

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 7 July 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 about an investigation into a named company. The Financial Conduct Authority (FCA) refused to confirm or deny whether it held the information requested under section 43(3) and 44(2) of the Freedom of Information Act 2000 (FOIA).
2. The Commissioner's decision is that the FCA was correct to neither confirm or deny whether it held the information requested under section 44(2) FOIA.
3. The Commissioner requires no steps to be taken.

Request and response

4. The complainant made a request for the following information:
"1. Did the FCA (or FSA at the time) in the course of investigating [named individual] deem it fit to extend their investigation to the lender, [named company], seeing that they were the lenders in almost all the cases picked to investigate. And seeing that if a small broker with limited resources 'erred' in the discharge of his duties, perhaps a giant corporation with larger resources should have picked up on it and not made the same mistake. Or did they simply look away?
2. If the FCA did conduct an investigation at the time and extended it to

[named company], what were the findings of this investigation?

3. If no investigation was conducted on [named company], why was it not done and can I request that one be done now (especially in the interest of equity, justice and fairness which are the tenets of the FCA.

4. If there was an investigation and they were found culpable, what was the punishment or penalties imposed on them, if any?

5. Can the FCA state that the penalties imposed on [named individual] are justified and commensurate with the allegations and findings? And if the answer is in the affirmative, is it right to say the FCA will use the same yardstick in imposing penalties on Bigger firms like [named company] and prohibit them from practicing/lending should I be able to help the FCA in proving their lack of integrity and failure to carry out proper checks.

6. Can the FCA explain why it says my prohibition is public record and any matter relating to [named company] is between the regulator and the entity concerned (according to [second named individual]). Where I was the entity concerned it was public record and where [named company] is the entity concerned, it turned confidential. Will the FCA clarify that it is not one rule for 'David' and a different rule for 'Goliath'."

5. On 26 February 2014 the FCA responded to points 5 and 6 of the request outside of FOIA. On 14 March 2014 the FCA responded to parts 1-4 of the request under FOIA. It refused to confirm or deny whether the requested information was held under section 43(3) and section 44(2) FOIA.

6. The complainant requested an internal review in relation to points 1-4 of the request on 15 March 2014. The FCA sent the outcome of its internal review on 11 April 2014. It upheld its original position.

Scope of the case

7. The complainant contacted the Commissioner on 22 April 2014 to complain about the way his request for information had been handled.

8. The Commissioner has considered whether the FCA was correct to apply the exemptions cited.

Reasons for decision

Section 44(2)

9. 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.

(2) The duty to confirm or deny does not arise if the confirmation or denial that would have to be given to comply with section 1(1)(a) would (apart from this Act) fall within any of paragraphs (a) to (c) of subsection (1).”

10. The FCA has explained that section 44(1)(a) exempts information, if held, from disclosure if its disclosure is prohibited by any other enactment or rule of law.

11. The FCA has claimed that the request is for ‘confidential information’, and if it were held, the release of which under FOIA is prevented by section 348 of the FSMA.

12. 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.

13. 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 disclosure or whether this could be obtained.

Is the FCA a primary recipient?

14. 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.

Is the request for confidential information (if it were held)?

15. The FSMA defines 'confidential information' at section 348(2). This describes it as information which relates to the business or other affairs of any person and was received by the primary recipient for the purposes of, or in the discharge of, its functions and is not prevented from being confidential.
16. Breaking down the components of the definition, the Commissioner must consider the following questions when seeking to establish whether information is 'confidential' –
- Does the information relate to the business or other affairs of any person?
 - Was the information received by the primary recipient for the purposes of, or in the discharge of, its functions?
 - Has the information already been made legitimately available to the public?
 - Can the information be anonymised?
17. The Commissioner has first considered if the information, if held, relates to the business or affairs of another person. A person is not defined in FOIA, thus the Commissioner has adopted the usual legal interpretation of a person, namely any entity that is recognised as having legal personality to enter into legal relations.
18. The Commissioner is satisfied that the information if held does relate to the business or affairs of another person, in this case [named company]. He has therefore gone on to consider whether the information if held was received by the FCA for the purposes of, or in the discharge of, any of its functions.
19. The FCA has explained that it is concerned with the regulation of financial services and markets in the UK. Under section 19 of the FSMA a person may not carry on a regulated activity in the UK unless he is authorised or exempt. Breach of this prohibition is a criminal offence and also exposes the offender to civil remedies at the hands of its clients as well as the FCA. It confirmed that the FCA has functions of inquiring into, investigating and if appropriate taking action through the courts against persons who breach the prohibition.

20. In this case the FCA explained that, if held, it would be information to enable it to ascertain whether [named company] may have been involved in non-compliant regulatory activities in relation to mortgage lending.
21. The Commissioner is content that the FCA would be fulfilling a regulatory function if it received any such information.
22. Section 348(4) FSMA also states that information may not be deemed confidential information if it has legitimately been made available to the public or it can be anonymised.
23. The Commissioner considers that the fact as to whether or not the requested information is held, will only have been legitimately made available where it has already been placed into the public domain without breaching the FSMA. There is no indication that this has occurred.
24. Section 348(4) of the FSMA additionally stipulates that information cannot be confidential information if it can be summarised or so framed that it is not possible to ascertain from it information relating to any particular person. The Commissioner does not consider this to be a relevant consideration in this case. This is because the direction of the request itself, which makes the named company its subject, removes the possibility of making the information, if held, anonymous.
25. For the reasons outlined above, the Commissioner has determined that the information, if held, is confidential information pursuant to section 348(2) of the FSMA.

If it is confidential information is there consent to its release or can this be obtained?

26. The FSMA allows that information may be disclosed if consent has been received from the provider of the information, and if different, the person to whom the information relates, if it were held.
30. The FSA stated that it would have considered whether to seek consent but that it would also have relied upon its previous experience in cases such as these. It also referred to the Tribunal's decision in the case of Norman Slann and the Information Commissioner and the FSA¹.

Paragraph 36 of the Judgement states:

Failure to obtain consent necessarily engaged the prohibition in section

¹ EA/2005/0019

348(1) of the FSMA.

31. The Commissioner considers that the requested information, if held remains confidential information for the purposes of the statutory bar provided by section 348 of the FSMA. The Commissioner therefore considers that the requested information, if held, would be exempt by virtue of section 44(1)(a).
32. Section 44(2) of the FOIA provides that the duty to confirm or deny that information is held does not apply if the confirmation or denial itself would be prohibited by that enactment.
33. In this case the Commissioner is satisfied that confirming or denying the requested information is held would reveal something to the public about the affairs of the company who are related to that information. Confirming or denying that information is held would therefore fall within section 348 of the FSMA and thus by virtue of sections 44(1)(a) and 44(2) of the FOIA the duty to confirm or deny contained at section 1(1)(a) of the FOIA does not apply.
34. The Commissioner is therefore satisfied that the FCA is correct to refuse to confirm or deny whether it holds the requested information under section 44(2) of the FOIA.
35. As the Commissioner considers that section 44(2) FOIA was correctly engaged he has not considered the application of section 43(3) FOIA any further.

Right of appeal

36. 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

37. 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.
38. 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
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