

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 10 March 2014

Public Authority: Financial Conduct Authority
Address: 25 The North Colonnade,
Canary Wharf, London, E14 5HS

Decision (including any steps ordered)

1. The complainant has requested information relating to the Financial Conduct Authority (FCA) and the European Commission in respect of CP 12/19 (marketing of 'unregulated collective investment schemes').
2. The Commissioner's decision is that the FCA has correctly applied section 44(1)(a) to the withheld information.
3. The Commissioner does not require the FCA to take any steps as a result of this decision notice.

Request and response

4. On 9 July 2013, the complainant wrote to the FCA and requested information in the following terms:

"I would like to know about any discussions or correspondence between the conduct regulator (FSA or FCA) and the European Commission in respect of CP 12/19 (marketing of 'unregulated collective investment schemes'): whether this specific Consultation Paper or any previous draft proposals were discussed with the European Commission and, if so, copies of any correspondence and minutes of any meetings."

5. The FCA responded on 31 July 2013. It stated that it held the information but refused to disclose it citing section 44(1)(a) of the FOIA as its basis for doing so. In addition it cited section 27 of the FOIA (International relations).

6. Following an internal review the FCA wrote to the complainant on 2 September 2013, in which it maintained its original position. However it provided further explanation regarding its application of the exemptions.

7. On 3 September 2013 the complainant wrote to the FCA again stating:

Fundamentally, it appears from the face of the record that you misunderstand the nature of the information I am seeking and of the European institutions who are the third party in this instance. You draw my attention to Normal Slann v IC UKIT EA/2005/0019. This however would need to be distinguished in the present instance: I am not interested in information about, from, or produced in conjunction with, private sector building societies or other authorised persons, or otherwise of the type meeting the three purposes of s.348 outlined by the Court of Appeal in Real Estate Opportunities v Aberdeen Asset Managers & Ors [2007] EWCA Civ 197 and which FSA has previously relied upon before the Tribunal. Instead, I am interested in information received from, or produced in conjunction with, the European Commission as to the implementation and application of European Law.

A specific point refers to consent. Your letter makes points, again citing Slann, that the FoI legislation does not require you to seek consent from third parties and that in your experience, third parties rarely grant it anyway. However, my email of 31 July 2013 did not ask you to seek consent from third parties in general; It asked you whether or not you had sought consent the European Commission. I am sure that you will appreciate that unlike the Building Societies in Slann, the EU is supposedly founded on principles of transparency [Article 1 of the Treaty], with a Commission that has a specific role in implementing and enforcing EU Law [Article 17 of the Treaty] (irrespective of whether discussions are subsequently disclosed), and whose governing documents enshrine a right of citizens and companies to access the documents of its institutions [Article 42 of the Charter]. Specifically, your reference to Slann ignores the relevance in the current instance of Article 5, Regulation EC 1049/2001 which would be of direct application and contrary to your references to domestic FoI indeed imposes a positive obligation on Member State institutions to consult the Commission in cases such as this.

8. The FCA responded on 10 September 2013 and provided a further explanation. However, it did not disclose the requested information.
9. Further information provided by the complainant relating to the background of this case is provided in an annexe at the end of this decision notice.

Scope of the case

10. The complainant contacted the Commissioner on 16 September 2013 to complain about the way his request for information had been handled.
11. During the course of the Commissioner's investigation, the FCA disclosed some of the requested information. The remaining information was withheld by virtue of section 27(1), section 40(2) and section 44(1)(a). The Commissioner considers the scope of this case to be to determine if the FCA has correctly applied the exemptions it has cited to the withheld information.

Reasons for decision

Section 44(1)(a)

12. Section 44 FOIA provides that:

"(1) Information is exempt information if its disclosure (otherwise than under this Act) by the public authority holding it-

(a) is prohibited by or under any enactment,

(b) is incompatible with any Community obligation, or

(c) would constitute or be punishable as a contempt of court."

