

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 4 December 2020

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

Decision (including any steps ordered)

1. The complainant has requested from the Financial Conduct Authority ('the FCA') 1) particular policy documents and 2) correspondence received from Leighton Buzzard Narrow Gauge Society Limited. The FCA advised it does not hold information within the scope of part 1 of the request and that the information it holds that is relevant to part 2 is exempt from disclosure under section 44 of the FOIA (prohibitions on disclosure).
2. The Commissioner's decision is as follows:
 - On the balance of probabilities, the FCA does not hold the specific information the complainant has requested in part 1 of his request and has complied with section 1(1)(a) of the FOIA.
 - The information the FCA holds that is relevant to part 2 of the request is exempt information under section 44(1)(a) of the FOIA.
3. The Commissioner does not require the FCA to take any remedial steps.

Background

4. In its submission to the Commissioner the FCA has provided the following background. Leighton Buzzard Narrow Gauge Railway Society Limited is a Mutual Society registered with the FCA under the Co-

operative and Community Benefit Societies Act 2014 ("the 2014 Act"). The FCA is responsible for making available to the public certain records relating to registered societies, such as registration documents, charges and rules of a society. The FCA's website publishes further details of the public documents it holds and can provide upon payment of a fee.

5. In addition, by law, all societies must send the FCA an Annual Return and Accounts. This information is published on the FCA website. Further details of the FCA's responsibilities in relation to Mutual Societies can also be viewed on the FCA website together with guidance on its approach to its role as registering authority for societies under the 2014 Act.
6. The first part of the complainant's request concerns requests for special meetings or the appointment of an inspector for a Mutual Society under the 2014 Act sections 106 and 107.
7. Section 106 of the 2014 Act requires the following criteria to be met before the FCA can exercise its power to call a special meeting (the Legislative Test):
 - a) That the society in question is a "relevant society".
 - b) Support from at least 10% of a society's members, or (if less) 100 members.
 - c) An application must be supported by "such evidence for the purpose of showing that the applicants have good reasons for requiring the examination or meeting (and do not have malicious motives).
8. If the Legislative Test is met, the FCA can then exercise its discretion to use the power to call a special meeting.
9. The substance of the application for a special meeting of Leighton Buzzard Narrow Gauge Railway Society Limited has also been subject to a decision of the Independent Complaints Commissioner¹.

¹ <https://frccommissioner.org.uk/wp-content/uploads/FCA00627-for-publication-FR-180520.pdf>.

Request and response

10. On 2 July 2019 the complainant wrote to the FCA and requested information in the following terms:

"1. What are the policy documents that govern the FCA's response to requests for a Special Meeting or the appointment of an inspector for a Mutual Society, particularly where a dispute is involved, under the Cooperative and Community Benefit Society Act 2014 Sections 106 and 107?

2. To see all of the correspondence received from the Leighton Buzzard Narrow Gauge Society Limited, Registered Number 20830R since January 2018."

11. On 30 July 2019 the FCA responded. It stated that it does not hold information within the scope of part 1 of the request and relied on section 44 of the FOIA to withhold the information it holds that falls within the scope of part 2, by virtue of section 348 of the Financial Services and Markets Act 2000 (FSMA).
12. The FCA provided an internal review on 30 September 2019. It upheld its original position.

Scope of the case

13. The complainant contacted the Commissioner on 27 January 2020 to complain about the way his request for information had been handled.
14. The Commissioner's investigation has focussed on whether, on the balance of probabilities, the FCA holds information within the scope of part 1 of the request and whether it can refuse part 2 of the request under section 44(1)(a) of the FOIA.

Reasons for decision

Section 1 – general right of access to information held by public authorities

15. Under section 1(1) of the FOIA anyone who requests information from a public authority is entitled under subsection (a) to be told if the authority holds the information and, under subsection (b) to have the information communicated to him or her if it is held and is not exempt information.

