

Freedom of Information Act 2000 (FOIA)
Environmental Information Regulations 2004 (EIR)

Decision notice

Date: 4 June 2021

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

Decision (including any steps ordered)

1. The complainant has requested communications the Financial Conduct Authority (FCA) has had with Danish Authorities and Credit Suisse about Danske Bank in the context of money laundering. The complainant also requested documents and communications regarding a named individual and records relating to the evaluation the FCA were conducting.
2. The FCA provided some information but withheld the remaining information on the basis of sections 27, 31, 40 and 44 of the FOIA.
3. The Commissioner's decision is the FCA has correctly applied the section 31(1)(g) with 31(2)(c) and (d) exemptions and the balance of the public interest favours maintaining the exemption and withholding the information.

Request and response

4. On 28 August 2019 the complainant made a request to the FCA in the following terms:

"The Danish Broadcasting Corporation would like to request any records relating to:

1) Communications that the FCA has had with Danish authorities about the money laundering case against Danske Bank and the individuals involved in the case.

2) Any specific documents and communication relating to the individual: [name redacted].

3) Records regarding the evaluation that the FCA is conducting:

https://register.fca.org.uk/ShPo_individualdetailsPage?id=003b000000LVSG5AAP

4) Any communication that the FCA has had with the banking institution Credit Suisse International regarding the above mentioned individual and matter."

5. The FCA responded on 23 January 2020 stating that it considered the requested information was exempt from disclosure under section 27 of the FOIA. The FCA also stated that it considered that section 31 of the FOIA would apply and some of the information would be exempt under section 40 as it related to personal data and section 44 where it related to 'confidential information'.
6. The complainant requested an internal review on 27 January 2020 and the FCA conducted an internal review and provided the outcome on 29 May 2020.
7. The internal review concluded that some of the information could be disclosed and this was provided, but it upheld the decision to withhold the remaining information under the cited exemptions – section 27, 31, 40 and 44 of the FOIA.

Scope of the case

8. The complainant contacted the Commissioner on 12 June 2020 to complain about the way his request for information had been handled.
9. The Commissioner considers the scope of her investigation to be to determine if the FCA has correctly withheld the remaining information on the basis of any of the cited exemptions – section 27, 31, 40 and 44 of the FOIA.

Reasons for decision

Section 31 – law enforcement

10. Section 31(1) of the FOIA states that:

"Information which is not exempt information by virtue of section 30 is exempt information if its disclosure under this Act would, or would be likely to, prejudice –

(g) the exercise by any public authority of its functions for any of the purposes specified in subsection (2),

11. The relevant subsections of section 31(2) that the FCA argues are applicable here are:

(c) the purpose of ascertaining whether circumstances which would justify regulatory action in pursuance of any enactment exist or may arise,

(d) the purpose of ascertaining a person's fitness or competence in relation to the management of bodies corporate or in relation to any profession or other activity which he is, or seeks to become, authorised to carry on

12. The exemption can be engaged on the basis that disclosing the information either "would" prejudice the regulatory function, or the lower threshold that disclosure only "would be likely" to prejudice that function. For the Commissioner to be convinced that prejudice "would" occur, she must be satisfied that there is a greater chance of the prejudice occurring than not occurring. To meet the threshold of "would be likely to" occur, a public authority does not need to demonstrate that the chance of prejudice occurring is greater than 50%, but it must be more than a remote or hypothetical possibility.
13. The Commissioner's approach to the prejudice test is based on that adopted by the Information Tribunal in *Christopher Martin Hogan and Oxford City Council v the Information Commissioner* EA/2005/0026 and 0030. This involves identifying the applicable interests within the exemption, establishing that the prejudice is real, actual or of substance, and showing there is a causal link between the disclosure and the prejudice claimed.
14. As background, the Commissioner considers it is important to explain the legislative background to the FCAs functions. The Financial Services and Markets Act 2000 (FSMA) regulates financial services and markets in the UK. Under the FSMA the FCA has functions of monitoring firm's and key individual's compliance with the FCAs requirements and is provided with powers to investigate matters in relation to the exercise of its functions and, if appropriate, take action in relation to misconduct.
15. In addition, the FCA has the functions of ascertaining a person's fitness or competence in relation to the management of bodies corporate or in relation to any profession or other activity which he or she is, or seeks

to become, authorised to carry on. Under Part V of FSMA, the FCA has the powers to grant and to withdraw approvals to perform certain activities (known as “controlled functions” and “designated senior management functions”). In exercising these powers, the FCA must satisfy itself as to the fitness and propriety of the persons who are to perform, or are performing, the specified functions.

