

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 04 October 2019

Public Authority: Financial Conduct Authority
Address: 12 Endeavour Square
London
E20 1JN

Decision (including any steps ordered)

1. The complainant requested a copy of a Public Confidence Risk Report. The Financial Conduct Authority (FCA) refused the request under section 36(2)(c) – prejudice to the conduct of public affairs and 36(2)(b)(i) – would or would be likely to inhibit the free and frank provision of advice.
2. The Commissioner is satisfied that section 36(2)(b)(i) is engaged and the public interest favours maintaining the exemption. The Commissioner does not require the public authority to take any action.

Request and response

3. On 1 November 2018 the complainant requested the following information:

*'Subject matter: Public Confidence Risk Report
Business area: Communications and Risk and Compliance Oversight teams
Dates: on or before 25 July 2018
Please provide me with a copy of the above report, which is referred to at item 16 of the public minutes of the FCA Board Meeting of 25 and 26 July 2018 (<https://www.fca.org.uk/publication/minutes/fca-board-25-and-26-july-2018.pdf>).'*
4. On 21 December 2018 the FCA provided the first 2 pages of the report and refused the remainder citing section 36 of the Act (Prejudice to the effective conduct of public affairs) as disclosure of the material

requested would or would be likely to inhibit the free and frank provision of advice (section 36(2)(b)(i)), the free and frank exchange of views for the purpose of deliberation (section 36(2)(b)(ii)), and would otherwise prejudice, or would be likely otherwise to prejudice, the effective conduct of public affairs (section 36(2)(c)).

5. The complainant requested an internal review on 21 December 2018. The FCA sent him the outcome of its internal review on 13 February 2019. It no longer relied on section 36 (2)(b)(ii) of FOIA and disclosed further information from the report as some of the information was factual or in the public domain. The remaining limited information was withheld under sections 36(2)(b)(i) and 36(2)(c).

Scope of the case

6. On 22 February 2019 the complainant wrote to the Commissioner and argued that the report was heavily redacted. *'While I would like to see the report in unredacted form, I am particularly interested in the sections relating to legacy cases, especially the one known as Connaught (a contraction of The Connaught Income Fund Series 1). There is heightened public interest in these legacy cases...'*
7. The Commissioner considers the focus of the investigation to be whether the FCA was entitled to rely upon the exemptions at 36(2)(b)(i) and 36(2)(c) to withhold the remaining information in the Report and, if so whether the public interest favours maintaining those exemptions.

Background

8. The FCA provided the following as a background.
9. The information requested comprises a paper titled - Public Confidence Risk Report (the Report). The Report reflects the public confidence risks faced by the FCA as assessed by FCA staff at the time of reporting to the FCA's Executive Committee and the Board in July 2018. The report looks at the most significant issues which could result in diminished levels of public trust in the (competence of the) FCA. The report captures a number of opinions, advice and/or assessment on the levels and trends of these risks.
10. The Public Confidence risks may arise from purely political, public policy and/or environmental factors over which the FCA has limited control and/or from external stakeholders being unhappy about the handling of an issue within the FCA remit.

11. The published Board Minutes of July 2018 stated that the FCA Board noted the Report.

Reasons for decision

Section 36 – prejudice to the conduct of public affairs

12. Section 36(2) of FOIA states that information is exempt if in the reasonable opinion of a qualified person, disclosure of the information –
 - (b) would or would be likely to inhibit:
 - (i) the free and frank provision of advice, or
 - (ii) the free and frank exchange of views for the purpose of deliberation, or
 - (c) would otherwise prejudice, or would be likely to otherwise prejudice the effective conduct of public affairs.
13. Section 36(2)(b)(i) and (ii) refer to the likely prejudice to the free and frank provision of advice and the free and frank exchange of views for the purposes of deliberation. As section 36(2)(c) is worded specifically as “would otherwise prejudice”, it is the Commissioner’s opinion that if a public authority is claiming reliance on section 36(2)(c) of the FOIA the prejudice claimed must be different to that which would fall in section 36(2)(b)(i) and (ii).
14. Section 36 is unique in that its application depends on the opinion of the qualified person that the inhibition envisaged would, or would be likely to occur. To determine whether the exemption was correctly engaged by the FCA, the Commissioner is required to consider the qualified person’s opinion as well as the reasoning that informed the opinion. Therefore the Commissioner must:
 - Ascertain who the qualified person is,
 - Establish that they gave an opinion,
 - Ascertain when the opinion was given, and
 - Consider whether the opinion was reasonable.
15. The FCA confirmed that the qualified person for the purposes of section 36 of the FOIA is Andrew Bailey, Chief Executive of the FCA. Having received a detailed submission setting out the request, the nature of the withheld information and the arguments for and against disclosure, Mr

Bailey reconsidered and authorised the use of sections 36(2)(b)(i) and 36(2)(c) of the FOIA at the time of the internal review in February 2019.