13. The FCA has explained that the information that falls within section 44(1)(a) is information received by the FCA for the purposes of or in the discharge of its functions under section 348 of the Financial Services and Markets Act 2000 (FSMA). That is, for the purpose of ensuring that its regulatory requirements to implement the Alternative Investment Fund Managers Directive (AIFMD) and the Markets in Financial Instruments Directive (MiFD) have been transposed properly into UK legislation. In this particular request, the FCA has taken the position that the views, opinions and the like received from officials of the European Commission, even though in an informal context, satisfy the test in section 348 for the information to be "confidential".
14. Section 348(1) of the FSMA states that –

"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.

15. The operation of the statutory bar is dependent on the consideration of the following issues; firstly, whether the FCA can be classified as a primary recipient, secondly, whether the request is for 'confidential information' and if so, thirdly, whether there is consent to the release of the information or whether this could be obtained.
16. The FCA stated that although it was perhaps not an obvious application of section 348, it considered that the information meets the criteria in section 348(2) FSMA. That is:
 - i. the information relates to the "other affairs" of the Commission if not its "business;
 - ii. on usual statutory interpretation principles, the Commission is a "person" as that term is defined in the Interpretation Act 1978 (the information was not about the officials themselves); and
 - iii. the FCA received the information when carrying out its functions under FSMA, that is, implementing its (or EU) policies through making rules and issuing guidance.

Is the FCA a primary recipient?

17. A primary recipient is defined at section 348(5) of the FSMA and includes the FCA. The Commissioner therefore accepts that the FCA is a primary recipient for the purposes of the FSMA.
18. The Commissioner accepts the FCA's application of section 44 to the withheld information on this basis.

Is the information "confidential"?

19. Section 348 also defines confidential information for the purposes of the legislation. That is, information that relates to the business or other affairs of any person, was received by the primary recipient for the purposes of, or in the discharge of, any of the FCA's functions and has not already been made available to the public.
20. The Commissioner has been advised by the FCA that it sought consent from the European Commission regarding disclosure. It agreed to disclosure of the majority of the information requested, apart from the 'third bullet point' which has been redacted in its entirety. It is therefore left for the Commissioner to decide whether the withheld information

satisfies the definition of confidential information set out in FSMA. If so, the information will be exempt information under section 44 of FOIA.

21. There is no doubt that the information requested relates to the business or other affairs of any person, namely the European Commission featured in the request, as required under section 348 of FSMA. Furthermore, the Commissioner is satisfied that should the information be found to have been received by the FCA, it would have been received for the purposes of discharging the FCA's function of regulating the financial services and markets in the UK. The key question therefore is whether the information was *received* by the FSA as the primary recipient.
22. A dictionary definition of 'received' connotes something acquired by one party from another. In considering whether the withheld information could reasonably be said to be *received*, the Commissioner has initially found it helpful to refer to his experience of the application of section 41 (information provided in confidence) of FOIA. This section also covers the issue of *receiving* information, albeit in the specific context of a public authority *obtaining* information from a third party.
23. The Commissioner appreciates that what constitutes *received* information for the purposes of FSMA is not necessarily clear cut.
24. In his decision on FS50218346, which involved the FSA and the application of section 44, the Commissioner acknowledged that it may not always be immediately obvious whether information could be said to be received. For example, he recognised that in negotiations involving discussions going backwards and forwards between the FSA and a third party, the origin of recorded information may be obscure. Therefore, to enable him to reach a decision on whether section 44 of FOIA was engaged, he considered the intention of the authors of the prohibition set out at section 348 of FSMA:

"19. [...] Having examined the wording of section 348 of FSMA, the Commissioner notes it applies a deliberately wide definition of what constitutes "confidential information" that may not be disclosed. The definition in section 348 of FSMA does not apply any restriction to when the information was "received" or whether it has been processed once already by the FSA and is being used for the second time [...]"