16. If the FCA commences an investigation, this means that the FCA considers that there are circumstances that suggest that a breach of its rules or principles may have occurred. The circumstances may come to the FCAs attention from several sources, including without limitation the FCAs own inquiries, whistle-blowers, information provided by competitors, complaints, evidence of consumer harm and, of relevance here, self-reporting by a firm or individual themselves.
17. It is the FCAs published policy not to publish the fact of an investigation or other regulatory action except in exceptional circumstances, as set out in [chapter 6 of the Enforcement Guide](#). Exceptional circumstances largely relate to issues that are already in the public domain where it would be expected that the FCA would initiate an investigation.
18. If, on conclusion of an investigation, the FCA decides to take action against the person in question, it will issue a Warning Notice, setting out the proposed action and the reasons for it, or issue proceedings. Any publicity about proceedings is governed by the rules and statutory regime. In the case of a disciplinary Warning Notice (but not other types of Warning Notice e.g. to cancel a firm’s permission), the FCA may, where permitted by section 391(1)(c) FSMA, publish such information about the matter to which the Warning Notice relates as it considers appropriate, unless to do so would be unfair, prejudicial or detrimental in the circumstances described in section 391(6). The FCA consulted on how it should exercise this section 391(1)(c) power (in CP 13/81) and, as a result, its policy when warning notice statements will be published is now set out in [Enforcement Guide 6.2.2](#)
19. If the FCA subsequently issues a Decision Notice, the FCA must publish such information about the matter to which the Decision Notice relates as it considers appropriate (section 391(4) FSMA); and similarly, for any subsequent Final Notice. The duty in both situations is also subject to section 391(6) FSMA.
20. There is therefore a discretion, expressly set out in FSMA, that publicity about the FCAs views of a person’s possible wrongdoing may be published at Warning Notice stage, at the conclusion of an investigation, provided certain criteria are met; and the FCA is under a duty to publish such information at Decision Notice and Final Notice stages, subject to section 391(6) FSMA. The FCA will not normally publish details about an

investigation (that is, preceding a Warning Notice), save for exceptional circumstances.

21. Turning to the circumstances in this case; the FCA has explained the statutory basis that it has for undertaking the functions at sections 31(2)(c) and (d) of the FOIA. The Commissioner must now consider if the FCA has demonstrated that disclosing the specific information in question would be likely to prejudice these functions.
22. The FCA has argued any prejudicial effect to its ability carry out these functions would not just occur during an ongoing investigation but also over time as disclosure would lead to a loss of flexibility in its use of supervisory or enforcement processes, or could lead the subjects or potential subjects or third parties to act in a way that might harm the conduct of the regulatory functions.
23. The FCA has concerns that disclosure of the requested information may lead firms or individuals to think they can reduce the possibility of any non-compliance being detected by the FCA because they understand the matter and priorities the FCA has (or has not) decided to direct its resources towards. The FCA believes that this may result in firms or individuals knowing how to phrase responses to avoid further investigation. The FCA considers that non-disclosure is more likely to raise overall standards in the financial services industry if firms and individuals are not able to second guess or predict what specific matters will be subject to a more detailed consultation or investigation, the resources that will be devoted to it and the methodology the FCA will use.
24. It is argued that if firms or individuals cannot be certain what areas of their business will be the subject of more detailed reviews or monitoring by the FCA, this will help to ensure they are not tempted to do the minimum necessary or tailor responses to regulatory enquiries and investigations to disguise their true position.
25. The FCA states that to the extent that they are, or have been, investigating (or considering investigating) the firms or individuals in this case, disclosing the requested information may tip off the markets or firms or individuals in similar positions, of the FCAs regulatory interest in a particular issue or activity and how the FCA invests its time and resources into investigating this.
26. The FCA also argues that prejudice and disruption would be likely to arise to the FCAs regulatory functions from disclosure of the information requested, as this could impact on the flow of information the FCA receives as part of its role as the UK's financial regulator. The FCA argues that a regulatory body will be dependent on its communications

to and from (and about) persons that operate in the financial services sector, and the public generally, being full and frank in nature so that it can effectively provide advice, investigate and consider any abuses of its regulatory requirements.

27. As already detailed, the FCAs published policy is not to publicise the fact or an investigation or regulatory action except in exceptional circumstances and the FCA does not consider any such circumstances apply in this case.
28. Taking into account all of these arguments and accepting that the FCA has the functions it has described that are relevant to the exemption; the Commissioner accepts that disclosing the requested information would be likely to prejudice the FCAs ability to ascertain whether regulatory action may be required or ascertaining if a person is competent in relation to the management of bodies corporate.
29. The Commissioner recognises that most of the FCAs arguments relate to the chilling effect that may occur as a result of disclosure on its interactions with the sector it regulates in various different ways.
30. The Commissioner accepts there will be occasions where a regulator needs to create a degree of uncertainty, amongst those they regulate, as to where its resources may be focused at any given time and how it conducts its investigations. The more information about how a regulator allocates its resources and the activities it is concerned with, added with information on how it goes about investigating matters, the better able an unscrupulous entity will be to make an accurate assessment of the likelihood of a particular activity coming to the attention of that regulator and therefore to determine the risk of carrying out that activity.
31. The Commissioner accepts the FCAs arguments that its ability to regulate effectively depends on a free flow of information to and from the companies it regulate. Whilst companies which are found to have broken the law should expect to be punished (and have that punishment made public), those that are genuinely unsure must be able to approach the regulator for guidance – without that fact being disclosed to the world at large. The FCA has clearly demonstrated, with reference to its Enforcement Guide, that it has a strategy for publication of action.
32. It may also be the case, given that the information in this case relates to a cross-border issue, that disclosure may have a chilling effect on international partners who may be more cautious in their interactions with the FCA if they think information may be disclosed.

33. The Commissioner is therefore satisfied that the chance of prejudice to the appropriate functions occurring is more than hypothetical and the harms identified are actual and of substance. Given that there is a clear link between disclosure of the requested information and the potential harms, the Commissioner is satisfied the section 31(1)(g) exemption, in conjunction with subsections 31(2)(c) and (d), is engaged.
34. Whilst the Commissioner is satisfied the exemption is engaged she must still consider the public interest test.

Public interest arguments in favour of disclosure

35. At the time the request was made it was publicly known that Danske Bank had come under investigation for failure to prevent money laundering¹.
36. The complainant considers there is a strong public interest in this issue and that the communications between British and Danish authorities are a crucial part of the evidence that should be publicly available.
37. The complainant has highlighted that in November 2018 the bank was formally charged. Nine former executives were preliminarily charged in the case with regard to possible shortcoming in the prevention of money laundering and it is in the public interest for all communications around the investigation to be made publicly available.
38. The FCA accepts there can positive advantages from publishing the facts of an investigation or other regulatory action. For example, where the matters under consideration have become the subject of public concern, speculation or rumour and publication would allay concern or contain speculation.

Public interest in maintaining the exemption

39. When conducting the public interest test in respect of a prejudice-based exemption, the Commissioner generally acknowledges that by accepting the exemption is engaged she also accepts there is a public interest in preventing that prejudice occurring. How much weight is given to this will depend on the severity of the prejudice and the likelihood of it occurring.
40. In terms of the public interest, the FCA has again stressed that it publishes considerable information on its website about what its

¹ [Danske: anatomy of a money laundering scandal | Financial Times \(ft.com\)](https://www.ft.com/content/2018/11/28/danske-bank-money-laundering-scandal)

expectations of firms and individuals are, what its regulatory priorities are at any given time and what the key risks it sees to the financial services sector. These publications include, amongst other things, the FCAs Handbook of rules and guidance; its consultation papers and policy statements; the FCAs annual Business Plan; speeches; press releases. As already noted, the FCAs policy is not to publish the fact of an investigation or other regulatory action except in exceptional circumstances; the discretion under section 391(1) FSMA and the FCAs policy in Enforcement Guide 6.2 to publish Warning Notice statements; and the FCAs duty to publish information concerning its Decision Notices and Final Notices. It is through such means, rather than publication of the fact of an investigation or other regulatory action, that the FCA states it sets standards for the regulated community.

41. The FCA does not consider that publishing the fact of an investigation or regulatory action into a particular firm or individual would cause them to make permanent changes for the benefit of consumers. The FCA considers that disclosure could have the opposite effect to raising standards. Instead, it argues that disclosure could create the following risks:
 - it will discourage firms or individuals from self reporting breaches or potential breaches;
 - it will encourage firms or individuals to take steps to avoid detection rather than improve standards;
 - it will tailor firms or individuals' compliance to the matters the FCA is investigating, and has investigated, rather than compliance across the range of their regulatory obligations; and
 - it will hinder the FCAs proper performance of its regulatory functions in the monitoring and investigation of firms and individuals
42. The FCA stresses that it has a strategic objective to ensure that the relevant market functions well. It would be contrary to the public interest to publish the fact of an investigatory or regulatory action outside the circumstances set out in FSMA and chapter 6 of the Enforcement Guide, as this could trigger market movements and speculation that could be detrimental to consumers. The robust statutory regime the FCA states that it has sets out when such action is published and protects against these risks
43. The FCA has pointed to the Commissioner's own guidance on the [section 31 exemption](#) which states that investigators need private thinking space (safe space) to explore all aspects of a case without interference

from the press or public. The FCA also points to the parts of the guidance which state that even if a provider of information to an investigating authority is not a confidential source, there is still a public interest in not discouraging others from cooperating with public authorities and supplying them with information they need on a voluntary basis.

44. Following on from this the FCA argues it is important that a regulator can determine whether any wrongdoing or undesirable practices have taken place and form a balanced assessment before making that assessment available to the world at large.

Balance of the public interest test

45. The Commissioner recognises there will almost always be a public interest in transparency within public authorities. As a public authority, the FCA should be accountable for the way it operates.
46. In this case, the Commissioner recognises that this issue involved large sums of money and has had a large impact on the Bank and trust in the financial sector. It is not unreasonable therefore to argue that disclosing information which highlights how the regulator has looked into this and the communications it has had with other financial institutions would be of some public interest in showing that this is being thoroughly and appropriately investigated from every angle.
47. The Commissioner notes that the FCA has referred to exceptional circumstances in which publication can be made outside of its usual processes. These circumstances are set out in Enforcement Guide 6.1.2 and are where the following advantages would arise:
- to maintain public confidence in the financial system or market; to protect consumers or investors;
 - to prevent widespread malpractice;
 - to help the investigation or regulatory action itself, for example, by bringing forward witnesses; or
 - to maintain the smooth operation of the market.
48. The Commissioner argues that the first bullet point here is relevant and if there is sufficient public interest in disclosure this 'exceptional circumstance' would be applicable and would not prevent disclosure.
49. That being said, the Commissioner considers the arguments for maintaining the exemption are compelling.

50. There is a considerable public interest in having a strong and effective regulator, able to take decisive action where necessary and with a variety of tools at its disposal. The FCA has clearly, and in detail explained why disclosing the requested information would reduce its ability to carry out its regulatory functions effectively. In particular the Commissioner attributes significant weight to both the chilling effect and safe space arguments as it is clear that a regulator should be afforded the time and space to investigate matters appropriately and with full cooperation from all parties. There is a time and place for transparency and publication and the FCA has demonstrated it is not only aware of this but has a clear publication process that does allow for publication in exceptional circumstances.
51. In this case the Commissioner does not consider that there is a wide enough public interest in the disclosure of this information to outweigh the public interest in withholding the information, particularly at the time of the request when investigations were ongoing and final decisions had not been reached creating a greater weight to maintaining the exemption.
52. The Commissioner is therefore satisfied that disclosing the information would be likely to have the prejudicial effects identified by the FCA. Section 31(1)(g) with sections 31(2)(c) and (d) are therefore engaged and the public interest favours maintaining the exemption. As such the Commissioner has not gone on to consider the application of the other exemptions.

Right of appeal

53. 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

54. 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.
55. 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

Jill Hulley
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