16. The Commissioner is therefore satisfied that the qualified person did provide his opinion that the information in question was exempt under section 36(2)(b)(i) and 36(2)(c).
17. The Commissioner now needs to consider whether this opinion is a reasonable opinion to hold. It is important to highlight that it is not necessary for the Commissioner to agree with the opinion of the qualified person in a particular case. The opinion also does not have to be the only reasonable opinion that could be held or the 'most' reasonable opinion. The Commissioner only needs to satisfy herself that the opinion is reasonable or, in other words, it is an opinion that a reasonable person could hold. The qualified person's opinion can only be considered unreasonable if it is one that no reasonable person could hold.
18. The Commissioner will first consider if section 36(2)(b)(i) has been cited correctly by the FCA.
19. The exemption can be engaged on the basis that the prejudice to public affairs either 'would' or would be 'likely' to occur. In this case the FCA has applied the exemption on the basis that disclosing the information in question would be 'likely' to prejudice the conduct of public affairs. This is taken to mean that the qualified person considers the likelihood of the inhibition occurring to be more than a hypothetical possibility; that there is a real and significant risk, even if that risk is less than 50%.
20. The FCA stated that it is the qualified person's opinion that disclosure of the requested information in this case would be likely to prejudice the free and frank provision of advice for a number of reasons:
 - There would be a chilling effect: authors of the reports would be inhibited and prevented from giving candid advice freely and frankly to the FCA Board in the future if the Report was disclosed in full.
 - A lack of open and uninhibited updates and communications (on the judgements, views, advice and/or assessments of the level of public confidence risks) to the Board will harm the effectiveness and quality of the Board's strategic thinking and associated decisions.
 - If the level (and trends) of risks are not properly identified and explained to the Board then the FCA will not have the authority to be able to take the steps necessary to mitigate them. This would undermine the FCA's ability to discharge its duties effectively.

- The Report includes opinions on the 'worst case scenario' risks that the FCA does not necessarily anticipate 'crystallising' and is prepared by FCA staff specifically and only for the Board. Publication of this Report may lose this important context. Communications for firms, media and/or Parliament are prepared in an appropriate way for the audience.
 - The risks are reported to the Board on a regular basis. Although the requested information dates back to July 2018, the issues around risk remain ongoing as regular updates are provided.
21. Having viewed the withheld information, the Commissioner is satisfied that it is reasonable for the qualified person to have concerns over the release of this information.
22. For these reasons, the Commissioner finds that the exemption provided by section 36(2)(b)(i) is engaged in respect of all the information to which it has been applied. The Commissioner has not gone on to consider the exemption provided by section 36(2)(c) as it was applied to the same withheld information.

Public interest test

23. Section 36 is subject to the public interest test as set out in section 2 of the Act. This means that although the exemption is engaged, the information can only be withheld if in all the circumstances of the case the harm that disclosing the information would cause is greater than the public interest in its disclosure.
24. The Commissioner's approach to the competing public interest arguments in this case draws heavily upon the Information Tribunal's Decision in the case of Guardian Newspapers Limited and Heather Brooke v Information Commissioner and BBC (the Brooke case)¹. The Commissioner notes, and adopts in particular, the Tribunal's conclusions that, having accepted the reasonableness of the qualified person's opinion the Commissioner must give weight to that opinion as an important piece of evidence in her assessment of the balance of the public interest.
25. Although the Commissioner has accepted the qualified person's opinion to be a reasonable one in respect of the information now under consideration, and therefore will give some weight to that opinion, she will reach her own view on the severity, extent and frequency of that inhibition to the decision making process occurring.