25. The Commissioner considers that a wide definition of "confidential information" must similarly be applied here. The Commissioner is therefore satisfied that the withheld information falls within the definition of confidential information contained in section 348 of FSMA.

26. He has also not been provided with any evidence that indicates the withheld information has been made available to the public in circumstances which would mean the information was not confidential under section 348(4) of FSMA.
27. The Commissioner has therefore decided that the withheld information is exempt information under section 44 of FOIA by virtue of section 348 of FSMA.
28. As the Commissioner has decided that section 44 of FOIA is engaged, he has not gone on to consider the application of section 27(1) of FOIA to the same information.

Right of appeal

29. 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: 0116 249 4253

Email: GRC@hmcts.gsi.gov.uk

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

30. 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.
31. 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

Pamela Clements
Group Manager, Complaints Resolution
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF

Annexe

32. The Public Authority ('PA') subject to the complaint is incorporated in England & Wales with Company No. 01920623.

Since 02 April 2013, it has been called the 'Financial Conduct Authority' per s.1A, Financial Services and Markets Act (2000)(as amended). It was originally incorporated in June 1985 as the Securities and Investments Board ('SIB'). Between 28 October 1997 and 01 April 2013, it was known as the 'Financial Services Authority'.

33. Since 29 April 1988, the Public Authority has been responsible in one guise or another for regulation of firms advising on, managing, dealing in or arranging investment transactions. Collective Investment Schemes have been regulated in the United Kingdom in some guise since 1939. Unregulated Collective Investment Schemes however have continued to be available in some guise subject to certain limitations in their marketing. Under the Prevention of Fraud (Investments) Act (1939) and its eponymous 1958 successor, such unregulated schemes could in effect only be promoted by members of the stock exchange or securities dealers association, or by holders of a Principal's license from the DTI.
34. With the advent of the Financial Services Act (1986), and the influx of thousands of new firms to regulation, the promotion of such schemes by authorised personas was restricted with the Public Authority being given a power to create exemption through regulations [s.76, FSA(1986)] with much the same structure continuing in the successor legislation.
- On 29 April 1988, the Public Authority made regulations granting such exemptions where firms promoted unregulated schemes to their established customers, where they believed such investments would be suitable.
 - In 1990, the Public Authority consulted on further exemptions, making it clear that the 'established customers' exemption was aimed at "ordinary private investors" as opposed to classes like experienced investors;
 - 1991 saw the 'established customer' exemption extended to 'new accepted customers' subject to the 'suitability' requirement and the firm having an ongoing service-relationship with a client governed by written terms.
 - Subsequent years saw further relaxations e.g. the Treasury introducing a further raft of exemptions based on high net worth or sophisticated investor certification.

35. In November 2007, the United Kingdom was required to implement the Markets in Financial Instruments Directive ('MiFID') by which the EU sought to standardise certain aspects of conduct regulation throughout the EU. This included standardisation of the suitability and appropriateness rules firms were required to meet when making recommendations to, or discretionary decisions for, clients. This Directive made no particular rules on the suitability or otherwise of classes of investments, whether unregulated collectives or otherwise.
- Article 4 of the MiFID Implementing Directive barred member states from imposing additional requirements to areas covered by the directive.
 - The Public Authority's 'Conduct of Business' Rules were rewritten to accommodate these changes.
 - In the financial promotion rules, all the existing exemptions to the marketing restriction on unregulated collectives were retained.
36. In 2009, the Public Authority began thematic work on the use of unregulated collective investment schemes. Its work allegedly found some concerns as to the suitability of sales. Its pronouncements however appeared to suggest a more restrictive approach to the marketing restriction and exemptions than had hitherto been understood (either by the industry or indeed the regulator). There were also numerous pronouncements and indeed individual supervision exercises where the Public Authority proceeded on the basis of a prima facie assumption that all unregulated collective investment schemes had defined characteristics of being high risk and that firms were obliged to proceed on that basis.