Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 7 November 2017

Public Authority: Financial Reporting Council
Address: 8th Floor
125 London Wall
London
EC2Y 5AS

Decision (including any steps ordered)

1. The complainant has requested information on the decision of the Financial Reporting Council's (FRC) Conduct Committee in 2013 that there were "no reasonable grounds" to suspect that there may have been misconduct in the auditing of HBOS.

2. The FRC withheld the information requested as it considered the requested information is outside the scope of the FOIA.

3. The Commissioner's decision is that the FRC is entitled to determine that the requested information is outside the scope of its responsibilities under the FOIA. She therefore does not require any further action to be taken.

Request and response

4. On 22 February 2017, the complainant wrote to the FRC and requested information in the following terms:

"This is a request for information on the decision of the FRC's Conduct Committee in 2013 that there were "no reasonable grounds" to suspect that there may have been misconduct in the auditing of HBOS.

"Please provide me with all internal minutes of discussions regarding the decision on HBOS, including attendees. Please provide me with

communications between members of the conduct committee and the following, regarding the decision:

- BIS

- HMT

- KPMG

- PRA

- FCA

Please include all emails, meeting minutes and memoranda, agendas, notes from telephone calls and text messages, and

Time period: 2012 – 2013"

5. The FRC responded on 12 April 2017. It stated that as the FRC's exercise of its role under independent disciplinary arrangements is not covered by the FOIA, it is not required by the FOIA to provide the requested information.

6. The complainant requested an internal review on 21 April 2017. She disagrees the requested information is not covered by the FOIA and asked the FRC to review its decision.

7. The FRC carried out an internal review on 11 May 2017 and notified the complainant of its findings. It stated that the FRC has limited designation under the FOIA. It is only designated a public authority in respect of the statutory functions delegated to it under Part 42 of the Companies Act and nothing more. Its role under independent disciplinary arrangements falls outside of Part 42 of the Companies Act and so the function to which the request relates is not covered by the FOIA. The FRC therefore has no duty to respond to this request in accordance with the FOIA or indeed provide the requested information.

Scope of the case

8. The complainant contacted the Commissioner on 24 May 2017 to complain about the way her request for information had been handled. She stated that FRC holds that the requested information does not come under the FOIA. However, she believes that the Conduct Committee was exercising a statutory function under section 457 of the Companies Act, which allows the FRC to present faulty accounts before a court. The complainant stated that it was her understanding that the FRC's assessment was being made under this statutory function. She therefore

is of the view that the requested information does come under the FOIA and should be disclosed. She also commented that she considers the FRC falls within the definition of a "government department" under section 84 of the FOIA, as a government department is defined to include any body or authority exercising statutory functions on behalf of the Crown.

9. The Commissioner considers the scope of this investigation to be to determine whether the requested information relates to a relevant function within Part 42 of the Companies Act 2006 so that it is covered by the FOIA. Or alternatively, whether the information is covered by the FOIA by virtue of the FRC exercising statutory functions on behalf of the Crown and therefore falling within the definition of "government department" at section 84 of the FOIA.

Reasons for decision

Section 5 – Further power to designate public authorities

10. Section 1(1) of the FOIA creates a general right of access to information held by public authorities. It states that:

"Any person making a request for information to a public authority is entitled –

(a) to be informed in writing by the public authority whether it holds information of the description specified in the request, and

(b) if that is the case, to have that information communicated to him."

11. Section 3 of the FOIA states:

"(1) In this Act "public authority" means –

(a) subject to section 4(4), anybody which, any other person who, or the holder of any office which –

(i) is listed in Schedule 1, or

(ii) is designated by order under section 5, or

(b) a publicly-owned company as defined by section 6."

12. Under section 5 of the FOIA the Secretary of State can, by order, designate bodies as public authorities. These are bodies that appear to be exercising functions of a public nature or who are providing, under contract with a public authority, any service whose provision is a

function of that authority. This is the means by which bodies that are not listed in Schedule 1, and cannot be added to that Schedule by order under section 4, are brought under the provisions of the FOIA.

13. Section 7(5) of the FOIA states:

"An order under section 5(1)(a) must specify the functions of the public authority designated by the order with respect to which the designation is to have effect; and nothing in Parts I to V of this Act applies to information which is held by the authority but does not relate to the exercise of those functions".