16. In part 1 of his request, the complainant has requested policy documents that govern the FCA's response to requests for special meetings or the appointment of an inspector for a Mutual Society under the Cooperative and Community Benefit Society Act 2014, sections 106 and 107.
17. The FCA's position is that it does not hold information falling within the scope of this request. It has noted that the complainant is particularly concerned about a reply the FCA provided in response to a pre-submitted question to the FCA's Annual Public Meeting. In that response, the FCA had explained that the calling of a special meeting is appropriate in exceptional cases, such as where a society finds itself in some difficulty it cannot easily resolve of its own volition, or where a significant minority or proportion of a society's members are directly affected by a decision or policy of a society. Full details of the FCA's response are included in pages 15-16 of the published 'Annual Public Meeting 2019: pre-submitted questions' document².
18. The FCA then notes that the complainant had advised the Commissioner that he considers that the information sent to Andrew Bailey (then the FCA's Chief Executive Officer) as the basis for his Annual Public Meeting response to the pre-submitted question constitutes a summary of policy on the approach to be adopted when requests for a special meeting are received.
19. The FCA has told the Commissioner that it has checked the position with its Mutuels Team and that team has confirmed that there is nothing that amounts to a finalised policy document or approach on the use of the FCA's power to call a special meeting. All requests for special meetings are considered on a case by case basis, in line with the requirement set out in sections 106 and 107 of the 2014 Act. For clarity, the FCA has advised that its Annual Public Meeting response, and the background information formulating that response, was drafted for that purpose and sought to provide some context about situations where the FCA may call a special meeting. The FCA says it was not quoting from a policy paper and its response does not, in its view, constitute a summary of policy.
20. The FCA says it appreciates that individuals can often be disappointed when not as much information exists as expected. However, searches of the relevant business areas' records (the FCA Mutuels Team) were undertaken and nothing of relevance was located.

² <https://www.fca.org.uk/publication/minutes/apm-2019-pre-submitted-questions.pdf>

21. The FCA has detailed those searches in its submission. The Mutuels Team is responsible for monitoring society compliance against mutuals' legislation. It is also responsible for providing a public records function and processing the annual returns submitted by mutual societies. If it existed, the Mutuels Team, as the relevant business area, would therefore hold any relevant information falling within part 1 of the request.
22. Following a search of its electronic systems and archive records the Mutuels team confirmed that it has not located any relevant information within the scope of the request as all requests for special meetings are considered on a case by case basis in line with the requirements set out in sections 106 and 107 of the 2014 Act. There is therefore no business requirement for a documented policy to be held.
23. The searches included information contained in electronic databases and MS Outlook folders for the FCA Mutuels team. FCA staff are not permitted to hold FCA information on personal computers.
24. Members of the Mutuels Team undertook a number of searches using the search term "special meeting", which they considered were certain to be found in any records relevant to this request. Manual searches were also undertaken navigating through electronic file structures where any agreed processes, guides or policy documents would be expected to be located.
25. The FCA has confirmed that there is no evidence to suggest that any relevant information has been created and subsequently destroyed. In any event, the FCA says, were it to hold information about any internal documented policies or procedures of relevance to this request (which it has been unable to locate) it would be likely to be exempt from disclosure under other sections of the Act such as section 31 (Law enforcement).

Conclusion

26. The Commissioner has considered the complainant's arguments and the FCA's submission. She agrees with the FCA that its response to the Annual Public Meeting question is a response put together for that specific question. Neither it nor the associated information provided to Andrew Bailey can be said to be a policy governing the FCA's response to requests for special meetings or the appointment of an inspector for a Mutual Society. Nor did the FCA draw on an existing policy to produce that response and associated information. The Commissioner considers that the searches the FCA undertook were adequate and accepts that no such policy document exists. Requests for a special meeting are

considered on a case by case basis in line with section 106 of the 2014 Act.

27. The Commissioner is satisfied that, on the balance of probabilities, the FCA does not hold the information requested in part 1 of the request and complied with section 1(1)(a) of the FOIA.

