

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 10 November 2022

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

Decision (including any steps ordered)

1. The complainant has requested derivative definitions documents from the Financial Conduct Authority (FCA). The FCA confirmed that it holds one of the documents, but relied on section 21(2) of FOIA to refuse to disclose it. The FCA also stated that it was unable to confirm if it holds copies of the remaining three documents, and the work required to determine whether or not it does in fact hold them would take it beyond the appropriate cost limit, citing section 12(2) of FOIA.
2. The Commissioner's decision is that the FCA has correctly cited sections 21(2) and 12(2) of FOIA to refuse to comply with the request in this case.
3. The Commissioner does not require the public authority to take any remedial steps.

Request and response

4. On 27 August 2021, the complainant wrote to the FCA and requested information in the following terms:

"Please provide the following documents:

- 2014 ISDA Credit Derivative Definitions
- 2011 ISDA Equity Derivatives Definitions and Appendix
- 1998 FX and Currency Option Definitions
- 2021 ISDA Interest Rate Derivatives Definitions"

5. The FCA responded on 27 September 2021. It stated that it holds some of the requested information, but that it was exempt from disclosure under section 21 of FOIA – information accessible to the applicant by other means.
6. On 15 October 2021, the complainant wrote to the FCA and asked it to conduct an internal review. They argued that the information is in fact not reasonably accessible to them in their circumstances due to the cost of the documents.
7. Following an internal review the FCA wrote to the complainant on 12 November 2021. It clarified that it only holds one of the requested documents (2014 ISDA Credit Derivative Definitions), but maintained its position that this document was exempt from disclosure under section 21(2) of FOIA. It also went on to explain that it cannot confirm if it holds copies of the remaining documents listed in the request, and to ascertain if it does in fact hold them would take it beyond the appropriate cost limit. Therefore, the FCA relied on section 12(2) to refuse the remaining part of the request.

Reasons for decision

Section 21 - information accessible to applicant by other means

8. Section 21 of FOIA states that:

"(1) Information which is reasonably accessible to the applicant otherwise than under section 1 is exempt information.

(2) For the purposes of subsection (1)-

(a) information may be reasonably accessible to the applicant even though it is accessible only on payment, and

(b) information is to be taken to be reasonably accessible to the applicant if it is information which the public authority or any other person is obliged by or under any enactment to communicate (otherwise than by making the information

available for inspection) to members of the public on request, whether free of charge or on payment.”

The FCA's position

9. The FCA has set out that the requested documents are produced and sold on a commercial basis by the International Swaps and Derivatives Association (ISDA).
10. The FCA explained that it would not typically have access to the requested documents, unless it specifically requested them from ISDA or one of its partners in order to fulfil a business requirement. The FCA confirmed that it holds a single hard-copy of the 2014 ISDA Credit Derivatives Definitions as it was provided to a member of FCA staff on a one-off business basis.
11. The FCA further explained that all of the requested documents are available from ISDA for purchase in standalone form via the ISDA Bookstore, and also by subscription to the ISDA Online Library. It provided clear links to each of the documents online at the ISDA Bookstore. Therefore, the FCA is of the position that even though payment to ISDA is required to obtain the information, it is reasonably accessible.

The complainant's position

12. The complainant disagrees with the FCA's reliance on section 21 of FOIA, as although the requested documents are indeed accessible online, they state that the cost of them cannot be said to be reasonable for a member of the public – specifically the applicant who is on benefits. Hence, they argue that the section 21 test of information being “reasonably accessible” to the applicant has failed in this case and the exemption cannot apply.

The Commissioner's conclusion

13. The Commissioner considers that information is only reasonably accessible to the applicant if the public authority either knows that the applicant has already found the information, or if it is able to provide the applicant with precise directions to the information so that it can be located without difficulty. The Commissioner is satisfied that the FCA has provided precise directions to the information in this case, by providing the complainant with links to each document on the ISDA Bookstore.
14. The Commissioner is also satisfied that the complainant has access to the internet, as they have used email communication in submitting this complaint to the Commissioner, and also submitted their request and internal review request via the What Do They Know website. Therefore,

the Commissioner can see no restriction on the complainant locating the requested information on ISDA's website.

15. The Commissioner does not consider that the intention behind section 21 was to place a requirement on public authorities to disclose copies of published books or publications which they hold, particularly those which are available from other sources, whether published by the authority or not, and regardless of commercial considerations. Nor does he consider it within his remit to comment on whether a charge attached to a commercial product by its third-party owners is "reasonable" or not.
16. Whilst the Commissioner notes that there is a charge to obtain the information from the website and is sympathetic to the circumstances of the complainant, he refers again to section 21(2)(a) of FOIA which states that information may be regarded as reasonably accessible to the applicant "even though it is accessible only on payment". In addition, the Commissioner's guidance on the application of section 21 states that "In such cases, information is generally reasonably accessible even though the payment may exceed that which would be payable via FOIA".
17. The Commissioner concludes that the FCA is correct to rely on section 21(2)(a) of FOIA to refuse to disclose the one document which it holds within the scope of the request, as it is readily available elsewhere, even if this is at a cost.
18. The Commissioner acknowledges that the FCA also provided extensive arguments to him during his investigation regarding the applicability of section 43(2) of FOIA. In light of his decision that section 21 has been correctly relied upon by the FCA to withhold the one document which it holds, the Commissioner did not need to go on to consider section 43(2) in this case. However, having noted more generally that there would be a risk to commercial interests in making books or other publications freely available under FOIA, it is more likely than not that the exemption from disclosure at section 43(2) would also be engaged in this case.

Section 12 – cost of compliance exceeds the appropriate limit

19. Section 12(1) of FOIA states that a public authority is not obliged to comply with a request for information if the authority estimates that the cost of complying with the request would exceed the appropriate cost limit.
20. Section 12(2) states that if a public authority estimates that it would exceed the appropriate limit to confirm whether or not the requested information is held it does not have to deal with the substance of the request.

21. The appropriate limit is set in the Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2004 ('the Fees Regulations') at £450 for public authorities such as the FCA.
22. The Fees Regulations also specify that the cost of complying with a request must be calculated at the rate of £25 per hour, meaning that section 12(1) effectively imposes a time limit of 18 hours for the FCA.
23. Regulation 4(3) of the Fees Regulations states that a public authority can only take into account the cost it reasonably expects to incur in carrying out the following permitted activities in complying with the request:
 - determining whether the information is held;
 - locating the information, or a document containing it;
 - retrieving the information, or a document containing it; and,
 - extracting the information from a document containing it.
24. Where section 12(2) is relied upon, only the first of these bullet points needs to be considered.
25. A public authority does not have to make a precise calculation of the costs of complying with a request, only an estimate is required. However, it must be a reasonable estimate. In accordance with the First-Tier Tribunal decision in the case of *Randall v IC & Medicines and Healthcare Products Regulatory Agency EA/20017/00041*, the Commissioner considers that any estimate must be "sensible, realistic and supported by cogent evidence".

The FCA's position

26. During the Commissioner's investigation the FCA provided a detailed explanation of how it had reached the conclusion that determining if it holds the three remaining documents would take it beyond the appropriate cost limit. It stated:

"Our initial enquiries established that the remaining three documents requested are not held within our electronic archives. Both for the purposes of assessing the complainant's request, and to see if we could suggest whether the request might reasonably be refined, we have undertaken electronic searches for the information being sought. We have used the titles of the definition documents as key words. We believe therefore we have identified all electronic copies that we hold. We would caveat this conclusion to note that it is possible (though unlikely) that these documents are held within restricted or historical archived electronic files, which may not have returned in the initial searches by the relevant business areas. It would require additional specialist work to search these restricted and archived files. While it is

difficult to give a precise estimate of the work involved, the Markets Oversight has at least eight electronic repository sites and in excess of 100 libraries in total within these. Even a conservative estimate of 15 minutes per search of each library would be some 25 hours of work. This is in addition to the time we have already spent on this request. However, the nature of the documents is such that it is unlikely that they would have been saved in a restricted manner or an archived area of our electronic file repository.

The difficulty that we alluded to in our previous responses is that it is possible that some staff in the FCA may have acquired copies of these definitions – particularly the older ones, in paper form. It would take substantial time to search all possible physical locations as numerous divisions would need to be included i.e., policy, legal, enforcement, supervision, and risk teams. We would need to search individual lockers of several hundred members of staff, several (we estimate 60) on-site filing cabinets as well as our considerable off-site archives to determine if we hold these documents.

Therefore, based on our assessment of the request for the remaining three ISDA definition documents (as detailed above), we would conservatively estimate that to locate, retrieve, and extract the relevant information for this element of the request would clearly take well in excess of 18 hours and thereby significantly exceed the appropriate limit defined under section 12 of the Act.

Further, to the extent that the FCA may hold any of the additional documentation requested, then the same reasoning, and the same exemptions in sections 21 and 43 of the Act, would apply to that also. We believe that the reasoning and arguments that apply to the first of the publications would also apply to the other three, should we hold these.”

The Commissioner’s conclusion

27. As mentioned earlier in this notice, the FCA set out that it would not typically hold copies of the requested documents unless it had requested them for a specific business purpose. The Commissioner is satisfied that this in itself makes the process of determining if it holds the information a much broader process than if it were to know exactly why it holds the documents and where they would be located.
28. The Commissioner is further satisfied that the FCA has put forward “sensible, realistic and cogent” arguments to support its position that determining if it holds the three remaining documents would take it well beyond the appropriate cost limit.

29. The Commissioner finds that the FCA has sufficiently demonstrated that it would take more than the 18 hours or £450 cost limit to determine if it holds the three remaining documents. Therefore, section 12(2) of FOIA is engaged and the Commissioner does not require the FCA to take any further steps on this matter.

Right of appeal

30. 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: 0203 936 8963

Fax: 0870 739 5836

Email: grc@justice.gov.uk

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

31. 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.
32. 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

**Catherine Fletcher
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