

## **Freedom of Information Act 2000 (FOIA)**

### **Decision notice**

**Date:** 17 December 2015

**Public Authority:** Financial Conduct Authority

**Address:** 25 The North Colonnade  
Canary Wharf  
London  
E14 5HS

#### **Decision (including any steps ordered)**

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1. The complainant has requested all qualified Form C notices submitted by the Royal Bank of Scotland Group PLC and its subsidiary companies and the details of the offences committed in each instance. The Financial Conduct Authority (FCA) refused to confirm or deny whether it held the information requested under section 44(2) of the FOIA.
2. The Commissioner's decision is that the FCA was correct to neither confirm nor deny whether it held the information requested under section 44(2) FOIA.
3. The Commissioner requires no steps to be taken.

#### **Request and response**

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4. On 24 May 2015 the complainant made the following request for information under the FOIA for:

"Please provide details of all qualified Form C notices submitted by the Royal Bank of Scotland Group PLC and its subsidiary companies The Royal Bank of Scotland, National Westminster Bank, Ulster Bank and Coutts for 2014 and 2015 (to date).

Please provide details of the offence committed in each instance."

5. On 14 July 2015 the FCA responded. It refused to confirm or deny whether the requested information was held under section 44(2) FOIA.

6. The complainant requested an internal review on 14 July 2015. The FCA sent the outcome of its internal review on 23 July 2015. It upheld its original position.

### **Scope of the case**

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7. The complainant contacted the Commissioner on 5 August 2015 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 exemption it has cited.

### **Reasons for decision**

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#### **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 whether the information, if it were 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 the Royal Bank

of Scotland and its subsidiaries. He has therefore gone on to consider whether the information, if held, would have been received by the FCA for the purposes of, or in the discharge of, any of its functions.

19. The FCA has explained that it has general functions of rule-making, preparing and issuing codes under the FSMA, giving general guidance or determining general policy and principles. It explained that in discharging these functions the FCA must, so far as is reasonably possible, act in a way which is compatible with its strategic objective.
20. It went on to say that the FCA's strategic objective under section 1B(2) FSMA is to ensure that the relevant financial markets work well. It said this is supported by three operational objectives contained in section 1B(3) FSMA, which are to:
  - protect and enhance the integrity of the UK financial system;
  - secure an appropriate degree of protection for consumers; and
  - promote effective competition in the interests of consumers.
21. It said that all FCA activity and interventions are made with these objectives firmly in mind. It said that under the FSMA, the FCA has powers to require persons authorised for the purposes of FSMA to apply for approval of certain categories of employees and other individuals before these individuals can perform certain functions ("controlled functions") for these persons. The firm (i.e. the authorised person) is the applicant.
22. It said that to ensure firms are effectively governed and able to deal with their customers fairly, only individuals with the appropriate skills, capabilities and behaviours should be appointed to these positions. The FCA will not grant an approval if it considers that an individual is not a fit and proper person to perform the controlled function(s) to which the approval relates.
23. An individual who has been granted approval to perform a controlled function is an "approved person". An approved person is therefore someone who is approved to perform a controlled function for an authorised firm or an appointed representative firm.
24. It said that under section 347 FSMA, the FCA is required to maintain a record of, amongst other things, every approved person. This record, which is publicly available, is called the Register.
25. It went on that the Form C must be used by the authorised firm when an approved person ceases to perform one or more controlled functions. It said that firms are reminded that they should be open and honest

with the FCA as per Principle 11 of the principles of good regulation. It said that any information provided must be factual and able to be substantiated. It said that the FCA reserves the right to use the information provided in carrying out its regulatory functions.

26. The Commissioner is content that the FCA would be fulfilling a regulatory function if it received any such information.
27. 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.
28. 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. Furthermore as Form C's are not shown on the register, even to give the number of Form C's received during the period requested, if at all, would be to disclose some non-public information about RBS's relationship with its employees.
29. 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.
30. 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?*

31. 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.
32. The FCA explained that RBS has confirmed that if the information were held it would not consent to disclosure.
33. The Commissioner considers that confirming or denying whether the requested information is 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).

34. 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.
35. In this case the Commissioner is satisfied that confirming or denying whether 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.
36. 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.

## Right of appeal

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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: 0300 1234504

Fax: 0870 739 5836

Email: [GRC@hmcts.gsi.gov.uk](mailto:GRC@hmcts.gsi.gov.uk)

Website: [www.justice.gov.uk/tribunals/general-regulatory-chamber](http://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.

**Signed .....**

**Gemma Garvey  
Senior Case Officer  
Information Commissioner's Office  
Wycliffe House  
Water Lane  
Wilmslow  
Cheshire  
SK9 5AF**