The FRC's designation as a public authority

14. The FRC is designated as a public authority under section 5 of the FOIA in relation to its exercise of those statutory functions delegated to it under Part 42 of the Companies Act 2006 (section 1252(3)) and the exercise of the functions pursuant to its appointment as the Independent Supervisor (section 1228(3)).

15. The main purposes of Part 42 of the Companies Act 2006 are:

(a) to secure that only qualified persons who are properly supervised and appropriately qualified are appointee as statutory auditors; and

(b) to secure that audits by persons so appointed are carried out properly, with integrity and with a proper degree of independence.

16. The FRC's statutory responsibilities under Part 42 are:

- independent oversight of the regulation of statutory auditors by the recognised supervisory and qualifying bodies;
- independent supervision of Auditors General in respect of the exercise of their function as statutory auditors;
- the regulation of auditors ("third country auditors") of companies outside the European Economic Area that have issued securities admitted to trading on UK regulated markets; and
- the receipt of statutory change of auditors notifications from companies and statutory auditors in respect of "major audits".

17. The FRC explained that the requested information relates to a matter (HBOS) dealt with under its Accountancy Scheme (the Scheme); a Scheme which does not fall within the FRC functions which are designated under the FOIA. It stated that it is designated in relation to those functions set out in Part 42 of the Companies Act 2006 delegated

to the FRC by the Secretary of State. Part 42 sets out the framework for the regulation for statutory audit but that does not mean that all of the FRC's activities in relation to statutory audit are covered by the Secretary of State delegation or, therefore, the FOIA regulation. The Accountancy Scheme does not fall within the Secretary of State delegation.

18. It explained further that the Companies Act states that to be an auditor, you have to be a member of a recognised supervisory body (RSB). The Companies Act also sets out the process and requirement for supervisory bodies to be recognised. Prior to June 2016, one of the requirements was that RSBs must participate in independent arrangements for the investigation of public interest cases involving statutory audit function. The RSBs entered into independent, contractual arrangements with the FRC in order to meet this requirement but they could have entered into such arrangements with another body. It stated that it is important to highlight that the Scheme met the requirement which applied to the RSBs but it is not a statutory scheme. Indeed the RSBs and two other accountancy bodies applied the Scheme on a voluntary basis to all their membership and not simply their statutory audit members.

19. By way of further background, the FRC stated that since June 2016 the statutory framework for the regulation of auditors has changed. The FRC is now the competent authority for statutory audit in the UK by virtue of the Statutory Audit and Third Country Auditor Regulations 2016. Its activities as the competent authority have not been designated under the FOIA.

20. The Commissioner's view is that the FRC's designation as a public authority under the FOIA is limited in its scope to those specific duties delegated to it by the Secretary of State under Part 42 of the Companies Act 2006. Paragraph 16 above outlines what these specific duties are and the Commissioner is satisfied that any other functions or activities it performs fall outside of the FOIA.

21. The FRC has explained that the requested information relates to its Accountancy Scheme; a scheme which does not fall within the specific functions outlined in paragraph 16 above. The FRC has explained how this Scheme was set up and why and how it is wholly separate to those functions delegated to it by the Secretary of State.

22. With regards to the complainant's assertion that the FRC is acting as a government department, the Commissioner has considered whether the FRC is caught by the definition of "government department" under section 84 by virtue of exercising statutory functions on behalf of the Crown. She is of the view that it is not.

23. Not every body exercising statutory functions is caught by section 84. They key issue is whether the statutory function is being exercised *on behalf of the Crown* i.e. on behalf of Her Majesty's government. Usually this is where a government department has delegated its functions to a body to undertake on its behalf. Independent regulators are not usually in that position; they have statutory functions, but exercise them on their own behalf rather than on behalf of the Crown.

24. The Commissioner is satisfied in this case that the requested information, regarding the review of HBOS in 2013 in accordance with the FRC's Accountancy Scheme, falls outside Part 42 of the Companies Act and is therefore not covered by the FOIA. She is also satisfied that the FRC does not fall within the definition of "government department" under section 84 of the FOIA.

25. The Commissioner therefore considers that the FRC was entitled to tell the complainant that such information is not within the scope of its designation under the FOIA and to therefore decline to comply with the request made.

Right of appeal

26. 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
    Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

27. 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.

28. 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 ……

Samantha Coward
Senior Case Officer
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF