or fundamental rights and freedoms of the data subject.

115. The Commissioner considers that the test of 'necessity' under stage (ii) must be met before the balancing test under stage (iii) is applied.

Legitimate interests

116. In considering any legitimate interest(s) in the disclosure of the requested information under the FOIA, the Commissioner recognises that such interest(s) can include broad general principles of accountability and transparency for their own sakes, as well as case-specific interests.

117. Further, a wide range of interests may be legitimate interests. They can be the requester's own interests or the interests of third parties, and commercial interests as well as wider societal benefits. They may be compelling or trivial, but trivial interests may be more easily overridden in the balancing test.

² Article 6(1) goes on to state that:-

"Point (f) of the first subparagraph shall not apply to processing carried out by public authorities in the performance of their tasks".

However, section 40(8) FOIA (as amended by Schedule 19 Paragraph 58(8) DPA) provides that:-

"In determining for the purposes of this section whether the lawfulness principle in Article 5(1)(a) of the GDPR would be contravened by the disclosure of information, Article 6(1) of the GDPR (lawfulness) is to be read as if the second sub-paragraph (dis-applying the legitimate interests gateway in relation to public authorities) were omitted".

118. In this case the complainant is seeking information which would allow him to reach a more informed view on the decision making process of the FCA is approving the FOS's certification as an ADR entity. The Commissioner is satisfied that in doing so the complainant is pursuing a legitimate interest.

Is disclosure necessary?

119. 'Necessary' means more than desirable but less than indispensable or absolute necessity. Accordingly, the test is one of reasonable necessity and involves consideration of alternative measures which may make disclosure of the requested information unnecessary. Disclosure under the FOIA must therefore be the least intrusive means of achieving the legitimate aim in question.

120. The information which is being withheld is simply the name of junior officials who are referred to in the minutes and papers purely because they have fulfilled a secretarial role in respect of the proceedings. The direct phone numbers of more senior officers have also been withheld. The Commissioner considers that the omission of these details would not in any way interfere with the public's ability to understand how decisions were taken, including which senior officers within the FCA were responsible for the decision, and why they reached the decisions they did.

121. As the Commissioner has decided in this case that disclosure is not necessary to meet the legitimate interest in disclosure, she has not gone on to conduct the balancing test. As disclosure is not necessary, there is no lawful basis for this processing and it is unlawful. It therefore does not meet the requirements of principle (a).

122. The Commissioner has therefore decided that the FCA was entitled to withhold the information under section 40(2), by way of section 40(3A)(a).

Right of appeal

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

124. 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.

125. 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

Rob Mechan
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