

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 4 June 2020

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

Decision (including any steps ordered)

1. The complainant requested a copy of the notes of an interview with an outgoing Chief Executive. The Financial Conduct Authority ("the FCA") initially withheld the requested information, citing sections 40(2) and 44 of the FOIA, before latterly noting that some of the information was already in the public domain.
2. The Commissioner's decision is that the FCA failed to issue, within 20 working days, a refusal notice specifying all the exemptions on which it eventually came to rely. She therefore finds that the FCA breached section 17 of the FOIA in responding to the request.
3. The Commissioner does not require further steps.

Request and response

4. On 25 September 2019, the complainant wrote to the FCA and requested information in the following terms:

"Can you now please supply with a copy of the record of the [Financial Services Authority]'s interview with Neville Richardson, which the report says took place in September 2011. I want to compare what is there with the transcript of the TSA's lengthy interview with him in September 2013."
5. The FCA responded on 23 October 2019. It stated that all the information it held was Mr Richardson's personal data and thus exempt from disclosure under section 40(2) of the FOIA. It also considered that the information fell within the definition of "confidential information" for

the purposes of the Financial Services and Markets Act 2000 (FSMA). Since section 348 of the FSMA prevents the FCA from disclosing confidential information, the information in question would also be exempt under section 44 of the FOIA (statutory prohibition on disclosure).

6. The complainant sought an internal review on 23 November 2019. He pointed out that Mr Richardson had given evidence to a public hearing of the Treasury Select Committee (TSC) in which details of the interview in question were discussed. The complainant argued that the fact that Mr Richardson had placed information voluntarily into the public domain amounted to him waiving his rights to confidentiality.
7. Following an internal review the FCA wrote to the complainant on 14 February 2020. It recognised that some of the information it held was now in the public domain. The then-head of the Prudential Regulation Authority (PRA) had written to the TSC in 2014. This correspondence had included a redacted version of the interview notes. However the FCA argued that this information was “reasonably accessible” to the complainant and therefore covered by the exemption at section 21 of the FOIA. Any information not already in the public domain would, the FCA argued, still be covered by the sections 40(2) and 44 of the FOIA.

Background

8. The Financial Services Authority (FSA) was broken up on 1 April 2013, with its functions being split between the FCA and PRA.

Scope of the case

9. The complainant first contacted the Commissioner on 12 November 2019 to complain about the way his request for information had been handled. At that point, the complainant had yet to seek an internal review of the way his request had been handled. Once the complainant had sought an internal review, the Commissioner’s intervention was necessary to get the FCA to complete its internal review within a reasonable time frame.
10. Once the FCA had completed its review, the complainant brought his complaint back to the Commissioner. Whilst he accepted that some of the information he was interested in was in the public domain – and thus reasonably accessible to him - he was unhappy that the FCA had not identified this information when it initially responded to him. He also

considered that the remaining information was no longer covered by confidentiality.

11. The Commissioner wrote to the complainant on 27 May 2020 to offer her preliminary view of the complaint. She explained that, at the time the interview was conducted, any notes would have fallen within the definition of "confidential information" for the purposes of section 348 of the FSMA. Whilst some of that information had subsequently been placed into the public domain, any information not already in the public domain remained "confidential information." As section 348 of the FSMA prohibits the disclosure of confidential information, all of the information not covered by the section 21 exemption would therefore engage section 44 of the FOIA.
12. Following an exchange of correspondence, the complainant accepted that pursuing a substantive complaint would be unlikely to result in any further disclosure of information. However, he remained unhappy that the FCA had failed to direct him to the information already in the public domain. The Commissioner therefore agreed to issue a decision notice focusing on the procedural handling of the request.
13. The Commissioner considers that the scope of her analysis is to determine whether the FCA complied with the procedural elements of the FOIA.

Reasons for decision

14. Section 17(1) of the FOIA states that when a public authority wishes to withhold information or to neither confirm nor deny holding information it must:

within the time for complying with section 1(1), give the applicant a notice which—

- (a) states that fact,*
 - (b) specifies the exemption in question, and*
 - (c) states (if that would not otherwise be apparent) why the exemption applies.*
15. Section 21 of the FOIA allows a public authority to withhold information where that information is already "reasonably accessible" to the requestor.

16. The FCA issued its first refusal notice on the 20th working day following the date of the receipt. However, following its internal review it modified its position and now relied on section 21 to withhold information.
17. Whilst the Commissioner considers that the position the FCA adopted following its internal review was almost certainly the correct one (as neither section 40(2) nor 44 would be likely to apply to information already publicly available) and that, in this particular case the internal review has served its purpose, the FCA's original refusal notice was incorrect.
18. Whilst noting that, strictly speaking, the error would not have resulted in any additional information being provided to the complainant, the Commissioner still finds that the FCA breached section 17(1) of the FOIA in responding to this request.

Other matters

Internal Review

19. Whilst there is no statutory time limit, within the FOIA, for carrying out an internal review, the Commissioner considers that internal reviews should normally take no longer than 20 working days and never longer than 40 working days.
20. In this particular case, the FCA's review (whilst ultimately fulfilling the function internal reviews are meant to fulfil) did take three months to complete. The Commissioner does not consider this to be good practice.

Right of appeal

21. 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

22. 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.
23. 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

**Phillip Angell
Group Manager
Information Commissioner's Office
Wycliffe House
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Cheshire
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