

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 1 April 2025

Public Authority: Financial Reporting Council
Address: 13th Floor
1 Harbour Exchange Square
London
E14 9GE

Decision (including any steps ordered)

1. The complainant requested a copy of a third party's response to a consultation. The Financial Reporting Council (FRC) refused the request, citing section 41 (information provided in confidence) of FOIA.
2. The Commissioner's decision is that the FRC is not entitled to rely on the exemption at section 41(1) of FOIA to withhold the requested information.
3. The Commissioner requires the FRC to take the following step to ensure compliance with the legislation:
 - disclose the requested Consultation Response.
4. The FRC must take this step within 30 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. By way of background, the FRC told the Commissioner:

"The Financial Reporting Council (the FRC) is responsible for issuing and maintaining technical actuarial standards (TASs). Members of

the Institute and Faculty of Actuaries (the IFoA) must comply with the FRC's TASs in their technical actuarial work in the geographic scope of the standards. The FRC keeps the TASs and other actuarial standards under regular review. The FRC consults on proposed changes to allow an opportunity for all interested parties to comment on the proposals and for the FRC to gauge the appropriateness and level of acceptance of the proposals.

The FRC's TAS 300 and 310 consultation was issued in May 2023 as there had been various developments since the FRC's previous review of TAS 300 including: the pensions freedoms introduced in 2015 and pension schemes increasingly exploring member options to accelerate the timetable to end games leading to greater scrutiny of factors used for individual calculations; and an expansion in the range of end game solutions, including superfunds for which new legislation has been proposed and The Pensions Regulator has introduced new guidance. In light of these changes, amendments to TAS 300 were proposed to maintain quality of actuarial advice. A new TAS, TAS 310, was also proposed in response to the introduction of the legislative framework for Collective Money Purchase pension schemes introduced in the Pensions Schemes Act 2021."

Request and response

6. On 18 June 2024, the complainant wrote to the FRC and requested information in the following terms:

"I am seeking a copy of the responses to the FRC consultation in 2023 on actuarial standard Pensions TAS 300 that were not published on the FRC website".

7. The FRC responded on 8 July 2024. It confirmed it holds the requested information but refused to disclose it, citing section 41 (information provided in confidence) of FOIA.

8. The complainant wrote to the FRC on 29 July 2024, disputing the application of section 41 and requesting an internal review. In their correspondence, they said:

"I know that the IFoA submitted a response because, after my FoIA request, I received [an email from the IFoA summarising the main points raised by the IFoA in the response to TAS300].

I wish to narrow my request to the response from the Institute and Faculty of Actuaries (IFoA). If the IFoA submitted more than one

response, please treat this request as covering each such response”.

9. Having carried out an internal review on the basis of that narrower request, the FRC wrote to the complainant on 27 August 2024.
10. The FRC maintained its application of section 41 to withhold the information in scope of the narrower request.

Scope of the case

11. The complainant contacted the Commissioner, disputing the FRC’s application of section 41 to the information falling within the scope of their narrowed request. In doing so, they raised a number of grounds of complaint, including the following:
 - the importance of the subject matter of the consultation;
 - that the IFoA’s request for confidentiality, with respect to its response to the FRC consultation, contradicts its established policy and practice of responding to a wide range of consultations and to making its responses public;
 - that the IFoA would not suffer detriment from disclosure;
 - even if there was an actionable case, this would not be likely to succeed; and, in any event
 - that there is a public interest defence in scrutinising the FRC’s decision-making.
12. The Commissioner understands that the consultation referred to in the request opened in May 2023, with comments to be received by 4 August 2023.
13. The information that is the subject of this decision notice is the IFoA’s response to the consultation (the Consultation Response).
14. The following analysis considers the FRC’s application of section 41(1) to withhold the requested information.

Reasons for decision

Section 41 – information provided in confidence

15. Section 41(1) of FOIA states that:

“(1) Information is exempt information if—

(a) it was obtained by the public authority from any other person (including another public authority), and

(b) the disclosure of the information to the public (otherwise than under this Act) by the public authority holding it would constitute a breach of confidence actionable by that or any other person”.