Section 44 – prohibitions on disclosure

28. Section 44(1(a) of the FOIA says that information is exempt information if its disclosure (otherwise than under the Act) by the public authority holding it is prohibited by or under any enactment. Section 44 is an absolute exemption which means it is not subject to the public interest test.
29. In part 2 of his request the complainant has requested particular correspondence. The FCA says that section 348 of FSMA restricts it from disclosing “confidential information” it has received, except in certain, limited circumstances. It considered none of those circumstances applied in this case.
30. The complainant put forward a number of arguments to support his view that the correspondence in question does not engage section 44. The Commissioner relayed these to the FCA and the FCA has discussed them in its submission to the Commissioner.
31. In its submission the FCA has explained that section 348 of FSMA, headed ‘Restrictions on disclosure of confidential information by FCA, PRA etc’ applies to “confidential information”, as defined in that section. The FCA notes the complainant’s assertion that the non-public information received by the FCA from Leighton Buzzard Narrow Gauge Railway Society Limited, was not (he says) confidential information within section 348 because the FCA’s function of acting as registering authority for mutual societies is, according to the complainant, not a function under any provision by or under FSMA. The complainant’s allegation invokes section 348(2)(b) of FSMA, which stipulates that, to be “confidential information” within section 348, the information must, amongst other things, have been received by the FCA *“for the purposes of, or in the discharge of, any functions of the FCA ... under any provision made by or under this Act”*.
32. The FCA says that the complainant does not allege any other ground and therefore it has focussed its submission on the application of section 348(2)(b) of FSMA to the withheld information. The FCA has however, confirmed that it is firmly of the view that all of the criteria in section 348 are met with respect to the said information.

33. It is the FCA's clear view that its function of acting as registering authority for mutual societies is a function of the FCA under a provision made by or under FSMA. Information received by it for the purposes of, or in the discharge, of this function therefore falls within section 348(2)(b) of FSMA. This is explained further below.
34. Leighton Buzzard Narrow Gauge Railway Society Limited is a registered society, first registered in 1973 under the Industrial and Provident Societies Act 1965 and now registered under the 2014 Act.
35. The registrar function for registered societies, as well as friendly societies, building societies and credit unions (all types of mutual society), was transferred to the FCA by Schedules 2, 5 and 6 of Financial Services Act 2012 (Mutual Societies) Order 2013, SI 2013/496, ("the 2013 Order"). At this time, the registrar function for registered societies, such as Leighton Buzzard Narrow Gauge Railway Society Limited, remained within the Industrial and Provident Societies Act 1965 but was a function transferred to the FCA by Schedule 2 of the 2013 Order.
36. Para 2(1) of Schedule 1 of the 2013 Order states that *"For the purposes of the provisions specified in sub-paragraph (2), functions transferred by this Order are to be treated as functions conferred on the FCA under a provision of FSMA 2000"*. Paragraph 2(2) of Schedule 1 of the 2013 Order includes in its specified provisions section 1A(3) of FSMA, which says *"The FCA is to have the functions conferred on it by or under this Act"*. Those functions are defined at section 1A(6) to include functions conferred on the FCA by or under the Financial Services Act 2012; and the 2013 Order is made under the Financial Services Act 2012. Therefore, functions transferred to the FCA by the 2013 Order are treated as being conferred on the FCA by or under FSMA. As just explained, the registrar function for registered societies was transferred to the FCA by Schedule 2 of the 2013 Order. Consequently, with effect from 1 April 2013, when the 2013 Order came into force, the function of acting as registering authority for registered societies (such as the Leighton Buzzard Narrow Gauge Railway Society Limited) was to be treated as a function conferred on the FCA by or under FSMA. It is not necessary (as the complainant claims) for section 1A(3) of FSMA to refer specifically to mutual societies to achieve this; it refers instead, via section 1A(6), to the Financial Services Act 2012 and, through that reference, to the 2013 Order.
37. On 1 August 2014, the 2014 Act came into force, replacing the registration function for registered societies, formerly under the 1965 Act, with provisions under the 2014 Act after that date. Schedule 7 of the 2014 Act specified that Schedule 2 of the 2013 Order was revoked, as was the whole of the 1965 Act to which Schedule 2 of the 2013 Order referred. (For completeness, and contrary to what the complainant

alleges, Schedules 5 and 6 of the 2013 Order were not revoked. The FCA's function of acting as registering authority for friendly societies and credit unions (both types of mutual society) therefore remains under the 2013 Order, by virtue of Schedules 5 and 6 respectively.)