¹ EA/2006/0011; EA/2006/0013

Public interest arguments in favour of disclosure

26. The FCA acknowledged that the Board is an important decision-making body of the FCA and the information would provide further insight into the judgement, views, advice and/or assessment presented to the Board on the level of public confidence risks. Disclosure would promote openness and transparency.
27. The complainant has argued that
 - Disclosure of this document should not prejudice the provision of free and frank advice, because such advice should be provided in keeping with the FCA's statutory objectives, which relate to consumer protection, the operation of effective markets and the promotion of competition. If there are concerns about the effectiveness with which the FCA is achieving any of these goals, it is in the public interest... (to disclose for)... external scrutiny.
 - Participants in the market are aware of the FCA's activities.
 - The Report identifies a number of areas in which the FCA's conduct and performance may be subject to criticism. For some or all of these, there are groups of consumers...who have suffered detriment. Disclosure of the FCA's concerns about these cases could be helpful to those victims in presenting arguments ... for redress...
 - Three funds have failed in circumstances which suggest that consumers might have been protected had the FCA acted on lessons learned from the Connaught case (London Capital and Finance, Lendy and Woodford Equity Income). There is therefore an enhanced public interest in full disclosure, compared with previously.
 - The FCA has announced an external 'lessons learned' review into Connaught but has set the terms of reference to exclude events after 10 March 2015 and appointed a reviewer who has a familiarity link with one of the FCA executives whose actions should be reviewed, suggesting that the regulator intends the review to be a whitewash. This adds to the overriding public interest in full disclosure.
 - The FCA announced the abovementioned review before concluding its remaining Enforcement investigation/s into a party or parties related to Connaught, despite previous undertakings not to do so.
28. The Commissioner accepts that there are public interest arguments in favour of disclosure to promote openness and transparency.

Public interest arguments in favour of maintaining the exemption

29. The FCA considered the following arguments in favour of maintaining the exemption
- The quality of the FCA's decisions and actions depends on the quality, detail and candidness of the information presented to the FCA Board by its staff.
 - Lack of open and uninhibited advice between the Board and FCA staff would be likely to harm the quality of decisions made. This will result in regulatory and operational functions being carried out less effectively.
 - There is a public interest in the FCA Board being able to preserve a 'protected space' in which to receive open and uninhibited assessments and advice on sensitive regulatory and operational issues.
 - Communications have to be expressed openly, honestly and completely. This protected space is particularly important when considering and setting down the potential risks associated with the most significant issues the FCA will need to address, which could result in diminished levels of public trust in the (competence of the) FCA.
 - The matter is time sensitive. Although the requested information dates back to July 2018, the issues around risk remain ongoing as regular updates are provided.
30. The Commissioner is satisfied that there are public interest arguments in favour of maintaining the exemption.

Balancing the public interest arguments

31. The Commissioner has considered both the complainant's and the FCA's public interest arguments. The Commissioner notes that considerable information from the Report has already been provided to the complainant.
32. The FCA has stated that the qualified person acknowledges the strong public interest in openness and transparency, particularly in ensuring fair and effective decision-making. However, the qualified person recognised that there is a strong public interest in the senior managers of the Board having the ability to receive the free and frank opinions on the level of public confidence risks to the FCA.

33. The complainant has argued that there is a significant public interest in disclosure. He has argued that disclosure would allow external scrutiny and may be helpful to consumers claiming redress. In particular he mentions the Connaught case and 3 funds that might have benefited from lessons learned. It is not within the remit of the Commissioner to comment on the terms of reference of the FCA review into Connaught.
34. Having viewed the withheld information the Commissioner's understanding is that the information being withheld under section 36 does not discuss details of the Connaught case.
35. The Commissioner has to be very cautious when considering disclosure of opinions in 'worst case scenarios' which may or may not 'crystallise'. The FCA has stated that these opinions were created for the sole use of the Board and are updated regularly. The Commissioner gives some weight to the qualified person's opinion that the FCA Board receives the candid opinions on the levels and trends of public confidence risks to the FCA as judgmentally assessed by the FCA staff.
36. However, the Commissioner would add to this her view that there is a significant public interest in the FCA feeling free to create a paper that provides its Board with a completely honest assessment of its public confidence risks so that it can make informed decisions. The Commissioner also recognises the value in allowing the FCA safe space in which to develop its levels and trends over time. Both the need for candour and the value of safe space are important if the FCA is to have the best opportunity to overcome the challenges it faces. To disclose the remaining information withheld under section 36 at the time of the request could have a chilling effect on the FCA.
37. In light of the above the Commissioner finds that although there is a significant and important public interest in the public understanding of the Report, there is a greater public interest in allowing the FCA the safe space in which to consider the risks as presented in the Report. The public interest favours withholding this information. The Commissioner finds that the FCA is entitled to rely upon the exemption at 36(2)(b)(i) to withhold the remaining information in the Report.

Right of appeal

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

39. 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.

40. 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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