16. Therefore, for this exemption to be engaged, two tests have to be met; the public authority has to have obtained the information from a third party **and** the disclosure of that information has to constitute an actionable breach of confidence.

Was the information obtained from another person?

17. The Commissioner is satisfied that the Consultation Response was clearly sent to the FRC by a third party, namely the IFoA. The requirement of section 41(1)(a) is therefore met.

Would disclosure of the information constitute an actionable breach of confidence?

18. With regard to whether disclosure would constitute an actionable breach of confidence the Commissioner follows the test of confidence set out by Judge McGarry in *Coco v A N Clark (Engineering) Ltd* [1968] FSR 415. This judgment suggested that the following three elements should be considered in order to determine if information was confidential:

- whether the information had the necessary quality of confidence;
- whether the information was imparted in circumstances importing an obligation of confidence; and,
- whether an unauthorised use of the information would result in detriment to the confider.

19. Further case law has argued that where the information is of a personal nature it is not necessary to establish whether the confider will suffer a detriment as a result of disclosure.

Does the information have the necessary quality of confidence?

20. In the Commissioner’s view, information will have the necessary quality of confidence if it is more than trivial and not otherwise accessible.
21. He recognises that information that is already in the public domain will not possess the necessary quality of confidence. In that respect he considers that information will be in the public domain if it is realistically accessible to the general public at the time of the request.

22. The FRC argued that it was clear that the requested information was more than trivial on the basis that it is a professional body's considered response to a consultation.
23. With respect to whether the information is otherwise accessible, the FRC argued that the Consultation Response was not realistically accessible to the public at the time of the request. It acknowledged that the IFoA had provided the requester with, what the FRC understood to be, a very high-level summary of its response. Specifically, it noted that the IFoA had chosen not to provide the complainant with its full response or the detail contained within it. The FRC considered that providing the complainant with a summary did not remove the quality of confidence of the Consultation Response.
24. The Commissioner agrees that this limb of the test is met – the information possesses the necessary quality of confidence.

Was the information imparted in circumstances importing an obligation of confidence?

25. The FRC noted that its consultation document provided a clear option for responders to request that their response be treated confidentially.
26. With respect to the response under consideration in this case, the FRC argued that there was an explicit expectation of confidence at the time of the request, referring to the IFoA's 'clear wishes' that the Consultation Response should be treated confidentially.
27. It also explained that the IFoA confirmed to the FRC that its response was provided on a confidential basis.
28. From the evidence he has seen, the Commissioner is satisfied that this limb of the test is also met – the information was imparted in circumstances importing an obligation of confidence.

Would an unauthorised use of the information result in detriment to the confider?

29. The FRC stated that disclosure would undermine the system of informal feedback between the IFoA and FRC which allows for the free expression of views.
30. It argued that, if the IFoA considered it likely that its feedback to the FRC was likely to be disclosed against its wishes, "it would no doubt feel obliged to temper its responses" which would, in turn, be detrimental to its ability to represent its members "in the manner which it considers most appropriate". It did not, however, provide any evidence in support of that view.

31. Furthermore, it considered that disclosure may be of detriment to the FRC itself if respondents in future consultations did not respond at all, or responded on the basis that their responses may be disclosed, even if they have requested confidentiality.
32. With respect to the FRC's arguments about detriment to itself, the Commissioner notes that the test relates to detriment to the confider, not to the public authority in receipt of the information.
33. From the evidence he has seen, the Commissioner accepts that the IFoA attaches importance to the information that is the subject of the request.
34. However, as to whether an unauthorised use of the information would result in detriment to the confider, the Commissioner is not satisfied that the FRC has put forward a realistic basis for claiming that the IFoA could suffer detriment as a result of disclosure of the Consultation Response.
35. In the absence of a finding of detriment to the confider, the Commissioner is unable to find that the disclosure of the information constitutes a breach of confidence.
36. It follows that section 41(1) is not engaged.

Right of appeal

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

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

Tel: 0203 936 8963

Fax: 0870 739 5836

Email: grc@justice.gov.uk

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

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

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