38. There are transitional provisions at paragraphs 1 and 3 of Schedule 5 of the 2014 Act that ensure that the function of acting as registering authority for registered societies, now in the 2014 Act, remains a function conferred on the FCA under FSMA. Paragraph 1 of Schedule 5 states "*The repeal and re-enactment of provisions by this Act does not affect the continuity of the law*". Paragraph 3 applies to a reference in any enactment [e.g. para 2(1) of Schedule 1 of the 2013 Order] to a provision repealed by this Act [e.g. Schedule 2 of the 2013 Order]. The reference [to Schedule 2 of the 2013 Order] is, subject to its context, to be read as a reference to the corresponding provision of this Act [the registrar functions in the 2014 Act] in relation to times, circumstances and purposes in relation to which that provision [Schedule 2 of the 2013 Order] had effect [e.g. according to para 2(1) of Schedule 1 of the 2013 Order]. As a result of paragraphs 1 and 3 of Schedule 5 of the 2014 Act, the function of acting as registering authority for registered societies, now in the 2014 Act, remains a function conferred on the FCA by or under FSMA for the purposes of section 1A(3) of FSMA.
39. In summary, the FCA's registering authority function for registered societies, such as the Leighton Buzzard Narrow Gauge Railway Society Limited, is conferred on the FCA by or under FSMA for the purposes of section 1A(3) of FSMA because:
- a) the registering authority function for registered societies (formerly known as industrial and provident societies) was transferred to the FCA, with effect from 1 April 2013, by the 2013 Order, by article 2 and Schedule 2 of the 2013 Order specifically; and, under paragraph 2 of Schedule 1 of the 2013 Order, that function was treated as being conferred on the FCA under FSMA;
 - b) on 1 August 2014, the 2014 Act came into force, replacing the registration function for registered societies (such as the Leighton Buzzard Narrow Gauge Railway Society Limited), formerly under the 1965 Act, with provisions under the 2014 Act. Schedule 7 of the 2014 Act specified that Schedule 2 of the 2013 Order was revoked and that the whole of the 1965 Act, which Schedule 2 had amended, was repealed;
 - c) Schedule 5 of the 2014 Act contains transitional provisions which mean that the registering authority function for registered societies in the 2014 Act remains a function conferred on the FCA by or under FSMA: see paragraphs 1 and 3. In particular, in

relation to paragraph 3 of Schedule 5 of the 2014 Act, paragraph 2(1) of Schedule 1 of the 2013 Order made provision as to the purposes, and circumstances, in relation to which Schedule 2 of the 2013 Order, and the 1965 Act which Schedule 2 amended, had effect; the 1965 Act was repealed, and Schedule 2 of the 2013 Order was revoked, by the 2014 Act; and, by paragraph 3 of Schedule 5 of the 2014 Act, those references (in paragraph 2(1) of Schedule 1 of the 2013 Order) are to be read as including a reference to the registrar functions in the 2014 Act.

40. The FCA is therefore satisfied that the withheld information for part 2 of the request falls within section 44(1)(a) of the FOIA because the function of acting as registering authority for mutual societies is a function of the FCA under a provision made by or under FSMA. Information received by it for the purposes of, or in the discharge, of this function therefore falls within section 348(2)(b) of FSMA; and the restrictions on disclosure of "confidential information", within the meaning of section 348(2) FSMA, apply to the FCA's function as registrar for mutual societies because it is:

"information which–

- a) relates to the business or other affairs of any person [in this case the Leighton Buzzard Narrow Gauge Railway Society Limited];
 - b) was received by the primary recipient [the FCA] for the purposes of, or in the discharge of, any functions of the FCA.... under any provision made by or under this Act, which includes the registering authority function for registered societies because of paragraphs 1 and 3 of Schedule 5 of the Co-operative and Community Benefit Societies Act 2014, and
 - c) is not prevented from being confidential information by subsection (4) [otherwise available to the public or anonymised so it is not possible to identify a particular person]".
41. Sections 348 and 349 FSMA prohibit the FCA, or any person obtaining "confidential information" directly or indirectly from the FCA, from disclosing "confidential information" except in certain limited circumstances, for example where there is the consent of the person who provided it and, if different, the person to whom it relates. A person who discloses information in contravention of section 348 FSMA is guilty of an offence under section 352 FSMA.
42. The FCA explained that section 348 of FSMA, which triggers the exemption in section 44 of the Act, is a self-contained regime and does not depend for its operation on more general legal or lay concepts of

confidentiality. If the tests in section 348 are met, the restriction on disclosure applies.

43. In its submission the FCA has also commented on section 348(4) FSMA. This states that information is not confidential if (a) 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. The FCA considers that sub-section (4) is not a relevant consideration in this case, to the information that has been withheld, because (a) the information falling within this exemption is not publicly available and (b) it would be impossible for us to make the information anonymous, as it is clearly identifiable as relating to the subject matter named in the request.
44. On the subject of consent, section 348(1) FSMA allows "confidential information" to be disclosed if consent has been obtained from the person that provided the FCA with the information and, if different, the person to whom it relates. The FCA confirmed that in this case it does not hold consent.
45. As noted in paragraph 36 of the decision of the Information Rights Tribunal case of 'Norman Slann and The Information Commissioner and FCA' (EA/2005/0019), the short answer - which in the Tribunal's view fully justified non-disclosure - was that failure to obtain consent necessarily engaged the prohibition in section 348(1) of FSMA. Therefore, where the information is covered by section 348 of FSMA then section 44 of the Act is engaged. As explained above disclosure of any such confidential information, without consent, is in breach of section 348 of FSMA and is a criminal offence.
46. The FCA made the following observation. In other cases before the Court of Appeal and the Information Rights Tribunal, the significance has been recognised of section 348 FSMA within the regulatory regime. In summary, the objects are to protect the privacy of persons providing information to the FCA and to assist in the exercise by the FCA of its regulatory functions, by encouraging the free-flow of information to the regulator.
47. To conclude, provided the criteria for information being "confidential", as set out in FSMA section 348 are met, which in this case FCA considers they are, there is a statutory bar from the FCA disclosing confidential information received from an external third party and where this relates to its or another party's business or other affairs, and where it is not prevented from being confidential by subsection 348(4) FSMA. As such the FCA is satisfied that it has correctly applied section 44(1)(a) of the Act to the withheld information.

48. The FCA notes that section 44 of the Act is an absolute exemption and there is no need for it to consider whether there might be a stronger public interest in disclosing the information than in not disclosing it. Consequently, the FCA's position is that it is prohibited from disclosing to the complainant, and the public at large, any information which was received by the FCA while performing its function as registrar for mutual societies and which is not in the public domain or where the relevant consents have not been obtained.

Conclusion

49. The Commissioner considers that the FCA has addressed the complainant's arguments satisfactorily and has made a strong supporting case for its application of the section 44 exemption. The Commissioner has decided that the FCA can rely on section 44(1)(a) of the FOIA to withhold the information requested in part 2 of the request; the information was received by the FCA, it is confidential information and the FSMA prohibits the FCA from disclosing it.

Right of appeal

50. Either party has the right to appeal against this decision notice to the First-tier Tribunal (Information Rights). Information about the appeals process may be obtained from:

First-tier Tribunal (Information Rights)
GRC & GRP Tribunals
PO Box 9300
LEICESTER
LE1 8DJ

Tel: 0300 1234504

Fax: 0870 739 5836

Email: grc@justice.gov.uk

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

51. If you wish to appeal against a decision notice, you can obtain information on how to appeal along with the relevant forms from the Information Tribunal website.
52. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

Signed

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